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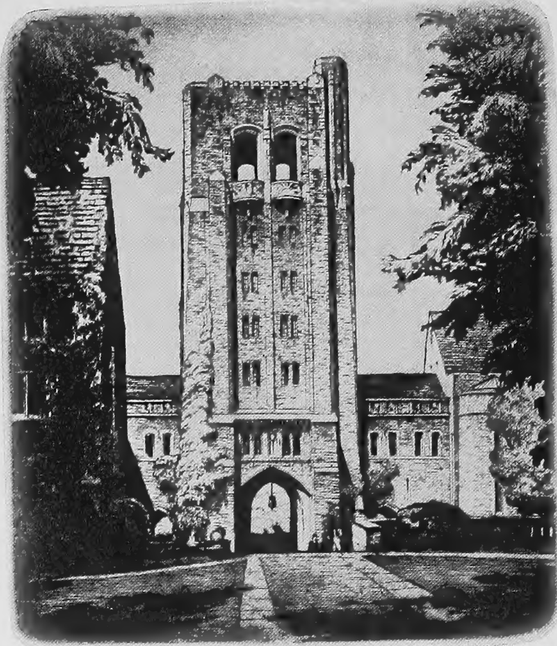

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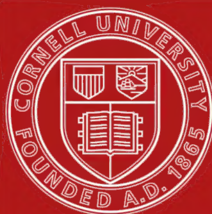

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OF

AMERICAN LAW.

BY JOHN BOUVIER.

In societate civili, aut lex aut vis valet.—BACON.

Ce qui est bien classé, est à moitié su.—DUVAL

VOL. I.

PHILADELPHIA:
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TO THE HONORABLE

ROGER B. TANEY, LL.D.

CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES,

THIS WORK

IS,

WITH HIS PERMISSION,

MOST RESPECTFULLY DEDICATED,

AS A TOKEN

OF THE GREAT REGARD ENTERTAINED FOR HIS INTEGRITY AS A JUDGE, HIS LEARNING AS A JURIST, AND HIS VIRTUES AS A MAN,

BY

THE AUTHOR.

PREFACE.

Whenever a writer submits a literary work to the public, he tacitly declares that it is his conviction such work deserves to be examined and read, and that it will place the objects of inquiry in a new light; for, unless such are the views he entertains, he will not trouble himself to write, nor others to read, what can be of no use. The author has, therefore, no apology to make, nor motive to offer, as an inducement for publishing this work, but the one which has influenced him throughout, in the course of his labor, that of being useful. He hopes he has not labored in vain.

Most lawyers have felt the want of a preliminary work to serve the young American student as a guide in the labyrinth of jurisprudence; as an instructor to give him a general view of the several parts of this juridical science; to mark the objects of each, and to point out the natural dependence which unites them: a work tending to establish a method which should be adopted in the study of the law; to point out the numerous links of the chain which unites the ancient with the modern law, which binds the past with the present, and which by its nature must forever remain indestructible. A work which would thus elevate the science of the law in the sight of youth, and impress a character of unity upon it, would exercise a happy influence on the minds of the students, develop their moral and intellectual faculties, and be a blessing to them.

But it is far less difficult to describe what the legal edifice should be, and to state what is required for its construction, than to select the materials of which it should be composed, and to make such a disposition of them in the building as would render the structure at once solid, elegant, and every way fitted for the purpose for which it is intended.

On entering on his profession, the American student is discouraged by being obliged to study laws which are not his own, and which do not belong to the present age, except as matter of history. It requires an effort to read even the elegant Blackstone, and, when studied, it must be forgotten, because the laws on which that author has so beautifully commented, are not the laws which the young aspirant seeks to know—they are not those of his country. It is true, noble efforts have been made by American writers to explain our laws, and to them the profession must be greatly indebted; but the commentaries which have been so liberally bestowed, are better adapted to the use of those who are already good lawyers, than to teach one who has every thing to learn.

The author cannot hope to have made a perfect work, and supplied, in this respect, all the deficiencies and the wants of the profession; his aim has been an approximation to what a work should be, which might, in some degree, deserve the title of *Institutes of American Law*. He has endeavored to reduce the whole to a strict method, and, by a correct classification, to impress upon the mind of the student the objects of his inquiry; for, "what is well classified is half known." It seemed to him that jurisprudence, as much as any other science, required this method; and while all kinds of human knowledge are now taught in this manner, the law should not be an exception.

In the execution of his work, the author has spared no pains to classify his materials in the most natural manner; he has not followed any known plan, and, it is possible, that with more

talents and knowledge, he might greatly improve upon that which he has adopted. He hopes, however, that with a very full table of contents, the reader will be at no great difficulty to comprehend it.

While it has been his constant object to show what the law actually is, he has ventured, not unfrequently, to state what it was, and from what source it flows. Whenever a comparison could be made with advantage, the foreign laws, within the reach of the author, have been consulted, and their agreement or discord with our own, pointed out. He has made free use of the Roman or civil law, whenever he found its principles applicable to our own jurisprudence, and by a frank acknowledgment of the source whence so many just rules flow, he has, as far as in his power, done what he could to avoid the reproachful accusation which some continental writers of Europe have, with perhaps too much truth, charged against the English lawyers, of constantly pillaging the Roman law, without ever citing it.(*a*) If all the principles found in Bracton and Fleta, Fortescue and Blackstone, and in the treatises on commercial law and equity, and many of the judgments of our courts, which have been borrowed from that system, without giving it credit, were expunged from those authors, their works and judgments would be deprived of their greatest ornaments.

In laying down principles and rules, the author has been careful to give correct definitions, and when these rules are subject to exceptions, he has pointed them out in as clear and simple language, as it has been in his power to employ. He has not thought it necessary to extend his researches into all the ramifications of the law, nor his inquiries into details which

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(*a*) On reconnait là, et à chaque page, dans Blackstone, le faire habituel des Anglais, qui pillent incessamment le droit romain, et ne le citent jamais. Duval, Le Droit dans ses Maximes, p. 24, note.

would confuse the reader without enlightening him: when there have been conflicting decisions, a reference has been made to authorities, to enable the student to examine the foundation upon which they rest. He has, however, shown the sources of the law, and traced the stream down its current. His chief aim has been to point out its rules and maxims, as principal landmarks to the student, and to enable him, by keeping a constant eye upon these summits of the law, to pursue his onward course, without ever losing himself; for these rules, "after having inspired the law, still remain with it, and in its midst, in some sort, as the lamp in the sanctuary, enlightening the parts where the law applies, and pointing out those which it cannot reach."

As this is intended as an American work, and for American lawyers, the principal positions laid down have been supported, whenever practicable, by reference to American authorities; and when there has been a difference in the several states of the Union, either in consequence of their statutory provisions, or the decisions of their courts, it has been pointed out and explained, whenever the subject was of sufficient importance to require it. Upon an examination, however, it will be found that English precedents have not been overlooked; on the contrary, they have been cited whenever they were important, or when American authorities could not be found applicable to the case.

While it is expected that this work will be useful to the student, it is hoped the practicing lawyer may find it a convenient manual, as a book of reference, in practice. To render it useful to this class of readers, the author has spared no pains to make a perfect index, so as to save the time of the practitioner.

PHILADELPHIA, June, 1851.

ABBREVIATIONS.

[The following abbreviations are copied from Bouvier's Law Dictionary.]

A, a, the first letter of the alphabet, is sometimes used in the ancient law books to denote that the paging is the first of that number in the book. As an abbreviation, A is used for anonymous.
A. & A. on Corp.—Angell and Ames on Corporations. Sometimes cited Ang. on Corp.
A. R.—Anonymous Reports, printed at the end of Bendloe's Reports.
A. D.—Anno Domini; in the year of our Lord.
A. & E.—Adolphus and Ellis' Reports.
A. & E. N. S.—Adolphus and Ellis' Queen's Bench Reports, New Series, commonly cited Q. B.
A. & F. on Fixt.—Amos and Ferard on Fixtures.
A. K. Marsh.—A. K. Marshall's (Kty.) Reports.
Ab. or Abr.—Abridgment.
Abr. Ca. Eq.—Abridgment of Cases in Equity.
Abs.—Absolute.
Ab. Sh.—Abbott on Shipping.
Acc.—Accord or agrees.
Act.—Acton's Reports.
Act. Reg.—Acta Regia
Ad. Eject.—Adams on Ejectment.
Ad. & Ell.—Adolphus and Ellis' Reports.
Ad. fin.—Ad finem. At or near the end.
Ads.—Ad sectum, vide Ats.
Adams' Doct. of Eq.—Adams' Doctrine of Equity.
Addam's R.—Addam's Ecclesiastical Reports. In E. Eccl. Rep.
Addis. on Contr.—Addison on the Law of Contracts and on Parties to Actions ex contractu.
Addis. R.—Addison's Reports.
Admr.—Administrator.
Ady. C. M.—Adye on Courts Martial.
Aik. R.—Aiken's Reports.
Al.—Aleyn's Cases.
Al.—Alinea. Al. et.—Et alii, and others.

Al. & N.—Alcock and Napier's Reports.
Ala. R.—Alabama Reports.
Alc. Reg. Cas.—Alcock's Registration Cases.
Ald. & Van Hoes. Dig.—A Digest of the Laws of Mississippi, by T. J. Fox Alden and J. A. Van Hoesen.
Aldr. Hist.—Aldridge's History of the Courts of Law.
Alis. Prin.—Alison's Principles of the Criminal Law of Scotland.
All. & Mar. Tr.—Allen and Morris' Trial.
Alley. L. D. of Mar.—Alleyne's Legal Degrees of Marriage considered.
Alln. Part.—Allnat on Partition.
Am.—America, American, or Americana.
Am. Lead. Cas.—American Leading Cases, by Hare and Wallace.
Amb.—Ambler's Reports.
Am. & Fer. on Fixt.—Amos and Ferard on Fixtures.
Amer.—America, American, or Americana.
Amer. Dig.—American Digest.
Amer. Jur.—American Jurist.
An.—Anonymous.
And.—Anderson's Reports.
Ander. Ch. War.—Anderdon on Church Wardens.
Andr.—Andrews' Reports.
Ang. on Adv. Enj.—Angell's Inquiry into the rule of law which creates a right to an incorporeal hereditament, by an adverse enjoyment of twenty years.
Ang. on Ass.—Angell's Practical Summary of the Law of Assignments in trust for creditors.
Ang. on B. T.—Angell on Bank Tax.
Ang. on Corp.—Angell on the Law of Private Corporations.
Ang. on Limit.—Angell's Treatise on the Limitation of Actions at Law, and Suits in Equity.
Ang. on Tide Wat.—Angell on the right of property in Tide Waters.
Ang. on Water Courses.—Angell on the common law in relation to Water Courses.
Ann.—Anne; as 1 Ann. c. 7.
Anna.—Annaly's Reports.
Annesl. on Ins.—Annesley on Insurance.
Anon.—Anonymous.
Anstr.—Anstruther's Reports.
Anth. L. Stud.—Anthon's Law Student.
Anth. N. P. C.—Anthon's Nisi Prius Cases.
Anth. Shep.—Anthon's edition of Sheppard's Touchstone.
Ap. Justin.—Apud Justinianum, or Justinian's Institutes.
App.—Apposition.
Appx.—Appendix.

Arch.—Archbold. Arch. Civ. Pl.—Archbold's Civil Pleadings. Arch. Cr. Pl.—Archbold's Criminal Pleadings. Arch. Pr.—Archbold's Practice. Arch. B. L.—Archbold's Bankrupt Law. Arch. L. & T.—Archbold on the Law of Landlord and Tenant. Arch. N. P.—Archbold's Law of Nisi Prius.
Arg.—Argumento by an argument drawn from such a law. It also signifies arguendo.
Arg. Inst.—Institution au Droit Français, par M. Argou.
Ark. Rep.—Arkansas Reports. See Pike's Rep.
Ark. Rev. Stat.—Arkansas Revised Statutes.
Arn. on Ins.—Arnould on Insurance.
Art.—Article.
Ashm. R.—Ashmead's Reports.
Aso & Man. Inst.—Aso and Manuel's Institutes of the Laws of Spain.
Ass. or Lib. Ass.—Liber Assissarium, or Pleas of the Crown.
Ast. Ent.—Aston's Entries.
Atherl. on Mar.—Atherley on the Law of Marriage and other Family Settlements.
Atk.—Atkyn's Reports.
Atk. P. T.—Atkyn's Parliamentary Tracts.
Atk. on Con.—Atkinson on Conveyancing.
Atk. on Tit.—Atkinson on Marketable Titles.
Ats. in practice, is an abbreviation for the words "at suit of," and is used when the defendant files any pleadings; for example: when the defendant enters a plea he puts his name before that of the plaintiff, reversing the order in which they are on the record. C. D. (the defendant,) ats. A. B. (the plaintiff.)
Aust. on Jur.—The Province of Jurisprudence determined, by John Austin.
Auth.—Authentica, in the Authentic; that is, the Summary of some of the Novels of the civil law inserted in the code under such a title.
Ayl.—Ayliffe's Pandect.
Ayl. Parerg.—Ayliffe's Parergon juris canonici Anglicani.
Azun. Mar. Law.—Azuni's Maritime Law of Europe.

B, b, is used to point out that a number used at the head of a page to denote the folio, is the second number of the same volume.
B. B.—Bail Bond.
B. or Bk.—Book.
B. & A.—Barnewall and Alderson's Reports.
B. & B.—Ball and Beatty's Reports.
B. C. R.—Brown's Chancery Reports.
B. Eccl. L.—Burns' Ecclesiastical Law.

B. Just.—Burns' Justice.
B. N. C.—Brooke's New Cases. Vide Bellew. post.
B. C. P.—or Bro. Parl. Cas.—Brown's Parliamentary Cases.
B. & P. or Bos. & Pull.—Bosanquet and Puller's Reports.
B. R. or K. B.—King's Bench.
B. Tr.—Bishop's Trial.
Bab. on Auct.—Babington on the Law of Auctions.
Bab. Set Off.—Babington on Set Off and Mutual Credit.
Bac. Abr.—Bacon's Abridgment. A new Abridgment of the Law. By Matthew Bacon. With considerable additions by Henry Gwillin; and with the additions of the later English and the American decisions. This book is generally cited by the page and sometimes by the title. An edition of this work has been published, with notes to American law and decisions, by the author of this work.
Bac. Comp. Arb.—Bacon's (M.) Complete Arbitrator.
Bac. El.—Bacon's Elements of the Common Law.
Bac. Gov.—Bacon on Government.
Bac. Law Tr.—Bacon's Law Tracts.
Bac. Leas.—Bacon (M.) on Leases and Terms of Years.
Bac. Lib. Reg.—Bacon's (John) Liber Regis, vel Thesaurus Rerum Ecclesiasticarum.
Bac. Uses.—Bacon's Reading on the Statute of Uses. This is printed in his Law Tracts.
Bach. Man.—Bache's Manual of a Pennsylvania Justice of the Peace.
Bail. R.—Bailey's Reports.
Bain. on M. & M.—Bainbridge on Mines and Minerals.
Baldw. R.—Baldwin's Circuit Court Reports.
Ball. & Beat.—Ball and Beatty's Reports. Reports of Cases in the High Court of Chancery in Ireland during the time of Lord Manners, from 1807 to 1815.
Ballan. Lim.—Ballantine on Limitations.
Banc. Sup.—Upper Bench.
Barb. Eq. Dig.—Barbour's Equity Digest.
Barb. Cr. Pl.—Barbour's Criminal Pleading.
Barb. Pract. in Ch.—Barbour's Treatise on the Practice of the Court of Chancery.
Barb. R.—Barbour's Chancery Reports.
Barb. Grot.—Grotius on War and Peace, with notes by Barbeyrac.
Barb. Puff.—Puffendorf's Law of Nature and Nations, with notes by M. Barbeyrac.
Barb. on Set Off.—Barbour on the Law of Set Off, with an appendix of precedents.
Barn. C.—Barnardiston's Chancery Reports. Report of Cases in Chancery. By Thomas Barnardiston. Lord Mansfield

absolutely forbid the citing of this book, for it would be only misleading students to put them upon reading it. 2 Burr. 1142, in margin.

Barn.—Barnardiston's K. B. Reports.

Barn. & Ald.—Barnewall and Alderson's Reports. Vide B. & A. In E. C. L. R.

Barn. & Adolph.—Barnewall & Adolphus' Reports. In E. C. L. R.

Barn. & Cress.—Barnewall & Cresswell's Reports. In E. C. L. R.

Barn. Sher.—Barnes' Sheriff.

Barnes.—Barnes' Notes of Practice.

Barr. Obs. Stat.—Barrington's Observations on the more Ancient Statutes.

Barr. Ten.—Barry's Tenures.

Bart. El. Conv.—Barton's Elements of Conveyancing. Bart. Prec. Conv.—Barton's Precedents of Conveyancing. Bart. S. Eq.—Barton's Suit in Equity.

Bat. on Contr.—Batten on the Law of Contracts relating to Specific Performance.

Batty's R.—Batty's Reports of cases determined in the K. B. Ireland.

Bay's R.—Bay's Reports.

Bayl. Bills.—Bayley on Bills.

Bayl. Ch. Pr.—Bayley's Chamber Practice.

Beam. Ne Exeat.—Brief view of the writ of Ne Exeat Regno, as an equitable process, by J. Beames.

Beam. Eq.—Beames on Equity Pleading.

Beam. Ord. Chan.—Beames' General Orders of the High Court of Chancery, from 1600 to 1815.

Beat. R.—Beatty's Reports determined in the High Court of Chancery, in Ireland.

Beav. R.—Beavan's Chancery Reports.

Beawes.—Beawes' Lex Mercatoria.

Beck's Med. Jur.—Beck's Medical Jurisprudence.

Bee's R.—Bee's Reports.

Bell on H. & W.—Bell on the Law of Property as arising from the relation of husband and wife.

Bell's Com.—Bell's Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence.

Bell. Del. U. L.—Beller's Delineation of Universal Law.

Bell's Dict.—Dictionary of the Law of Scotland. By Rob. Bell.

Bell's Med. Jur.—Bell's Medical Jurisprudence.

Bellew.—Bellewe's Cases in the time of K. Richard II. Bellewe's Cases in the time of Henry VIII., Edw. VI., and Q. Mary, collected out of Brooke's Abridgment, and arranged under years, with a table, are cited Brooke's New Cases.

Bellingh. Tr.—Bellingham's Trial.
Belt's Sup.—Belt's Supplement. Supplement to the Reports in Chancery of Francis Vesey, senior, Esq. during the time of Lord Ch. J. Hardwicke.
Belt's Ves. sen.—Belt's edition of Vesey senior's Reports.
Benl.—Benloe & Dalison's Reports. Reports and Pleadings in Common Pleas, in the reigns of K. Henry VII., Henry VIII., Edward VI., and Queens Mary and Elizabeth. By William Benloe and William Dalison. See New Benl.
Ben. on Av.—Benecke on Average.
Ben. Adm. Pr.—Benedict's Admiralty Practice.
Benn. Diss.—Bennet's Short Dissertation on the nature and various proceedings in the Master's Office, in the Court of Chancery. Sometimes this book is called Benn. Pract.
Benn. Pract.—See Ben. Diss.
Benth. Ev.—Bentham's Treatise on Judicial Evidence.
Best on Ev.—Best on the Principles of Evidence.
Best on Pres.—Best's Treatise on Presumptions of Law and Fact.
Bett's Adm. Pr.—Bett's Admiralty Practice.
Bev. on Hom.—Bevil on Homicide.
Bill. on Aw.—Billing on the Law of Awards.
Bing.—Bingham. Bing. Inf.—Bingham on Infancy. Bing. on Judg.—Bingham on Judgments and Executions. Bing. L. & T.—Bingham on the Law of Landlord and Tenant. Bing. R.—Bingham's Reports. In E. C. L. R. Bing. N. C.—Bingham's New Cases.
Binn.—Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Horace Binney.
Bird on Conv.—Bird on Conveyancing. Bird L. & T.—Bird on the Laws respecting Landlords, Tenants and Lodgers. Bird's Sol. Pr.—Bird's Solution of Precedents of Settlements.
Biret, De l'Abs.—Traite de l'Absence et de ses effets, par M. Biret.
Biss. on Est. or Biss. on Life Est.—Bissett on the Law of Estates for Life.
Biss. on Partn.—Bissett on Partnership.
Bl.—Blount's Law Dictionary and Glossary.
Bl. Comm. or Comm.—Commentaries on the Laws of England, by Sir William Blackstone.
Bl. Rep.—Sir Wm. Blackstone's Reports.
Bl. H.—Henry Blackstone's Reports, sometimes cited H. Bl.
Black. L. T.—Blackstone's Law Tracts.
Blackb. on Sales.—Blackburn on the effect of the Contract of Sale.
Blackf. R.—Blackford's Reports.

Blak. Ch. Pr.—Blake's Practice of the Court of Chancery of the State of New York.
Blan. on An.—Blaney on Life Annuities.
Bland's Ch. R.—Bland's Chancery Reports.
Blansh. Lim.—Blanshard on Limitations.
Bligh. R.—Bligh's Reports of Cases decided in the House of Lords. There are two series of these Reports; the first contains three volumes, and the last ten, and is still continued.
Blount.—Blount's Law Dictionary and Glossary.
Bo. R. Act.—Booth on Real Actions.
Boh. Dec.—Bohun's Declarations. Boh. Eng. L.—Bohun's English Lawyer. Boh. Priv. Lon.—Bohun's Privilegia Londini.
Boote. Boote's Ch. Pr.—Boote's Chancery Practice. Boote's S. L.—Boote's Suit at Law.
Booth's R. A.—Booth on Real Actions.
Borthw. on Lib.—Borthwick on the Law of Libels. Borth. L. L.—Borthw. on the Law of Libels.
Bos. & Pull.—Bosanquet and Puller's Reports. Vide B. & P.
Bosc. on Conv.—Boscowen on Convictions.
Bott.—Bott's Poor Laws.
Bouch. Inst. Dr. Mar.—Boucher, Institution au Droit Maritime.
Boulay Paty, Dr. Com.—Cours de Droit Commercial Maritime, par P. S. Boulay Paty.
Bousq. Dict. de Dr.—Bousquet, Dictionnaire de Droit.
Bouv. L. D.—Bouvier's Law Dictionary.
Bouv. Inst.—Bouvier's Institutes of American Law.
Bowl. on Lib.—Bowles on Libels.
Br. or Brownl.—Brownlow's Reports.
Br. or Br. Ab.—Brooke's Abridgment.
Bra.—Brady's History of the Succession of the Crown of England, etc.
Brac.—Bracton's Treatise on the Laws and Customs of England. Vide, as to character of this book, Fortesc. 419; Jones on Bailm. 75; 1 Show. 121; Fitz. Ab. Gard. 71.
Bra. Princ.—Branche's Principia Legis et Æquitatis.
Brack. L. Misc.—Brackenridge's Law Miscellany.
Bradb.—Bradby on Distresses.
Bradl. P. B.—Bradley's Point Book.
Bran. Prin. or Bran. Max.—Branche's Principia Legis Æquitatis, being an alphabetical collection of maxims, etc.
Brayt. R.—Brayton's Reports.
Breese's R.—Breese's Reports.
Brev. Sel.—Brevia Selecta, or Choice Writs.
Bridg.—Bridgman's Reports. Reports from 12 to 19 K. James. By Sir John Bridgman.

Brid. Dig. Ind.—Bridgman's Digested Index. Brid. Leg. Bib.—Bridgman's Legal Bibliography. Brid. Conv.—Bridgman's Precedents of Conveyancing. Brid. Refl.—Bridgman's Reflections on the Study of the Law. Bridg. Synth.—Bridgman's Synthesis. Bridg. Thes. Jur.—Bridgman's Thesaurus Juridicus.

Bridg. O.—Orlando Bridgman's Reports.

Bridg. The. Jur.—Bridgman's Thesaurus Juridicus.

Bright. on Costs.—Brightly on Costs.

Brightl. Rep.—Brightly's Reports.

Bright on H. & W.—Bright on Husband and Wife.

Britton.—Treatise on the Ancient Pleas of the Crown.

Bro. or Brownl.—Brownlow's Reports.

Bro. Ab.—Brooke's Abridgment.

Bro. A. & C. L.—Brown's Admiralty Civil Law. This book, though far too brief, deserves to be popular. Coop. Just. 670.

Bro. C. C.—Brown's Chancery Cases. Reports in Chancery from 18 Geo. III. 1788, to 34 Geo. III. 1794. By William Brown.

Bro. Off. Not.—A Treatise on the Office and Practice of a Notary in England, as connected with Mercantile Instruments, etc. By Richard Brooke.

Bro. P. C.—Brown's Parliamentary Cases. Reports of Cases upon Appeals and Writs of Error in the High Court of Parliament. By Josiah Brown.

Bro. Read.—Brooke's Reading on the Statute of Limitations.

Bro. on Sales.—Brown on Sales.

Bro. V. M.—Brown's Vade Mecum.

Brock. R.—Brockenbrough's Reports of Chief Justice Marshall's Decisions.

Brod. & Bing.—Broderip and Bingham's Reports. In E. C. L. R.

Broom on Part.—Broom on Parties to Actions.

Brownl. Rediv. or Brownl. Ent.—Brownlow Redivivus.

Bruce M. L.—Bruce's Military Law.

Buck's Ca.—Buck's Cases. Cases in Bankruptcy in 1817, 1818. By J. W. Buck.

Bull. or Bull. N. P.—Buller's Nisi Prius. When Buller wrote his N. P. he was a young man, and intended his book to carry with him on the circuit, for his own use. 10 Serg. & R. 49.

Bulst.—Bulstrode's Reports. Reports in K. B. in the reigns of King James I. and Charles I.; in three parts. By Edward Bulstrode.

Bunb.—Bunbury's Reports. Lord Mansfield says, "Mr. Bunbury never meant that those cases should be published; they are very loose notes." 5 Burr. 2658.

Burge Col. Law.—Burge's Colonial Law.
Burge Confl. of Law.—Burge on the Conflict of Laws.
Burge on Sur.—Burge's Commentaries on the Law of Suretyship, etc.
Burge For. Law.—Burge on Foreign Law.
Burlam.—Burlamaqui's Natural and Political Law.
Burns' L. D.—Burns' Law Dictionary.
Burns' Just.—Burns' Justice of the Peace.
Burns' Eccl. Law, or Burns' E. L.—Burns' Ecclesiastical Law.
Burn. C. L.—Burnett's Treatise on the Criminal Law of Scotland.
Burn. Com.—Burnett's Commentaries on the Criminal Law of Scotland.
Burr.—Burrow's Reports.
Burr. L. D.—Burrill's Law Dictionary.
Burr. Pract.—Burrill's Practice.
Burr. Sett. Cas.—Burrow's Settlement Cases.
Burr's Tr.—Burr's Trial.
Burt. Man.—Burton's Manual of the Law of Scotland. The work is in two parts, one relating to public law, and the other to the law of private rights and obligations. The former is cited Burt. Man. Pl.; the latter, Burt. Man. P. R.
Burt. on Real Prop.—Burton on Real Property.
Butl. Hor. Jur.—Butler's Horæ Juridicæ Subsecivæ.

C.—Codex, the Code of Justinian. C.—Code. C.—Chancellor.
C. & A.—Cooke and Alcock's Reports.
C. B.—Communi Banco, or Common Bench.
C. C.—Circuit Court.
C. C.—Cepi Corpus. C. C. and B. B.—Cepi Corpus and Bail Bond.
C. C. or Ch. Cas.—Cases in Chancery, in three parts. Most of these cases, in 2 C. C. are grossly misreported, said per Lord Loughborough, 1 H. Bl. 332.
C. C. C. or Cr. Cir. Com.—Crown Circuit Companion.
C. C. & C.—Cepi corpus et committitur.
C. C. E. or Cain. Cas.—Caines' Cases in Error.
C. D. or Com. Dig.—Comyn's Digest. This book is cited in this manner: Com. Dig. Arbitrament, (A. 2,) which signifies Comyn's Digest, title Arbitrament, division (A. 2.) Sometimes the volume and page are cited as follows: 2 Com. Dig. 100.
C. & D. C. C.—Crawford and Dix's Criminal Cases.
C. & D. Ab. C.—Crawford and Dix's Abridged Cases.
C. & F.—Clarke and Finelly's Reports.
C. J.—Chief Justice.
C. & J.—Crompton and Jervis' Exchequer Reports.

C. J. C. P.—Chief Justice of the Common Pleas.
C. J. K. B.—Chief Justice of the King's Bench.
C. J. Q. B.—Chief Justice of the Queen's Bench.
C. J. U. B.—Chief Justice of the Upper Bench. During the time of the Commonwealth, the English Court of the King's Bench was called the Upper Bench.
C. & K.—Carrington and Kirwan's Reports.
C. & M.—Crompton and Meeson's Reports.
C. & M.—Carrington and Marshman's Reports.
C. M. & R.—Crompton, Meeson and Roscoe's Exchequer Reports.
C. N. P. C.—Campbell's Nisi Prius Cases.
C. P.—Common Pleas.
C. P. Coop.—C. P. Cooper's Reports.
C. & P. or Car. & Payn.—Carrington and Payne's Reports, in E. C. L. R.
C. & P.—Craig and Phillips' Reports.
C. R. or Ch. Rep.—Chancery Reports.
C. & R.—Cockburn and Rowe's Reports.
C. W. Dudl. Eq.—C. W. Dudley's Equity Reports.
C. Theod.—Codice Theodosiano, in the Theodosian Code.
Ca.—Case or Placitum.
Ca. T. K.—Select Cases tempore King.
Ca. T. Talb.—Cases tempore Talbot.
Ca. Res.—Capias ad respondendum.
Ca. sa. in practice, is the abbreviation of capias ad satisfaciendum.
Caines' R.—Caines' Term Reports.
Caines' Cas.—Caines' Cases, in error.
Caines' Pr.—Caines' Practice.
Cald. R.—Caldecott's Reports.
Cald. S. C.—Caldecott's Settlement Cases; sometimes cited Cald. R.
Caldw. Arbit.—Caldwell on Arbitration.
Call. on Sew.—Callis on the Law relating to Sewers.
Call's R.—Call's Reports.
Calth. R.—Calthorp's Reports of special cases touching several customs and liberties of the city of London.
Calth. on Copyh.—Calthorpe on Copyholds.
Calv. on Part.—Calvert on Parties to Suits in Equity.
Cam. & Norw.—Cameron and Norwood's Reports.
Campb.—Campbell's Reports. Reports of Cases argued and ruled at Nisi Prius in the Courts of K. B. and C. P., from 1807 to 1816. By John Campbell.
Can.—Canon.
Cap.—Capitulo, chapter.
Car.—Carolus; as 13 Car. II., st. 2, c. 1.

Carr. Cr. L.—Carrington's Criminal Law.
Carr. & Kirw.—Carrington and Kirwan's Reports. See C. & K.
Carr. & Marsh.—Carrington and Marshman's Reports.
Carr. & Oliv. R. & C. C.—Carrow and Oliver's Railway and Canal Cases.
Cart.—Carter's Reports. Reports in C. P. in 16, 17, 18 and 19, Charles II.
Carta de For.—Carta de Foresta.
Carth.—Carthew's Reports.
Cary.—Cary's Reports.
Cary on Partn.—Cary on the Law of Partnership.
Cas. of App.—Cases of Appeals to the H. of L.
Cas. L. Eq.—Cases and Opinions in Law, Equity, and Conveyancing.
Cas. of Pr.—Cases of Practice in the Court of the King's Bench, from the reign of Eliz. to the 14 Geo. III.
Cas. of Sett.—Cases of Settlement.
Cas. Temp. Hardw.—Cases during the time of Lord Hardwicke.
Cas. Temp. Talb.—Cases during the time of Lord Talbot.
Ch.—Chancellor.
Ch. Cas.—Cases in Chancery.
Ch. Pr.—Precedents in Chancery.
Ch. R.—Reports in Chancery.
Ch. Rep.—Vide Ch. Cases.
Chamb. on Jur. of Chan.—Chambers on the Jurisdiction of the High Court of Chancery, over the persons and property of Infants.
Chamb. L. & T.—Chambers on the Law of Landlord and Tenant.
Char. Merc.—Charta Mercatoria. See Bac. Ab. Smuggling, C.
Charlt.—Charlton. T. U. P. Charl.—T. U. P. Charlton's Reports. R. M. Charlt.—R. M. Charlton's Reports.
Chase's T. R.—Chase's Trial.
Cher. Cas.—Cherokee Case.
Chev. C. C.—Cheves' Chancery Cases.
Chipm. R.—Chipman's Reports. D. Chipm.—D. Chipman's Reports.
Chipm. Contr.—Essay on the Law of Contracts for the payment of Specific Articles. By Daniel Chipman.
Ch. Contr.—A Practical Treatise on the Law of Contracts, not under seal, and upon the usual defences to actions thereon. By Joseph Chitty, jr. Cited Chit. on Contr.
Chitty on App.—Chitty's Practical Treatise on the Law relating to Apprentices and Journeymen.
Chit. on Bills.—Chitty on Bills.
Chit. jr. on Bills.—Chitty, junior, on Bills.

Chit. Com. L.—Chitty's Treatise on Commercial Law.
Chit. Cr. L.—Chitty's Criminal Law.
Chit. on Des.—Chitty on the Law of Descents.
Chit. F.—Chitty's Forms and Practical Proceedings.
Chit. Med. Jur.—Chitty on Medical Jurisprudence.
Chit. Rep.—Chitty's Reports. In E. C. L. R.
Chit. Pl.—A Practical Treatise on Pleading.
Chit. Pr.—Chitty's General Practice. A most excellent and practical work.
Chit. Prerog.—Chitty on the Law of the Prerogatives of the Crown.
Chris. B. L.—Christian's Bankrupt Laws.
Christ. Med. Jur.—Christison's Treatise on Poisons, relating to Medical Jurisprudence, Physiology, and the Practice of Physic.
Civ.—Civil.
Civ. Code Lo.—Civil Code of Louisiana.
Cl.—The Clementines.
Cl. Ass.—Clerk's Assistant.
Clan. H. & W.—Clancy on the Rights, Duties, and Liabilities of Husband and Wife.
Clark on Leas.—Clark's Enquiry into the Nature of Leases.
Clarke's R.—Clarke's Reports.
Clark & Fin.—Clark and Finelly's Reports.
Clark. Adm. Pr.—Clarke's Practice in the Admiralty.
Clark. Prax.—Clarke's Praxis, being the manner of proceeding in the Ecclesiastical Courts.
Clay.—Clayton's Reports. Reports of Pleas of Assize at York, with some Precedents useful for Pleaders, in English.
Cleir. Us et Cous.—Cleirac, Us et Coutumes de la Mer.
Clerke's Rud.—Clerke's Rudiment's of American Law and Practice.
Clift.—Clift's Entries.
Co.—A particle used before other words to imply that the person spoken of possesses the same character as other persons whose character is mentioned, as co-executor, an executor with others; co-heir, an heir with others; co-partner, a partner with others, etc. Co. is also an abbreviation for company, as John Smith & Co. When so abbreviated it also represents county.
Co.—Coke's Reports.
Co. or Co. Rep.—Coke's Reports.
Co. Ent.—Coke's Entries.
Co. B. L.—Coke's Bankrupt Law.
Co. on Courts.—Coke on Courts; 4th Institute. See Inst. below, and 1 Bl. Com. 73.
Co. Litt.—Coke on Littleton. See Inst.

Co. M. C.—Coke's Magna Charta; 2d Institute. See Inst. and 1 Bl. Com. 73.
Co. P. C.—Coke's Pleas of the Crown. See Inst. and 1 Bl. Com. 73.
Cock. & Rowe.—Cockburn and Rowe's Reports.
Code Civ.—Code Civil, or Civil Code of France. This work is usually cited by the article.
Code Nap.—Code Napoleon. The same as Code Civil.
Code Com.—Code de Commerce.
Code Pén.—Code Pénal.
Code Pro.—Code de Procedure.
Col.—Column. In the first or second column of the book quoted.
Col. & Cai. Cas.—Coleman and Caines' Cases.
Cole on Inf.—Cole on Criminal Informations, and Informations in the nature of Quo Warranto.
Coll. on Pat.—Collier on the Law of Patents.
Coll. on Idiots.—Collinson on the Law concerning Idiots, etc.
Coll. Rep.—Colle's Reports.
Coll.—Collation.
Colly. on Partn.—Collyer on Partnership.
Colly. Rep.—Collyer's Reports.
Com.—Communes, or Extravagantes Communes.
Com. or Com. Rep.—Comyn's Reports.
Com. Contr.—Comyn on Contract.
Com. on Us.—Comyn on Usury.
Com. Dig.—Comyn's Digest.
Com. L. & T.—Comyn on the Law of Landlord and Tenant.
Com. Law.—Commercial Law.
Com. Law Rep.—Common Law Reports, edited by Sergeant and Lowber. Vide E. C. L. Rep.
Comb.—Comberbach's Reports. Reports in K. B., from 1 K. James II. (1685) to 10 K. William III. (1698.) By Roger Comberbach.—Comberbach is said by Lord Thurlow to be bad authority. 1 Bro. C. C. 97.
Comm.—Blackstone's Commentaries.
Con. & Law.—Connor and Lawson's Reports.
Cond.—Condensed.
Cond. Ch. R.—Condensed Chancery Reports.
Cond. Ex. R.—Condensed Exchequer Reports.
Conf. Chart.—Confirmatio Chartorem. See Bac. Ab. Smuggling, B.
Cong.—Congress.
Conkl. Pr.—Conkling's Practice of the Courts of the United States.
Conn. R.—Connecticut Reports.
Conr. Cust. R.—Conroy's Custodian Reports.
Cons. del Mar.—Consolato del Mare.

Cons. Ct. R.—Constitutional Court Reports.
Cons. on Co.—Consett on Practice of the Ecclesiastical Courts.
Cont.—Contra.
Cooke on Defam.—Cooke on Defamation.
Coop. Eq. R.—Cooper's Equity Reports.
Coop. Cas.—Cases in the High Court of Chancery during the time of Lord Chancellor Eldon, in Hilary, Easter, and Trinity Terms, 55 Geo. III. 1815, with a few cases of an earlier period. By George Cooper.
Coop. on Lib.—Cooper on the Law of Libels.
Coop. Eq. Pl.—Cooper's Equity Pleading.
Coop. Just.—Cooper's Justinian's Institutes.
Coop. Med. Jur.—Cooper's Medical Jurisprudence.
Coop. t. Brough.—Cooper's Cases in the time of Brougham.
Coop. P. P.—Cooper's Points of Practice.
Coote on Mortg.—Coote on Mortgages.
Corb. & Dan.—Corbet and Daniel's Election Cases.
Corn. on Uses.—Cornish on Uses.
Corn. on Rem.—Cornish on Remainders.
Corp. Jur. Civ.—Corpus Juris Civilis.
Corp. Jur. Can.—Corpus Juris Canonicus.
Corvin.—Corvinus. See Bac. Ab. Mortgage A, where this author is cited.
Cot. Abr.—Cotton's Abridgment of Records.
Cov. on Conv. Evi.—Coventry on Conveyancers' Evidence.
Cow. Int.—Cowel's Law Dictionary, or the interpreter of words and terms, used either in the common or statute laws of Great Britain.
Cowp.—Cowper's Reports.
Cow. R.—Cowen's Reports, N. Y.
Cox's Cas.—Cox's Cases. Cases determined in the Courts of Equity from 1783 to 1796 inclusive.
Coxe's R.—Coxe's Reports.
Crabb's C. L.—Crabb's Common Law. A History of the English Law; or an attempt to trace the rise, progress, and changes of the Common Law. By George Crabb.
Crabb, R. P.—Crabb on the Law of Real Property.
Craig. & Phil.—Craig and Phillips' Reports.
Cranch, R.—Cranch's Reports.
Cresw. R.—Creswell's Reports of Cases decided in the Court for the Relief of Insolvent Debtors.
Crim. Con.—Criminal conversation; adultery.
Cro.—Croke's Reports. Cro. Eliz.—Croke's Reports, during the time of Queen Elizabeth, also cited as 1 Cro. Cro. Jac.—Croke's Reports, during the time of King James I., also cited as 2 Cro. Cro. Car.—Croke's Reports, during the time of Charles I., also cited as 3 Cro.

Crompt. Ex. Rep.—Crompton's Exchequer Reports.
Crompt. J. C.—Crompton's Jurisdiction of Courts.
Crompt. & Mees.—Crompton and Meeson's Exchequer Reports.
Crompt. Mees. & Rosc.—Crompton, Meeson and Roscoe's Exchequer Reports.
Cross on Liens.—Cross' Treatise on the Law of Liens and Stoppage in Transitu.
Cru. Dig. or Cruise's Dig.—Cruise's Digest of the Law of Real Property.
Cul. culpabilis, guilty; non cul., not guilty.
Cull. Bankr. L.—Cullen's Principles of the Bankrupt Law.
Cun.—Cunningham's Reports.
Cun. Dict.—Cunningham's Dictionary.
Cur. adv. vult.—Curia advisere vult.
Cur. Scacc.—Cursus Scaccarii, the Court of the Star Chamber.
Cur. Phil.—Curia Philipica.
Curs. Can.—Cursus Cancellariæ.
Curt. R.—Curteis' Ecclesiastical Reports.
Curt. Eq. Pr.—Curtis' Equity Precedents.
Curt. Am. Sea.—Curtis on American Seamen.
Curt. on Copyr.—Curtis on Copyrights.
Cush. Rep.—Cushing's Reports.
Cush. Trust. Pr.—Cushing on Trustee Process, or Foreign Attachment, of the Laws of Massachusetts and Maine.
Cus. de Norm.—Custome de Normandie. See Bac. Ab. Customs, B.

D. dialogue; as, Dr. & Stud. d. 2, c. 24, or Doctor and Student, dialogue 2, chapter 24.
D. dictum; D. Digest of Justinian.
D.—The Digest or Pandects of the civil law, is sometimes cited thus, D. 6, 1, 5.
D. C.—District Court; District of Columbia.
D. C. L.—Doctor of the Civil Law.
D. Chipm. R.—D. Chipman's Reports.
D. S. B.—Debit sans brève.
D. S —Deputy Sheriff. See 1 Tenn. R. 436.
D. & C.—Dow and Clark's Reports.
D. & C.—Deacon and Chitty's Reports.
D. & E.—Durnford and East's Reports. This book is also cited as Term Reports, abbreviated T. R.
D. & L.—Danson and Lloyd's Mercantile Cases.
D. & M.—Davidson's and Merivale's Reports.
D. & R.—Dowling and Ryland's Reports of Cases decided in the Court of the King's Bench. In E. C. L. R.
D. & R. N. P. C.—Dowling and Ryland's Reports of Cases decided at Nisi Prius. In E. C. L. R.

D. & S.—Doctor and Student.
D. & W.—Drury and Walsh's Reports.
D'Aguesseau, Œuvres.—Œuvres Completes du Chancellier D'Aguesseau.
Dag. Cr. L.—Dagge's Criminal Law.
Dal.—Dalison's Reports. See Benl.
Dall.—Dallas' Reports.
Dall. L.—Dallas' Laws of Pennsylvania.
Dalloz, Dict.—Dictionnaire Général et raissonné de Legislation, de Doctrine, et de Jurisprudence, en matiere civile, commerciale, criminelle, administrative, et de Droit Public. Par Armand Dalloz, jeune.
Dalr. Feud. Pr.—Dalrymple's Essay, or History of Fuedal Property in Great Britain. Sometimes cited Dalr. F. L.
Dalr. on Ent.—Dalrymple on the Polity of Entails.
Dalr. F. L.—Dalrymple's Feudal Law.
Dalt. Just.—Dalton's Justice.
Dalt. Sh.—Dalton's Sheriff.
D'Anv.—D'Anvers' Abridgment.
Dan. Ch. Pr.—Daniell's Chancery Practice.
Dan. Ord.—Danish Ordinances.
Dan. Rep.—Daniell's Reports.
Dan. & Ll.—Danson and Lloyd's Reports.
Dana's R.—Dana's Reports.
Dane's Ab.—Dane's Abridgment of American Law.
Dav.—Davy's Reports.
Dav. on Pat.—Davies' Collection of Cases respecting Patents.
Dav. Rep.—Davis' Reports.
Daw. Land. Pr.—Dawes' Epitome of the Law of Landed Property.
Daw. Real Pr.—Dawes' Introduction to the Knowledge of the Law on Real Estates.
Daw. on Arr.—Dawes' Commentaries on the Law of Arrest in Civil Cases.
Daws. Or. Leg.—Dawson's Origo Legum.
Deac. R.—Deacon's Reports.
Deac. & Chit.—Deacon and Chitty's Reports.
Dean's Med. Jur.—Dean's Medical Jurisprudence.
Deb. on Jud.—Debates on the Judiciary.
Dec. temp. H. & M.—Decisions in Admiralty during the time of Hay and Marriott.
Deft.—Defendant.
De Gex & Sm. R.—De Gex and Smale's Reports.
Den. Cr. Cas.—Denison's Crown Cases.
Den. Rep.—Denio's New York Reports.
Desaus. R.—Desaussure's Chancery Reports.
Dev. R.—Devereux's Reports.

Dev. Ch. R.—Devereux's Chancery Reports.
Dev. & Bat.—Devereux and Battle's Reports.
Dy.—Dyer's Reports.
Dial. de Scac.—Dialogus de Scaccario.
Dick. Just.—Dickinson's Justice.
Dick. Pr.—Dickson's Practice of the Quarter and other Sessions.
Dick.—Dickens' Reports.
Dict.—Dictionary.
Dict. Dr. Can.—Dictionnaire de Droit Cannonique.
Dict de Jur.—Dictionnaire de Jurisprudence.
Dig.—Digest of Writs. Dig.—The Pandects or Digest of the Civil Law, cited Dig. 1, 2, 5, 6, for Digest, book 1, tit. 2, law 5, section 6.
Disn. on Gam.—Disney's Law of Gaming.
Doct. & Stud.—Doctor and Student.
Doct. Pl.—Doctrina Placitendi.
Doder. Eng. Law.—Doderidge's English Lawyer.
Dods. R.—Dodson's Reports.
Dom.—Domat, Lois Civiles.
Dom. Proc.—Domo Procerum. House of Lords.
Domat.—Lois Civiles dans leur ordre naturel. Par. M. Domat.
Dougl.—Douglas' Reports.
Doug. El. Cas.—Douglas' Election Cases.
Dougl. (Mich.) R.—Douglas' Michigan Reports.
Dow. or Dow. P. C.—Dow's Parliamentary Cases.
Dow & Clarke.—Dow and Clarke's Reports of Cases in the House of Lords.
Dowl. P. C.—Dowling's Practical Cases.
Dow. & R. N. P.—Dowling and Ryan's Nisi Prius Cases.
Dow. & Ry. M. C.—Dowling and Ryan's Cases for Magistrates.
Dowl. & Ry.—Dowling and Ryland's Reports of Cases decided in the Court of the King's Bench. In E. C. L. R.
Dr. & St.—Doctor and Student.
Drew. on Inj.—Drewry on Injunctions.
Dru. & Wal.—Drury and Walsh's Reports.
Dru & War.—Drury and Warren's Reports.
Dub.—Dubitatur.
Dudl. R.—Dudley's Law and Equity Reports.
Dug. S. or Dugd. Sum.—Dugdale's Summonses.
Dugd. Orig.—Dugdale's Origines.
Dug. Sum.—Dugdale's Summonses.
Duke or Duke's Ch. Uses.—Duke's Law of Charitable Uses.
Dunl. Pr.—Dunlap's Practice.
Dunl. Adm. Pr.—Dunlap's Admiralty Practice.
Duponc. on Jur.—Duponceau on Jurisdictions.
Duponc. Const.—Duponceau on the Constitution.

Dur. Dr. Fr.—Duranton, Droit Français.
Durnf. & East.—Durnford and East's Reports, also cited D. & E. or T. R.
Duv. Dr. Civ. Fr.—Duvergier, Droit Civil Français. This is a continuance of Toullier's Droit Civil Français. The *first* volume of Duvergier is the *sixteenth* volume of the continuation. The work is sometimes cited 16 Toull. or 16 Toullier, instead of being cited 1 Duv. or 1 Duvergier, etc.
Dwar. on Stat.—Dwarris on Statutes.
Dy.—Dyer's Reports.

E.—Easter Term.
E.—Edward; as 9 E. III., c. 9.
E. of Cov.—Earl of Coventry's Case.
E. C. L. R.—English Common Law Reports, sometimes cited Eng. Com. Law Rep. (q. v.)
E. g., usually written e. g, exempli gratia; for the sake of an instance or example.
E. P. C. or East, P. C.—East's Pleas of the Crown.
Eccl.—Ecclesiastical.
Eccl. Law.—Ecclesiastical Law.
Eccl. Rep.—Ecclesiastical Reports. Vide Eng. Eccl. Rep.
Ed. or Edit.—Edition.
Ed.—Edward; as, 3 Ed. I., c. 9.
Ed. Inj.—Eden on Injunction.
Ed. Eq. Reps.—Eden's Equity Reports.
Ed. Prin. Pen. Law.—Eden's Principles of Penal Law.
Edm. Exch. Pr.—Edmund's Exchequer Practice.
Edw. Ad. Rep.—Edwards' Admiralty Reports.
Edw. Lead. Dec.—Edwards' Leading Decisions.
Ed. on Part.—Edwards on Parties to Bills in Chancery.
Edw. on Rec.—Edwards on Receivers in Chancery.
Eliz.—Elizabeth; as, 13 Eliz. c. 15.
Ellis on D. and Cr.—Ellis on the Law relating to Debtor and Creditor.
Elm. on Dil.—Elmes on Ecclesiastical and Civil Dilapidations.
Elsn. on Parl.—Elsynge on Parliaments.
Encycl.—Encyclopædia, or Encyclopédie.
Eng.—English.
Eng. Ch. R.—English Chancery Reports. Vide Cond. Ch. R.
Eng. Com. Law. Rep.—English Common Law Reports.
Eng. Ecc. R.—English Ecclesiastical Reports.
Eng. Plead.—English Pleader.
Engl. Rep.—English's Arkansas Reports.
Eod.—Eodem, under the same title.
Eod. tit.—In the same title.
Eq. Ca. Ab.—Equity Cases Abridged.

Eq. Draft.—Equity Draftsman.
Ersk. Inst.—Erskine's Institute of the Law of Scotland. Ersk. Prin. of Laws of Scot.—Erskine's Principles of the Laws of Scotland.
Esp. N. P.—Espinasse's Nisi Prius.
Esp. N. P. R.—Espinasse's Nisi Prius Reports.
Esp. on Ev.—Espinasse on Evidence.
Esp. on Pen. Ev.—Espinasse on Penal Evidence.
Esq.—Esquire.
Et Al.—Et alii and others.
Eunom.—Eunomus, or Doctor and Student.
Ev. Col. Stat.—Evans' Collection of Statutes.
Ev. on Pl.—Evans on Pleading.
Ev. Tr.—Evans' Trial.
Ex. or Exor.—Executor. Execx.—Executrix.
Exch. Rep.—Exchequer Reports. Vide Cond. Exch. Rep.
Exec.—Execution.
Exp.—Expired.
Exton's Mar. Dicæo.—Exton's Maritime Dicæologie.
Extrav.—Extravagants.

F.—Finalis, the last or latter part.
F.—Fitzherbert's Abridgment.
F. & F.—Falconer and Fitzherbert's Reports.
F. R.—Forum Romanum.
F. & S.—Fox and Smith's Reports.
F. N. B.—Fitzherbert's Natura Brevium.
Fairf. R.—Fairfield's Reports.
Fac. Coll.—Faculty Collection; the name of a set of Scotch Reports.
Falc. & Fitzh.—Falconer and Fitzherbert's Election Cases.
Far.—Farresly, (7 Mod. Rep.) is sometimes so cited.
Farr's Med Jur.—Farr's Elements of Medical Jurisprudence.
Fearn. on Rem.—Fearne on Remainders.
Fell. on Mer. Guar.—Fell on Mercantile Guarantees.
Ferg. on M. & D.—Ferguson on Marriage and Divorce.
Ferg. Rep. Div.—Ferguson's Reports in Actions of Divorce.
Ferg. R.—Fergusson's Reports of the Consistorial Court of Scotland.
Ff. or ff.—Pandects of Justinian. This is a careless way of writing the Greek π.
Ferr. Hist. Civ. L.—Ferriere's History of the Civil Law.
Ferr. Mod.—Ferrière Moderne, ou Noveau Dictionnaire des Termes de Droit et de Practique.
Fess. on Pat.—Fessenden on Patents.
Fi. fa.—Fieri Facias.
Field's Com. Law.—Field on the Common Law of England.

Field. on Pen. Laws.—Fielding on Penal Laws.
Finch.—Finch's Law; or a discourse thereof, in five books. Finch's Pr.—Finch's Precedents in Chancery.
Finl. L. C.—Finlason's Leading Cases on Pleading.
Fish Copyh.—Fisher on Copyholds.
Fitzg.—Fitzgibbon's Cases in the Courts of the K. B., Chancery, C. P., and Exch. Vide 3 Atk. 306.
Fitzh.—Fitzherbert's Abridgment. Fitzh. Nat. Bre.—Fitzherbert's Natura Brevium.
Fl. or Fleta.—A Commentary on the English Law, written by an anonymous author in the time of Edward I., while a prisoner in the Fleet.
Fletch on Trusts.—Fletcher on the Estates of Trustees.
Floy. Proct. Pr.—Floyer's Proctor's Practice.
Fol.—Foley's Poor Laws.
Fol.—Folio.
Fonb.—Fonblanque on Equity. Fonb. Med. Jur.—Fonblanque on Medical Jurisprudence.
Forr.—Forrester's Cases during the time of Lord Talbot, commonly cited Cas. Temp. Talb.
For. Pla.—Brown's Formulæ Placitorium.
Forb. on Bills.—Forbes on Bills of Exchange.
Forb. Inst.—Forbes' Institute of the Law of Scotland.
Forr. Exch. Rep.—Forrest's Exchequer Reports.
Fors. on Comp.—Forsyth on the Law Relating to Composition with Creditors.
Fors. Cust. of Inf.—Forsyth on the Custody of Infants.
Fortesc.—Fortescue, De Laudibus Legum Angliæ. Fortesc. R.—Fortescue's Reports, temp. Wm. and Anne.
Fost. or Fost. C. L.—Foster's Crown Law.
Fox & Sm.—Fox and Smith's Reports.
Fr. Fragamentum.
Fra. or Fra. Max.—Francis' Maxims.
Fr. Ord.—French Ordinance. Sometimes cited Ord. de la Mer.
Fras.—Elect. Cas.—Fraser's Election Cases.
Fred. Co.—Frederician Code.
Freem.—Freeman's Reports. Freem. C. C.—Freeman's Cases in Chancery.
Freem. (Miss.) R.—Freeman's Reports of Cases decided by the Superior Court of Chancery of Mississippi.

G.—George; as, 13 G. I., c. 29.
G. & J.—Glyn and Jameson's Reports.
G. & J.—Gill & Johnson's Reports.
G. M. Dudl. Rep.—G. M. Dudley's Reports.
Gale & Dav.—Gale and Davison's Reports.
Gale's Stat.—Gale's Statutes of Illinois.

Gall. or Gall. Rep.—Gallison's Reports.
Garde on Ev.—Garde's Practical Treatise on the General Principles and Elementary Rules of the Law of Evidence.
Geo.—George; as, 13 Geo. I., c. 29.
Geo. Dec.—Georgia Decisions.
Geo. Lib.—George on the Offence of Libel.
Gibb. on D. & N.—Gibbons on the Law of Dilapidation and Nuisances.
Gibs. Codex.—Gibson's Codex Juris Civilis.
Gilb. R.—Gilbert's Reports. Gilb. Ev.—Gilbert's Evidence, by Lofft. Gilb. U. & T.—Gilbert on Uses and Trusts. Gilb. Ten.—Gilbert on Tenures. Gilb. on Rents.—Gilbert on Rents. Gilb. on Rep.—Gilbert on Replevin. Gilb. Ex. —Gilbert on Executions. Gilb. Exch.—Gilbert's Exchequer. Gilb. For. Rom.—Gilbert's Forum Romanum. Gilb. K. B.—Gilbert's King's Bench. Gilb. Rem.—Gilbert on Remainders. Gilb. on Dev.—Gilbert on Devises. Gilb. Lex Præt.—Gilbert's Lex Prætoria.
Gill & John.—Gill and Johnson's Reports.
Gill's R.—Gill's Reports.
Gilm. R.—Gilmer's Reports.
Gilp. R. Gilpin's Circuit Court Reports.
Gl. Glossa, the Gloss.
Glanv.—Glanville's Treatise of the Laws and Customs of England. See Co. Rep. Preface; Plowd. 368; 1 Show. 121; Madox's Exch. 123; 2 Reeve's Eng. Law, page v. and 283.
Glassf. Ev.—Glassford on Evidence.
Glov. Mun. Corp.—Glover on Municipal Corporations, or Glov. on Corp.—Glover on the Law of Municipal Corporations.
Glyn & Jam.—Glyn and Jameson's Reports of Cases in Bankruptcy.
Godb.—Godbolt's Reports.
Godolph. Ad. Jur.—Godolphin's View of the Admiralty Jurisdiction.
Godolph. Rep. Can.—Godolphin's Repertorium Canonicum.
Godolph.—Godolphin's Orphan's Legacy.
Gods. on Pat.—Godson's Treatise on the Law of Patents.
Goldesb.—Goldesborough's Reports. See Bro. Brownl.
Golds.—Goldsborough's Reports.
Gord. Dig.—Gordon's Digest of the Laws of the United States.
Gord. on Dec.—Gordon on the Law of Decedents in Pennsylvania.
Gould on Pl.—Gould on the Principles of Pleading in Civil Actions.
Gow on Part.—Gow on Partnership.
Grah. Pr.—Graham's Practice. Grah. N. T.—Graham on New Trials.

Grand Cout.—Grand Coutumier de Normandie.
Grady on Fixt.—Grady on the Law of Fixtures.
Grant on New Tr.—Grant on New Trials.
Grant's Ch. Pr.—Grant's Chancery Practice.
Gratt. R.—Grattan's Virginia Reports.
Green's B. L.—Green's Bankrupt Laws.
Green's R.—Green's Reports.
Greenl. on Ev.—Greenleaf's Treatise on the Law of Evidence.
Greenl. Ov. Cas.—Greenleaf's Overruled Cases.
Greenl. R.—Greenleaf's Reports.
Greenw. on Courts.—Greenwood on Courts.
Gres. Eq. Ev.—Gresley's Equity Evidence.
Griff. Reg.—Griffith's Law Register.
Grimk. on Ex.—Grimké on the duty of Executors and Administrators.
Grisw. Rep.—Griswold's Reports.
Grot.—Grotius de Jure Bellum.
Gude's Pr.—Gude's Practice on the Crown side of King's Bench, etc.
Gwill.—Gwillim's Tithe Cases.
Gwy. on Shff.—Gwynn on Sheriff.

H.—Henry; as 19 H. VII., c. 15.
H.—Hilary Term.
H. A.—Hoc anno.
H. v. commonly written in small letters *h. v.* hoc verbo.
H. of L.—House of Lords.
H. of R.—House of Representatives.
H. & B.—Hudson and Brooke's Reports.
H. & G.—Harris and Gill's Reports.
H. & J.—Harris and Johnson's Reports.
H. Bl.—Henry Blackstone's Reports.
H. H. C. L.—Hale's History of the Common Law.
H. & M.—Henning and Munford's Reports.
H. & M'H. or Harr. & M'Hen.—Harris and McHenry's Reports.
Hab fa. seis.—Habere facias seisinam.
H. P. C.—Hale's Pleas of the Crown.
H. t. usually put in small letters, *h. t.* hoc titulo.
Hab. Corp.—Habeas corpus.
Hab. fa. pos.—Habere facias possessionem.
Hagg. Ad. R.—Haggard's Admiralty Reports. Hag. Eccl. R.—Haggard's Ecclesiastical Reports. In E. E. R. Hagg. C. R.—Haggard's Reports in the Consistory Court of London.
Hale, P. C.—Hale's Pleas of the Crown.
Hale's Sum.—Hale's Summary of Pleas.
Hale's Jur. H. L.—Hale's Jurisdiction of the House of Lords.

Hale's Hist. C. L.—Hale's History of the Common Law.
Halif. Civ. Law.—Halifax's Analysis of the Civil Law.
Hall's R.—Hall's Reports of Cases decided in the Superior Court of the city of New York.
Halk. Dig.—Halkerton's Digest of the Law of Scotland relating to Marriage.
Hall's Adm. Pr.—Hall's Admiralty Practice.
Halst. R.—Halstead's Reports.
Hamm. N. P.—Hammond's Nisi Prius.
Ham. R.—Hammond's (Ohio) Reports.
Hamm. on Part.—Hammond on Parties to Actions.
Hamm. Pl.—Hammond's Analysis of the Principles of Pleading.
Hamm. on F. I.—Hammond on Fire Insurance.
Han.—Hansard's Entries.
Hand's Ch. Pr.—Hand's Chancery Practice.
Hand on Fines.—Hand on Fines and Recoveries.
Hand's Cr. Pr.—Hand's Crown Practice.
Hand on Pat.—Hand on Patents.
Hans. Parl. Deb.—Hansard's Parliamentary Debates.
Hard.—Hardress' Reports.
Hardin's R.—Hardin's Reports.
Hare, R.—Hare's Reports.
Hare & Wall. Sel. Dec.—Hare and Wallace's Select Decisions of American Cases, with Notes, by J. J. Clark Hare and H. B. Wallace.
Hare on Disc.—Hare on the Discovery of Evidence by Bill and Answer in Equity.
Harg. Coll.—Hargrave's Juridical Arguments and Collections.
Harg. St. Tr.—Hargrave's State Trials.
Harg. Exer.—Hargrave's Exercitations.
Harg. Law Tr.—Hargrave's Law Tracts.
Harp. L. R.—Harper's Law Reports.
Harp. Eq. R.—Harper's Equity Reports.
Harr. Ch.—Harrison's Chancery Practice.
Harr. Cond. Lo. R.—Harrison's Condensed Reports of Cases in the Superior Court of the Territory of Orleans, and in the Supreme Court of Louisiana.
Harr. Dig.—Harrison's Digest.
Harr. Ent.—Harris' Entries.
Harr. Rep.—Harris' Reports of Cases decided by the Supreme Court of Pennsylvania. Sometimes cited Penn. St. Rep.
Harr. (Mich.) R.—Harrington's Reports of Cases in the Supreme Court of Michigan.
Harr. & Gill.—Harris and Gill's Reports.
Harr. & John.—Harris and Johnson's Reports.
Harr. & M'H.—Harris and M'Henry's Reports.
Harringt. R.—Harrington's Reports.

Hasl. Med. Jur.—Haslam's Medical Jurisprudence.
Hawk. P. C.—Hawkins' Pleas of the Crown.
Hawk's R.—Hawk's Reports.
Hay. on Est.—An Elementary View of the Common Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates. By William Hayes.
Hay. on Lim.—Hayes on Limitations.
Hay. Exch. R.—Hayes' Exchequer Reports.
Hays on R. P.—Hays on Real Property.
Heath's Max.—Heath's Maxims.
Hein. Elem. Juris Civ.—Heineccii Elementa Juris Civilis, secundum ordinem Institutionem.
Hein. Elem. Juris Nat.—Heineccii, Elementa Juris Naturæ et Gentium.
Hen. on For. Law—Henry on Foreign Law.
Hen. J. P.—Henning's Virginia Justice of the Peace.
Hen. & Munf.—Henning and Munford's Reports.
Herne's Ch. Uses.—Herne's Law of Charitable Uses.
Herne's Plead.—Hearne's Pleader.
Het.—Hetley's Reports.
Heyw. on El.—Heywood on Elections.
Heyw. (N. C.) R.—Heywood's North Carolina Reports.
Heyw. (Tenn.) R.—Heywood's Tennessee Reports.
High.—Highmore. High. on Bail.—Highmore on Bail. High. on Lun.—Highmore on Lunacy. High. on Mortm.—Highmore on Mortmain.
Hill. Ab.—Hillard's Abridgment of the Law of Real Property.
Hill's R.—Hill's Reports.
Hill's Ch. R.—Hill's Chancery Reports.
Hill. on Trust.—A Practical Treatise on the Law relating to Trustees, etc.
Hind's Pr.—Hind's Practice.
Hob.—Hobart's Reports.
Hodg. R.—Hodges' Reports.
Hodges on Railw.—Hodges on the Law of Railways.
Hoffm. Outl.—Hoffman's Outlines of Legal Studies. Hoffm. Leg. St.—Hoffman's Legal Studies. Hoffm. Ch. Pr.—Hoffman's Chancery Practice. Hoffm. Mas. Ch.—Hoffman's Master in Chancery.
Hoffm. R.—Hoffman's Reports.
Hog. R.—Hogan's Reports.
Hog. St. R.—Hogan's State Trials.
Holt. on Lib.—Holt on the Law of Libels.
Holt on Nav.—Holt on Navigation.
Holt's R.—Holt's Reports.
Holt on Sh.—Holt on the Law of Shipping.
Hopk. R.—Hopkins' Chancery Reports.

Hopk. Adm. Dec.—Hopkins' Admiralty Decisions.
Houard's Ang. Sax. Laws.—Houard's Anglo Saxon Laws and Ancient Laws of the French.
Houard's Dict.—Houard's Dictionary of the Customs of Normandy.
Hough C. M.—Hough on Courts Martial.
Hov. Fr.—Hovenden on Frauds.
Hov. Supp.—Hovenden's Supplement to Vesey Junior's Reports.
How. St. Tr.—Howell's State Trials.
Howe's Pr.—Howe's Practice in Civil Actions and Proceedings at Law in Massachusetts.
How. Pr. R.—Howard's Practice Reports.
Hub. on Suc. Hubback on Successions.
Huds. & Bro.—Hudson and Brooks' Reports.
Hugh. Ab.—Hughes' Abridgment.
Hugh. Entr.—Hughes' Entries.
Hugh. on Wills.—Hughes on Wills.
Hugh. R. Hughes' Reports.
Hugh. Or. Writs.—Hughes' Comments upon Original Writs.
Hugh. Ins.—Hughes on Insurance.
Hugh. on Wills.—Hughes' Practical Directions for taking Instructions for Drawing Wills.
Hull. on Costs.—Hullock on the Law of Costs.
Hult. on Conv.—Hulton on Convictions.
Humph. R.—Humphrey's Reports.
Hume's Com.—Hume's Commentaries on the Criminal Law of Scotland.
Hut.—Hutton's Reports.

I.—The Institutes of Justinian (q. v.) are sometimes cited, I. 1, 3, 4.
I.—Infra, beneath or below.
Ib.—Ibidem.
Ictus.—Jurisconsultus. This abbreviation is usually written with an *I*, though it would be more proper to write it with a *J*, the first letter of the word Jurisconsultus; *c* is the initial letter of the third syllable, and *tus* is the end of the word.
Id.—Idem.
Il Cons. del Mar.—Il Consolato del Mare.
Imp. Pr. C. P.—Impey's Practice in the Common Pleas. Imp. Pr. K. B.—Impey's Practice in the King's Bench. Imp. Pl.—Impey's Modern Pleader. Imp. Sh.—Impey's Office of Sheriff.
In. f.—In fine, at the end of the title, law, or paragraph quoted.

In pr.—In principio, in the beginning and before the first paragraph of a law.
In princ.—In principium. In the beginning, the Preface.
In. sum.—In summa, in the summary.
Ind.—Index.
Inf.—Infra, beneath or below.
Ing. Dig.—Ingersoll's Digest of the Laws of the United States.
Ing. Roc.—Ingersoll's Roccus.
Ingr. on Insolv.—Ingraham on Insolvency.
Inj.—Injunction.
Ins.—Insurance.
Inst.—Coke on Littleton, is cited Co. Litt. or 1 Inst., for First Institute. Coke's Magna Charta, is cited Co. M. C. or 2 Inst., for Second Institute. Co. P. C.—Coke's Pleas of the Crown is cited 3 Inst., for Third Institute. Co. on Courts.—Coke on Courts is cited 4 Inst., for Fourth Institute.
Inst.—Institutes. When the Institutes of Justinian are cited, the citation is made thus: Inst. 4, 2, 1; or Inst. lib. 4, tit. 2, l. 1; to signify Institutes, book 4, tit. 2, law 1. Coke's Institutes are cited, the first, either Co. Litt. or 1 Inst., and the others 2 Inst., 3 Inst., and 4 Inst.
Inst. Cl. or Inst. Cler.—Instructor Clericalis.
Inst. Jur. Angl.—Institutiones Juris Anglicani, by Doctor Cowell.
Introd.—Introduction.
Ir. Eq. R.—Irish Equity Reports.
Ir. T. R.—Irish Term Reports. Sometimes cited Ridg. Irish T. R. (q. v.)

J.—Justice; as Story, J.
J.—Institutes of Justinian.
J. C.—Juris Consultus.
J. C. P.—Justice of the Common Pleas.
J. Glo.—Juncta Glossa, the Gloss joined to the text quoted.
JJ.—Justices, as Yelverton and Croke, JJ. Hov. on Frauds, 271.
J. J. Marsh.—J. J. Marshall's (Kentucky) Reports.
J. K. B.—Justice of the King's Bench.
J. P.—Justice of the Peace.
J. Q. B.—Justice of the Queen's Bench.
J. U. B.—Justice of the Upper Bench. During the Commonwealth, the English Court of the King's Bench was called Upper Bench.
Jac.—Jacobus, James; as 4 Jac. 1, c. 1.
Jac. Introd.—Jacob's Introduction to the Common, Civil, and Canon Law.

Jac. L. D.—Jacob's Law Dictionary.
Jac. L. G.—Jacob's Law Grammar.
Jac. Lex. Mer.—Jacob's Lex Mercatoria, or the Merchants' Companion.
Jac. R.—Jacob's Chancery Reports.
Jac. & Walk.—Jacob and Walker's Chancery Reports.
Jack. Pl.—Jackson on Pleading.
Jarm. on Wills.—Jarman on the Law of Wills.
Jarm. Pow. Dev.—Powell on Devises, with Notes by Jarman.
Jebb's Ir. Cr. Cas.—Jebb's Irish Criminal Cases.
Jeff. Man.—Jefferson's Manual.
Jeff. R.—Thomas Jefferson's Reports.
Jenk.—Jenkin's Eight Centuries of Reports; or eight hundred cases solemnly adjudged in the Exchequer Chamber, or upon Writs of Error, from K. Henry III. to 21 K. James I.
Jer.—Jeremy. Jer. on Carr.—Jeremy's Law of Carriers. Jer. Eq. Jur.—Jeremy on the Equity Jurisdiction of the High Court of Chancery.
Jer. on Cor.—Jervis on Coroners.
John. Cas.—Johnson's Cases.
John. R.—Johnson's Reports.
John. Ch. R.—Johnson's Chancery Reports.
John. Eccl. Law.—Johnson's Ecclesiastical Law.
Johns. Civ. L. of Sp.—Johnson's Civil Law of Spain.
Johns. on Bills.—The Law of Bills of Exchange, Promissory Notes, Checks, etc. By Cuthbert W. Johnson.
Jon.—Sir Wm. Jones' Reports.
Jon. & Car.—Jones and Carey's Reports.
Jon. on Lib.—Jones, De Libellis Famosis, or the Law of Libels.
Jon. Inst. Hind. L.—Jones' Institutes of Hindoo Laws.
Jon. Land Laws of Pa.—Jones' Land Laws of Pennsylvania.
Jon. Rep.—Jones' Pennsylvania Reports. Sometimes cited Penn. St. Reports.
Jon. (1)—Sir W. Jones' Reports.
Jon. (2)—Sir T. Jones' Reports.
Jon. T.—Thomas Jones' Reports.
Jon. on Bailm.—Jones' Law of Bailments.
Jones' Intr.—Jones' Introduction to Legal Science.
Joy on Ev. Acc.—Joy on the Evidence of Accomplices.
Joy on Chal.—Joy on Challenge to Jurors.
Joy Leg. Ed.—Joy on Legal Education.
Jud. Chr.—Judicial Chronicle.
Jud. Repos.—Judicial Repository.
Judg.—Judgments, as they were, upon solemn arguments, given in the Upper Bench and Common Pleas, upon the most difficult points, in all manner of actions.

Jur. Eccl.—Jura Ecclesiastica, or a Treatise of the Ecclesiastical Law and Courts, interspersed with various Cases of Law and Equity.
Jur. Mar.—Molloy's Jure Maritimo. Sometimes cited *Molloy.*
Jus. Nav. Rhod.—Jus Navale Rhodiorum.
Just. Inst.—Justinian's Institutes.

K. B. King's Bench.
K. C. R.—Reports in the time of Chancellor King.
K. &. O.—Knapp and Omber's Election Cases.
Kames on Eq.—Kames' Principles of Equity.
Kames' Ess.—Kames' Essays.
Kames' Hist. L. T.—Kames' Historical Law Tracts.
Keat. Fam. Settl.—Keating on Family Settlements.
Keb.—Keble's Reports.
Keb. Stat.—Keble's English Statutes.
Keen's R.—Keen's Reports.
Keil. or Keilw.—Keilway's Reports.
Kel.—Sir John Kelyng's Reports. Kel. 1, 2, or W. Kel.—William Kelyng's Reports, two parts.
Kelh. Norm. L. D.—Kelham's Norman French Law Dictionary.
Kell. R.—Kelly's Reports.
Ken. on Jur.—Kennedy on Juries.
Kent. Com.—Kent's Commentaries on American Law.
Keny.—Kenyon's Reports of the Court of King's Bench.
Kit. or Kitch.—Kitchen on Courts.
Kna. & Omb.—Knapp and Omber's Election Cases.
Knapp's A. C.—Knapp's Appeal Cases.
Knapp's R.—Knapp's Privy Council Reports.
Kyd on Aw.—Kyd on the Law of Awards.
Kyd on Bills.—Kyd on the Law relating to Bills of Exchange.
Kyd on Corp.—Kyd on the Law of Corporations.

L. in citation means Law, as L. 1, 33. Furtum, ff de Furtis, i. e. Law 1, section or paragraph beginning with the word Furtum; ff signifies the Digest, and the words de Furtis denote the title. L. signifies also liber, book.
L. & G.—Lloyd and Goold's Reports.
L. & W.—Lloyd and Welsby's Mercantile Cases.
LL.—Laws, as LL. Gul. I., c. 42. Laws of William I., chapter 42; LL. of U. S., Laws of the United States.
L. S.—Locus sigili.
L. R.—Louisiana Reports.
La.—Lane's Reports.
Lalaure, des Ser.—Traité des Servitudes Réeles, par M. Lalaure.
Lamb. Archai.—Lambard's Archaionomia.
Lamb. Eiren.—Lambard's Eirenarcha.

Lamb. on Dow.—Lambert on Dower.
Lat.—Latch's Reports.
Laus. on Eq.—Laussat's Essay on Equity Practice in Pennsylvania.
Law. on Chart. Part.—Lawes on the Law of Charter Parties.
Law. Lib.—Law Library.
Law. Rep.—Law Reporter.
Law's Eccl. Law.—Law's Ecclesiastical Law.
Law Intel.—Law Intelligencer.
Law Fr. & Latin Dict.—Law French and Latin Dictionary.
Law. Pl.—Lawes' Elementary Treatise on Pleading in Civil Actions.
Law. Pl. in Ass.—Lawes' Treatise on Pleading in Assumpsit.
Laws of Wom.—Laws of Women.
Lawy. Mag.—Lawyer's Magazine.
Le.—Ley's Reports.
Leach.—Leach's Cases in Crown Law.
Lead. Cas. in Eq.—Leading Cases in Equity.
Leç. Elém.—Leçon's Elémentaire du Droit Civil Romain.
Lee, Abs. Tit.—Lee on the Evidence of Abstracts of Title to Real Property.
Lee on Capt.—Lee's Treatise of Captures in War.
Lee's Dict.—Lee's Dictionary of Practice.
Lee's Eccl.—Lee's Ecclesiastical Reports.
Leg. Bibl.—Legal Bibliography, by J. G. Marvin.
Leg.—Legibus.
Leg. Obs.—Legal Observer.
Leg. Oler.—The Laws of Oleron.
Leg. on Outl.—Legge on Outlawry.
Leg. Rhod.—The Laws of Rhodes.
Leg. ult.—The last law.
Leg. Wisb.—Laws of Wisbuy.
Leigh & Dal. on Conv.—Leigh and Dalzell on Conversion of Property.
Leigh's R.—Leigh's Reports.
Leigh's N. P.—Leigh's Nisi Prius.
Leo. or Leon.—Leonard's Reports.
Lev.—Levinz's Reports.
Lev. Ent.—Levinz's Entries.
Lew. C. C.—Lewin's Crown Cases.
Lew. Cr. Law.—An Abridgment of the Criminal Law of the United States, by Ellis Lewis.
Lew. on Tr.—Lewin on Trusts.
Lew. on Perp.—Lewis on the Law of Perpetuities.
Lex Man.—Lex Maneriorum.
Lex. Mer.—Lex Mercatoria. Lex Mer. Am.—Lex Mercatoria Americana.

Lex Parl.—Lex Parliamentaria.
Ley.—Ley's Reports.
Lib.—Liber, Book.
Lib. Ass.—Liber Assisarum.
Lib. Ent.—Old Book of Entries.
Lib. Feud.—Liber Feudorum.
Lib. Intr.—Liber Intrationum; or Old Book of Entries.
Lib. Nig.—Liber Niger.
Lib. Pl.—Liber Placitandi.
Lib. Reg.—Register Books.
Lib. Rub.—Liber Ruber.
Lib. Ten.—Liberum Tenementum.
Lid. Jud. Adv.—Liddel's Detail of the Duties of a Deputy Judge Advocate.
Lill. Entr.—Lilly's Entries. Lill. Reg.—Lilly's Register.
Lill. Rep.—Lilly's Reports.
Lill. Conv.—Lilly's Conveyancer.
Lind.—Lindewoode's Provinciale; or Provincial Constitutions of England, with the Legantine Constitutions of Otho and Othobond.
Litt. s.—Littleton, section.
Litt. R.—Littell's Reports. Litt. R.—Littleton's Reports.
Litt. Sel. Cas.—Littell's Select Cases.
Litt. Ten.—Littleton's Tenures.
Liv.—Livre, book.
Liv. on Ag.—Livermore on the Law of Principal and Agent.
Liv. Sys.—Livingston's System of Penal Law for the State of Louisiana. This work is sometimes cited Livingston's Report on the Plan of a Penal Code.
Liverm. Diss.—Livermore's Dissertations on the Contrariety of Laws.
Llo. & Go.—Lloyd and Goold's Reports.
Llo. & Go. t. Sudg.—Lloyd and Goold's Reports during the time of Sugden.
Llo. & Go. t. Plunk.—Lloyd and Goold during the time of Plunkett.
Llo. & Welsb.—Lloyd and Welsby's Reports of Cases relating to Commerce, Manufactures, etc., determined in the Courts of Common Law.
Lo. Ann. Rep.—Louisiana Annual Reports.
Loc. cit.—Loco citato, the place cited.
Log. Comp.—Compendium of the Law of England, Scotland, and Ancient Rome. By James Logan.
Lofft.—Lofft's Reports.
Lois des Batim.—Lois des Batimens. See 3 Kent. Com. 350, n. for the character of this work.

Lom. Dig.—Lomax's Digest of the Law of Real Property in the United States.
Lom. Ex.—Lomax on Executors.
Long. Quint.—Year Book, part 10. Vide Year Book.
Louis. Code.—Civil Code of Louisiana.
Louis. R.—Louisiana Reports.
Lovel. on Wills.—Lovelass on Wills.
Lown. Leg.—Lowndes on the Law of Legacies.
Lubé Pl. Eq.—An Analysis of the Principles of Equity Pleading. By D. G. Lubé.
Luder's Elec. Cas.—Luder's Election Cases.
Luml. Ann.—Lumley on Annuities.
Luml. Parl. Pr.—Lumley's Parliamentary Practice.
Luml. on Settl.—Lumley on Settlements and Removal.
Lut. Ent.—Lutwyche's Entries.
Lutw.—Lutwyche's Reports.

M.—Michaelmas Term.
M. Maxim, or Maxims.
M.—Mary; as 4 M. st. 3, c. 1.
M. & A.—Montagu and Ayrton's Reports of Cases of Bankruptcy.
M. & B.—Montagu and Bligh's Cases in Bankruptcy.
M. & C.—Mylne and Craig's Reports.
M. & C.—Montagu and Chitty's Reports.
M. & G.—Manning and Granger's Reports.
M. & G.—Maddock and Geldart's Reports.
M. G. & S.—Manning, Granger and Scott's Reports.
M. & K.—Mylne and Keen's Chancery Reports.
M. & M. or Mo. & Malk. Rep.—Moody and Malkin's Nisi Prius Reports. In E. C. L. R.
M. P. Exch.—Modern Practice Exchequer.
M. & P.—Moore and Payne's Reports.
M. R.—Master of the Rolls.
M. R.—Martin's Reports of the Supreme Court of the State of Louisiana.
M. & R.—Manning and Ryland's Reports. In E. C. L. R.
M. & S.—Moore and Scott's Reports.
M. & S.—Maule and Selwyn's Reports.
M. & Y. or Mart. and Yerg.—Martin and Yerger's Reports.
M. & W.—Meeson and Welsby's Reports.
M. D. & G.—Montagu, Deacon and Gex's Reports of Cases in Bankruptcy.
M'Arth. C. M.—M'Arthur on Courts Martial
M'Cl. & Yo.—M'Clelland and Younge's Exchequer Reports.
M'Clel. E. R.—M'Clelland's Exchequer Reports.
M'Cord's Ch. R.—M'Cord's Chancery Reports.

M'Cord's R.—M'Cord's Reports.
M'Kin. Phil. Ev.—M'Kinnon's Philosophy of Evidence.
M'Naght. C. M.—M'Naghton on Courts Martial.
M'Lean & Rob.—M'Lean and Robinson's Reports.
M'Lean R.—M'Lean's Reports.
Macn. on Null.—Macnamara on Nullities and Irregularities in the Practice of the Law.
Macnal. Ev.—Macnally's Rules of Evidence on Pleas of the Crown.
Macph. on Inf.—Macpherson on Infants.
Macq. on H. and W.—Macqueen on Husband and Wife.
Mad. Exch.—Madox's History of the Exchequer.
Mad. Form.—Madox's Formulare Anglicanum.
Madd. & Geld.—Maddock and Geldart's Reports.
Madd., Madd. R.—Maddock's Chancery Reports. Madd. Pr. or Madd. Ch.—Maddock's Chancery Practice.
Mag. Ins.—Magens on Insurance.
Mal.—Malyne's Lex Mercatoria.
Man.—Manuscript.
Man. & Gra.—Manning and Granger's Reports.
Man. Gr. & Sc.—Manning, Granger and Scott's Reports.
Man. & Ry.—Manning and Ryland's Reports. In E. C. L. R.
Manb. on Fines.—Manby on Fines.
Mann. Comm.—Manning's Commentaries of the Law of Nations.
Mann. Exch. Pr.—Manning's Exchequer Practice.
Mans. on Dem.—Mansel on Demurrers.
Mans. on Lim.—Mansel on the Law of Limitations.
Manw.—Manwood's Forest Laws.
Mar.—Maritime.
Mar. N. C.—March's New Cases. Mar. R.—March's Reports.
Marg.—Margin.
Mar. Adm. Dec.—Marriott's Admiralty Decisions.
Marr. Form. Inst.—Marriott's Formulare Instrumentorum; or a Formulary of Authentic Instruments, Writs, and Standing Orders used in the Court of Admiralty of Great Britian, of Prize and Instance.
Marsh.—Marshall's Reports in the Court of Common Pleas. In E. C. L. R. A. Marsh.—Marshall's (Kty.) Reports. J. J. Marsh.—J. J. Marshall's Reports. Marsh. Ins.—Marshall on the Law of Insurance.
Marsh. Decis.—Brockenbrough's Reports of Chief Justice Marshall's Decisions.
Mart. Law Nat.—Martin's Law of Nations.
Mart. (N. C.) R.—Martin's North Carolina Reports.
Mart. (Lo.) R.—Martin's Louisiana Reports.
Mart. & Yerg.—Martin and Yerger's Reports.
Mart. N. S.—Martin's Louisiana Reports, new series.

Marv. Leg. Bibl.—Marvin's Legal Bibliography.
Mason, R.—Mason's Circuit Court Reports.
Mass. R.—Massachusetts Reports.
Math. on Pres.—Mathew on the Doctrine of Presumption and Presumptive Evidence.
Matth. on Port.—Matthews on Portion.
Matth. on Ex.—Matthews on Executors.
Maugh. Lit. Pr.—Maughan on Literary Property.
Maule & Selw.—Maule and Selwyn's Reports.
Max.—Maxims.
Maxw. L. D.—Maxwell's Dictionary of the Law Bills of Exchange, etc.
Maxw. on Mar. L.—Maxwell's Spirit of the Marine Laws.
Mayn.—Maynard's Reports. The first part of the Y. B. is sometimes so cited.
Med. Jur.—Medical Jurisprudence.
Mees & Wels.—Meeson and Welsby's Reports.
Meigs' R.—Meigs' Tennessee Reports.
Mer. R.—Merivale's Reports.
Merch. Dict.—Merchant's Dictionary,
Merl. Quest.—Merlin, Questions de Droit.
Merl. Rêpert.—Merlin, Rêpertoire.
Merrif. Law of Att.—Merrifield's Law of Attorneys.
Merrif. on Costs.—Merrifield's Law of Costs.
Metc. R.—Metcalf's Reports.
Metc. & Perk. Dig.—Digest of the Decisions of the Courts of Common Law and Admiralty in the United States. By Theron Metcalf and Jonathan C. Perkins.
Mich.—Michaelmas.
Mich. Rev. St.—Michigan Revised Statutes.
Miles' R.—Miles' Reports.
Mill. Civ. Law.—Miller's Civil Law.
Mill. Ins.—Millar's Elements of the Law relating to Insurances. Sometimes this work is cited Mill. El.
Mill. on Eq. Mort.—Miller on Equitable Mortgages.
Minor's Rep.—Minor's Alabama Reports, sometimes cited Ala. Rep.
Mireh. on Adv.—Mirehead on Advowsons.
Mirr.—Mirror des Justices.
Misso. R.—Missouri Reports.
Mitf. Pl.—Mitford's Pleadings in Equity. Also cited Redesd. Pl.—Redesdale's Pleadings.
Mo.—Sir Francis Moore's Reports in the reign of K. Henry VIII., Q. Elizabeth, and K. James.
Mo. & Malk.—Moody and Malkin's Reports. In E. C. L. R.
Mo. C. C.—Moody's Crown Cases.
Mo. Cas.—Moody's Nisi Prius and Crown Cases.

Mod. or Mod. R.—Modern Reports.
Mod. Cas.—Modern Cases.
Mod. C. L. & E.—Modern Cases in Law and Equity. The 8 & 9 Modern Reports are sometimes so cited; the 8th cited as the 1st, and the 9th as the 2d.
Mod. Entr.—Modern Entries.
Mod. Int.—Modus Intrandi.
Mol.—Molloy, De Jure Maritimo.
Moll. R.—Molloy's Chancery Reports.
Monr. R.—Monroe's Reports.
Mont. & Ayrt.—Montagu and Ayrton's Reports.
Mont. B. C.—Montagu's Bankrupt Cases.
Mont. & Bligh.—Montagu and Bligh's Cases in Bankruptcy.
Mont. & Chit.—Montagu and Chitty's Reports.
Mont. on Comp.—Montagu on the Law of Composition. Mont. B. L.—Montagu on the Bankrupt Laws. Mont. on Set Off.—Montagu on Set Off.
Mont. Deac. & Gex.—Montagu, Deacon and Gex's Reports of Cases in Bankruptcy, argued and determined in the Court of Review and on Appeals to the Lord Chancellor.
Mont. Dig.—Montagu's Digest of Pleadings in Equity.
Mont. Eq. Pl.—Montagu's Equity Pleading.
Mont. & Mac.—Montagu and Macarthur's Reports.
Mont. Sp. of Laws.—Montesquieu's Spirit of Laws.
Montesq.—Montesquieu, Esprit des Lois.
Moo. & Malk.—Moody and Malkin's Reports.
Moo. & Rob.—Moody and Robinson's Reports.
Moore, R.—J. B. Moore's Reports of Cases decided in the Court of Common Pleas. In E. C. L. R.
Moore's A. C.—Moore's Appeal Cases.
Moore & Payne.—Moore and Payne's Reports of Cases in C. P.
Moore & Scott.—Moore and Scott's Reports of Cases in C. P.
Mort. on Vend.—Morton's Law of Venders and Purchasers of Chattels Personal.
Mos.—Mosely's Reports.
MSS.—Manuscripts; as, Lord Colchester's MSS.
Much. D. & S.—Muchall's Doctor and Student.
Mun.—Municipal.
Munf. R.—Munford's Reports.
Murph. R.—Murphy's Reports.
My. & Keen.—Mylne and Keen's Chancery Reports.
Myl. & Cr.—Mylne and Craig's Reports.

N.—Number. N. or Nov.—Novellæ: the Novels.
N. A.—Non allocatur.

N. B.—Nulla bona.
N. Benl.—New Benloe.
N. C. Cas.—North Carolina Cases.
N. C. Law Rep.—North Carolina Law Repository.
N. C. Term R.—North Carolina Term Reports. This volume is sometimes cited 2 Tayl.
N. Chipm. R.—N. Chipman's Reports.
N. E. I.—Non est inventus.
N. H. Rep.—New Hampshire Reports.
N. H. & G.—Nicholl, Hare and Garrow's Reports.
N. L.—Nelson's edition of Lutwyche's Reports.
N. L.—Non liquet.
N. & M.—Neville and Manning's Reports.
N. & P.—Neville and Perry's Reports.
N. P.—Nisi Prius.
N. & M'C.—Nott and M'Cord's Reports.
N. R. or New R.—New Reports; the new series, or 4 & 5 Bos. & Pull. Reports are usually cited N. R.
N. S.—New Series of the Reports of the Supreme Court of Louisiana.
N. Y. R. S.—New York Revised Statutes.
Nar. Conv.—Nares on Convictions.
Neal's F. & F.—Neal's Feasts and Fasts; an Essay on the Rise, Progress and Present State of the Laws relating to Sundays and other Holidays, and other days of Fasting.
Nels. Ab.—Nelson's Abridgment.
Nels. Lex Maner.—Nelson's Lex Maneriorum.
Nels. R.—Nelson's Reports.
Nem. con.—Nemine contradicenti.
Nem. dis.—Nemine dissentiente.
Nev. & Mann.—Neville and Manning's Reports.
Nev. & Per.—Neville and Perry's Reports.
New Benl.—Benloe's Reports.
New Rep.—New Reports. A continuation of Bosanquet and Puller's Reports. See B. & P.
Newf. Rep.—Newfoundland Reports.
Newl. Contr.—Newland's Treatise on Contracts.
Newl. Ch. Pr.—Newland's Cancery Practice.
Newn. Conv.—Newnam on Conveyancing.
Ni. Pri.—Nisi Prius.
Nich. Adult. Bast.—Nicholas on Adulterine Bastardy.
Nich. Har. & Gar.—Nicholl, Hare and Garrow's Reports.
Nient cul.—Nient culpable, old French, not guilty.
Nol. P. L.—Nolan's Poor Laws.
Nol. R.—Nolan's Reports of Cases relative to the Duty and Office of Justice of the Peace.
Non cul.—Non culpabilis, not guilty.

North.—Northington's Reports.
Nott & M'Cord.—Nott and M'Cord's Reports.
Nov.—Novellæ, the Novels.
Nov. Rec.—Novisimi Recopilacion de las Leyes de España.
Noy's Max.—Noy's Maxims. Noy's R.—Noy's Reports.

O. Benl.—Old Benloe.
O. Bridg.—Orlando Bridgman's Reports.
O. C.—Old Code; so is denominated the Civil Code of Louisiana 1808.
O. N. B.—Old Natura Brevium. Vide Vet. N. B.
O. Ni.—These letters, which are an abbreviation for *oneratur nisi habent sufficientem exonerationem*, are, according to the practice of the English Exchequer, marked upon each head of a sheriff's account for issues, amerciaments and mean profits. 4 Inst. 116.
Oblig.—Obligations.
Observ.—Observations.
Off.—Office. Off. Br.—Officiana Brevium.
Off. Ex.—Wentworth's Office of Executors.
Ohio R.—Ohio Reports.
Oldn.—Oldnall's Welch Practice.
Onsl. N. P.—Onslow's Nisi Prius.
Ord. Amst.—Ordinance of Amsterdam.
Ord. Antw.—Ordinance of Antwerp.
Ord. Bilb.—Ordinance of Bilboa.
Ord. Ch.—Orders in Chancery.
Ord. Cla.—Lord Clarendon's Orders.
Ord. Copenh.—Ordinance of Copenhagen.
Ord. Cur.—Orders of Court.
Ord. Flor.—Ordinances of Florence.
Ord. Gen.—Ordinance of Genoa.
Ord. Hamb.—Ordinance of Hamburg.
Ord. Konigs.—Ordinance of Konigsburg.
Ord. Leg.—Ordinances of Leghorn.
Ord. de la Mar.—Ordonnance de la Marine de Louis XIV.
Ord. Port.—Ordinances of Portugal.
Ord. Prus.—Ordinances of Prussia.
Ord. Rott.—Ordinances of Rotterdam.
Ord. Swed.—Ordinances of Sweden.
Ord on Us.—Ord on the Law of Usury.
Orfil. Med. Jur.—Orfila's Medical Jurisprudence.
Orig.—Original.
Ought.—Oughton's Ordo Judiciorum.
Overt. R.—Overton's Reports.
Ow.—Owen's Reports.
Owen, Bankr.—Owen on Bankruptcy.

P.—Page or part. Pp.—Pages.
P.—Paschalis, Easter term.
P. C.—Pleas of the Crown.
P. & D.—Perry and Davison's Reports.
P. & K.—Perry and Knapp's Election Cases.
P. & M.—Philip and Mary; as, 1 & 2 P. & M. c. 4.
P. N. P.—Peake's Nisi Prius.
P. P.—Propriâ personâ; in his own person.
Pa. R.—Pennsylvania Reports.
P. R. or P. R. C. P.—Practical Register in the Common Pleas.
P. Wms.—Peere Williams' Reports.
Page on Div.—Page on Divorces.
Paige's R.—Paige's Chancery Reports.
Paine's R.—Paine's Reports.
Pal.—Palmer's Reports.
Pal. Ag.—Paley on the Law of Principal and Agent.
Pal. Conv.—Paley on Convictions.
Palm. Pr. Lords.—Palmer's Practice in the House of Lords.
Pand.—Pandects. Vide Dig.
Par.—Paragraph; as, 29 Eliz. cap. 5, par. 21.
Par. & Fonb. M. J.—Paris and Fonblanque on Medical Jurisprudence.
Pardess.—Pardessus, Cours de Droit Commercial. In this work Pardessus is cited in several ways, namely: Pardes. Dr. Com. part 3, tit. 1, c. 2, s. n. 286; or 2 Pardes. n. 286, which is the same reference.
Park on Dow.—Park on Dower.
Park, Ins.—Park on Insurance.
Park. R.—Sir Thomas Parker's Reports of Cases concerning the Revenue, in the Exchequer.
Park. on Ship.—Parker on Shipping and Insurance.
Park. Pr. in Ch.—Parker's Practice in Chancery.
Parl. Hist.—Parliamentary History.
Pars. Rep.—Parson's Reports.
Patch on Mortg.—Patch's Treatise on the Law of Mortgages.
Paul's Par. Off.—Paul's Parish Officer.
Pay. Mun. Rights.—Payne's Municipal Rights.
Peak. Add. Cas.—Peake's Additional Cases.
Peak, C. N. P.—Peake's Cases, determined at Nisi Prius and in the K. B.
Peake, Ev.—Peake on the Law of Evidence.
Peck, R.—Peck's Reports.
Peck's Tr.—Peck's Trial.
Peckw. E. C.—Peckwell's Election Cases.
Penn. Bl.—Pennsylvania Blackstone, by John Read, Esq.
Penn. Law Jo.—Pennsylvania Law Journal.

Penn. R.—Pennington's Reports. The Pennsylvania Reports are sometimes cited Penn. R., but more properly, for the sake of distinction, Penna. R.

Penn. St. R.—Pennsylvania State Reports.

Penna. Pr.—Pennsylvania Practice; also cited Tro. & Hal. Pr.—Troubat & Haly's Practice.

Penna. R.—Pennsylvania Reports.

Pennsylv.—Pennsylvania Reports.

Penr. Anal.—Penruddocke's Analysis of the Criminal Law.

Penult.—The last but one.

Per. & Dav.—Perry and Davison's Reports.

Per. & Knapp.—Perry and Knapp's Election Cases.

Perk.—Perkins on Conveyancing.

Perk. Prof. B.—Perkins' Profitable Book.

Perpig. on Pat.—Perpigna on Patents. The full title of this work is, "The French Law and Practice of Patents, for Inventions, Improvements, and Importations. By A. Perpigna, A. M. L. B., Barrister in the Royal Court of Paris, Member of the Society for the Encouragement of Arts, etc. The work is well written in the English language. The author is a French lawyer, and has written another work on the same subject in French.

Pet. Ab.—Petersdorff's Abridgment.

Pet. Adm. Dec.—Peters' Admiralty Decisions.

Pet. on Bail, or Petersd. on Bail.—Petersdoff on the Law of Bail.

Pet. R.—Peters' Supreme Court Reports.

Pet. C. C. R.—Peters' Circuit Court Reports.

Petting. on Jur.—Pettingal on Juries.

Phil. Ev.—Phillips' Evidence.

Phil. Ins.—Phillips on Insurance.

Phil. St. Tr.—Phillips' State Trials.

Phill. Civ. and Can. Laws.—Phillimore on the Study of the Civil and Canon Law, considered in relation to the State, the Church, and the Universities, and in connection with the College of Advocates.

Phill. on Dom.—Phillimore on the Law of Domicil.

Philim. or Phillim. E. R.—Phillimore's Ecclesiastical Reports. This forms a part of the English Ecclesiastical Reports.

Pick. R.—Pickering's Reports.

Pig.—Pigot on Recoveries.

Pike's Rep.—Reports of Cases argued and determined in the Supreme Court of Law and Equity of the State of Arkansas. By Albert Pike. These Reports are cited Ark. Rep.

Pitm. Prin. & Sur.—Pitman on Principal and Surety.

Pl.—Placitum or plea. Pl. or Plow. or Pl. Com.—Plowden's Commentaries or Reports.

Plff.—Plaintiff.
Platt on Cov.—Platt on the Law of Covenants.
Platt on Lea.—Platt on Leases.
Pol.—Pollexfen's Reports.
Poph.—Popham's Reports. The cases at the end of Popham's Reports are cited 2 Poph.
Port. R.—Porter's Reports.
Poth.—Pothier. The numerous works of Pothier are cited by abbreviating his name Poth. and then adding the name of the treatise; the figures generally refer to the number, as Poth. Ob. n. 100; which signifies Pothier's Treatise on the Law of Obligations, number 100. Poth. du Mar.—Pothier du Mariage; Poth. Vente.—Pothier Traité de Vente, etc. His Pandects, in 24 vols. are cited Poth. Pand. with the book, title, law, etc.
Pott's L. D.—Pott's Law Dictionary.
Pow.—Powell. Pow. Contr.—Powell on Contracts. Pow. Dev.—Powell on Devises. Pow. Mortg.—Powell on Mortgages. Pow. Powers.—Powell on Powers.
Poyn. on M. & D.—Poynter on the Law of Marriage and Divorce.
Pr.—Principium. In pr.—In principium; in the beginning.
Pr. Ex. Rep. or Price's E. R.—Price's Exchequer Reports.
Pr. Reg. Cha.—Practical Register in Chancery.
Pr. St.—Private Statute.
Pr. Stat.—Private Statute.
Pract. Reg. C. P.—Practical Register of the Common Pleas.
Pract. Reg. in Ch.—Practical Register in Chancery.
Prat. on H. & W.—Prater on the Law of Husband and Wife.
Pref.—Preface.
Prél.—Préliminaire.
Prest.—Preston. Prest. on Est.—Preston on Estates. Prest. Abs. Tit.—Preston's Essay on Abstracts of Title. Prest. on Conv.—Preston's Treatise on Conveyancing. Vide 4 Kent Com. 101, note.
Prest. on Leg.—Preston on Legacies.
Pri.—Price's Reports.
Price's Ex. Rep.—Price's Exchequer Reports.
Price's Gen. Pr.—Price's Gen. Practice.
Prin.—Principium, the beginning of a title or law.
Prin. Dec.—Printed Decisions.
Priv. Lond.—Customs or Privileges of London.
Pro. LL.—Province Laws.
Pro. quer.—Pro querens, for the plaintiff.
Proct. Pr.—Proctor's Practice.
Puff.—Puffendorff's Law of Nature.

Q.—Quæstione, in such a question.
Q. B.—Queen's Bench.
Q. B. R.—Queen's Bench Reports, by Adolphus and Ellis. New series.
Q. t.—Qui tam.
Qu.—Quere.
Q. Van Weyt.—Q. Van Weytsen on Average.
Q. Warr.—Quo Warranto; (q. v.) The letters (q. v.) quod vide, which see, refer to the article mentioned immediately before them.
Qu.—Quæstione, in such a question.
Qu. claus. freg.—Quare clausum fregit. (q. v.)
Quæst.—Quæstione, in such a question.
Quest.—Questions.
Quinti Quinto.—Year-book, 5 Henry V.
Quon. Attach.—Quoniam Attachiamenta. See Dalr. F. L. 47.

R.—Resolved, ruled, or repealed.
R.—Richard; as, 2 R. II., c. 1.
Rich. Rep.—Richardson's (S. C.) Reports.
RC.—Rescriptum.
R. & M.—Russell and Mylne's Reports.
R. & M. C. C.—Ryan and Moody's Crown Cases.
R. & M. N. P.—Ryan and Moody's Nisi Prius Cases.
R. & R.—Russell and Ryan's Crown Cases.
R. M. Charlt.—R. M. Charlton's Reports.
RS.—Responsum.
R. S. L.—Reading on Statute Law.
Ram on Judgm.—Ram on the Law relating to Legal Judgments.
Rand. Perp.—Randall on the Law of Perpetuities.
Rand. R.—Randolph's Reports.
Rast.—Rastall's Entries.
Rawle's R.—Rawle's Reports.
Rawle, Const.—Rawle on the Constitution.
Ray's Med. Jur.—Ray's Medical Jurisprudence of Insanity.
Raym. or, more usually, Ld. Raym.—Lord Raymond's Reports. T. Raym.—Sir Thomas Raymond's Reports.
Re. fa. lo.—Recordari facias loquelam.
Rec.—Recopilacion. Rec.—Recorder; as, City Hall Rec.
Redd. on Mar. Com.—Reddie's Historical View of the Law of Maritime Commerce.
Redesd. Pl.—Redesdale's Equity Pleading. This work is also and most usually cited Mitf. Pl.
Reeves' H. E. L.—Reeves' History of the English Law
Reeves on Ship.—Reeves on the Law of Shipping and Navigation.

Reeves on Des.—Reeves on Descents.
Reg.—Regula, rule. Reg.—Register.
Reg. Brev.—Registrum Brevium, or Register of Writs.
Reg. Gen.—Regulæ generalis.
Reg. Jud.—Registrum Judiciale.
Reg. Mag.—Regiam Magestatem.
Reg. Pl.—Regula Placitandi.
Renouard, des Brev. d'Inv.—Traité des Brevets d'Invention, de Perfectionement, et d'Importation, par Augustin Charles Renouard.
Rep.—The Reports of Lord Coke are frequently cited 1 Rep., 2 Rep., etc., and sometimes they are cited Co.
Rép.—Répertoire.
Rep. Eq.—Gilbert's Reports in Equity.
Rep. Q. A.—Reports of Cases during the time of Queen Anne.
Rep. T. Finch.—Reports tempore Finch.
Rep. T. Hard.—Reports during the time of Lord Hardwicke.
Rep. T. Holt.—Reports tempore Holt.
Rep. T. Talb.—Reports of Cases decided during the time of Lord Talbot.
Res.—Resolution. The Cases reported in Coke's Reports, are divided into resolutions on the different points of the Case, and are cited 1 Res. etc.
Ret. Brev.—Retorna Brevium.
Rev. St. or Rev. Stat.—Revised Statutes.
Rey, des Inst. de l'Anglet.—Des Institutions Judiciaries de l'Angleterre comparées avec celles de la France. Par Joseph Rey.
Reyn. Inst.—Institutions du Droit des Gens, etc., par Gerard de Reyneval.
Ric.—Richard; as, 12 Ric. II., c. 15.
Rice's Rep.—Reports of Cases in Chancery argued and determined in the Court of Appeals and Court of Errors of South Carolina. By William Rice, State Reporter.
Rich. Pr. C. P.—Richardson's Practice in the Common Pleas.
Rich. Pr. K. B.—Richardson's Practice in the King's Bench.
Rich. Eq. R.—Richardson's Equity Reports.
Rich. on Wills.—Richardson on Wills.
Ridg. Irish T. R.—Ridgway, Lapp, and Schoale's Term Reports in the K. B., Dublin. Sometimes this is cited Ridg. L. & S.
Ridg. P. C.—Ridgeway's Cases in Parliament.
Ridg. Rep.—Ridgeway's Reports of Cases in K. B. and Chancery.
Ridg. St. Tr.—Ridgeway's Reports of State Trials in Ireland.
Ril. Ch. Cas.—Riley's Chancery Cases.
Rob. Adm. Rep.—Robinson's Admiralty Reports.

Rob. Cas.—Robertson's Cases in Parliament, from Scotland.
Rob. Dig.—Roberts' Digest of the English Statutes in force in Pennsylvania.
Rob. Entr.—Robinson's Entries.
Rob. on Fr.—Roberts on Frauds.
Rob. on Fraud. Conv.—Roberts on Fraudulent Conveyances.
Rob. on Gavelk.—Robinson on Gavelkind.
Rob. Lo. Rep.—Robinson's Louisiana Reports.
Rob. Just.—Robinson's Justice of the Peace.
Rob. Pr.—Robinson's Practice in Suits at Law, in Virginia.
Rob. V. Rep.—Robinson's (Virginia) Reports.
Rob. on Wills.—Roberts' Treatise on the Law of Wills and Codicils.
Roc. Ins.—Roccus on Insurance. Vide Ing. Roc.
Rog. Eccl. Law.—Rogers' Ecclesiastical Law.
Rog. Rec.—Rogers' City Hall Recorder.
Roll.—Rolle's Abridgment. Roll. R.—Rolle's Reports.
Rom. Cr. Law.—Romilly's Observations on the Criminal Law of England, as it relates to Capital Punishments.
Rop. on H. & W.—A Treatise on the Law of Property, arising from the relation between Husband and Wife. By R. S. Donnison Roper.
Rop. Leg.—Roper on Legacies.
Rop. on Revoc.—Roper on Revocations.
Rosc.—Roscoe. Rosc. on Act.—Roscoe on Actions relating to Real Property. Rosc. Civ. Ev.—Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. Rosc. Cr. Ev.—Roscoe on Criminal Evidence. Rosc. on Bills.—Roscoe's Treatise on the Law relating to Bills of Exchange, Promissory Notes, Bankers' Checks, etc.
Rose's R.—Rose's Reports of Cases in Bankruptcy.
Ross on V. & P.—Ross on the Law of Vendors and Purchasers.
Rot. Parl.—Rotulæ Parliamentariæ.
Rowe's Sci. Jur.—Rowe's Scintilla Juris.
Rub. or Rubr.—Rubric.
Ruffh.—Ruffhead's Statutes at Large.
Ruff. or Ruffin's R.—Ruffin's Reports.
Runn. Ej.—Runnington on Ejectments.
Runn. Stat.—Runnington's Statutes at Large.
Rus. & Myl.—Russell and Mylne's Chancery Reports.
Rush.—Rushworth's Collections.
Russ. Cr.—Russell on Crimes and Misdemeanors.
Russ. & Myl.—Russell and Mylne's Reports of Cases in Chancery.
Russ. on Fact.—Russell on the Laws relating to Factors and Brokers.
Russ. R.—Russell's Reports of Cases in Chancery.

Russ. & Ry.—Russell and Ryan's Crown Cases.
Rutherf. Inst.—Rutherford's Institutes of Natural Law.
Ry. F.—Ryder's Fœdera.
Ry. & Mo.—Ryan and Moody's Nisi Prius Reports. In E. C. L. R. Ry. & Mo. C. C.—Ryan and Moody's Crown Cases.
Ry. Med. Jur.—Ryan on Medical Jurisprudence.

S. §.—Section.
S. B.—Upper Bench.
S. & B.—Smith and Batty's Reports.
S. C.—Same Case.
S. C. C.—Select Cases in Chancery.
S. C. Rep.—South Carolina Reports.
S. & L.—Schoale and Lefroy's Reports.
S. & M.—Shaw and Maclean's Reports.
S. & M. Ch. R.—Smedes and Marshall's Reports of Cases decided by the Superior Court of Chancery of Mississippi.
S. & M. Err. & App.—Smedes and Marshall's Reports of Cases in the High Court of Errors and Appeals of Mississippi.
S. P.—Same Point.
S. & R.—Sergeant and Rawle's Reports.
S. & S. —Sausse and Scully's Reports.
S. & S.—Simon and Stuart's Chancery Reports. In Con. C. R.
Sa. & Scul.—Sausse and Scully's Reports.
Sandl. St. Pap.—Sandler's State Papers.
Salk.—Salkeld's Reports.
Sandf. Rep.—Reports of Cases argued and determined in the Court of Chancery of the State of New York, before the Hon. Lewis H. Sandford, Assistant Vice Chancellor of the First Circuit.
Sand. U. & T.—Sanders on Uses and Trusts.
Sanf. on Ent.—Sanford on Entails.
Sant. de Assec.—Santerna, de Assecurationibus.
Saund.—Saunders' Reports.
Saund. Pl. & Ev.—Saunders' Treatise on the Law of Pleading and Evidence.
Sav.—Saville's Reports.
Sav. Dr. Rom.—Savigny, Droit Romain.
Sav. Dr. Rom. M. A.—Savigny, Droit Romain au Moyan Age.
Sav. Hist. Rom. Law.—Savigny's History of the Roman Law during the Middle Ages. Translated from the German of Carl Von Savigny, by E. Cathcart.
Say.—Sayer's Reports. Say. Costs.—Sayer's Law of Costs.
SC.—Senatus Consultum.
Scac. de Cam.—Scaccia de Cambiis.
Scam. Rep.—Scammon's Reports of Cases argued and determined in the Supreme Court of Illinois.

Scan. Mag.—Scandalum Magnatum.
Sch. & Lef.—Schoale and Lefroy's Reports.
Scheiff. Pr.—Scheiffer's Practice.
Schul. Aq. R.—Schultes on Aquatic Rights.
Sci. fa.—Scire facias.
Sci. fa. ad dis. deb.—Scire facias ad disprobandum debitum.
Scil.—Scilicet, that is to say.
Sco. N. R.—Scott's New Reports.
Scott's R.—Scott's Reports.
Scriv. Copyh.—Scriven's Copyholds.
Seat. F. Ch.—Seaton's Forms in Chancery. By Henry Wilmot Seaton.
Sec.—Section.
Sec. Leg.—Secundum legem; according to law.
Sec. Reg.—Secundum regulam; according to rule.
Sedgw. on Dam.—Sedgwick on Damages.
Sedgw. on H. & W.—Sedgwick on the Law of Husband and Wife.
Sel. Ca. Chan.—Select Cases in Chancery. Vide S. C. C.
Seld. Mar. Cla.—Seldon's Mare Clausum.
Self. Tr.—Selfridge's Trial.
Sell. Pr.—Sellon's Practice in K. B. and C. P.
Selw. N. P.—Selwyn's Nisi Prius. Selw. R.—Selwyn's Reports. These Reports are usually cited M. & S.—Maule and Selwyn's Reports.
Sem. or Semb.—Semble, it seems.
Sen.—Senate.
Seq.—Sequentia.
Serg. on Att.—Sergeant on the Law of Attachment.
Serg. Const. Law.—Sergeant on Constitutional Law.
Serg. on Land L.—Sergeant on the Land Laws of Pennsylvania.
Serg. & Lowb.—Sergeant and Lowber's edition of the English Common Law Reports; more usually cited Eng. Com. Law Rep.
Serg. & Rawle.—Reports of Cases adjudged in the Supreme Court of Pennsylvania. By Thomas Sergeant and William Rawle, jr.
Sess. Ca.—Sessions Cases in K. B., chiefly touching Settlements.
Set. on Dec.—Seton on Decrees.
Shaw & Macl.—Shaw and Maclean's Reports.
Shelf. Lun.—Shelford on Lunacy.
Shelf. on Mort.—Shelford on the Law of Mortmain.
Shelf. on Railw.—Shelford on Railways.
Shelf. on R. Pr.—Shelford on Real Property.
Shep. To.—Sheppard's Touchstone.
Shepl. R.—Shepley's Reports.

Sher.—Sheriff.
Show. P. C.—Shower's Parliamentary Cases.
Show. R.—Shower's Reports in the Court of King's Bench.
Shub. Jur. Lit.—Shuback de Jure Littoris.
Sid.—Siderfin's Reports.
Sim.—Simon's Chancery Reports. In Con. C. R.
Sim. & Stu.—Simon and Stuart's Chancery Reports. In Con. C. R.
Skene, Verb. Sign.—Skene de Verborum Significatione; an explanation of terms, difficult words, etc.
Skin.—Skinner's Reports.
Skirr. Und. Sher.—Skirrow's Complete Practical Under Sheriff.
Slade's Rep.—Slade's Reports. More usually cited Vermont Reports.
Smed. & Marsh. Ch. R.—Smedes and Marshall's Reports of Cases decided by the Superior Court of Chancery of Mississippi.
Smed. & Marsh. Err. & App.—Smedes and Marshall's Reports of Cases decided by the High Court of Errors and Appeals of Mississippi.
Smith & Batty.—Smith and Batty's Reports.
Smith's Ch. Pr.—Smith's Chancery Practice.
Smith's For. Med.—Smith's Forensic Medicine.
Smith's Hints.—Smith's Hints for the Examination of Medical Witnesses.
Smith on M. L.—Smith on Mercantile Law.
Sm. on Pat.—Smith on the Law of Patents.
Smith's Rep.—Smith's Reports of Cases decided by the Supreme Court of Indiana.
Smith's R.—Smith's Reports in K. B., together with Cases in the Court of Chancery, from 44 to 46 Geo. III.
Sol.—Solutio, the answer to an objection.
South Car. R.—South Carolina Reports.
South. R.—Southard's Reports.
Sp. of Laws.—Spirit of Laws, by Montesquieu.
Spelm. Feuds.—Spelman on Feuds.
Spel. Gl.—Spelman's Glossary.
Spence on Eq. Jur. of Ch.—Spence on the Equitable Jurisdiction of Chancery.
Spenc. R.—Spencer's Reports.
Speers' Eq. Cas.—Equity Cases argued and determined in the Court of Appeals of South Carolina. By R. H. Speers.
Speers' Rep.—Speers' Reports.
SS. usually put in small letters, *ss.*—Scilicet, that is to say.
St. or Stat.—Statute.
St. Armand's Hist. Ess.—St. Armand's Historical Essay on the Legislative Power of England.

Stant. R.—Stanton's Reports.
Stath. Ab.—Stathan's Abridgment.
Stath.—Statham's Abridgment.
St. Cas.—Stillingfleet's Cases.
St. Tr.—State Trials.
Stair's Inst.—Stair's Institutions of the Law of Scotland.
Stallm. on Elec. & Sat.—Stallman on Election and Satisfaction.
Stark. or Starkie's Ev.—Starkie on the Law of Evidence. Stark. Cr. Pl.—Starkie's Criminal Pleadings. Stark. R.—Starkie's Reports. In E. C. L. R. Stark. on Sl.—Starkie on Slander and Libel.
Stat.—Statutes.
Stat. Wes.—Statute of Westminster.
Staunf. or Staunf. P. C.—Staunford's Pleas of the Crown.
Stearne on R. A.—Stearne on Real Actions.
Steph. Comm.—Stephen's New Commentaries on the Law of England, (partly founded on Blackstone.)
Steph. Cr. Law.—Stephen on Criminal Law. Steph. Pl.—Stephen on Pleading. Steph. Proc.—Stephen on Procurations.
Steph. on Slav.—Stephens on Slavery.
Stev. on Av.—Stevens on Average.
Stev. & B. on Av.—Stevens and Beneke on Average.
Stew. Adm. Rep.—Stewart's Reports of Cases argued and determined in the Court of Vice Admiralty at Halifax.
Stew. R.—Stewart's Reports.
Stew. & Port.—Stewart and Porter's Reports.
Story, Ag.—Story on Agency.
Story on Bail.—Story's Commentaries on the Law of Bailments.
Story, Confl.—Story on the Conflict of Laws.
Story on Const.—Story on the Constitution of the United States.
Story on Eq.—Story's Commentaries on Equity Jurisprudence.
Story's L. U. S.—Story's edition of the Laws of the United States, in 3 vols. The 4th and 5th volumes are a continuation of the same work by George Sharswood, Esq.
Story on Partn.—Story on Partnership.
Story on Pl.—Story on Pleading.
Story's R.—Story's Reports.
Str.—Strange's Reports.
Stracc. de Mer.—Straccha de Mercatura, Navibus Assecurationibus.
Strah. Dom.—Straham's Translation of Domat's Civil Law.
Strob. R.—Strobhart's Reports.

Stroud's Dig.—Stroud's Digest of the Laws of Pennsylvania.

Stuart's (L. C.) R.—Reports of Cases in the Court of King's Bench in the Provincial Court of Appeals of Lower Canada, and Appeals from Lower Canada, before the Lords of the Privy Council. By George O'Kill Stuart, Esq.

Sty.—Style's Reports.

Sugd. or Sugd. Pow.—Sugden on Powers. Sugd. Vend.—Sugden on Vendors. Sugd. Lett.—Sugden's Letters.

Sull. Lect.—Sullivan's Lectures on the Feudal Law, and the Constitution and Laws of England.

Sull. on Land Tit.—Sullivan's History of Land Titles in Massachusetts.

Sum.—Summa, the summary of a law.

Sumn. R.—Sumner's Circuit Court Reports.

Supers.—Supersedeas.

Supp.—Supplement. Supp. to Ves. Jr.—Supplement to Vesey Junior's Reports. This is an excellent collection of notes on the points decided in the Reports.

Swan on Eccl. Cts.—Swan on the Jurisdiction of Ecclesiastical Courts.

Swanst.—Swanston's Reports.

Sweet on Wills.—Sweet's Popular Treatise on Wills.

Swift's Ev.—Swift's Evidence.

Swift's Sys.—Swift's System of the Laws of Connecticut. Swift's Dig.—Swift's Digest of the Laws of Connecticut.

Sw.—Swinburne on Wills.

Swinb.—Swinburne on the Law of Wills and Testaments. This work is generally cited by reference to the part, book, chapter, etc.

Swinb. on Desc.—Swinburne on the Law of Descents.

Swinb. on Mar.—Swinburne on Marriage.

Swinb. on Spo.—Swinburne on Spousals.

Sys. Plead.—System of Pleading.

T.—Title.

T. & G.—Tyrwhitt and Granger's Reports.

T. & P.—Turner and Phillips' Reports.

T. Jo.—Sir Thomas Jones' Reports.

T. L.—Termes de la Ley, or Terms of the Law.

T. R.—Term Reports. Ridgway's Reports are sometimes cited Irish T. R.

T. R.—Teste Rege.

T. & R. C. R.—Turner and Russell's Chancery Reports.

T. & R.—Turner and Russell's Reports.

T. R. E. or T. E. R.—Tempore Regis Edwardi. This abbreviation is frequently used in Doomsday Book, and in the more ancient law writers. See Tyrrel's Hist. Eng., Introd. viii. p. 49. See also Co. Inst. 86, a, where, in a quotation from Doomsday Book, this abbreviation is interpreted Terra Regis Edwardi; but in Cowell's Dict. verb. Reveland, it is said to be wrong.

T. Raym.—Sir Thomas Raymond's Reports.

T. U. P. Charlt.—T. U. P. Charlton's Reports.

Tait on Ev.—Tait on Evidence.

Taml. on Ev.—Tamlyn on Evidence, principally with reference to the Practice of the Court of Chancery, and in the Master's Office.

Taml. R.—Tamlyn's Reports of Cases decided in Chancery.

Taml. T. Y.—Tamlyn on Terms for Years.

Tapia, Jur. Mer.—Tratade de Jurisprudentia Mercantil.

Taunt.—Taunton's Reports. In E. C. L. R.

Tayl. on Ev.—Taylor on Evidence.

Tayl. Civ. L.—Taylor's Civil Law.

Tayl. Law. Glo.—Taylor's Law Glossary.

Tayl. R.—Taylor's Reports.

Tayl. L. & T.—Taylor's Treatise on the American Law of Landlord and Tenant.

Tayl. on Pois.—Taylor on Poisons.

Tech. Dict.—Crabb's Technological Dictionary.

Tex. Rep.—Texas Reports.

Thach. Crim. Cas.—Thacher's Criminal Cases.

Th. Br.—Thesaurus Brevium.

Th. Dig.—Thelvall's Digest.

Theo. of Pres. Pro.—Theory of Presumptive Proof.

Theo. Pres. Pro.—Theory of Presumptive Proof, or an Inquiry into the Nature of Circumstantial Evidence.

Tho. Co. Litt.—Coke upon Littleton; newly arranged on the plan of Sir Matthew Hale's Analysis. By J. H. Thomas, Esq.

Thomp. on Bills.—Thompson on Bills.

Tho. U. J.—Thomas on Universal Jurisprudence.

Tidd's Pr.—Tidd's Practice.

Tit.—Title.

Toll. Ex.—Toller's Executors.

Toml. L. D.—Tomlin's Law Dictionary.

Toth.—Tothill's Reports.

Touchs.—Sheppard's Touchstone.

Toull.—Le Droit Civil Français suivant l'ordre du Code; ouvrage dans lequel on a taché de reunir la théorie a la practique. Par M. C. B. M. Toullier. This work is sometimes cited Toull. Dr. Civ. Fr. liv. 3, t. 2, c. 1, n. 6; at other times, 3 Toull. n. 86, which latter signifies vol. 3 of Toullier's work, No. 86.

Towns. Pl.—Townshend's Pleadings.
Towns. N. Pr.—Townshend's New Practice.
Tr. Eq.—Treatise of Equity; the same as Fonblanque on Equity.
Traill, Med. Jur.—Outlines of a course of Lectures on Medical Jurisprudence. By Thomas Stewart Traill, M. D.
Treb. Jur. de la Méd.—Jurisprudence de la Médecine, de la Chirurgie, et de la Pharmacie. Par Adolphe Trebuchets.
Trem.—Tremaine's Pleas of the Crown.
Tr. of Webs.—Trial of Doctor Webster.
Tri. of 7 Bish.—Trial of the Seven Bishops.
Tri. per Pays.—Trial per Pays.
Trin.—Trinity Term.
Tuck. Bl. Com.—Blackstone's Commentaries, edited by Judge Tucker.
Turn. R.—Turner's Reports of Cases determined in Chancery.
Turn. & Russ.—Turner and Russell's Chancery Reports.
Tuck. Com.—Tucker's Commentaries.
Turn. & Phil.—Turner and Phillip's Reports.
Tyl. R.—Tyler's Reports.
Tyrw.—Tyrwhitt's Exchequer Reports.
Tyrw. & Gra.—Tyrwhitt and Granger's Reports.
Tyt. Mil. Law.—Tytler's Essay on Military Law, and the Practice of Military Courts Martial.

U. S.—United States of America.
U. S. Dig.—United States Digest. See Metc. & Perk. Dig.
Ult.—Ultimo, ultima, the last, usually applied to the last title, paragraph or law.
Umfrev. Off. of Cor.—Umfreville's Office of Coroner.
Under Sher.—Under Sheriff, containing the Office and Duty of High Sheriff, Under Sheriffs, and Bailiffs.
Ux. et.—Et uxor, et uxorem, and wife.

V.—Versus, against; as A B v. C D.
V.—Versiculo, in such a verse.
V.—Vide, see.
V. or v.—Voce; as Spelm. Gloss. v. Cancellorius.
V. & B.—Vesey and Beames' Reports.
V. C.—Vice Chancellor.
Voc.—Voce.
V. & S.—Vernon and Scriven's Reports.
Val. Com.—Valin's Commentaries.
Van Heyth. Mar. Ev.—Van Heythuysen's Essay upon Marine Evidence, in Courts of Law and Equity.
Vand. Jud. Pr.—Vanderlinden's Judicial Practice.
Vatt. or Vattel.—Vattell's Law of Nations.

Vaugh.—Vaughan's Reports.
Vend. Ex.—Venditioni Exponas.
Ventr.—Ventris' Reports.
Verm. R.—Vermont Judges' Reports.
Vern.—Vernon's Reports.
Vern. & Scriv.—Vernon and Scriven's Reports of Cases in the King's Courts, Dublin.
Verpl. Contr.—Verplanck on Contracts.
Verpl. Ev.—Verplanck on Evidence.
Ves.—Vesey Senior's Reports.
Ves. Jr.—Vesey Junior's Reports.
Ves. & Bea.—Vesey and Beames' Reports.
Vet. N. B.—Old Natura Brevium.
Vid.—Vidian's Entries.
Vin. Ab.—Viner's Abridgment.
Vin. Supp.—Supplement to Viner's Abridgment.
Vinn.—Vinnius.
Viz.—Videlicet, that is to say.
Vs.—Versus.

W. 1, W. 2.—Statutes of Westminster, 1 and 2.
W. C. C. R.—Washington's Circuit Court Reports.
W. & C.—Wilson and Courtenay's Reports.
W. Jo.—Sir William Jones' Reports.
W. Kel.—William Kelynge's Reports.
W. & M.—William and Mary.
W. & M. Rep.—Woodbury and Minot's Reports.
W. & S.—Wilson and Shaw's Reports of Cases decided in the H. of L.
W. & T. Eq. Cas.—White and Tudor's Equity Cases.
Wagr. on Disc.—Wagram on Discoveries.
Walf. on Part.—Walford's Treatise on the Law respecting Parties to Actions.
Walk. on Ch. Ca.—Walker's Chancery Cases.
Walk. Am. L. or Walk. Introd.—Walker's Introduction to American Law.
Walk. R.—Walker's Reports.
Wall. R.—Wallace's Circuit Court Reports.
Ward on Leg.—Ward on Legacies.
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Warr. L. S.—Warren's Law Studies.
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Washb. R.—Washburn's Vermont Reports.
Wat. Cop.—Watkin's Copyhold.
Watk. Conv.—Watkin's Principles of Conveyancing.

Wats. Cler. Law.—Watson's Clergyman's Law.
Wats. on Arb.—Watson on the Law of Arbitrations and Awards.
Wats. on Partn.—Watson on the Law of Partnership.
Wats. on Sher.—Watson on the Law relating to the Office and Duty of Sheriff.
Watts' R.—Watts' Reports.
Watts & Serg.—Watts and Sergeant's Reports.
Welf. on Eq. Plead.—Welford on Equity Pleading.
Wellw. Ab.—Wellwood's Abridgment of Sea Laws.
Wend. R.—Wendell's Reports.
Wentw.—Wentworth. Went. Off. Ex.—Wentworth's Office of Executor. Wentw. Pl.—Wentworth's System of Pleading, in 10 vols.
Wesk. Ins.—Weskett on the Law of Insurance.
West's Parl. Rep.—West's Parliamentary Reports.
West's Rep.—West's Reports of Lord Chancellor Hardwicke.
West's Symb.—West's Symboliography, or a Description of Instruments and Precedents, 2 parts.
Westm.—Westminster; Westm. I.—Westminster Primer.
Weyt. on Av.—Quinton Van Weytsen on Average.
Whart. Cr. Law.—Wharton on the Criminal Law of the United States.
Whart. Dig.—Wharton's Digest.
Whart. Law Lex.—Wharton's Law Lexicon, or Dictionary of Jurisprudence.
Whart. R.—Wharton's Reports.
Wheat.—Wheaton. Wheat. R.—Wheaton's Reports. Wheat. on Capt.—Wheaton's Digest of the Law of Maritime Captures and Prizes. Wheat. Hist. of L. of N.—Wheaton's History of the Law of Nations in Europe and America.
Wheel. Ab.—Wheeler's Abridgments.
Wheel. Cr. Cas.—Wheeler's Criminal Cases.
Wheel. on Slav.—Wheeler on Slavery.
Whish. L. D.—Whishaw's Law Dictionary.
Whit. on Liens.—Whitaker on the Law of Liens.
Whit. on Trans.—Whitaker on Stoppage in Transitu.
White's New Coll.—A new collection of the Laws, Charters, and Local Ordinances of the governments of Great Britain, France, and Spain, etc.
White's L. C.—White's Leading Cases in Equity.
Whitm. B. L.—Whitmarsh's Bankrupt Law.
Wicq.—L'Ambassadeur et ses Fonctions, par de Wicquefort.
Wightw.—Wightwich's Reports in the Exchequer.
Wilc. on Mun. Cor.—Wilcock on Municipal Corporations.
Wilc. R.—Wilcox's Reports.
Wilk. Leg. Ang. Sax.—Wilkin's Leges Anglo-Saxonicæ.
Wilk. on Lim.—Wilkinson on Limitations.

Wilk. on Pub. Funds.—Wilkinson on the Law relating to the Public Funds, including the Practice of Distringas, etc.
Wilk. on Repl.—Wilkinson on the Law of Replevin.
Will. Auct.—Williams on the Law of Auctions.
Will. on Eq. Pl.—Willis' Treatise on Equity Pleadings.
Will. on Inter.—Willis on Interrogatories.
Will. L. D.—Williams' Law Dictionary.
Will. Per. Pr.—Williams' Principles of the Law of Personal Property.
Will. (P.) Rep.—Peere Williams' Reports.
Willc. Off. of Const.—Willcock on the Office of Constable.
Willes' R.—Willes' Reports.
Wills on Cir. Ev.—Wills on Circumstantial Evidence.
Wils. on Uses.—Wilson on Springing Uses.
Wildm. Int. L.—Wildman's International Law.
Wilm. on Mortg.—Wilmot on Mortgages.
Wilm. Judg.—Wilmot's Notes of Opinions and Judgments.
Wils. on Arb.—Wilson on Arbitrations.
Wils. Ch. R.—Wilson's Chancery Reports.
Wils. & Co.—Wilson and Courtenay's Reports.
Wils. Ex. R.—Wilson's Exchequer Reports.
Wils. & Sh.—Wilson and Shaw's Reports decided by the House of Lords.
Wils. R.—Wilson's Reports.
Win.—Winch's Entries. Win. R.—Winch's Reports.
Wing. Max.—Wingate's Maxims.
Wms. Just.—Williams' Justice.
Wms. R., more usually, P. Wms.—Peere Williams' Reports.
Wolff. Inst.—Wolffius Institutiones Juris Naturæ et Gentium.
Wood's Inst., or Wood's Inst. Com. L.—Wood's Institutes of the Common Law of England. Wood's Inst. Civ. Law.—Wood's Institutes of the Civil Law.
Wood. & Min. Rep.—Woodbury and Minot's Reports.
Woodes.—Wooddesson. Woodes. El. Jur.—Wooddesson's Elements of Jurisprudence. Woodes. Lect.—Wooddesson's Vinerian Lectures.
Woodf. L. & T.—Woodfall on the Law of Landlord and Tenant.
Woodm. R.—Woodman's Reports of Criminal Cases tried in the Municipal Court of the city of Boston.
Wool. L. W.—Woolrych's Law of Waters.
Woolr. on Com. Law.—Woolrych's Treatise on the Commercial and Mercantile Law of England.
Wool. on Ways.—Woolrych on Ways.
Worth. on Jur.—Worthington's Inquiry into the Power of Juries to decide incidentally on questions of law.

Worth. Pre. Wills.—Worthington's General Precedents for Wills, with Practical Notes.
Wright's R.—Wright's Reports.
Wright, Fr. Soc.—Wright on Friendly Societies.
Wright, Ten.—Sir Martin Wright's Law of Tenures.
Wy. Pr. Reg.—Wyatt's Practical Register.

X.—The Decretals of Gregory the Ninth are denoted by the letter X, thus, Ẍ.

Y. B.—Year Books.
Y. & C.—Younge and Collyer's Exchequer Reports.
Y. & C. N. C.—Younge and Collyer's New Cases.
Y. & J.—Younge and Jervis' Exchequer Reports.
Yeates, R.—Yeates' Reports.
Yearb.—Year Book.
Yelv.—Yelverton's Reports.
Yerg. R.—Yerger's Reports.
Yo. & Col.—Younge and Collyer's Exchequer Reports.
Yo. & Col. N. C.—Younge and Collyer's New Cases.
Yo. Rep.—Younge's Reports.
Yo. & Jer.—Younge and Jervis' Reports.

Zouch's Adm.—Zouch's Jurisdiction of the Admiralty of England, asserted.

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INSTITUTES

OF

AMERICAN LAW.

PRELIMINARY BOOK.

PART I.—OF LAWS IN GENERAL.

MAN is a social being, fond of the company of his fellows, and always disposed to live with others. It is thus that families, tribes and nations are formed. Men render to, and receive mutual benefits and assistance from each other. But in such societies there must constantly arise causes of difference among the several members, and these must be adjusted or settled, either by the parties themselves, or by some power which is superior to them. Their rights must also be regulated, so that the parties may know to what each one is entitled. This is done by an actual or presumed agreement of all the members of the society, state or nation, by the establishment of certain rules, which acquire the name of *laws*. The knowledge of these laws, or the science by which they are understood, is called *jurisprudence*.

2. The first step to understand this science is, therefore, to know exactly the nature of the laws, and to form of them a definite and precise idea. By *science* is understood a connection of truths, founded on evident principles or on demonstrations; a collection of

truths of the same kind, arranged in a methodical order, for the purpose of making them more easily understood.

3. In its most extensive sense, the word *law* signifies a rule of action. It is a rule which all beings, whether animate or inanimate, reasonable or not, must observe. Thus we say the laws of motion, of gravitation, of mechanics, as we say natural laws, civil laws, political or criminal laws. In this sense all beings have their laws; the material world, animals and man, each have their laws.(*a*)

The knowledge of all these laws belongs to philosophy, which, in its immensity, embraces all the knowledge which man can acquire by the use of his reason. More circumscribed in its object, jurisprudence regulates only human actions.

4. Law, in this view then, is the rule of human actions; that is, of those actions which are the result of the free exercise of intelligence and will.

Law is called a *rule* of action by a metaphor borrowed from mechanics. A rule, in its proper sense, is an instrument, by means of which we draw, from one point to another, the shortest line possible, which is called a straight line. The rule is used in comparison in the arts, in order to judge whether a line is straight, as it is used in law, to judge whether an action is just or unjust.

An action is just or right, when it conforms to the rule, which is the law; it is unjust when it differs from it; it is not right. And so it is of our will or intention.

TITLE I.—OF JUSTICE.

5. *Justice* has been variously defined: it is the constant and perpetual disposition to render to every man

(*a*) Montesq. Esp. des Louis, liv. 1, c. 1.

his due;(a) or, perhaps more correctly, it is a conformity of our actions and wills to the law.(b)

6. Justice is interior or exterior. The first is the conformity of our will, and the last of our actions to the law. The union of both makes perfect justice. The last is alone the subject of human jurisprudence. Interior justice is the object of morality.

7. In the most extensive sense of the word, justice differs but little from virtue, for it includes within itself the whole circle of virtues. Yet the common distinction between them is this; that which positively and in itself is called virtue, when considered relatively with respect to others, has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

TITLE II.—OF LAWS.

8. To make a law, there must be a *superior*, who has authority to make it, and an *inferior*, who is bound by it. To complete the definition of law, we must say that it is a rule prescribed by a lawful superior.

God is the first great superior. Peace and order in society would not be guaranteed by the principles of human legislation, if those principles were not protected by the salutary influence of true religion. And human laws would be insufficient to regulate the conduct of men, if their actions were not supported, directed and supplied by religion; and morality and religion would of themselves be powerless to insure the peace of society, without the aid of the civil law.

Many moral obligations exist which are not enforced by the civil law, and these are left to the operations of conscience. Such, for example, as gratitude and benevolence.

(a) Just. Inst. b. 2, t. 1. (b) Toul. Dr. Civ. tit. Prél. n. 5.

CHAP. I.—OF THE LAW OF NATURE.

9. The *law of nature*, or natural law, is that which God, the sovereign of the universe, has prescribed to all men, not by any formal promulgation, but by the dictate of right reason alone. It is ascertained by a just consideration of the agreeableness or disagreeableness of human actions to the nature of man; and it comprehends all the duties we owe either to the Supreme Being, to ourselves, or to our neighbors; as, reverence to God, self-defence, temperance, honor to our parents, benevolence to all, a strict adherence to our engagements, gratitude, and the like.

By natural law is also understood the system or collection of those laws arranged together in a methodical order.

The law of nature is superior in obligation to any other. It is binding in all countries and at all times. No human laws are valid if opposed to this, and all which are binding derive their authority either directly or indirectly from it.

CHAPTER II.—OF THE LAW OF NATIONS.

10. The *law of nations* is a system of rules, deducible by human reason from the immutable principles of natural justice, and established by universal consent among the civilized nations of the earth, in order to decide all disputes, and to insure the observance of good faith and justice in that intercourse which must frequently occur between them; or it depends upon mutual compacts, treaties, leagues and agreements between separate, free and independent communities.(*a*)

The law of nations, *jus gentium*, has of late years been called *international law*.

(*a*) Just. Inst. 1, 2, 1; Dig. 1, 1, 9.

Nations, with regard to each other, are considered as individuals, and the law of nations is to regulate the differences which may exist between them in their national capacity. Being in a state of nature, they must be considered as so many free and independent persons living in that state; and, therefore, the rules of natural law are to be applied to them.

International law is generally divided into two branches: 1. The *natural law of nations*, consisting of rules of justice applicable to the conduct of states. 2. The *positive law of nations*, which consists of, 1st, the voluntary law of nations, derived from the presumed consent of nations, arising out of their general usage; 2dly, the conventional law of nations, derived from the express consent of nations, as individuals, as evidenced in treaties and other international contracts or compacts; 3dly, the customary law of nations, which is a tacit consent to certain rules which have been observed by them.(*a*)

The law of nations has been divided by writers into *necessary* or *voluntary*, or into *absolute* and *arbitrary;* by others into *primary* and *secondary*, which latter has been subdivided into *customary* and *conventional*. Another division is made into *natural* and *positive*.

The various sources and evidence of the law of nations are the following:

1. The rules of conduct deducible by reason from the nature of society existing among independent states, which ought to be observed among nations.(*b*)

2. The adjudications of international tribunals, such as prize courts and boards of arbitration.

3. Text writers of authority.

4. Ordinances or laws of particular states, prescribing rules of conduct for their commissioned cruisers and prize tribunals.

5. The history of the wars, negotiations, treaties of

(*a*) Vat. Dr. des Gens, tit. Prél.

(*b*) The *Le Louis*, 2 Dods. 249. See Triquet *v.* Bath, W. Bl. 471.

peace, and other matters relating to the intercourse of nations.

6. Treaties of peace, alliance and commerce, declaring, modifying or defining the preëxisting international law.(*a*)

CHAPTER III.—OF MUNICIPAL LAW.

11. Various definitions have been given of *municipal or civil law*. According to Mr. Justice Blackstone, it is "a rule of civil conduct, prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong." This definition has been justly criticised; the latter part has been considered superabundant, and the first too general and indefinite, and too limited in its signification, to convey a just idea of the subject. Mr. Chitty defines it to be "a rule of civil conduct, prescribed by the supreme power in a state, commanding what shall be done and what shall not be done."(*b*) But this does not appear to distinguish between a law which may have the form of a judgment and a general law; as, for example, that Primus shall pay Secundus a certain sum of money. Laws should apply to all the citizens.(*c*) Civil or municipal law is a rule of conduct prescribed to all the citizens by the supreme power in the state, in conformity to the constitution, on a matter of common interest. It is the solemn declaration of the legislative power, by which it commands, under certain penalties or certain rewards, what each citizen should do, not do, or suffer, for the common good of the state.

In order fully to comprehend the subject, let us consider the several parts of this definition.

1. It being the civil law, it of course prescribes rules of *civil* conduct only. This distinguishes it from the *moral* law, which is regulated by the law of nature or the revealed law.

(*a*) Wheat. Int. Law, pt. 1, c. 1, § 14.
(*b*) 1 Bl. Com. 44, note 6, Chit. ed.
(*c*) 1 Bl. Com. 44.

2. It is a *rule*, because it is the standard of what the law deems right and proper. It is also called a rule, to distinguish it from *advice* or *counsel*, which may be given even by an inferior; and the law is a precept which all are bound to obey.

3. The law is a rule of *conduct*. It is to regulate the actions of men. The law regards man as a citizen, who is bound to perform certain duties to his neighbor.

4. It must be *prescribed*, for, until it is made known, it has no binding authority. But if promulgated according to the rules established in such cases, it is binding, although it may be unknown. Laws are generally binding from their passage, that being a sufficient publication; but sometimes they are to take effect only from some time named. In general they are published in books and newspapers, by authority of the government, for the information of the people.

5. The law must be prescribed to *all the citizens*. It is not a transitory order, relating to an individual or to a particular object; it is a permanent, uniform rule, prescribed as to an object of general utility and of a common interest. The law considers the citizens in mass. It cannot apply to an individual, nor to a particular action, nor to a particular case. It is equal for all, whether it protects or punishes. All men are equal before the law. It is the constant practice of the national and state legislatures, however, to pass what are called private acts, such as to authorize the sale of lands, and a variety of other things; but these cannot, with any propriety, be called rules of conduct.

6. Laws must be made in a solemn manner by the sovereign authority, or by the *supreme power in the state*. They derive their binding force from this power alone. But it frequently happens that the power of making laws is delegated to other bodies, by those which derive their authority from the constitution. Municipal and other corporations make ordinances or laws, which have a binding force, though they derive

their power wholly from the legislature. In a late case it was held that a law passed by the legislature, which required the sanction of the people at an election, was unconstitutional.(*a*)

7. The law must be made in *conformity with the requirements of the constitution.* If the forms prescribed by the constitution have not been observed, or the power have not been delegated to the legislative body, the act is unconstitutional and void.(*b*)

8. The law must have an object of *common interest to all.* It differs from orders or commands given by a legitimate authority, although they may be obligatory, because the law authorizes their execution. It differs also from judgments, which must always be given as to past actions, whereas the law provides only for the future.

12. Having shown that law is a rule prescribed by the supreme power or sovereignty of the state, and that it is a solemn declaration of the legislative power, it will be proper to inquire what is the sovereignty; what is the government of the United States; how laws are made, and how many kinds there are. These will be considered separately.

PART II.—OF SOVEREIGNTY.

13. This chapter will be divided into five sections: 1, what is sovereignty; 2, by whom it is to be exercised; 3, how it is divided; 4, what is the constitution of a state; 5, of the different forms of government.

TITLE I.—WHAT IS SOVEREIGNTY.

Sovereignty is that public authority which has no superior, and which commands in an independent civil

(*a*) Parker *v.* Commonwealth, 6 Penn. St. R. 507.
(*b*) Commonwealth *v.* Mann, 5 W. & S. 403, 419.

society, ordering and directing what each must do, to acquire its ends. It is the union of all the powers; it is the power to do any and every thing in a state, without being accountable to any one; to make laws and execute them; to coin money; to impose and levy contributions; to declare war, or to make peace; to form treaties with foreign nations, etc.

TITLE II.—BY WHOM SOVEREIGNTY IS TO BE EXERCISED.

14. Abstractedly, sovereignty belongs to the people, and resides essentially in the body of the nation. But the nation, from whom emanate all the powers of sovereignty, can exercise them only by *delegation.* Sovereignty cannot be exercised otherwise, except in small republics.

TITLE III.—HOW THE POWERS OF SOVEREIGNTY ARE DIVIDED.

15. If we analyze sovereignty, we find it composed of *three powers*, namely, the *legislative*, the *executive*, and the *judicial.*

16. The first, is the power to make new laws, to correct, repeal or abrogate the old.

17. The second, is the power to cause those laws to be executed or obeyed. This power is usually exercised by a single individual, known by the names of president, governor, emperor, king, etc.

18. The third, is the power to apply the law to particular facts; to judge of differences which arise among the citizens or inhabitants of the state, and to punish crimes. This is vested in courts of justice.

TITLE IV.—WHAT IS A CONSTITUTION.

19. A *constitution* is the fundamental law of the state, containing the principles upon which the government is founded, and regulating the division of the sovereign powers, directing to what persons each of

these powers is to be confided, and the manner in which it is to be exercised.

The constitution is made by the authority of the people themselves, or their delegates specially authorized, and it can be changed only by the like power. The legislature, which is the creature of the constitution, cannot make any change in such fundamental law.

TITLE V.—OF THE DIFFERENT FORMS OF GOVERNMENT.

20. *Government* is the manner in which sovereignty is exercised in the state. It is the means adopted to put the fundamental law of the state in action. It is the function and the very end of the government to apply this fundamental law for the happiness and advantage of all the citizens; for the constitution of the state is the lawful expression of the wants and of the will of all. Hence follows this necessary consequence, that the government is the delegate of society, the state, or the nation. The people, being sovereign, may adopt any of the forms of government which have been devised among men.

21. There have been at all times, and there are now, different *forms* of government, the three principal of which are democracy, aristocracy, and monarchy. But these different forms are combined and subdivided to infinity. From the African prince, who disposes freely of the lives and properties of his subjects, to the European monarch, whose power is contained within much narrower bounds; from the savage cazique, who governs his tribe because he is the oldest man in it, to the republican magistrate who is elected by the free suffrage of his fellow citizens, we perceive an infinity of organic combinations.

22. When the sovereign power is exercised by the people in a body, or by a majority of the people, the government is called a *democracy*. In this form of

government all men are equal in a political and civil point of view. Democracy is the complete triumph of the principle of equality. All the citizens must have an equality of rights and not merely of privileges.

23. When the sovereign power is exercised by a small number of persons, in their own right, exclusively from the rest of the people, this form of government is called an *aristocracy*. In an aristocratic country the rulers claim the power to govern in their own right, and not by delegation, as in a representative democracy. Aristocracy and slavery spring from the same root. The first is the parent of the second, for the master and slave appeared on the same day.

24. When the sovereign power is concentrated in the hands of a single magistrate, the government is a *monarchy*, whether it bear the name of an empire, a kingdom, a duchy, or any other.

25. But the sovereign power may be divided and combined in a thousand different ways; hence result *mixed governments*, such as are most of those of civilized nations. Indeed, it may with truth be observed that the constitution of each state, consisting in the manner in which the powers of sovereignty are divided, seldom remains the same for any great length of time. Its form varies more frequently than it would strike one at first blush, in consequence of the encroachments which are insensibly made by one branch of the government over the others. There are, besides these principal forms, a variety of governments, which will here be defined.

26. *Theocracy* is a government where the clergy exercise the sovereign power, under a pretence that it is the government of God, and under his immediate direction.(*a*)

27. *Ochlogracy* is a government where the authority

(*a*) Matter, De l'influence des mœurs sur les lois, et de l'influence des lois sur les mœurs, 189.

is in the hands of the multitude; it is the abuse of a democracy.(*a*)

28. *Oligarchy* is a government where the sovereign authority has been usurped by a few men, when such power ought to reside in the people.

29. *Demagogy* is the exaggeration and abuse of democracy, and is a violation of the principle of the sovereignty of the people.

30. *Polyarchy* is that form of government in which the authority is confided to several persons; as, for example, the Directory and the Consulate, and the late Provisionary government of France. Another example may be given where two brothers, the sons of a king, succeed to the throne and reign jointly.

31. A *representative democracy* is a government where the powers of sovereignty are delegated to a body of men, elected from time to time, who exercise them for the benefit of the whole nation. Such is the general government of the United States, and of the several states of the American Union.

32. *Despotism* is the state where the powers of the government are not divided, but united in the hands of a single man, whatever may be the title he bears, emperor, king, sultan, president, etc. Where the power of such man is not limited by law, he may, having only his will for a rule, make or repeal laws, execute them or not, at his pleasure, etc. This is not properly a form of government but an abuse of government. Despotism is an act of tyranny.

By *tyranny* is understood the violation of the laws which regulate the exercise of the powers of sovereignty, and tyrant the chief of the state, who, although he may be legitimate, violates them for the purpose of committing arbitrary acts contrary to justice.

The terms *tyrant* and *usurper* are often confounded, because usurpers are almost always tyrants. But these terms are very different. Even a legitimate

(*a*) Vaumène, Dict. du Langage Politique, h. v.

king may become a tyrant, if he governs in an unjust and despotic manner; and a usurper may cease to be a tyrant by governing according to justice.

33. A *commonwealth* is that form of government in which the administration of public affairs is open or common to all persons, without any special regard to rank or property, as distinguished from monarchy or aristocracy.

34. A *republic*, which is another name for commonwealth, is that form of government in which the administration of affairs is open to all the citizens. In another sense the term republic, *res publica*, signifies the state independently of its form of government.

35. A *hierarchy* signified originally *power of the priests*, for in the beginning of societies, the priests were entrusted with all the power; but among the priests themselves there were different degrees of power and authority, at the summit of which was the sovereign pontiff, and this was called the hierarchy. Now it signifies not so much *power of the priest*, as *order of power*.

36. *Stratocracy* is a military government. This word is derived from two Greek words signifying army and power.

PART III.—OF THE GOVERNMENT OF THE UNITED STATES.

37. This part will be divided into four titles; 1, of the history of the formation of the government of the United States; 2, by whom the sovereignty is exercised; 3, in whom the government is vested by the constitution; 4, of the government of the several states.

TITLE I.—OF THE HISTORY OF THE FORMATION OF THE GOVERNMENT OF THE UNITED STATES.

The government of Great Britain had obtained a footing on the American continent by right of disco-

very, and in 1606 established two colonies, namely, Virginia and Massachusetts, and, from that period until the year 1732, other colonies were established along the eastern shore of the continent. These were governed in various modes; they had provincial, proprietary, and charter governments; but they did not essentially differ from each other. The people were all subjects of the mother country, and under the same general government. They had all brought and adopted the laws of England, which were suitable to their condition, but they were independent of each other. Each colony had its own legislature, and they were all dependent colonies and not independent states; consequently they could make no laws repugnant to the acts of the parliament of England or of Great Britain; and the mother country assumed the right of binding the colonies, in all cases, by acts of parliament. This soon produced the most resolute denial, on the part of the colonies, who claimed that taxation and representation should be inseparable, and, as they were not represented in the British parliament, they insisted that no taxes could be imposed upon them by the laws of Great Britain, and they prepared to resist such acts of oppression. Before this period the colonies had found it necessary to unite together, to repress the hostilities of the French and Indians. For this purpose they had assembled at various periods. As soon as they resolved to oppose these tyrannical acts of Great Britain they formed a revolutionary league, and, in 1774, the people of the colonies elected delegates to represent them in a general assembly, which met in Philadelphia, and assumed the name of the *Continental Congress*. This was the commencement of that union which has made our country the admiration of the whole world.

The colonies which were represented in this congress were thirteen in number, namely: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York,

New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

On the fourth day of July, 1776, a day memorable in the annals of human liberty, the Continental Congress adopted the celebrated Declaration of Independence, which severed the tie between Great Britain and her colonies, and the latter became free and independent states. In this memorable instrument are portrayed, in nervous language, the various acts of tyranny of Great Britain, a firm reliance upon God, and an unswerving determination to support the rights of the American people.

By the dissolution of the relations which existed between the colonies and the mother country, the former were left with no other than their local governments. A common sense of danger, in this situation, induced the new states to adopt that form of government, which is contained in the *Articles of Confederation*. This instrument obtained its full force in 1781, but owing to its inefficiency, it was found not to answer the purpose for which it was intended.

To remedy the evils attendant upon the weakness of the Articles of Confederation, delegates were appointed by the legislatures of all the states, except Rhode Island, who assembled in Philadelphia in May, 1787, with power to amend the Articles of Confederation. It was soon found impracticable to amend them, and it was resolved to form a new instrument, which resulted in the Constitution of the United States, which was unanimously adopted by the Convention on the 17th day of September, 1787. After much consideration, the legislatures of all the states ratified the constitution, and it went into full operation on the fourth day of March, seventeen hundred and eighty-nine.(*a*) A number of amendments have since been made in the constitution, and ratified by the requisite number of the states.

(*a*) Owings *v.* Speed, 5 Wheat. 420.

TITLE II.—BY WHOM THE SOVEREIGNTY IS EXERCISED IN THE UNITED STATES.

38. By the Declaration of Independence, and the acknowledgment of Great Britain that the United States of America are and were free and independent states, they became a nation.

39. In its original signification the word *nation* denoted those of the same origin, who were natives of the same race, although they might live in different countries; as, for example, the Jewish nation; and the union of the several tribes of the Greeks, although they composed several states, made but one nation. In this sense the Romans understood this term, for they had but one word, *gens*, to represent race and nation. But considered in a more limited sense, the word nation indicates a social form, in which a certain number of towns, or particular states, whether of the same race or origin or not, obey a law common to them all and the same government. A nation is, therefore, an independent body politic; a society of men united together for the purpose of promoting their mutual safety and advantage by their joint efforts and their combined strength. Such a nation becomes a moral person, and is susceptible of obligations and rights.(*a*)

In considering the people of the United States they may be classed as follows: those born in the country, and those born out of it.

CHAPTER I.—OF THOSE BORN IN THE COUNTRY.

40. The *natives*, or persons born within the jurisdiction of the United States, in any state or territory, have not all the same rights, some being citizens, and others not; some having all their civil rights, and others being deprived of them.

(*a*) Vat. Prél. § 1, 2; The Cherokee Nation *v.* The State of Georgia, 5 Pet. R. 52.

1st. *White persons,* so born, are, in general, citizens of the United States, unless they have lost that right. By *white* person is meant one who is not of the Indian or African race; but it is not easy to say what shade of color or mixture will deprive a man of the quality of being white, or will entitle him to that appellation.

2dly. The *aborigines,* or persons of the Indian race, are not in general citizens of the United States, and can exert no political rights.

3dly. *Negroes,* or descendants of the African race, in general, possess no political power whatever; they cannot vote or hold office; and many of them are deprived even of their civil rights, being holden in a state of slavery.

4thly. *Children of foreign ambassadors,* although born in the United States, are not citizens, being aliens, as their fathers were at the time of their birth.

CHAPTER II.—OF INHABITANTS OF THE UNITED STATES BORN OUT OF THEIR JURISDICTION.

41. Like those born within the United States, persons born out of their territory are entitled to different rights; some are citizens and others are not.

1st. Persons born out of the United States who are *children of citizens of the United States,* or of persons who have been such, are citizens, provided the father of such children shall have resided within the same.(*a*)

2dly. Persons who were in the country at the time of the *adoption of the Constitution,* have the rights of citizens.

3dly. Persons who became *naturalized* under the laws of *any state* before the passage of any law on the subject of naturalization by Congress, or who have become naturalized under the *acts of Congress,* are citizens of the United States, and, like other citizens, are

(*a*) Act of Cong. of April 14, 1802, s. 4.

entitled to vote for all officers who are elected by citizens, and to hold any office except those of president and vice-president of the United States.

4thly. *Children of naturalized citizens*, who were under the age of twenty-one years at the time of their parents' being so naturalized or admitted to the rights of citizenship, are, if then living in the United States, considered as citizens, and entitled to the same rights as their respective fathers.

5thly. Persons who resided in a *territory which was annexed to the United States* by treaty, and the territory afterward became a state of the Union: as, for example, a person who, born in France, moved to Louisiana in 1806, settled there, and remained in the territory till it was admitted as a state, was held to be a citizen of the United States, although not naturalized under the acts of congress.(*a*)

6thly. *Aliens* and *foreigners*, who have never been naturalized, are not citizens of the United States, and have no political rights whatever.

TITLE III.—IN WHOM THE GOVERNMENT OF THE UNITED STATES IS VESTED BY THE CONSTITUTION.

42. The constitution vests the legislative power in Congress; the executive in the President of the United States; and the judicial power in certain courts and tribunals. These will be separately considered.

CHAPTER I.—OF THE LEGISLATIVE POWER.

43. All *legislative power* granted by the constitution is vested in a *Congress of the United States*, which consists of a senate and house of representatives.(*b*)

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday of

(*a*) Desbois' case, 2 Mart. Lo. R. 185. (*b*) Const. U. S. art. 1, sec. 1.

December, unless they shall by law appoint a different day.(*a*)

1. Each house shall be judge of the elections, returns and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.(*b*)

The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.(*c*)

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof

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(*a*) Const. U. S. art. 1, s. 4.
(*b*) Ibid. s. 5.
(*c*) Const. U. S. art. 1, s. 6.

shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.(a)

By section 8, article 1, the congress shall have power—

1. 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; but all duties, imposts and excises, shall be uniform throughout the United States:

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

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

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

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

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

7. To establish post-offices and post-roads:

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

9. To constitute tribunals inferior to the supreme court:

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

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

12. To raise and support armies; but no appropri-

(a) Const. U. S. art. 1, s. 6.

ation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

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

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

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

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

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

The Senate and House of Representatives will be separately considered.

SECTION I.—OF THE SENATE.

44. In considering the Senate let us inquire, 1, into the number of senators; 2, by whom they are elected; 3, into their qualifications; 4, the time of their election; 5, the duration of their office; 6, their powers.

§ 1.—Number of Senators.

The *Senate* is composed of two members from each state, who are called *senators*.(*a*) This is fixed without any regard to the number of inhabitants in the respective states; the senators represent the states rather than the people. The Vice-President of the United States is president of the senate.

§ 2.—By whom they are elected.

45. The senators are chosen by the legislature of each state,(*b*) and in cases of vacancies, they are appointed by the executive of the state, and are then to serve until the next meeting of the legislature, which shall then fill such vacancies.(*c*)

§ 3.—Qualifications of Senators.

46. No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.(*d*)

§ 4.—Time of the election of Senators.

47. After the first election of senators, under the constitution, they were divided according to its requisition, into three classes. The seats of the first class were vacated at the expiration of the second year; the second class at the expiration of the fourth year; and the third class at the expiration of the sixth year; so that one-third may be chosen at the expiration of every second year.(*e*)

§ 5.—Duration of the office of Senators.

48. The senators are chosen and hold their office for the term of six years.

(*a*) Const. art. 1, s. 3.
(*b*) Ibid.
(*c*) Ibid.
(*d*) Const. art. 1, s. 3.
(*e*) Ibid.

§ 6.—Power of Senators.

49. In their deliberations and all their acts each senator has the right to speak and give his opinion, and they vote not by states, but each senator has a vote. The president of the senate has no vote except when the senate are equally divided, when he gives the casting vote.

The senate act in *three distinct capacities*, and to this body are delegated legislative power, executive authority, and judicial functions. A short view will be taken of each of these.

Article 1.—*Of the Legislative power of the Senate.*

50. No law can be made without the concurrence of the senate. A majority of the senate constitutes a *quorum;* this majority relates not to the states but to the members of the senate.

Article 2.—*Of the Executive authority of the Senate.*

51. By the constitution the president has power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.(*a*)

Till the treaty has been completed by the president or the agents of the United States under his direction and foreign powers, the senate take no part in the matter. It is then submitted to the senate, and, in their deliberations the president takes no part, but he gives them, when required, such information relative to it as they may want. The senate may ratify it in whole or in part, or reject the whole; or they may recommend additional articles, or modify those which have been agreed upon. In such case the treaty is again the subject of negotiation with foreign powers, if the president approve of such alterations or additions.

(*a*) Const. art. 2, s. 2, n. 2.

The senate must give their concurrence to the appointment of certain officers before they can be appointed. The constitution provides that the president shall nominate, and by and with the consent of the senate, shall appoint public ambassadors, other public ministers and consuls, judges of the supreme court and other officers of the United States, whose appointments are not therein provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.(*a*)

The proceedings of the senate, while acting on executive business, are with closed doors, and such proceedings are kept secret until the senate annul the restriction of secrecy.

Article 3.—Of the Judicial functions of the Senate.

52. Whenever an officer of the government is impeached by the house of representatives, such impeachment is to be tried by the senate. The constitution directs that the senate shall have the sole power of trying impeachments. When sitting for that purpose the senators shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.(*b*)

SECTION 2.—OF THE HOUSE OF REPRESENTATIVES.

53. The same order will be observed in considering the house of representatives which has been adopted with regard to the senate.

§ 1.—Number of Members.

54. Representatives and direct taxes shall be ap-

(*a*) Const. art. 2, s. 2, n. 2.

(*b*) Art. 1, s. 3, n. 6.

portioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and, excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.(*a*)

§ 2.—By whom they are elected.

55. Representatives are elected by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.(*b*)

§ 3.—Qualifications of members of House of Representatives.

56. No person shall be a representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.(*c*)

§ 4.—Of the time of their Election.

57. They are elected every second year. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.(*d*)

§ 5.—Duration of their Office.

58. Representatives are chosen and hold their office for the term of two years.

(*a*) Const. art. 1, s. 2, n. 3.
(*b*) Ib. art. 1, s. 2, n. 1.
(*c*) Const. art. 1, s. 2, n. 2.
(*d*) Ib. art. 1, s. 2, n. 1 and 4.

§ 6.—Power of Representatives.

59. The most important of the functions of representatives is that of legislation, but they have also a power somewhat similar to that of the grand jury. In all cases, each member has one vote. One of their members is elected speaker or president of the house, who, with the rest, has a right to vote. No law can be passed without the concurrence of the house of representatives.

The house has the exclusive right to originate bills for raising revenue; but the senate may propose or concur with amendments, as on other bills.

It shall choose its speaker and other officers; and shall have the sole power of impeachment.

CHAPTER II.—OF THE EXECUTIVE POWER.

60. The executive power is vested in a President of the United States. It will be proper to consider, 1, by whom he is elected; 2, his qualifications; 3, the time of his election; 4, the duration of his office; 5, his power and duties; 6, of the vice-president.

SECTION 1.—BY WHOM THE PRESIDENT IS ELECTED.

61. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.(a)

The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the persons voted for as president, and in distinct ballots the persons voted for as vice-presi-

(a) Const. art. 2, s. 1, n. 2.

dent; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president shall be president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But, in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.(*a*)

SECTION 2.—QUALIFICATIONS OF THE PRESIDENT.

62. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.(*b*)

(*a*) Const. Am. art. 12, n. 1.

(*b*) Const. art. 2, s. 1, n. 5.

SECTION 3.—THE TERM OF HIS OFFICE.

63. The president shall hold his office for the term of four years.(*a*)

His duties commence the fourth day of March next after his election.(*b*)

SECTION 4.—TIME OF HIS ELECTION.

64. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which shall be the same throughout the United States.(*c*)

By virtue of this clause in the constitution, congress passed an act declaring that the electors shall be appointed in each state within thirty-four days preceding the first Wednesday in December, in every fourth year succeeding the last election of president, according to the apportionment of the representatives and senators then existing. The electors chosen are required to meet and give their votes on the said first Wednesday of December, at such place in each state as shall be directed by the legislature thereof.(*d*)

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the vice-president; and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.(*e*)

SECTION 5.—OF THE POWERS AND DUTIES OF THE PRESIDENT.

65. The powers and duties of the president may be

(*a*) Const. art. 2, s. 1, n. 1.
(*b*) Act of 1st of March, 1792, ch. 8.
(*c*) Const. art. 2, s. 1, n. 4.
(*d*) Act of 1st March, 1792, c. 8.
(*e*) Const. art. 2, s. 1, n. 6.

conveniently classed into those cases where, 1, he exercises the power alone; 2, he exercises it in connection with congress; and 3, he exercises it in concurrence with the senate.

§ 1.—Where he exercises power alone.

66. He is commander-in-chief of the army of the United States, and of the militia of the several states when called into the actual service of the United States.(*a*)

He has power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.(*b*)

He may appoint all officers of the United States whose appointments are not otherwise provided for by the constitution, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.(*c*)

He shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.(*d*)

He may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relative to the duties of their respective offices.(*e*)

He shall, from time to time, give to the 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 extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such

(*a*) Const. art. 2, s. 3, n. 1.
(*b*) Ibid.
(*c*) Ib. art. 2, s. 2, n. 2.
(*d*) Const. art. 2, s. 2, n. 3.
(*e*) Ib. art. 2, s. 2, n. 1.

time as he shall think proper; he shall receive ambassadors, and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.(*a*)

§ 2.—Of the power the President exercises in connection with Congress.

67. The president has a negative on all laws passed by congress. This will be considered in another place.

§ 3.—Of the power he exercises in concurrence with the Senate.

68. This relates either to the treaty-making power, or to appointment to office.

Article 1.—*Of the Treaty-making Power.*

69. In making treaties with foreign nations the president acts, in the first place, independently and alone. When made abroad, the treaty is made through the medium of our ministers to foreign courts, under the instructions of the president. When made in this country, the secretary of state takes the place of our minister abroad, and, under like instructions. Until the treaty has been agreed upon, the senate is not consulted. When it has been agreed upon, it is submitted to the senate for their concurrence. Here it is either approved of, rejected, or amended. When amendments take place, if the president approves of the same, the treaty again becomes the subject of negotiation with the foreign power, and after it has been modified it is again brought before the senate, for its final ratification.

Article 2.—*Of the Appointing Power.*

70. The president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur;

(*a*) Const. art. 2, s. 3.

and 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, whose appointments are not therein otherwise provided for, and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.(*a*)

SECTION 6.—OF THE VICE-PRESIDENT.

71. The vice-president is chosen by the same electors, and at the same time, that the president is elected. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.(*b*)

But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.(*c*)

CHAPTER III.—OF THE JUDICIAL POWER.

72. This will be considered hereafter.

(*a*) Const. art. 2, s. 2, n. 2

(*b*) Const. Amend. art. 12, n. 3.

(*c*) Const. Am. art. 12, n. 3.

PART IV.—OF THE STATE GOVERNMENTS.

73. The several states of the Union have power to legislate on all matters within their territorial jurisdiction, except where the power has been delegated to congress, or they are forbidden by the constitution of the United States, or of their own state.

74. By the 10th section of the Constitution of the United States it is provided:

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

75. The *governments of the several states* are formed very much upon the model of the general government. They are all of a republican form. The constitution of the United States provides that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legis-

lature, or of the executive, (when the legislature cannot be convened,) against domestic violence.(*a*)

76. The *executive power* of each state is vested in a governor, elected either by the people or the legislature, who is entrusted with more or less power, and the duration of whose office varies generally from one to three years.

77. The *legislative power* is vested in a general assembly, composed of two branches, generally known by the names of senate and house of representatives.

78. The *judicial power* is in general vested in justices of the peace, courts of common pleas, courts of equity, criminal courts, and a supreme court. These have jurisdiction within the limits of their respective states, and over subject matters made cognizable by the state laws.

PART V.—OF THE PASSAGE, PUBLICATION, AND EFFECT OF LAWS.

TITLE I.—OF THE PASSAGE OF LAWS.

79. The ordinary mode of passing laws is briefly this: one day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings must be on different days; and no bill can be committed and amended until it has been twice read. In the house of representatives, bills, after being twice read, are committed to a committee of the whole house, when a chairman is appointed by the speaker to preside over the committee; the speaker leaves the chair, and takes a part in the debate as an ordinary member.

When a bill has passed one house, it is transmitted to the other, and goes through a similar form, though

(*a*) Const. art. 4, s. 4.

in the senate there is less formality, and bills are often committed to a select committee, chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated, and if the two houses cannot agree, they appoint a committee to confer on the subject.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on their journal, and proceeds to re-consider it. If, after such re-consideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise re-considered, and if approved by two-thirds of that house, it becomes a law. But in all such cases, the votes of both houses are determined by yeas and nays; and the names of the persons voting for and against the bill, are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return; in which case it shall not be a law.

TITLE II.—OF THE PROMULGATION AND PUBLICATION OF THE LAWS.

80. In order to make a law binding it must be made known; to punish a man for the violation of a law he could not know, would be tyrannical, and yet in some cases this has happened.(a) In cases of this kind a pardon is easily obtained.

The order given by the executive to cause a law to

(a) The Ann, 1 Gallis. 62; Branch Bank of Mobile *v.* Murphy, 8 Ala. 119.

be executed and to make it public, is called its *promulgation.* In the United States this, in general, is not required.

The *publication* of a law is the act of making it public. The passage of a law is a sufficient publication of it to make it obligatory, and unless another time is fixed in the statute, it commences its binding operation from the time of its date.(*a*)

In order to make known the laws of congress, that body by an act has provided that the laws should be published in the newspapers in every part of the Union.

TITLE III.—OF THE EFFECT AND SANCTION OF THE LAW.

81. Having shown what is the law, how it is made, how it is published and how it becomes binding, it will be proper now to point out its effects, who are bound by it, and who are charged with its execution.

The law commands, forbids, permits and punishes: *leges virtus hæc est imperare, vetare, permittere, punire.*(*b*)

The *sanction* of the law, then, is the punishment or reward, the good or evil which follow its observance, or the violation of its precepts, or the doing what it forbids. In another sense, the sanction of the law is that part which imposes a punishment, or bestows a recompense or reward, for a certain action.

The sanction of natural law is to be found, first, in religion, which teaches the immortality of the soul, and a future state of rewards and punishments; secondly, in the public esteem, which a good man enjoys; thirdly, in the delicious sentiment of a pure conscience; in the happiness which is enjoyed internally by the man who has nothing to reproach himself with, and

(*a*) Matthews *v.* Zane, 7 Wheat. 164; The Ann, 1 Gallis, 62; Smets *v.* Weathersbee, R. M. Charl. 537; The State *v.* Click, 2 Ala. 26; Goodsell *v.* Boynton, 1 Scam. 555; Branch Bank of Mobile *v.* Murphy, 8 Ala. 119.

(*b*) Dig. 1, 3, 7.

who has observed the dictates of the law; in the remorse which is felt by him who has violated all laws, and whose bosom is lacerated with vain regrets, and with pain from which he cannot fly; in the infamy and shame with which he is covered even in his own eyes, although he may have succeeded in concealing his turpitude from the public view.

Human laws give a stronger sanction to the precepts of natural law, as well as to the positive precepts which they have added to them. For this purpose they authorize the employment of the public force to compel every citizen to obey them. And they have carried their foresight further, by imposing punishments against their violators, and these are proportioned to the importance of each crime or misdemeanor.

The reparation in damages caused by an action forbidden in law, is also a kind of sanction.

Not unfrequently a special sanction is provided for in the law, which declares acts null which are contrary to its precepts or prohibitions. But all acts are not null which are forbidden by law. No system of legislation can, perhaps, be found in which all such acts are void. This would, in many cases, produce injustice, and the distinction has been made between those statutes which provide that contracts violating them shall be void, and those which do not so direct.(*a*)

For example, a clergyman is forbidden to marry minors; he marries them, and by that act subjects himself to a penalty; but unless the marriage be declared void by the statute, it is valid.

82. The law, as before observed, commands and forbids. The principal and direct effect of a command or prohibition is to bind those to whom the law applies. Every obligation to obey, therefore, presumes a law

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(*a*) See Mabin *v.* Coulon, 4 Dall. 298: Biddis *v.* James, 6 Binn. 321; Seidenbender *v.* Charles, 4 S. & R. 159. This subject is more fully investigated hereafter.

which commands; and every law produces a binding obligation.

An *obligation* is a moral necessity to perform actions commanded by the law, or to abstain from actions forbidden by it, and to suffer those which are permitted.

No *right* can exist in favor of one person, unless there is imposed a *duty* on another. If I have the right to go over your field, I can have it only by virtue of some law, or what comes to the same thing, by virtue of an agreement sanctioned by law. It is your duty to let me pass through your field; your are obliged to permit me to do so.

Thus law, obligation, right and duty, are correlative terms. A *correlative* term is one which designates things which cannot exist one without the other; for example, father and son, etc.

The obligation which arises from the law is not a *physical* or *absolute* constraint. The law binds by the consideration of the punishments or rewards annexed to the infractions of its prohibitions, or to the observance of its precepts.

TITLE IV.—WHAT ADVANTAGES OF THE LAW AN INDIVIDUAL MAY RENOUNCE.

83. Laws have for their principal object to regulate the rights of citizens with each other, to declare what one may require to be done and what another must perform. As every one is free to renounce his rights, it follows that every citizen may *renounce* those provisions of law which are made in his favor, and which interest him only.

But as no man can control the rights of another, or what concerns the public, he cannot, by his agreement, renounce those provisions of law which concern public order or good morals.

The rule that a man may renounce the advantages which the law gives him, is subject to many exceptions. One may renounce an acquired right; for

example, the right of being an heir after the estate is cast upon him. But he cannot always renounce *future advantages* to the *future effect* of a law, although its object may be to regulate the rights of individuals only.

The faculty of making a will may be given as an example. It is introduced for the benefit of individuals only; so is the right to plead the act of limitations; yet no man can deprive himself of the right to make a will, or to plead the act of limitations, before the right to plead it has been acquired.

The rule, then, that an individual may renounce a right given him by law, is subject to several exceptions: 1, whenever the law itself forbids the renunciation of such right; 2, whenever it is clear that it is positively prohibited; 3, whenever the provisions of the act are founded on some political or public cause, or concern the interest of a third person.

TITLE V.—OF THE PERSONS BOUND BY THE LAW.

84. The sovereign authority can extend only over those who are subject to it; it cannot, therefore, regulate the rights of foreigners. But if they come within its territory, either to reside or to travel, they are considered as submitting themselves to the authority of the laws of the country, and they are bound by them. This is perfectly reasonable, for during their stay in the country they are protected by its laws.

TITLE VI.—OF THE APPLICATION OF THE LAW, AND BY WHOM IT IS TO BE APPLIED.

85. Having examined the principal effects of the law, and the persons who are bound by it, the consideration of the persons who are to apply it, and how it is to be applied, remains to be examined.

We have seen that the executive and the legislative powers are separated from the judicial. This power is vested by the constitution and laws of the United

States in the judiciary of the general government; and by the constitution and laws of each state in what are called the state courts. The examination of the jurisdiction and powers of the several courts will be deferred till we come to consider the remedies which the law has provided for the establishment of right and the repression of wrong.

TITLE VII.—OF THE POWER TO INTERPRET THE LAW.

CHAPTER I.—GENERAL RULES OF INTERPRETATION.

86. The judges are bound to interpret or construe the law with fidelity and skill; they are required to judge according to law, not to judge the law. When the law is doubtful or ambiguous they are bound to declare what it is, and they cannot refuse to give an interpretation because it is obscure.

By *interpretation* is meant the judicial exposition of the meaning of the law; or it is the collection of its meaning out of signs the most probable.(*a*)

Construction has nearly the same meaning as interpretation.

In the supreme court of the United States the rule which has been uniformly observed "in construing statutes, is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification when applied to British statutes which are adopted in any of these states. By adopting them, they become our own, as entirely as if they had been enacted by the legislature of the state."

The received construction, in England, at the time they were admitted to operate in this country—indeed, to the time of our separation from the British empire—may very properly be considered as accompanying the statutes themselves, and forming an integral part

(*a*) 1 Pow. on Contr. 370.

of them. But, however we may respect the subsequent decisions, (and certainly they are entitled to great respect,) we do not admit their absolute authority. If the English courts vary their construction of a statute, which is common to the two countries, we do not hold ourselves bound to fluctuate with them.(*a*)

CHAPTER II.—KINDS OF INTERPRETATION.

87. There are two kinds of construction; the literal or strict, and the liberal.

SECTION 1.—THE LITERAL OR STRICT CONSTRUCTION.

88. The *strict* or *literal* interpretation of laws is applied to penal statutes. It is a rule that penal statutes must be construed strictly, but not against the manifest intention of the legislature, or so as to produce an absurdity.(*b*)

Penal statutes are to be construed strictly, so as to bring the case within the definition of the law; but this rule is not so inflexible as to require that cases which can be decided by ordinary interpretation shall be construed as not coming within the law.(*c*)

A question frequently arises as to what is a *penal statute*. In general it is one which inflicts a punishment for the violation of its provisions or commands.(*d*) But a statute for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, is not, in a strict sense, penal, although it inflicts a penalty.(*e*) And a statute, penal as to some of its

(*a*) Cathcart *v.* Robinson, 5 Pet. R. 280.

(*b*) Commonwealth *v.* Loving, 8 Pick. 370; Reed *v.* Davies, 8 Pick. 514; Crawford *v.* The State, Minor, 143; Butler *v.* Ricker, 6 Greenl. 268; The Enterprize, Paine, 32; U. States *v.* Wiltberger, 5 Wheat. 76; Dagget *v.* The State, 4 Conn. 61; Sprague *v.* Birdsall, 2 Cowen, 419; The Mayor *v.* Davis, 6 Watts & S. 269; United States *v.* Wigglesworth, 2 Story, 369.

(*c*) U. States *v.* Wilson, Baldw. 78.

(*d*) 1 Bl. Com. 88; Esp. on Penal Act. 1; Bosc. on Conv. h. t.; Sewell *v.* Jones, 9 Pick. 412.

(*e*) Taylor *v.* U. States, 3 How. U. S. R. 197.

provisions, if it is generally beneficial, may be equitably construed.(*a*)

Statutes in derogation of the common law are to be construed strictly.(*b*)

SECTION 2.—OF THE LIBERAL CONSTRUCTION.

89. In civil cases, a liberal interpretation must be adopted in order to discover the meaning of the law, where it seems silent, and the courts are required to give a judgment and state what was the intention of the legislature; they are then the speaking law, *lex loquens*.

But this interpretation is not to be arbitrary, it ought to be founded on equity, provided that equity be directed by science; for without this the judge should tremble in his seat in the temple of justice, and without this the mind will only wander in search of a phantom of equity purely imaginary.

90. A number of *rules* have been adopted, the observance of which will enable the judge to discover the intention of the legislature, and thus decide what the law is. They are principally the following:

1. When the law is *clear*, it must not be eluded under the pretext of grasping its intention.(*c*) Words must be used in their usual and most known signification, unless they appear plainly to have been used in another sense;(*d*) and in the construction of an obscure law, the most natural sense is to be preferred, or that which is the least difficult of execution.(*e*)

2. To ascertain and fix the true sense of a law, we must examine the *context*, and if it can be gathered from a subsequent statute, in *pari materia*, this will

(*a*) Sickles *v*. Sharp, 13 John. 497.

(*b*) Melody *v*. Reab, 4 Mass. 471; Gibson *v*. Jenney, 15 Mass. 205; Lock *v*. Miller, 3 Stew. & Port. 13.

(*c*) Crocker *v*. Crane, 21 Wend. 211; Bartlet *v*. Morris, 9 Port. 266.

(*d*) Merchants' Bank *v*. Cook, 4 Pick. 405.

(*e*) 1 Bl. Com. 60.

amount to a legislative declaration of its meaning, and will govern the construction of the first statute.(*a*) And a mistake apparent in one part of a statute, may be corrected by another part.(*b*)

3. The construction of each law must be made in relation to the *subject matter* of the statute.(*c*)

4. Statutes must be construed as to their *effects* or *consequences*, so that where words bear either none or a very absurd signification, the intention ought to be adopted.(*d*)

5. A statute should be construed by considering the *reason* and *spirit* of the act. But this can only take place when the plain import of the words is dubious.(*e*)

6. Mere *failure of justice* is not a sufficient ground for construing a statute against its clear meaning, so as to give a court jurisdiction.(*f*)

7. A statute ought to be so construed, if possible, so that *every word* shall have some force and effect,(g) and that no clause, sentence or word, shall be superfluous, void, or insignificant.(*h*)

8. Statutes are to be construed *prospectively*, unless the contrary intention of the legislature be clearly expressed.(*i*)

9. The rules for construing statutes are *the same* in equity that they are at law.(*k*)

10. A posterior law shall be construed to repeal an anterior one, when they are inconsistent

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(*a*) U. States *v.* Freeman, 3 How. U. S. R. 556.

(*b*) Blanchard *v.* Sprague, 3 Sumn. 279.

(*c*) Ruggles *v.* Washington County, 3 Mis. 496; Ex parte Hall, 1 Pick. 261; Woodworth *v.* Paine, Breeze, 294; Jacob *v.* U. States, 1 Brock. 520.

(*d*) Henry *v.* Tilson, 17 Verm. 479.

(*e*) Kilby Bank *v.* Petitioners, 23 Pick, 93; Opinion of the Justices, 22 Pick. 571.

(*f*) Pitman *v.* Flint, 10 Pick. 506.

(*g*) Opinion of the Justices 22 Pick. 571.

(*h*) Jones *v.* Dubois, 1 Harr. 285; Hutchen *v.* Niblo, 4 Blackf. 148.

(*i*) Hastings *v.* Lane, 3 Shepl. 134; Garret *v.* Doe, 1 Scam. 335; Guard *v.* Rowan, 2 Scam. 499; Forsyth *v.* Marbury, R. M. Charlt. 324.

(*k*) Talbot *v.* Simpson, Pet. C. C. Rep. 188.

with each other.(*a*) *Posteriora derogant prioribus* is the rule.

TITLE VIII.—OF THE REPEAL OF LAWS.

CHAPTER I.—WHAT IS A REPEAL.

91. To *repeal* a law is to annul it and destroy all its force and effect. In the civil law, the term used for repeal is *abrogation*. It differs from *derogation*, which is only a partial abrogation; *derogatur legi, cùm pars detrahitur; abrogatur legi, cùm prorsùs tollitur*.(*b*) Laws are repealed by new laws, and they are derogated from either by provisions in the new laws, or by usage, which has acquired the force of law.

92. The repeal is either express or implied; it is *express*, when it is literally declared by the new law, either in general terms, as where a provision declares all laws contrary to the repealing act to be repealed, or in special terms, when such and such laws, which are named and identified, are repealed.(*c*)

93. It is *implied*, when the new law contains provisions contrary to those of former laws, without expressly repealing them: *posteriora derogant prioribus* is the maxim in such cases, as has been already observed,(*d*) though the law does not favor repeals by implication.(*e*)

The rule *posteriora derogant prioribus* must, however, be applied with great discretion; for as the laws ought not to be changed, modified or repealed, except with great consideration, the repeal of the old by the new laws ought not to be presumed; there must be a for-

(*a*) Morris *v.* Delaware and Schuylkill Canal, 4 W. & S. 461.
(*b*) Dig. 50, 16, 102.
(*c*) The State *v.* Stinson, 5 Shepl. 154.
(*d*) Milne *v.* Huber, 3 McLean, 212.
(*e*) Snell *v.* Bridgewater, 24 Pick. 296; Bowen *v.* Lease, 5 Hill, 221; Wyman *v.* Campbell, 6 Port. 219; Street *v.* Commonwealth, 6 W. & S. 209.

mal conflict between the two laws, in order that the old shall be impliedly repealed by the new.(*a*)

When the laws are in conflict only as to some points, the new derogates from the old only as to those points, and the remainder is in full force.

94. Usage and custom have also much force to construe or abrogate old laws, and *non user* for a great length of time will have the effect of a repeal. But it must be a very strong case which will have that effect.(*b*)

CHAPTER II.—EFFECT OF A REPEAL OF A LAW.

95. Whenever rights have become vested by virtue of a statute, which is afterwards repealed, such rights are not affected by the repeal.(*c*) But inchoate rights, generally, derived from a statute, are lost by its repeal, unless expressly excepted.(*d*)

When a penal statute is repealed, a violation before its repeal cannot be punished afterwards, for then there is no law to authorize the punishment.(*e*) In general there is an exception as to the extent of the repeal, and the statute remains in force as to such violations.

Proceedings commenced under a statute are arrested by its repeal, because after that there is no law authorizing them.(*f*)

At common law the repeal of a statute, which was itself a repealing statute, revives the first.(*g*) But in some states this rule has been changed by a legislative act.(*h*)

(*a*) Kinney *v.* Mallory, 3 Ala. 626; Bowen *v.* Lease, 5 Hill. 221; In the matter of Brown, 21 Wend. 316; Comm. *v.* Cromly, 1 Ashm. 179; Daviess *v.* Fairbairn, 3 How. U. S. R. 636.

(*b*) Wright *v.* Crane, 13 S. & R. 452; Ruthf. Inst. B. 2, c. 6, s. 19; Merl. Répert. Désuetude.

(*c*) Davis *v.* Minor, 1 How. Mis. 183; James *v.* Dubois, 1 Harr. 285.

(*d*) Butler *v.* Palmer, 1 Hill, 324.

(*e*) Comm. *v.* Welsh, 2 Dana, 330; Road in Hatfield, 4 Yeates, 392; Anon. 1 W. C. C. 84; Atto *v.* Comm. 2 Virg. Cas. 382.

(*f*) North Canal Street Road, 10 Watts. 351.

(*g*) Directors *v.* Railroad Co. 7 W. & S. 236; Comm. *v.* Churchill, 2 Met. 118; Comm. *v.* Mott, 21 Pick. 492.

(*h*) Civ. Cod. Lo. art. 23.

TITLE IX.—OF THE SEVERAL KINDS OF LAWS.

96. Laws may be divided into four principal kinds, namely, 1, Natural law; 2, the Law of Nations; 3, Public law; 4, Private or civil law.

Having considered these general laws in another place,(*a*) this title will be confined to the laws of the United States and of the several states. When considered as to their several kinds, laws are express or tacit; when as to their object, they are civil and criminal, they relate to the law merchant, the municipal law, and the law martial; when as to their duration, they are immutable and arbitrary; when as to their origin, they are national or domestic laws and foreign laws; when as to their extent, they extend over the United States, over their territories, and over ships.

97. Blackstone, Hale and others, have divided laws, when considering the source whence they arose, into *lex scripta* and *lex non scripta*. By the former they designate the statute law, and by the latter the common law.(*b*) This division is not exact as applied to American law. Our constitutions, treaties, orders or rules of court, would come within the definition of *lex scripta* as well as statutes; and the common law is not literally *lex non scripta*.

A preferable mode of dividing them has been adopted. They are *express*, or made directly and expressly for the people by the legislative power; and *tacit*, when they receive their force from the general adoption of them by the people.

CHAPTER I.—OF EXPRESS LAW.

98. The *express laws* are, first, the constitution of the United States; secondly, the treaties made with foreign powers; thirdly, the acts of congress; fourthly, the constitutions of the respective states; fifthly, the

(*a*) Ante, n. 9, et seq. (*b*) 1 Bl. Com. 63.

laws of the several state legislatures; sixthly, laws made by inferior legislative bodies, such as the councils of the municipal corporations, and *general rules* made by the courts.

SECTION 1.—OF THE CONSTITUTION OF THE UNITED STATES.

99. The *Constitution of the United States* is an act of the people themselves, made by their representatives elected for that purpose. It is the supreme law of the land and binding on all future legislatures, until it shall be altered by the people in the manner provided for in the instrument itself.

SECTION 2.—OF TREATIES.

100. Treaties constitutionally made are declared to be the supreme law of the land.(*a*) A *treaty* is a compact made between two or more independent nations, with a view to the public welfare. Treaties are for a perpetuity, or for a considerable time. When contracts between nations are performed by a single act, and their execution is at an end at once, they are not called treaties, but *agreements, conventions or pactions*.

Treaties are made by the president and senate on the part of the United States.(*b*) No state of the Union can enter into a treaty with a foreign government, or with another state.(*c*)

SECTION 3.—OF STATUTES.

101. Acts and resolutions of congress, enacted constitutionally, are of course binding. These are called *statutes*, and they are of several kinds, namely, constitutional and unconstitutional; public and private; declaratory and remedial; preceptive, prohibitive, permissive and penal; temporary and perpetual; affirmative and negative; prospective and retrospective.

(*a*) United States *v.* Schooner Peggy, 1 Cranch, 103; Lessee of Gordon *v.* Kerr, et al. 1 Wash. C. C. 322.

(*b*) Ante, n. 51; Const. art. 2, s. 2, n. 2.

(*c*) Const. art. 1, s. 10, n. 1 and 2.

SECTION 4.—OF CONSTITUTIONAL AND UNCONSTITUTIONAL LAWS.

102.—1. A *constitutional law* is one made by the legislative power properly organized, according to the requisitions of the constitution. Such a law is binding upon all the people, citizens and others, who are within the territorial jurisdiction of the legislature.

103.—2. An *unconstitutional law* is one made in contravention of the requisitions of the constitution, and for that reason it is, *ipso facto*, void, because the constitution has greater force than any law, it being the supreme law of the land, as already observed.

The courts have the power, and it is their duty, when the law is unconstitutional, to declare it to be so; but this is not done, except in a clear case, and, as an additional guard against error, the supreme court of the United States refuses to take up a case involving a constitutional question, when the court is not full.(*a*)

SECTION 5.—OF PUBLIC AND PRIVATE STATUTES.

104.—1. *Public* statutes are those of which the judges will take notice without pleading. They are of universal rule and regard the whole community.(*b*)

105.—2. *Private* statutes are those which the judges will not take notice of without pleading. They concern only private persons and private concerns.(*c*) But a private statute may become public by being so declared by the legislature.(*d*)

SECTION 6.—OF DECLARATORY AND REMEDIAL STATUTES.

106.—1. A *declaratory* statute is one which is passed

(*a*) Mayor of New York *v.* Miln. 9 Pet. 85.

(*b*) Gorham *v.* Springfield, 8 Shepl. 58; New Portland *v.* New Vineyards, 4 Shepl. 69; Pierce *v.* Kimbal, 9 Greenl. 54; Case of Rogers, 2 Greenl. 303.

(*c*) 1 Bl. Com. 86.

(*d*) Brookville Ins. Co. *v.* Records, 5 Blackf. 170; Bac. Ab. Statutes, (F.)

to put an end to a doubt as to what the common law is, and which declares what the law is and has been.(a)

107.—2. A *remedial* statute is one which supplies such defects, and abridges such superfluities in the common law, as may have been discovered.(b) This is done by enlarging or restraining the common, and these remedial statutes are therefore called *enlarging* statutes or *restraining* statutes.

The term remedial statute is also applied to one which gives the party injured a remedy; in some respects such statute is a penal law.(c)

SECTION 7.—OF PRECEPTIVE, PROHIBITIVE, PERMISSIVE, AND PENAL STATUTES.

108.—1. When the statute commands certain actions, and regulates the forms and acts which ought to accompany them, it is called a *preceptive* statute.

109.—2. When it forbids all actions which disturb the public repose, or injury to the rights of others, or crimes and misdemeanors; or when it forbids certain acts in relation to the transmission of estates, the capacity of persons and other objects, it is a *prohibitive* statute.

110.—3. When it allows certain actions without commanding them; for example, when it allows any one who is competent, to make a will; such a statute is *permissive*.

111.—4. *Penal* statutes are those which order or prohibit a thing under a certain penalty.

SECTION 8.—OF TEMPORARY AND PERPETUAL STATUTES.

112.—1. A *temporary* statute is one which is limited in its duration at the time of its enactment. It continues in force until the time of its limitation has expired, unless sooner repealed.

113.—2. A *perpetual* statute is one for the continuance of which there is no limited time, although

(a) 1 Bl. Com. 86. (b) Ibid. (c) Esp. Pen. Act. 1.

it be not expressly declared to be so. If, however, a statute which does not itself contain any limitation, is to be governed by another which is temporary only, the former will also be temporary and dependent upon the existence of the latter.(*a*)

SECTION 9.—OF AFFIRMATIVE AND NEGATIVE STATUTES.

114.—1. An *affirmative* statute is one which is enacted in affirmative terms; such statute does not take away the common law. If, for example, a statute without negative words, declares that when certain requisites shall have been complied with, deeds shall have in evidence a certain effect, this does not prevent their being used in evidence, though the requisites have not been complied with, in the same manner they might have been before the statute was passed.(*b*)

115.—2. A *negative* statute is one expressed in negative terms, and so controls the common law, that it has no force in opposition to the statute.(*c*)

SECTION 10.—OF PROSPECTIVE AND RETROSPECTIVE STATUTES.

116.—1. A *prospective* law is one which regulates the future, and is the only one which can be just, for no man can conform himself to the law which is yet unknown to him.

117.—2. A *retrospective* statute is one which is made to operate upon some subject, contract or crime, which existed before its enactment.

These laws are generally unjust, and are, to a certain extent, forbidden by that article in the Constitution of the United States which prohibits the passage of *ex post facto* laws, or laws impairing the obligation of contracts.

(*a*) Bac. Ab. Statutes, (D.)
(*b*) Jackson *v.* Brady, 2 Cain. R. 169.
(*c*) Bro. Parl., pl. 72; Bac. Ab. Statutes, (G.)

An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed.(*a*) This prohibition applies only to crimes.(*b*)

The right to pass retrospective laws, subject to the exceptions mentioned, exists in the several states, if not forbidden by their own constitutions.(*c*) And instances are to be found where the legislature have set aside a decree of a court,(*d*) and opened a judgment.(*e*)

SECTION 11.—OF CONSTITUTIONS AND LAWS OF THE STATES.

118. The constitution and laws of the respective states, if not in conflict with the constitution of the United States, are of binding force in the states respectively.

SECTION 12.—OF LAWS MADE BY INFERIOR LEGISLATIVE BODIES.

119. Laws made by lawful inferior legislative bodies, usually known by the name of *ordinances*, have full force within their respective jurisdictions. Such are the ordinances of a municipal corporation. And *general rules* and *orders* of court, when not violating the constitution or laws, have the effect of laws in such courts.

CHAPTER II.—OF THE TACIT LAWS.

120. The *tacit* laws, which derive their authority from the common consent of the people, without any legislative enactment, may be subdivided as follows:

SECTION 1.—THE COMMON LAW.

121. The *common law* is a system of rules which have been used by the universal consent and imme-

(*a*) Fletcher *v.* Peck, 6 Cranch, 138.
(*b*) Story, Const. § 1339.
(*c*) Hess *v.* Werts, 4 S. & R., 364.
(*d*) Calder *v.* Bull, 3 Dall. 386.
(*e*) Braddee *v.* Brownfield, 2 W. & S. 271.

morial practice of the people, without receiving the express authority of the legislative power. It is derived principally from two sources, the common law of England, and the practice and decisions of our own courts. No general rule has been adopted to ascertain what part of the English common law is valid and binding. To run the line of distinction is a subject of embarrassment to the courts, and the want of it a great perplexity to the student.(*a*)

It is generally binding where it has not been superseded by the Constitution of the United States, or of the several states, or by their legislative enactments, or varied by custom, and when it is founded in reason, and is consonant to the genius and manners of the people.(*b*) Into the common law have been grafted many principles derived from other systems.

Customs form a part of the common law. A custom is a usage which has acquired the force of law. It derives its binding authority from the tacit consent of the legislature and the people; it follows, therefore, that there can be no custom in relation to a matter regulated by statute. Law cannot be established or abrogated, except by the sovereign will; but this will may be expressed, or implied or presumed, and whether it manifests itself by words or by acts is of little consequence.

To make a good custom, it must be public, peaceable, uniform, general, continued, reasonable and certain, and it must have continued for a "time whereof the memory of man runneth not to the contrary." It then acquires the force of law.

Customs are general or particular. 1. By *general custom* is meant the common law itself, by which proceedings and determinations in court are guided. 2. *Particular customs* are those which affect the inhabitants of some particular districts only.

(*a*) Kirby R. Pref.

(*b*) 1 Gallis. 20; Bains *v.* The Schooner James and Catherine, Bald. 554; Parsons *v.* Bedford, 3 Pet. 446.

SECTION 2.—OF THE ROMAN LAW.

122. The *Roman* or *civil* law has furnished many rules, and is constantly supplying the common law with maxims which appear there without any acknowledgment of their paternity. This law is the source of wisdom, from which many of our judges have drawn with unsparing hands, to adorn their judgments. The proceedings of the courts of equity, and many of the admirable distinctions which manifest their wisdom, flow from this source. And from this great store-house the courts of admiralty have borrowed most of the laws which govern in admiralty cases. The civil law is to be found in the Institutes of Justinian, the Pandects, the Novels, and the Code,(*a*) and their numerous commentators.

SECTION 3.—OF THE CANON LAW.

123. The *Canon* law is a system of Roman ecclesiastical law, relative to such matters as the church of Rome either has or pretends to have jurisdiction over. Many of the rules of this system have been adopted by the English ecclesiastical law, and they have been incorporated into ours. Perhaps all, or at least a great number of rules relating to administrations, wills, and marriages, have been derived from the ecclesiastical law.(*b*)

CHAPTER III.—OF THE OBJECTS OF THE LAW.

SECTION 1.—OF CIVIL AND CRIMINAL LAWS.

124. Those laws which regulate civil matters between individuals, are called *civil laws*, in contradistinction to those which regulate criminal matters, and

(*a*) Bouv. L. D. Law, Civil. By the phrase Civil Law, is meant the whole body of Roman jurisprudence promulgated by Justinian and his successors. This does not include the Jus Ante-Justinianeum, a part of which was composed of the Laws of the Twelve Tables. Walker's Inquiry, 26, 27.

(*b*) 1 Bl. Com. 82; Bouv. L. D. Law, Canon.

provide for the repression and punishment of crimes, which are called *criminal laws*.

SECTION 2.—OF LAW MERCHANT.

125. Those which form a system of customs acknowledged and taken notice of by all commercial nations, are called the *law merchant*. These customs constitute a part of the general law of the land; and, being part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio*.(*a*)

SECTION 3.—OF MUNICIPAL LAW.

126. *Municipal* law. This has been already considered.(*b*)

SECTION 4.—OF MARTIAL LAW.

127. *Martial* law. This is a code of laws established for the government of the army and navy of the United States. Its principal rules are to be found in the Articles of War. The violations of this law are to be tried by a court martial. A military commander may, in extreme cases, declare a district of country or a city under martial law; but he has no right to suspend the *habeas corpus* act.(*c*)

CHAPTER IV.—OF IMMUTABLE AND ARBITRARY LAWS.

SECTION 1.—OF IMMUTABLE LAWS.

128. Those laws are *immutable* which are founded on the laws of nature, and if ever altered by men, are not binding, because the laws of God are superior to all human laws.

SECTION 2.—OF ARBITRARY LAWS.

129. An *arbitrary* law is one made by the legisla-

(*a*) See Beawes, Lex Merc.; Cain. Lex Merc. Am.; Pardes. Dr. Com.
(*b*) Ante, n. 11.
(*c*) Johnson *v.* Duncan, 3 Mart. Lo. R. 531.

tor, simply because he wills it, and is not founded in the nature of things; such law, for example, as the tariff law, which may be high or low.

CHAPTER V.—OF NATIONAL OR DOMESTIC AND FOREIGN LAWS.

SECTION 1.—OF NATIONAL OR DOMESTIC LAWS.

130. Laws enacted by the government of the United States, duly constituted, are *national* or *domestic* laws. These have a binding force over the whole country, as will be shown in the next chapter.

The laws of each state are obligatory on all persons in the state, but do not extend beyond their territorial jurisdictions. Considered with regard to their connection with each other, the states are foreign to one another.

SECTION 2.—OF FOREIGN LAWS.

131. The laws of a foreign country are said to be *foreign laws*. They have no force to regulate any thing out of their jurisdiction; but sometimes contracts are made in a foreign country, which are broken in this, and a remedy is sought here. In such case, the matter in dispute is to be adjudicated in this country by the law of the country where the contract was made.(*a*)

But there is an exception to the universal validity of this rule. A foreign law, which violates the law of nature, or the laws of this country, or which opposes our national policy or institutions,(*b*) will not be enforced here.

CHAPTER VI.—OVER WHAT COUNTRIES AND PLACES THE LAWS EXTEND.

SECTION 1.—LAWS EXTEND OVER THE UNITED STATES.

132. The laws of congress extend over all the

(*a*) Story, Confl. of Laws, § 242.
(*b*) Story, Confl. of Laws, § 246 to § 260.

United States. Not only those which originally formed the federal compact, but also over those which have been admitted since, whether they were formed out of the original territory, or of that acquired from France, by the treaty which ceded Louisiana to the United States; Florida from Spain; or that which was annexed by an agreement with the independent republic of Texas, and which annexation has since been recognized and sanctioned; nor to the additional territory which has been granted to the United States, by a treaty made with Mexico.

How far the country extends into the *open sea*, is a question not easily solved. Though the open sea be not capable of being possessed as private property by a nation, yet the waters on the coast to a certain extent are considered as belonging to the territory. By the law of nations, this space is limited to the distance to which a cannon can throw a ball,(*a*) though a claim extending farther than this has been made by the United States.(*b*)

The constitution provides that "new states may be admitted by congress into this Union; but no new state shall be formed by the junction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of congress."(*c*)

These states, when once established, are considered as upon an equal footing with the original states, and the laws of the Union bind them.

SECTION 2.—OF THE TERRITORIES OF THE UNITED STATES.

133. By *territory* is understood, in the sense in which this word is used in the constitution, that portion of the country subject, and belonging to the

(*a*) Vatt. liv. 1, c. 23, n. 289, in fin.; Chit. Law of Nat. 113; Marten's Law of Nat. B. 1, c. 8, s. 6; 3 Rob. Adm. R. 102; 3 Hagg. Adm. R. 257.
(*b*) 1 Kent, Com. 29, 30. But see Serg. Const. Law, 219, 2d ed.
(*c*) Const. art. 4, s. 3, n. 1.

United States, which is not within the boundaries of any of them, or within the District of Columbia.

The constitution directs that "the congress shall have power to dispose of, and make all needful rules and regulations, respecting the territory or other property belonging to the United States."(a)

Some of these territories are organized by act of congress, and have a government to make their local laws, generally having the powers which have been retained by the states; with courts established to administer justice. Others are not organized, and these are regulated altogether by the laws of the Union.(b)

SECTION 3.—JURISDICTION OVER SHIPS.

134. The laws of the United States extend over all merchant ships owned by citizens of the United States, and ships of war of the United States in the open sea generally, or while lying in a foreign port or place, and also over the crews.(c)

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135. Having taken this general view of the laws, the consideration of their application to persons, to things, and to actions, will next be the subject of inquiry. For this purpose this work will be divided into five books. In the first, we will treat of persons; in the second, of things; injuries and wrongs will be the subject of the third; in the fourth, will be explained what remedies can be had at law for injuries; and in the fifth, the nature and proceedings in equity.

(a) Const. art. 4, s. 3, n. 2.
(b) Story on the Const. § 1318.
(c) Act of Sept. 24, 1789, s. 9 and 11; Act of 1790, c. 9; Act of March 3, 1825, s. 5; 1 Kent, Com. 362, 363.

BOOK I.—OF PERSONS.

PART I.—OF NATURAL AND ARTIFICIAL PERSONS.

136. Persons are divided into natural and artificial. These will be considered separately.

TITLE I.—OF NATURAL PERSONS.

CHAPTER I.—WHO IS A PERSON.

137. Men, women and children are called natural persons; but, in another sense, by person is meant the part which a man plays in society. In law, man and person are not exactly synonymous terms.(*a*) Any human being is a man,(*b*) whether he be a member of society or not, and whatever may be the rank he holds, whatever may be his age, his sex, etc. A person is a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes.(*c*) A slave, though a man, is in general con-

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(*a*) Toullier has given us the derivation of the word *person*, which will render sufficiently clear its true meaning. He says,

"The word *person*, in its primitive and natural sense, signifies the mask with which actors, who played dramatic pieces in Rome and Greece, covered their heads. These pieces were played in public places, and afterward in such vast amphitheatres, that it was impossible for a man to make himself heard by all the spectators. Recourse was had to art; the head of each actor was enveloped with a mask, the figure of which represented the part he was to play, and it was so contrived that the opening for the emission of his voice, made the sounds clearer, and more resounding, *vox personabat:* whence the name *persona* was given to the instrument or mask which facilitated the resounding of his voice. The name *persona* was afterward applied to the part itself, which the actor had undertaken to play, because the face of the mask was adapted to the age, and to the character of him who was considered as speaking, and sometimes it was his own portrait. It is in this last sense of personage, or of the part which an individual plays, that the word *persona* is employed in jurisprudence, in opposition to the word man, *homo*. When we speak of a person, we only consider the state of the man, the part he plays in society, abstractedly, without considering the individual."—Toull. Dr. Civ. Français, liv. 1, n. 168.

(*b*) Bouv. L. D. Man. (*c*) Toull. Dr. Civ. Fr. liv. 1, n. 168.

sidered not as a person, but a thing. For some purposes he is considered a person.(*a*)

CHAPTER II.—OF THE STATE OR CONDITION OF A PERSON.

138. The word *state* or *condition* of persons, has various acceptations. When we speak of a person, we consider only the part a man plays in society, without taking into view the individual. State and person are then correlative terms.

If we inquire into its origin, the word state will be found to come from the Latin *status*, which is derived from the verb *stare*, *sto*, whence has been made *statio*, which signifies the place where a person is located, *stat*, to fulfil the obligations which are imposed upon him.(*b*)

State, then, is that quality which belongs to a person in society, and which secures to, and imposes upon him, different rights and duties, in consequenc of the differences of that quality.

139. Although all men come from the hands of nature upon an equality, yet there are among them marked *natural* differences. The distinctions of sex, parentage, age, youth, etc., all come from nature.

To these natural qualities, the civil or municipal laws have added distinctions which are purely *civil* and *arbitrary*, founded on the manners of the people, or the will of the legislature. Such are the differences which these laws have established between citizens and aliens, between magistrates and private

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(*a*) State *v*. Thackam, 1 Bay, R. 358. In the fourth article of the constitution of the United States, the word person is used in the sense of man; "no person held to labor," evidently refers to slaves.

(*b*) At Rome, by state was understood the inscription of the name of an individual on the registers, or census. The state was the same as *caput*, head; by *capite censi* was meant those who had declared to the censors that they had nothing of their own, neither property nor posterity. They could then be numbered only by their heads. None were inscribed on the list or census except freemen, citizens, and heads of families. And thus the word head, *caput*, signified simply a state of *liberty*, of *citizenship*, and of *family*. The slave, who was deprived of all state, was said to have no head: *caput non habere*.

citizens or subjects; and between freemen and slaves.

140. Although these latter distinctions are more particularly subject to the civil and municipal law, because to it they owe their origin, it nevertheless extends its authority over the natural qualities, not to destroy or weaken them, but to confirm them, and to render them more inviolable by positive rules and by certain maxims.

141. This union of the civil or municipal law with the law of nature, form among men a third species of differences which may be called *mixed*, because they participate of both, and derive their principle from nature and the perfection of the law; for example, infancy, or the privileges which belong to it, have their foundation in the law of nature; but the age, and the term of these prerogatives, are determined by the civil or municipal law.

142. From these premises, it is easy to perceive that three sorts of different qualities, which form the state or condition of men, may be distinguished: those which are purely natural, those which are purely civil, and those which are composed of natural and civil or municipal law.

143. If we analyze what are the qualities which compose the state of a person, we will find they have a necessary or essential connection with public or political, or private right, and that they are either *qualities of state* or *distinctions of state*, because they render the party either able or unable to participate in the public state or the private state.

144.—1. Let us commence, for example, with public or political right. It is a question as to his state, which settles whether a man is a freeman or a slave, a citizen or an alien; because if he is free and a citizen, he is qualified to render service to his country in all public stations or offices; if, on the contrary, he is a slave or an alien, he is excluded by both of these

qualities from filling any functions which are connected with public or political right, and from all advantages which the law grants only to those who are entitled to participate in them.

145.—2. The rule is the same with regard to private rights. The state of a person is confined to the regulation of contracts or engagements and descents. It is used to determine what connections the private state of an individual, and his contracts or engagements, or his rights to inherit by descent, have with each other, and what renders men capable or incapable of making contracts or taking by descent.

Thus, the state of majority renders a man capable of entering into all sorts of obligations; that of infancy prevents him from forming many: these qualities must be classed among those which determine the state of a person.

The quality of a legitimate or an illegitimate child, renders him capable or incapable of taking by descent; it is, therefore, the quality of the person, in this case, which constitutes his state.

146. The *public state* consists in a capacity founded in nature, or the law, or arising from both, to participate in all offices, honors, and all other prerogatives, which are the right of those who are considered members of the nation.

147. The *private state* is a quality, which no agreement can alone establish, but which is the effect of natural or civil law, or of both of them, and which renders those who possess it capable or incapable of certain kinds of conventions or agreements; or even of all agreements, and by which they are capable or incapable of taking by descent.

CHAPTER III.—OF THE LOSS OF ONE'S STATE OR CONDITION.

148. Many changes take place in the state of a person; the principal of which are the following:

1. *Civil death.* By which a man loses his political and civil rights.

2. *Interdiction.* By this is meant a legal restraint, by the sentence of a competent tribunal, upon a person incapable of managing his estate, because of mental incapacity.

3. When a single woman *marries* she experiences a change in her state; she falls into the power of another, and becomes incapable of making a contract without the consent of her husband; but when the marriage is dissolved there is another change, by which she is freed from the marital restraint.

CHAPTER IV.—OF THE CLASSIFICATON OF PERSONS.

SECTION 1.—OF PUBLIC PERSONS.

149. In the United States *public persons* have but few privileges more than private citizens; these are granted to them, not for their own advantage, but for the public good: as for example, a congressman cannot be arrested nor sued, in a civil case, while attending to his duty in congress, because the public interest requires his undivided attention there. Public persons are magistrates of various grades, from the President of the United States down to the constable.

SECTION 2.—OF PRIVATE PERSONS.

150. All persons who do not fill official stations are *private persons.* These will be considered in separate classes.

§ 1.—With regard to the sexes.

151. The physical difference between male and female animals is called *sex.* In the human species the male is called *man,* and the female *woman.* The first difference which nature has established among persons is that of the sexes: *inter masculos et feminas.*

Some human beings, whose sexual organs are somewhat imperfect, have acquired the name of *hermaphrodites.* They are adjudged to belong to that sex which prevails.(*a*)

(*a*) Co. Litt. 2, 7; Domat., Lois Civ. liv. 1. t. 2, s. 1, n. 9; Dig. 1, 5, 10.

152. The condition of woman is, in many respects, less advantageous than that of man. This difference is owing in part to nature, and partly to our customs, and to the positive institutions of society.

Let us examine the question between husband and wife. By the natural law, the superior control in a state of marriage belongs to the man rather than the woman; perfect equality is impossible, and, as the marriage is a partnership between two persons, one must have the controlling voice, when both cannot agree. The preponderating voice belongs to the husband rather than to the wife; he is stronger and more courageous, he works to support the family of which he is the head, and which he is bound to protect and defend; woman then must yield to him, whom nature and the law have provided for her as a guide and protector.

This is the source of the prerogatives which the husband has over the wife. Hence it follows, that the wife cannot make any contracts binding upon herself, without the express or implied authority of her husband, nor make a will—the existence of a married woman being merged, by a fiction of law, in the being of her husband.

153. Single women, when of full age, have all the civil rights of men; they may, therefore, enter into contracts and engagements; make wills; sue and be sued; be trustees or guardians; they may be witnesses, and for that purpose may attest all papers. Among the civilians they may dispose of their property and make contracts like men, but they cannot be guardians nor attesting witnesses.(*a*)

154. In general, women possess no political power; they cannot hold office nor vote for officers. Instances occur, however, of their being appointed post-mistresses.

(*a*) 1 Toull. n. 187.

§ 2.—Of the difference between persons with regard to age.

155. The prerogatives granted to age, take their rise in the law of nature. Nothing is better calculated to support public morals than a perfect subordination of the young to the aged.(*a*) The want of proper regard and deference to old age has always been considered as one of the most strongly marked features of depravation.

But, as it cannot be ascertained when each individual has been so far developed as to act for himself, the law has fixed an age at which all, who attain it, are presumed to have their proper faculties. The time fixed by law, then, establishes a legal presumption of legal capacity.

Art. 1.—*As to males.*

156. Before arriving at fourteen years, a male is said not to be of discretion; by the common law, at that age he may consent to marriage, and choose a guardian; at twenty-one, he is of full age for all private purposes, and he may then exercise his rights as a citizen, by voting for public officers; and, being a citizen, he is eligible to all offices, unless otherwise provided for in the constitution. At twenty-five, he may be elected to congress; at thirty, a senator of the United States; and at thirty-five, he may be elected President of the United States, if otherwise properly qualified.

Art. 2.—*As to females.*

157. At twelve, a woman arrives at years of discretion, and may consent to marriage; at fourteen, she may choose a guardian; and at twenty-one, as in the case of males, she is of full age, and may exercise all the rights which are inherent to her sex.

§ 3.—Of husband and wife, and parent and child.

158. The third difference between persons, is that

(*a*) Montesq. Esp. des Lois, liv. 5, c. 7.

which results from the relations established between husband and wife, and parent and child. This subject will be considered in another place.

§ 4.—Of citizens and aliens.

159. The fifth difference between persons, exists between citizens and aliens. These will be separately considered.

Art. 1.—*Of citizens.*

160. A *citizen* of the United States is one who is in the enjoyment of all the rights to which the people are entitled, and bound to fulfil the duties to which they are subject; this includes men, women and children.(*a*) In a more limited sense, a citizen is one who has a right to vote for public officers; for example, representatives in congress, and who is qualified to fill offices in the gift of the people.

Citizens are natives or naturalized. All persons born in the United States are not citizens. The exceptions are, first, children of foreign ambassadors; secondly, Indians; and thirdly, in general, persons of color.(*b*)

161. A *naturalized citizen* is one who, born an alien, has acquired the right of a citizen by complying with the requisition of the naturalization laws. The principal of which are,

1. That the applicant shall be an alien, and a free white person.

2. That he shall have declared before some competent tribunal, on oath or affirmation, three years at least before his admission, that it was, *bona fide*, his intention to become a Citizen of the United States, and

(*a*) Amy *v.* Smith, 1 Litt. 334.

(*b*) Amy *v.* Smith, 1 Litt. 334; Grandall *v.* State, 10 Conn. 340. Persons of color and Indians have some rights as citizens; they cannot in any sense be considered as aliens, nor can they be deprived of any of those rights which belong to American citizens, of holding property, of obtaining a patent for an invention, and the like; but they are deprived in some states of the right of voting for public officers, or of holding office.

to renounce forever all allegiance and fidelity to every foreign prince, &c., and particularly, by name, the prince, &c., whereof such alien may at the time be a citizen or subject. But if such applicant has resided and continued to reside in the United States between the 14th day of April, 1802, and the 18th of June, 1812, he may be admitted without making a previous declaration.(*a*)

3. That at the time he shall be admitted, by the said tribunal, to become a citizen of the United States, he shall so renounce such allegiance.

4. That the said alien shall have resided at least five years within the United States, and in such state or territory where such court is held, one year at least. By subsequent acts, provisions are made in favor of persons who have arrived in the United States at different periods.(*b*)

5. That the applicant is a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

6. That he shall renounce all titles of nobility to which he may be entitled.

7. That the native country of such alien is then at peace with the United States.(*c*)

There are two classes of persons, who, though born out of the United States, are nevertheless citizens thereof. To the first class belong children of American ambassadors born abroad. Among the second class are "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law upon that subject by the government of the United States, may have become citizens of any one of the said states, under

(*a*) Act of 24th of May, 1828.

(*b*) See act of 14th of April, 1802; Act of 26th of March, 1804; Act of July 30, 1813; Act of April 22, 1816; Act of 26th of May, 1824; Act of 24 of May, 1828.

(*c*) Act of 14th of April, 1802.

the laws thereof, being under the age of twenty-one years at the time of their parents' being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States: provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."(a)

162. The Constitution of the United States provides, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."(b)

This clause of the constitution evidently refers to the privilege or capacity of taking, holding, and conveying lands lying within any state of the Union, and also of enjoying all civil rights which citizens of any state were entitled to; but it cannot be extended to give a citizen of another state a right to vote or hold office immediately on his entering the state.(c)

Art 2.—Of Aliens.

163. An *alien* is one born out of the jurisdiction of the United States, subject to some foreign prince, potentate, state or sovereignty, and who has never been naturalized under the constitution or laws of the United States, or any of them.

There must be a union of birth abroad, and subjection to some other power to make an alien; for, as we have seen, a man may be born in a foreign country and still be a citizen of the United States, and of no other country whatever.

The rights and duties of aliens will be properly considered when we come to treat of the enjoyment of their civil rights.

(a) Act of April 14, 1802, s. 4.
(b) Const. art. 4, s. 2.
(c) Ward *v.* Morris, 4 H. & McH. 341; Corfield *v.* Coryell, 4 Wash. C. C. 371; 3 Story, Const. § 1800; Livingston *v.* Van Ingen, 9 John. 507; Gassiess *v.* Ballon, 6 Pet. 761.

§ 5.—Of Freemen and Slaves.

Art. 1.—*Of Freemen.*

164. A *freeman* is one who has a right to do whatever he pleases, not forbidden by law; one in the possession of the civil rights enjoyed by the people generally.(*a*) It is not necessary that a man should have any political power to be a freeman; an alien may be a freeman as well as a citizen. Although he may be liable to serve another for a period of time, still he is a freeman, if such service has arisen in consequence of his agreement; as in the case of an apprentice, who has bound himself to serve another for a definite period. Nor would a servant bound to serve another for a certain period, be less a freeman by his liability so to serve.

Art. 2.—*Of Slaves.*

165. A *slave* is one who is by law deprived of his liberty for life, and who is the property of another. One who has been kidnapped or stolen away, or a freeman who has been taken by robbers and reduced to slavery, is not a slave. And a citizen of the United States, taken captive by barbarians and reduced to slavery, does not lose either his political or civil rights on that account.

166. By the natural law all men are created free,(*b*) and no man can be reduced to slavery but by virtue of some law. The general government of the United States does not sanction or establish slavery: the state governments, where that institution exists, have authorized it by law; for without such authority it has no existence whatever.(*c*)

167. It is a maxim of law, that the child follows the condition of the mother, *partus sequitur ventrem.*(*d*)

(*a*) Hobbs *v.* Fogg, 6 Watts, 556.
(*b*) Decl. of Ind.
(*c*) Jones *v.* Vanzandt, 2 McLean, 596.
(*d*) Code, 8, 25, 1.

The child of a female slave is therefore a slave, whoever may have been its father.(*a*) But the child of a female slave, born in a free state where slavery is not recognized by law, is free.(*b*)

168. A slave has no political nor any civil rights, while subject to his condition of slavery.(*c*) But in a state where slavery is not allowed, a man, who is a slave by the laws of his domicil, may maintain an action in his own name for a personal tort committed against him within that jurisdiction;(*d*) for by the law of nations, no state is bound to recognize slavery in another state.(*e*)

The Constitution of the United States(*f*) provides, that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due." Interpreted by the common rules of construction, by which alone it must be understood, the clause is not clear of difficulty; but

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(*a*) By the Roman law, the child of a female slave was free, if, at the time of the conception, the mother was free; or if, being a slave, she was manumitted during the pregnancy, and again became a slave before the child's birth. Inst. lib. 1, t. 4. In Kentucky, it was held that when a testator by his will directed that a female slave should be free at a certain age, her children, born after the death of the testator, and before the period arrived, were held to be slaves. Ned *v.* Beale, 2 Bibb, 298. In New Jersey, where a testator directed his executors to sell a slave for fifteen years, and "at the end of that time to be free," she was considered free from the time of the sale; and a child born afterwards, and before the end of the fifteen years, was adjudged to be free also. State *v.* Anderson, Coxe, 36. In Pennsylvania, it has been held that when a pregnant slave absconded from another state, and gave birth to a child in Pennsylvania, the child was free. Commonwealth, *v.* Halloway, 2 S. & R. 305; Benjamin *v.* Armstrong, 2 S. & R. 392.

(*b*) Jackson *v.* Bullock, 12 Conn. 38.

(*c*) Amy *v.* Smith, 1 Litt. 326; Lenoir *v.* Sylvester, 1 Bail. 633; Catiche *v.* The Circuit Court, 1 Miss. 608: Vincent *v.* Duncan, 2 Miss. 214; Hall *v.* Mullin, 5 Har. & John. 190; The State *v.* Hart, 4 Ired. 246; Gist *v.* Toohey, 2 Rich. 424; Jenkins *v.* Brown, 6 Humph. 299.

(*d*) Polydore *v.* Prince, Ware, 402.

(*e*) Prigg *v.* Pennsylvania, 16 Pet. 539.

(*f*) Art. 4, s. 2.

as the supreme court has given it a judicial construction, the subject must now be considered at rest.

Another important consideration has been urged, since this subject has unhappily agitated our country, whether congress possess any power to legislate upon the subject. From a very early period of our history, and when many of those who formed the constitution were in the councils of the nation, a law was passed by congress to give this clause its full operation. The act of 12th February, 1793, sec. 3, was passed; and a still more stringent law was enacted by congress in 1850, to enable the owner of a fugitive from labor to recover him when he has fled into a free state.(*a*)

169. In some of the states slaves are considered as chattels,(*b*) and sometimes as real estate.(*c*) And under the special phraseology of certain acts, they are treated as persons.(*d*)

(*a*) It is not a little singular, that among the Romans there were laws not dissimilar to the acts of congress mentioned in the text. They declared a slave as a fugitive who staid away from the house of his master with an intention of running away and escaping from his search: the slave was not considered a fugitive who had only had the design of running away, even though he should have divulged his intention—he must have executed it. Dig. 21, 1, 17 and 43; Dig. 50, 16, 225; Code, 6, 1. 1. After the slave became a fugitive, if any one received him into his house in order to shelter him from the anger of his master, he became liable to an action, and the master could recover damages in an action called *de servo corrupto*. The law treated him who concealed a fugitive slave, in order to cause his evasion, with much severity: *Is qui fugitivum celavit, fur est.* Dig. 11, 4, 1. By a senatus consultum, authority was given to every military man, or even an individual, to enter into the lands of senators and other persons to search for fugitive slaves; and, by another law, the houses of the prince himself might be examined to search for them. But in order not too much to infringe on the rights of individuals, the persons who made the searches were to be authorized by the president of the tribunal, who would give an injunction, and send a serjeant to obtain access to the house intended to be examined. Poth. ad Pand. lib. 11, tit. 4, art. 1, n. 5. When found, the slave was to be brought before a magistrate, whose duty it was to deliver him to his master, if the latter's claim was established. In the provinces, when arrested, the slave was carried before the president of the province or the proconsul, who decided as to the right of the supposed master. Poth. ad Pand. lib. 11, 4—2, 7.

(*b*) 1 Walden *v.* Payne, 2 Wash. 1; McDonald *v.* Walton, 2 Mis. 48; Plumpton *v.* Cook, 2 A. K. Marsh. 450; Withers *v.* Smith, 4 Bibb, 170.

(*c*) Wells *v.* Bowling, 2 Dana, 41.

(*d*) The State *v.* Edmund, 4 Dev. 340.

170. *Manumission*, which is an express act by the owner of the slave by which the latter is rendered free, has the effect to change the state of the slave, and he then acquires all the rights of a free man of color.

A slave may acquire his freedom, not only with the consent of his owner as above mentioned, but by implication, or by operation of law alone, as when a master takes his slave into a free state for the purpose of continued residence; or by a continued residence there, whatever may have been his intention, beyond the time allowed by the laws of such state, the slave becomes free.

He may also be manumitted by the last will of his master.

§ 6.—Of White and Colored Persons.

171. A *white person* is one who is of the Caucasian race, without any mixture of African or aboriginal blood, or at most not a fourth part of such blood.(*a*) In the southern states, when a question as to the quantity of African blood in a person arises, it is left to the jury to find it as a matter of fact.(*b*)

The act of congress which authorizes the naturalization of aliens, confines the description of such aliens to free *white persons*. And many of the state constitutions require, as one of the qualities of a citizen or elector, that he shall be white.

A rule has been adopted in the slave states that *color* is presumption of slavery;(*c*) but in the free states this rule would probably be reversed, because there the presumption is that all men are free, and he who would rebut the presumption must establish the contrary fact.(*d*)

(*a*) Gentry *v.* McMinnis, 3 Dana, 382.
(*b*) State *v.* Davis, 2 Bailey, 558.
(*c*) Davis *v.* Curry, 2 Bibb, 238; Burke *v.* Joe, 6 Gill & John. 136; Rawlings *v.* Boston, 3 Harris & McHen. 139. The same rule prevails in New Jersey, Fox *v.* Lambson, 3 Halst. 275.
(*d*) The presumption of law is in favor of freedom. The State *v.* Dilla-

§ 7.—Of Nobles and Plebeians.

172. In some countries this distinction exists. A *nobleman* there, is one to whom some special privileges are granted, generally at the expense of the more deserving classes of the people.

A *plebeian* is one who belongs to the common people.

Happily, in this country, the order of nobles does not exist: the Constitution of the United States provides that "no title of nobility shall be granted by the United States."(*a*) And no state shall "grant a title of nobility."(*b*)

§ 8.—Of the Sane and Insane.

173. *Sanity* is the state of a person who has a sound mind; one who in his actions conforms to those of the bulk of mankind; one whom the law regards as capable to perform all civil duties, and to be responsible for his acts.

Sanity is always presumed.

Insanity is that state which induces a continued impetuosity of thought, which, for the time being, unfits a man for judging and acting in relation to the affairs of life with the composure requisite for the maintenance of the social relations: one who is deprived of the use of reason, after having attained the age when he ought to have it, either in consequence of a defect at his birth, or because of some accident which has happened since.(*c*)

This state is never presumed, but if once proved to exist, it will be presumed to have continued.

The insane man is deprived of his political and civil rights. He is represented by a guardian, curator, or committee.

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hunt, 3 Harring. 551; State *v.* Griffin, 3 Harring. 559; Kinney *v.* Cook, 3 Scam. 232.

(*a*) Art. 1, s. 9, n. 7.

(*b*) Ibid. 1, s. 10, n. 1.

(*c*) Domat, Lois Civ. liv. 2, s. 1, n. 11; Ray, Med. Jur. § 24.

§ 9.—Of infamous persons.

174. *Infamy*, in a general sense, is the condition of a person who is regarded with contempt and disapprobation by the generality of men, on account of his vices.(*a*) But, in a legal sense, it is the state of one who has been lawfully convicted of a crime, followed by a judgment,(*b*) by which he has lost his honor.

The crimes which render a person infamous are, 1, treason;(*c*) 2, felony;(*d*) 3, frauds; which come within the notion of the crimen falsi of the Roman law, as perjury and forgery,(*e*) piracy,(*f*) swindling and cheating,(g) baratry,(*h*) and bribing a witness to keep away.(*i*)

The consequences of infamy are the loss of political rights and incapacity to testify as a witness.(*k*)

§ 10.—Of persons born and not born.

175. *Birth* is the act of being wholly brought into the world; the fact of having acquired an existence independent of one's mother. A child born differs in many respects from one in *ventre sa mère*.

But unless the child be born alive, it is not a birth, but a *miscarriage*. The consequence is, that such child neither acquires nor transmits to others any rights.(*l*)

Persons who are born are generally entitled to all the rights which are exercised by others except those which are gained by age, and are the objects of the care of the law.

One who is not born, technically called an infant

(*a*) Wolff. § 148.
(*b*) State *v.* Valentine, 7 Iredell, 225; U. States *v.* Dickinson, 2 McLean, 325; 1 Ashm. 57.
(*c*) 1 Greenl. Ev. § 373; 5 Mod. 16, 74.
(*d*) Co. Litt. 6.
(*e*) Co. Litt. 6; People *v.* Whipple, 9 Cowen, 707; 1 Greenl. Ev. § 373.
(*f*) 2 Roll. Ab. 886.
(*g*) Fort. 209.
(*h*) Rex *v.* Ford, 2 Salk. 690.
(*i*) Fort. 208.
(*k*) 1 Greenl. Ev. § 372, 376.
(*l*) 1 Chit. Gen. Pr. 35, note (z).

in ventre sa mère, is treated as a man, but this is only in the hope of his being born alive.

176. The rights of a child *in ventre sa mère* are numerous:

1. For all beneficial purposes to himself, such a child is considered as born.(*a*) But a stranger can acquire no title through him, unless he be afterwards born alive.
2. An estate may be limited to his use.(*b*)
3. He may have a distributive share of an intestate property.(*c*)
4. May take a devise of lands.(*d*)
5. Takes under a marriage settlement a provision made for children living at the death of the father.(*e*)
6. May be appointed executor, at common law.(*f*)
7. A guardian may be assigned to him.(*g*)
8. Others may act on his behalf.(*h*)

TITLE II.—OF ARTIFICIAL PERSONS OR CORPORATIONS.

177. Having considered the rights and duties of natural persons, the next object of our inquiries will be the law relating to artificial persons or corporations. This will be done by considering, 1, what is a corporation; 2, how it is created; 3, the kinds of corporations; 4, their powers; and 5, how they are dissolved.

CHAPTER I.—DEFINITION.

178. A *corporation* is an intellectual body politic, created by law, composed of one or more persons acting under a common name, endowed with perpetual succession, and with various other powers, by its charter or the law which created it, and which, for certain purposes, is considered as a natural person.

(*a*) Co. Litt. 36.
(*b*) 1 Bl. Com. 130.
(*c*) 1 Ves. 181.
(*d*) Wallis *v.* Hodson, 2 Atk. 117.
(*e*) Miller *v.* Turner, 1 Ves. 85.
(*f*) Bac. Ab. Infancy, B.
(*g*) 1 Bl. Com. 130.
(*h*) Beeton *v.* Darkin, 2 Vern. 170.

It is, as it is well observed by Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law."(a)

CHAPTER II.—OF THE CREATION OF A CORPORATION.

179. Unlike the law of England, which allows the existence of corporations by implication, by prescription, or by the express or implied consent of the king, corporations by our law owe their origin to a legislative act, called a *charter;* and this is the source of all their power.(b)

"Being the mere creature of law," says the late learned Chief Justice Marshall, in the case already cited, "it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyance, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use."

180. Joint stock companies and partnerships are not corporations, unless actually incorporated. In these cases the individual members are parties to every contract, and do not lose their individuality in that of the social body.(c)

(a) Dartmouth College *v.* Woodward, 4 Wheat. 626.
(b) Head *v.* Providence Ins. Co., 2 Cranch, 127; 4 Wheat. 636.
(c) See Ernst *v.* Bartle, John. Cas. 319.

CHAPTER III.—OF THE VARIOUS KINDS OF CORPORATIONS.

181. Corporations have been variously classed, according to the views or skill of different writers. They are not unfrequently divided into *public*, or such as relate to towns, cities, counties, and parishes, existing for public purposes;(*a*) and *private*, or such as concern matters not of a public nature. Private corporations, when considered as to their object, are *ecclesiastical*, when they relate to the affairs of the church; or *lay*, when they affect other persons; and the latter are divided into *civil*, when they have for their object the promotion of something of a temporal nature; and *eleemosynary*, when they are constituted for the perpetual distribution of free alms, or the bounty of the founder, as he has directed. In this class are included hospitals for the relief of the poor, and colleges for the promotion of learning.(*b*) When considered as to the number of members, they are *sole* or *aggregate*. A sole corporation consists of one person only, or his successors. Few of these are to be found in the United States, though some exist.(*c*) Aggregate corporations consist of two or more persons.

All these may be reduced to four classes, namely: 1, political; 2, public and not political; 3, private; 4, quasi corporations.

SECTION 1.—OF POLITICAL CORPORATIONS.

182. *Political* corporations are those which have principally for their object the administration of the United States, of some state of the Union, or some portion of the same, and to whom the powers of the government, or a part of such powers, have been delegated to that effect.

(*a*) Bonaparte *v.* The Camden and Amboy Rail Road Company, 1 Bald. 223.

(*b*) Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518, 668.

(*c*) Brunswick *v.* Dunning, 7 Mass. 447; Weston *v.* Hunt, 2 Mass. 501; Jansen *v.* Ostrander, 1 Cow. 670.

Nations or *states* are denominated bodies politic; they have their affairs and interests to deliberate on in common. They thus become moral persons, having an understanding and will peculiar to themselves, and are susceptible of obligations and laws.(*a*) In this extensive sense, the United States of America may be termed a corporation;(*b*) and so may each of the states of the Union singly. To this class belong all municipal corporations, as counties, townships, districts, cities, boroughs and the like.

SECTION 2.—OF PUBLIC CORPORATIONS, NOT POLITICAL.

183. Corporations of a *public nature*, which are *not political*, are those which are composed for the benefit of the government alone, but if individuals have a part in them they are private: for example, if a bank were incorporated for the use of the government, and there were no other stockholder, it would be a public corporation; but if any private individual held a part of the stock, it would be a private corporation.(*c*)

SECTION 3.—OF PRIVATE CORPORATIONS.

184. All corporations, which are neither political nor public, are *private* corporations. They are divided into civil and religious; and this results, as well from the quality of the persons who usually compose them, as from the difference of their object.

Civil corporations are those which relate to temporal police; such as companies for the advancement of commerce, agriculture, literary societies, colleges, hospitals, and the like.

Religious corporations are those whose principal object is to establish and regulate congregations of different religious denominations.

(*a*) Vatt. liv. prél. § 1 & 4.

(*b*) 1 Marsh, Dec. 177; Per Iredell, J. 3 Dall. 447; United States *v.* Tingey, 5 Pet. 115: United States *v.* Baker, Paine, R. 156.

(*c*) Bank of the U. States *v.* Planters' Bank of Georgia, 9 Wheat. 907.

Private corporations give a right to the corporators of which they cannot be deprived without their consent, unless the act of incorporation or charter reserves to the legislature the power to do so; and in this respect they differ from public or political corporations, because in the latter no vested right is violated by the change, and the legislature may at pleasure alter the provisions of their charter or constitution.

SECTION 4.—OF QUASI-CORPORATIONS.

185. By *quasi-corporations* is understood a municipal society or body of men, who, though not vested with the general powers of a corporation by any express law, are yet recognized by statute, or immemorial usage, and the body they compose is a person or an aggregate corporation, with powers and duties which may be enforced, and privileges which may be maintained by suits at law. Such bodies are considered *qua* corporations, with limited powers, coëxtensive with the duties imposed upon them by statute or usage; but restrained from a general use of authority, which belongs to those metaphysical persons by common law.

186. Among quasi-corporations may be classed towns, townships, counties, parishes, hundreds, and other political divisions, which are established without an express charter of incorporation; commissioners of a county, supervisors of highways, overseers of the poor, loan officers of a county, and the like, who are invested with corporate powers *sub modo*, and for a few specified purposes only. But not such a body as the General Assembly of the Presbyterian Church.(*a*)

CHAPTER IV.—OF THE POWERS AND INCAPACITIES OF CORPORATIONS.

187. This chapter will be divided into two sections: in the first will be considered what are the rights,

(*a*) Commonwealth *v.* Green. 4 Whart. 531; Ang. on Corp. 16; 2 Kent, Com. 224.

powers, and privileges of a corporation, and by whom they are to be exercised; and, in the second, its incapacities.

SECTION 1.—OF THE RIGHTS, POWERS, AND PRIVILEGES OF A CORPORATION.

§ 1.—What are such powers, etc.

188. A corporation is, for all the purposes of its creation, to be considered as a *person*, capable of performing a variety of acts for the promotion of the object of its creation, and sanctioned by the charter. Among these are—

1. To use a *common seal*, for the purpose of authenticating all its solemn acts. Formerly a corporation could bind itself only by seal.(*a*) But this doctrine is now repudiated,(*b*) and an aggregate corporation may contract, unless restrained by its charter, by the intervention of agents duly authorized by a corporate vote of the board of managers or directors;(*c*) and even an implied contract will be enforced against a corporation, but such implied contract must be within the scope of its authority.(*d*) The seal is required only in those cases where an individual must use one.

2. A corporation may enter into *contracts:* it has the same capacity to buy and sell that an individual has who is *sui juris*, unless restrained by its charter.(*e*) They are generally restricted as to the quantity of land they may hold. When authorized to hold lands they may use them as individuals, and may, therefore, sell them or mortgage them to secure debts due by them.(*f*)

(*a*) 1 Bl. Com. 475.

(*b*) Chestnut Hill Turnpike *v.* Rutter, 4 S. & R. 16; Rumford *v.* Wood. 13 Mass. 199; Bank of U. S. *v.* Dandridge, 12 Wheat. 64.

(*c*) Bank of Columbia *v.* Patterson, 7 Cranch, 299.

(*d*) Canal Bridge *v.* Gordon, 1 Pick. 297; Stone *v.* Berkshire Cong. Society, 14 Verm. 86; Bates *v.* Bank of Alabama, 2 Ala. 451.

(*e*) Reynolds *v.* Comm. of Starks, 5 Ham. 205.

(*f*) Gordon *v.* Preston, 1 Watts, 135; S. P. 5 Wend. 590.

3. A corporation is an *intellectual being*, different and distinct from all persons who compose it. It has individuality. The estate or rights of the corporation belong completely to the body, and not to the individuals who compose it; nor can any one of them dispose of any such estate or right, or of any part of it. In this respect the right to the property is different from rights held in common. What is due to a corporation is not due to any of the individuals who compose it, and debts due by such corporation are not due by the individual members.

4. It has *uninterrupted succession.* As long as the charter endures it remains the same, although all its members may be changed. As to its duration it is either unlimited, when it becomes immortal, or it is limited, and then it expires at the time appointed by its charter. It may, however, be dissolved by various other means.(*a*)

5. A corporation has a *corporate name*, which is always fixed by the charter, and in this name it makes all its contracts and sues and is sued.(*b*) But if in a contract with a corporation its name be so given as to distinguish it from all other corporations, it is sufficient to support an action in the true corporate name.(*c*)

6. For the regulation of their affairs in detail, corporations are authorized to make *by-laws* or rules and ordinances for their government. When the power to make by-laws is expressly conferred by the charter, it must be exercised by the persons to whom it is given, and in the manner pointed out.(*d*) When the charter is silent as to the persons who shall make by-laws, the power resides in the members of the corporation at large.(*e*) When a by-law is made to conflict with the

(*a*) Post, n. 194.
(*b*) Porter *v.* Neckervis, 4 Rand. 359.
(*c*) Hagerst. Turnp. *v.* Creger, 5 Har. & J. 122; Alloway's Creek *v.* String, 5 Halst. 323; Berks and Dauphin cos. *v.* Myers, 6 S. & R. 16; Bac. Ab. h. t. (*c*).
(*d*) Kyd on Corp. 102.
(*e*) Harr. & Gill, 324; 4 Burr, 2515, 2521; 6 Bro. P. C. 519.

Constitution of the United States or its laws, or with the constitution or laws of the state, it is void. And so is an unreasonable law,(*a*) or one which operates retrospectively,(*b*) or one which is not requisite for the good government and support of the affairs of the corporation.(*c*) But a by-law may be good in part and void for the rest.(*d*)

189. A corporation is usually composed of many members, or persons who have a right to act in the affairs of the corporation, like any others who have an interest in the same. In charitable, and other civil or religious corporations, not of a pecuniary nature, each member has an equal right, and the majority rule; but in pecuniary corporations, for example, a bank, the members vote by representing the interest they have in it, which is called their *stock*, and not by representing their persons. In such cases the capital is divided into shares, and every one who is a shareholder is a membeı of the corporation.

190. Great inconvenience would follow if all the members of a numerous corporation were required to be present, whenever business was transacted in which it was concerned. To obviate this, the charter usually provides that there shall be elected a number of the corporators, who shall have the power to manage the affairs of the corporation, and these are called by the various names of *managers*, *directors*, *syndics*, *committees*, and the like.

These officers constitute themselves into a separate body, called a board of managers, etc., have all an equal voice, and, in the management of the affairs of the corporation, a majority rule without any regard to the amount of stock they hold individually; and, when they act within the limits of their powers, bind the corporation. Agents and attorneys, acting within the

(*a*) Comm. *v.* Worcester, 3 Pick. 473.
(*b*) Howard *v.* Savannah, Charlt. 173.
(*c*) Comm. *v.* St. Patrick's Society, 2 Binn. 448.
(*d*) Rogers *v.* Jones, 1 Wend. 260.

powers delegated to them, when the board have a right to delegate such powers, bind the corporation as if the act had been that of the board.

191. Managers and other officers may be removed from their office by the members of the corporation, for cause. This power, which is called the power of *amotion*, is incident to every corporation.

192. *Disfranchisement*, which is the power to expel a member, must in general be expressly given. But every corporation has power, inherently, to expel members in certain cases.

1. When a member commits an *infamous* offence, rendering him unfit for the society of honest men: in such case there must be a previous conviction at law.

2. When the offence is against the party's *duty as a corporator:* in this case, he must be expelled on trial, after being duly summoned, on conviction by the corporation.

3. When the offence is of a mixed nature, against the party's duty as a corporator, and also against the law of the land.(*a*)

SECTION 2.—OF THE INCAPACITIES OF CORPORATIONS.

193. Corporations being intellectual persons, they are subject to various kinds of *incapacities*, some of which are inherent to their nature, others are established by law.

A corporation *cannot commit a crime*, nor a misdemeanor, though its officers may, while acting on its behalf, do both; in such case, they alone will be responsible.(*b*) Nor can such a body commit any forcible injury, as trespass.

A corporation cannot be a *witness*, nor do any personal act: when it is sued, and must make an answer in chancery, such answer must be made under the corporate seal.

(*a*) Comm. *v.* St. Patrick's Society, 2 Binn. 448; Comm. *v.* Guardians of the Poor, 6 S. & R. 469.

(*b*) Comm. *v.* Swift Run Gap Turnp. Co., 2 Virg. Cas. 362; The State *v.* The Great Works, etc. Co. 2 App. 41.

Having no other than an ideal existence, a corporation cannot *commit a battery*, nor bring an action for an assault and battery; it cannot be imprisoned. But corporations may be liable for acts of omission of their officers or agents.

A corporation derives all its power from its charter, it is of course incapable to perform any act forbidden by it, or which it does not authorize.

CHAPTER V.—OF THE DISSOLUTION OF CORPORATIONS.

194. A corporation legally established, may *dissolve* in the following ways:

1. By *efflux or lapse of time*. When the charter limits a time for the existence of the corporation, it is dissolved as soon as the period arrives.

2. By *surrender*. A corporation may yield up all rights to its charter, and surrender it to the legislature from whom it emanated;(*a*) and if the rights of third persons are to be affected by it, the surrender must be accepted by the legislature.(*b*) But the officers of a corporation, composed of several integral parts, cannot dissolve the corporation, without the full assent of the great body of the society.(*c*)

3. By a *legislative act*. A public corporation, when no individual has any vested interest in it, may be dissolved by an act of the legislature; but private corporations, where such private rights are vested, cannot be dissolved by a statute, so as to deprive any one of a vested right, unless the power so to dissolve it has been reserved in the charter. This wise provision is now generally contained in new charters.

4. By *death* of all the members of a corporation. But this does not apply to pecuniary corporations, as for example, a bank; in that case the rights of the

(*a*) Mumma *v.* Potomac Company, 8 Pet. 281.
(*b*) Revere *v.* Boston Copper Co., 15 Pick. 351; Enfield Toll Bridge Co. *v.* Conn. River Co., 7 Conn. 45.
(*c*) Smith *v.* Smith, 3 Desaus. 557.

corporator vest in his executors or administrators, who then become members.

5. By *forfeiture*. A corporation may, by wilful non-feasance or mal-feasance, forfeit its franchises, which may be seized by the state on a judgment upon an information filed and prosecuted by the state.(*a*) But such prosecution can be only by the state through its agents.(*b*) The remedy is by *scire facias* or *quo warranto*.

CHAPTER VI.—OF FOREIGN CORPORATIONS.

195. It is a rule of law, founded on reason, that no state has a right to extend the jurisdiction of its laws beyond its own territory. The states of the American Union are for many purposes considered as foreign to each other, and the jurisdiction of the laws of one of them can extend into the others only in those cases where the laws of a foreign country, or one not a member of the Union, becomes the rule for deciding controversies; but by the rules adopted among themselves, on the principle of comity, the laws of one of the states will, in certain cases, be executed, or have force in another.

Every corporation erected by the laws of a foreign state, taken in this sense, is a *foreign corporation*. Such a corporation cannot lawfully carry on business in another state; as, for example, a corporation created by the laws of Massachusetts, to carry on manufacturing or banking, could not establish itself in Pennsylvania, and there pursue the object of its creation, because the state of Massachusetts cannot extend its laws over Pennsylvania; but, by the comity of nations, a corporation established in one state may sue in another; and it may sue in a court of equity, as well as at law.(*c*)

(*a*) Terret *v.* Taylor, 9 Cranch, 43.

(*b*) Comm. *v.* Union Fire, etc., Ins. Co., 5 Mass. 230. See Lehigh Bridge Company *v.* Lehigh Coal and Navigation Company, 4 Rawle, 9.

(*c*) Silver Lake Bank *v.* North, 4 John. Ch. 370; Bank of Marietta *v.* Pindalf, 2 Rand. R. 465; Clarke *v.* New Jersey Steam Navigation Company, 1 Story, 531; British American Land Company *v.* Ames, 6 Met. 391;

A foreign corporation, *composed wholly of aliens*, may sue in the federal courts, for the court will go beyond the corporate name and ascertain who are the parties really interested.(*a*)

PART II.—OF THE ENJOYMENT AND LOSS OF CIVIL RIGHTS.

TITLE I.—OF CONSTITUTIONAL RIGHTS.

196. Whatever may be the theories which have been adopted in other countries in order to establish a civil state, or the combination of all the power of a society of men under a particular direction, in the United States we need not have any recourse to them, because the foundation of our government is a compact or agreement of the people establishing the civil state, the constitution.

The first law of the civil state is the establishment of a *public power* to cause the execution of the laws, which shall not be exercised by any individual of the society; he is not permitted to do himself justice, but must appeal in all cases when required to the depositories of the public authority, or to the power of all for the surety of all, whenever he can have recourse to it. Hence the maxim that all the people are under the protection of the law.

All rights flow from the same source, the whole of the laws which concern the state; but they may be divided conveniently into political rights and civil rights.

CHAPTER I.—OF POLITICAL RIGHTS.

197. *Political rights* consist in the faculty of partici-

Savage Man. Co. *v.* Armstrong, 5 Shep. 34; Day *v.* Essex Bank, 13 Verm. 97; Bank of Washtenaw *v.* Montgomery, 2 Scam. 422; Guaga Iron Co. *v.* Dawson, 4 Blackf. 202; Libbey *v.* Hodgdon, 9 N. Hamp. 394; Bank of Augusta *v.* Earle, 13 Pet. 519; Lucas *v.* Bank of Georgia, 2 Stew. 147.

(*a*) Bank of U. S. *v.* Deveaux, 5 Cranch, 61; Soc. for the Propagation of the Gospel *v.* Wheeler, 2 Gall. 105; Lexington Man. Co. *v.* Dorr, 2 Litt. 256.

pating directly, either in the exercise or the establishment of the public power, or the public functions. These rights are fixed by the constitution, and have been considered in a former part of this work.(*a*)

CHAPTER II.—OF CIVIL RIGHTS.

198. *Civil rights* are those which have not for their object the exercise or the establishment of public power or functions. They consist in the power of acquiring and enjoying property, of exercising paternal and marital authority, and the like. Every one, unless lawfully deprived of them, is in the enjoyment of his civil, but not of his political rights. An alien, for example, has no political, though he is in the full enjoyment of his civil rights.

Civil rights are divided into absolute and relative.

SECTION I.—OF ABSOLUTE RIGHTS.

199. Absolute rights are those which belong to each man in particular, considered as an individual, independently of the relations which he has with other men, or the other members of society. Liberty, for example, is an absolute right.

By *absolute rights*, in a primitive and strict sense, must be understood those which man holds from nature; those which he enjoyed in his natural, independent state, and which he continues to enjoy in his civil state; for the very object of civil society is to maintain him in those absolute rights which he derives from the immutable laws of nature.

200. In entering into society, man yields up a part of his natural independence in exchange for the advantages he receives from society; and in consideration of those advantages he becomes bound to obey the laws which the majority have established. This species of constraint is far preferable to the ferocious liberty of a

(*a*) Prèl. Tit. c. 3.

state of nature; for if he is restrained, others are also prevented from doing him any injury.

201. *Civil liberty* is the power to do whatever is permitted by the constitution of the state, or the laws of the land. It is no other than natural liberty, so far restrained by human laws, and no further, operating equally upon all the citizens, as is necessary and expedient for the general advantage of the public.(*a*) Thus every law which prevents us from injuring our fellow citizens, increases and assures civil liberty, though it may decrease natural freedom. On the contrary, every law which controls our actions, unnecessarily, in relation to things purely indifferent, is a law against liberty, unless, upon the whole, it proves a benefit to society at large.(*b*)

Laws prudently established, so far from destroying our absolute rights, become their strongest support.

The absolute rights may be divided into three principal points: personal security, personal liberty, and the right to enjoy property.

§ 1.—Of personal security.

202. The right of personal security is the principal object of the law. It consists in the legal and uninterrupted enjoyment by a man of his life, his limbs, his body, his health, and his reputation.

203.—1. *Life* is a gift which man has received from God, and which society incessantly endeavors to secure to him, even before he is born, from the very instant he exists in *ventre sa mère*. The law does not alone punish the homicide of a man who is born, but it punishes as a misdemeanor, whoever has procured the criminal abortion of a woman quick with child, even with her consent. And though the mother appears to have some rights over the fœtus, which is yet a part of herself, she is punishable for attempting its life.

(*a*) 1 Bl. Com. 125; Paley's Mor. Phil. B. 6, c. 5; 1 Swift's Syst. 12.
(*b*) 1 Bl. Com. 126.

An infant in *ventre sa mère*, or in its mother's womb, is considered as having the rights of a man born, whenever it is for the interest of its life or its preservation that it should be so.(*a*) It is for this reason that if a woman quick with child should be capitally convicted, her execution will be delayed until after her confinement.(*b*)

The law punishes homicide committed with premeditation, with death—and without premeditation, with a less punishment, regulated according to circumstances. It punishes even attempts upon human life, when followed by a commencement of execution.

But the law foresees still further, and places man in a state of nature by restoring to him all his rights of self-defence, whenever it finds itself impotent and unable to protect his life, the safety of his limbs, or even his property. When he can obtain redress by applying to the law, however, he is bound to call for its aid. If in self-defence he kills the assailant, he is excused on the ground of necessity.(*c*)

The party attacked may undoubtedly defend himself, and the law further sanctions the reciprocal defence of such as stand in the near relation of husband and wife, parent and child, and master and servant.(*d*)

He who makes the attack may be resisted, and, if several join in such attack, they may all be resisted; and one may be killed, although he may not himself have given the immediate cause for such killing, if, by his presence, and his acts, he has aided the assailants.

Besides the provisions which have been made in the penal code, for the punishment of those who attempt to injure the lives of others, the law has made other provisions for the security of life, and the preservation of those unable to take care of themselves, by the

(*a*) 1 Bl. Com, 130; 1 Toull. n. 210; Dig. 1, 5, 26.
(*b*) Bouv. L. D. Pregnancy.
(*c*) Hawk. B. 2, c. 11, s. 13.
(*d*) 2 Roll. Ab. 546; 1 Chitt. Pract. 592.

establishment of hospitals, and by making a provision for the poor.

It is also with a view to maintain personal security, that a police has been established, which, even unknown to us, takes care of our persons and property.

204.—2. The law anxiously protects not only the life, but the *limbs* of every individual. By limbs is understood those members of the body, which may be useful in fight, and the loss of which amounts to mayhem by the common law. By statute law, in perhaps every state of the Union, woundings, cutting off the nose, slitting the lips, and other such grave injuries, are also punished by statute, when committed unlawfully and with premeditation; if they are committed unlawfully but without premeditation, then with penalties less severe.

The right of self-defence extends to injuries committed against the limbs and the body of a man, and the aggressor may even be killed, if the person attacked has no other means of saving himself: *si aliter periculum effugere non potest.*

205.—3. A man has a right to the protection of his *body*, from all assaults and batteries, insults or menaces, and the law protects him in the enjoyment of these.

206.—4. *Health* is of vast importance to man, for without health the blessings of life cannot be enjoyed. The law protects it whenever it is assailed. When the injury to health is so great as to affect the public, as by the erection of a nuisance, the party guilty of erecting it may be indicted; and a physician who unlawfully endangers the health of his patient, may be punished either for the misdemeanor by public indictment, or by an action by the party injured.

207.—5. The law also guarantees to every member of society the full enjoyment of his *honor and reputation.* Confidence binds men together, and hence arises reciprocal esteem. It is to the love of esteem

that the origin of honor is owing This delicate sentiment takes it source in nature, because man naturally loves the esteem of his fellows. Honor or reputation are dearer than life, and for civilized man they are the most precious possessions. For this reason, reputation is so well guarded by law, which affords in general an efficacious remedy. This will be further considered when we come to treat of actions.

§ 2.—Of personal liberty.

208. *Personal liberty* is the independence in our actions of all other will than our own;(*a*) it consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law, for some crime or wrong.(*b*) This right is protected by law, and consists in three principal points:

Liberty of our person and actions;

Liberty of thought, of speech, and of printing whatever we please, subject to punishment for the abuse of this freedom; and

Liberty of conscience.

Art. 1.—*Of the liberty of our person and of our actions.*

209. The *liberty of the person and of actions* consists in the faculty of doing whatever is not injurious to others, and what is not forbidden by the law, without any authority in any one to prevent us, to arrest or to imprison us in any case, except in cases determined by law, and according to the form it has prescribed.(*c*)

A necessary consequence of this liberty is the right which all citizens of the United States have of remaining in the country as long as they may desire, and where it shall please them, without being liable to be arbi-

(*a*) Wolff. Ins. Nat. § 77.
(*b*) 1 Bl. Com. 134.
(*c*) Const. Am. art. 5.

trarily compelled to go out of it, or to be exiled, unless by virtue of some law, and a competent judgment.

It is of the greatest importance to the people that personal liberty should be religiously respected. If a man's property should be arbitrarily taken, the fact would alarm his fellow-citizens and they would be prepared to resist. But to arrest a man, put him in an obscure and impenetrable prison, and there leave him without any knowledge on the part of his family or friends as to his place of confinement, and perhaps forgotten by those who deprived him of his liberty, is an act which, being hidden, makes less sensation, and for that cause becomes more dangerous to public liberty. The constitution has wisely provided that no person shall "be deprived of his life, liberty, or property, without due process of law."(*a*)

210. To protect the personal liberty of the citizen from unlawful arrests, it is the law that no person can be imprisoned for an alleged crime, unless *upon the oath* of some competent witness,(*b*) and the warrant of commitment must be in writing, under the hand of a competent magistrate; it must express the cause of the commitment, and show by what authority the prisoner is committed.

No man can be committed who can give bail, except in some special cases designated by law, and no excessive bail shall be required.(*c*)

211. Still further to protect him, the law gives to the prisoner, or to any one who will sue it out on his behalf, the benefit of the writ of *habeas corpus*. This is an order in writing, signed by the judge who grants the same, and sealed with the seal of a court of which he is judge, issued in the name of the sovereignty where it is granted, by such a court or a judge thereof, having lawful authority to issue the same, directed to

(*a*) Amend. art. 5.
(*b*) Connor *v.* The Commonwealth, 3 Binn. 38; 2 Russ. on Cr. 512.
(*c*) Const. art. 8.

any one having a person in his custody or under his restraint, commanding him to produce such a person at a certain time and place, or to state the reasons why he is held in custody or under restraint. To this writ the person to whom it is addressed is required to make a return, and the judge on that return, decrees what shall be done, whether the prisoner shall be remanded, admitted to bail, or discharged.

In England this writ is secured by the 31 Car. II., c. 2, and the English justly pride themselves in the existence of this remedy, which some seem to think originated with them, but of this there is just ground to doubt.(*a*) In the United States this writ has been adopted by legislative enactments very similar to the statute of 31 Car, II., or by enforcing the provisions of that act.

The *habeas corpus* can be suspended only by authority of the legislature. The constitution provides that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it."(*b*) Whether this writ ought to be suspended depends on political considerations, of which the legislature is to decide.(*c*) The proclamation of a military chief, declaring martial law, cannot, therefore, suspend the operation of the law.(*d*)

(*a*) The words of the Digest which grant a writ similar to the *habeas corpus* are, "Ait prætor: *quem liberum dolo malo retinens, exhibeas.*" Dig. 43, 29, 1. The edict of the prætor is thus conceived; "I order you to bring before me the free person whom in bad faith you detain." This mandate, requiring the production of any person who was unlawfully held in confinement, might be sued out by any one, it being open to every person in favor of liberty. "Ait prætor, *exhibeas;*" continues the Dig. 43, 29, 8 and 9, "exhibere est, in publicum producere, et videndi tangendique hominis facultatem præbere. Propriè autem *exhibere* est, extra secretam habere. Hoc interdictum omnibus competit: nemo enin prohibendus est libertati favere." The edict of the prætor says, that you *exhibit.* To exhibit a person is to produce him in public, and put it in the powerof others to see him and to touch him. To *exhibit* is properly not to have in secret. This interdict is open to every one, because every one is entitled to it in favor of liberty.

(*b*) Art. 1, s. 9, n. 2.

(*c*) Ex parte Bollman and Swartwout, 4 Cranch 101.

(*d*) Johnson. *v.* Duncan, 3 Mart. Lo. Rep. 531.

212. Citizens of the United States may remove from the country until restrained by congress, and no citizen can be compelled to return to the country, except for the purpose of answering for some crime committed by him. He cannot, however, cast off his allegiance.

Art. 2.—Of the liberty of thought.

213. The free communication of his thoughts and opinions is one of the most precious rights of man: every citizen may *speak, write* and *freely print* what he thinks, being responsible to the law for an abuse of this liberty. This is a natural right, which cannot be infringed by congress.(*a*)

Members of congress and of the state legislatures, and counsel exgaged in cases in court, may freely speak whatever they think proper without being responsible to any one, except, perhaps, in the case of counsel, where they maliciously utter slander without proof or instruction from their clients.(*b*) The right, however, does not extend beyond the mere speaking, for if a member of congress were to print his speech, containing libellous matter, he would be held responsible.(*c*)

214. By *liberty of the press*, is understood the right to print and publish the truth, from good motives, and for justifiable ends.(*d*)

The constitution provides, that no law shall be made abridging the freedom of speech or of the press.(*e*)

The abuse of the freedom of the press is punished criminally by indictment—civilly, by action; for it is evident, that if not restrained within proper bounds, or if the publisher were not responsible for libellous publications, the liberty of the press would soon become so licentious, that it would destroy itself. On

(*a*) Const. Am. art. 1 (*b*) 3 Chit. Pr. 887. (*c*) Bac. Ab. Libel, B.
(*d*) People *v.* Crosswell, 3 John. Cas. 394. (*e*) Am. art. 1.

the other hand, if liable to a censorship, its benefits to the public would be wholly lost.

Art. 3.—Liberty of Conscience.

215. Happily for our country, no sect has a preference; they are all permitted to exercise their religion according to the dictates of their consciences; and, as a guarantee for this, the constitution declares that "no *religious test* shall ever be required as a qualification to any office or public trust under the United States."(*a*) To attempt to regulate the religious belief of a man, under pains and penalties, is a grievous tyranny, calculated to excite persecution and civil war. It is not more reasonable to command a man to believe what does not appear evident to him, than to order the eye to see what it cannot perceive. Man is not to be constrained in his belief; he must be enlightened, convinced, and persuaded.

§ 3.—Of the right to enjoy property.

216. The right to enjoy property, is the third absolute right of man. Considered as a natural and absolute right, it is the faculty of enjoying peaceably the property which we possess, without being constrained to part with it, without our consent.

Considered as a civil right, it is the faculty of acquiring and possessing property, and of alienating it as we please, either by our own contract, or by last will and testament, as the law prescribes.

Property, which owes its origin to natural law, has received its perfection from the civil or municipal law, by which it has become permanent. This will be the subject of our second book, when the origin and progress of property will be explained.

The right of property, includes the faculty of receiving that which is cast upon us by descent or succession, devises, legacies, and gifts; to transmit it in

(*a*) Art. 6, s. 3.

the same way; to acquire it by prescription, and the like.

Thus this right, absolute in its origin in society, takes a relative character. It is subject to almost an infinity of modifications, which render it so complicated, that the greatest number of disputes or contests, which arise among men, have property for their object.

SECTION 2.—OF RELATIVE RIGHTS.

217. Relative rights are public or private.

§ 1.—Of public relative rights.

218. *Public relative rights*, are those which subsist between the citizens and the government, as the right of protection on the part of the people, and the duty of allegiance which is due by the people to the government. These include the political rights, such as the right of suffrage, which each citizen may exercise, and that of being eligible to all offices.

§ 2.—Of private relative rights.

219. *Private relative rights*, are so called in contradistinction to public relative rights. These are very numerous, and to make a complete list, would not be an easy task; among them are the reciprocal rights of husband and wife, parent and child, guardian and ward, master and servant; the right of inheritance or succession, to receive a donation *inter vivos*, or by will, etc. These are considered in another place.

TITLE II.—OF THE LOSS OF CIVIL RIGHTS.

220. The enjoyment of civil rights is attached to the quality of citizen of the United States. This quality is subject to be lost by abdication or renunciation of the right of citizen, or by civil death.

CHAPTER I.—OF THE LOSS OF CIVIL RIGHTS BY EXPATRIATION.

221. It is the doctrine of the English common law, that a subject cannot be released from his *allegiance* to

the crown, without the consent of the government; and that no man can, by his own act, throw off the duty which he owes to his native country by adopting another.

In the United States, this question has not yet been decided by the supreme court, but the better opinion seems to be, that a citizen cannot cast off his allegiance without the consent of the government.(*a*) Yet the naturalization laws require that on becoming a citizen of the United States, an alien shall renounce and abjure his former allegiance, without requiring any proof that his sovereign has released him from it.

If, however, congress should by law authorize expatriation, the citizen expatriated would, by that act, become an alien, and would be entiled to no other civil rights than those enjoyed by an alien.

CHAPTER II.—OF THE LOSS OF CIVIL RIGHTS IN CONSEQUENCE OF JUDICIAL CONDEMNATIONS.

222. Civil death is the state of a person who, though possessing natural life, has lost all his civil rights by a judicial condemnation, and is, as to them, considered dead.(*b*)

TITLE III.—OF THE EVIDENCE OF THE CIVIL STATE.

223. After having examined how civil rights are acquired and lost, it is proper now to consider how the civil state is proved.

This may be done by proof of possession, by witnesses, by private writings and by public registers. And this proof relates to the birth, marriage, or death of the individual.

When written evidence, made by public authority, or a register such as is recognized by law, exists as to

(*a*) Case of Isaac Williams, cited in 2 Cranch, 82, n.; Murray *v.* The Charming Betsey, 2 Cranch, 64; Talbot *v.* Janson, 3 Dall. 133; The Santissima Trinidad, 7 Wheat. 283; Inglis *v.* Trustees, etc., 3 Pet. 99; Shanks *v.* Dupont, 3 Pet. 242.

(*b*) Platner *v.* Sherwood, 6 Johns. C. R. 118; Troup *v.* Wood, 4 Johns. C. R. 228, 260; Co. Litt. 130 a; 1 Bl. Com. 132, 133.

the time and circumstances of the birth, marriage, or death of an individual, it must be produced as being the best evidence of which the case will admit, but when such written evidence does not exist, parol evidence may be given to establish those facts.

224. Proof of the *birth* of a child may be made by giving evidence of possession. When a child lives with his reputed father and mother, as such, proof of these facts will, in general, be sufficient *prima facie* to establish the fact of his legitimacy, and that he is what his condition represents him to be. His civil state may also be proved by the testimony of witnesses, as where the witness was present at the accouchement; or by private writings, such as entries in a Bible; or by the correspondence of deceased members of his family.(*a*) It may also be established by public registers, authorized by law to be kept.(*b*)

225. The civil state of *marriage* is proved either by direct evidence, establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. What is evidence for this purpose will be more fully considered when we come to examine what are the sufficient proofs of a marriage.(*c*)

TITLE IV.—OF THE DOMICIL.

226. It is in the place of his domicil, that a man exercises his civil and political rights. After having shown how he acquires the enjoyment of the rights which constitute the civil state, and how those rights are proved, it is now proper to point out the rules which fix his domicil.

227. *Domicil* is the place where a person has established his ordinary dwelling, without a present intention of removal.(*d*)

(*a*) 1 Greenl. Ev. § 104; Phil. & Am. on Ev. 229; 1 Phil. Ev. 216; Doe *v*. Griffin, 15 East, 203.

(*b*) Vide post, n. 311.

(*c*) Vide post, n. 262.

(*d*) The Venus, 8 Cranch, 278; Thorndyke *v*. City of Boston, 1 Metc. 242; 1 Binn. 349, n.; Foster *v*. Hall, 4 Humph. 346.

A man cannot be without a domicil; at his birth he acquires that of his parents, and this he retains until he gains another by his choice,(*a*) or by operation of law.

By fixing his residence at two different places at the same time, a man may have, for some purposes, two domicils at one and the same time; as, for example, if a foreigner, coming to this country, should establish two houses, one in New York and the other in New Orleans, and pass one half the year in each, he would for most purposes have two domicils.(*b*) If a man has two places of residence he may elect which shall be his domicil.(*c*)

But it is to be observed that circumstances which might be held sufficient to establish a commercial domicil in time of war, and a matrimonial, or forensic, or political domicil in time of peace, might not be such as would establish a principal or testamentary domicil, for there is a wide difference in applying the law of domicil to contracts and to wills.(*d*)

There are three kinds of domicils, namely: 1, the domicil of origin, *domicilium originis vel naturali;* 2, the domicil by operation of law, or necessary domicil; 3, the domicil of choice. These will be severally considered.

CHAPTER I.—OF THE DOMICIL OF ORIGIN.

228. By *domicil of origin,* is understood the home of a man's parents at the time of his birth, not the place where, the parents being on a visit or journey, a child happens to be born. The domicil of origin is to be distinguished from the accidental place of birth.(*e*)

(*a*) 1 Binn. 349, n.; Somerville *v.* Somerville, 5 Ves. 787; 3 Robinson, 191; Jennison *v.* Hapgood, 10 Pick. 77; Abington *v.* North Bridgewater, 23 Pick. 170.

(*b*) Greene *v.* Greene, 11 Pick. 440. See Somerville *v.* Somerville, 5 Ves. 750.

(*c*) Burnham *v.* Rangely, 1 W. & M. 7.

(*d*) Phill. on Dom. xx; Greene *v.* Greene, 11 Pick. 410; Putnam *v.* Johnson, 10 Mass. 488; 4 Wash. C. C. 514.

(*e*) Guier *v.* O'Daniel, 1 Binn. 349, n.; 2 B. & P. 231, n.

CHAPTER II.—OF THE DOMICIL ACQUIRED BY OPERATION OF LAW.

229. There are two classes of persons who acquire or retain a domicil *by operation of law*. 1. Those who, being under the control of another, the law gives them the domicil of that other; 2, those on whom the state affixes a domicil.

SECTION 1.—OF THE DOMICIL OF PERSONS UNDER THE CONTROL OF ANOTHER.

230. Among those who, being under the control of another, acquire such person's domicil, are—

1. The *wife*. She takes the domicil of her husband.(*a*) On becoming a widow, she retains it until she changes it, which may be done in two ways; first, by removing to another place, with an intention of fixing her domicil there; secondly, by marrying again, in which case she immediately takes the domicil of her new husband.(*b*)

2. A *minor*. His domicil is that of his father, or in case of his death, that of his mother.(*c*) When his father and mother are both dead, the minor's domicil is in general that of his guardian, but to this there are some exceptions.(*d*)

3. A *lunatic*. In general the domicil of the lunatic is that of his guardian, curator, committee or other person who is lawfully appointed to take care of him. In this respect he resembles a minor. But the domicil of such a person may be changed by direction or with the assent of his guardian, either express or implied.(*e*)

SECTION 2.—OF THOSE ON WHOM THE STATE AFFIXES A DOMICIL.

231. It is but reasonable that a man who serves

(*a*) Greene *v.* Greene, 11 Pick. 410.

(*b*) Adams' Eccl. R. 519.

(*c*) Somerville *v.* Somerville, 5 Ves. 787; School Directors *v.* James, 2 Watts & S. 568; Parsonfield *v.* Kennebunkport, 4 Greenl. 47.

(*d*) School Directors *v.* James, 2 W. & S. 568.

(*e*) Holyoke *v.* Hoskins, 5 Pick. 20.

the public, and is compelled for this purpose to change his place of residence, should not on this account lose his domicil; for this there is a double reason, first, that the public should be better served; and secondly, because the officer did not intend to abandon his old domicil, but left it *animo revertendi.*

232. Persons who thus retain their domicil may be classed as follows:

1. *Public officers* whose temporary duties require them to reside at the capital, as the President of the United States, the several secretaries, etc.

2. *American ambassadors and consuls* who are compelled to go abroad in order to fulfil the duties of their appointments. And this privilege extends to their family or suite.

3. *Officers, soldiers* and *marines* of the United States do not lose their domicil, while thus employed.

4. A *prisoner* does not acquire a domicil where the prison is located, nor lose his old, because there is no intention on his part to do so.

CHAPTER III.—OF THE DOMICIL OF CHOICE.

233. The domicil of origin is retained until another is acquired by the act of the party, or by operation of law. In order to acquire a *domicil of choice,* there must be an actual removal with an intention of residing in the place to which the party has removed.(*a*) As soon as the removal is completed, with such intention, the new domicil is acquired, and the old one is lost.(*b*)

A mere *intention to remove,* unless such intention be carried into effect, is not sufficient to operate the change.(*c*)

When a man changes his domicil and gains another, and afterward returns to his original domicil with an

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(*a*) Jennison *v.* Hapgood, 10 Pick. 77; Cooper *v.* Galbraith, 3 Wash. C. C. R. 546.

(*b*) 3 Wash. C. C. 546; Wilton *v.* Falmouth, 3 Shep. 479.

(*c*) Hallowell *v.* Saco, 5 Greenl. 143; State *v.* Hallet, 8 Ala. 159.

intention to reside there, his original domicil is at once restored.(a)

TITLE V.—OF ABSENTEES.

234. Having treated of the domicil, it is proper to consider an absence from it, and its effects.

The law watches with care the rights of a man during the whole of his life, and even before his birth, while in *ventre sa mère*. It is to be regretted that in general it is so loose on this important subject, and that the questions which arise are to be decided frequently by the opinion of the judges, unaided by any statutory provision.

By *absence*, is sometimes meant that a person is not at the place of his domicil, yet his place of residence being known, or news or information having been received from him, his existence is not uncertain. But in a more confined and more technical sense, absence signifies that the residence of the person, who is not at the place of his domicil, is unknown, and that, for this reason, his existence is doubtful. It is in this last sense that it is here considered.

When a person has been absent for a long time, unheard from, the law will presume him to be dead: it has been adjudged, that after twenty-five years;(b) twenty years; in another case, sixteen years;(c) fourteen years;(d) twelve years;(e) and seven years,(f) the presumption of death arises. It seems to be agreed, that after an absence of seven years, without being heard from, the presumption of death is sufficient to treat the absentee's property as if he were dead; though, like every other presumption, this may be rebutted by showing that the absentee is alive.(g)

(a) Miller's estate, 3 Rawle, 312; Gallis. 274, 284; 5 Rob. Adm. R. 99.
(b) Dixon *v.* Dixon, 3 Brown, C. C. 510.
(c) Mainwaring *v.* Baxter, 5 Ves. 458.
(d) Miller *v.* Beates, 3 S. & R. 490.
(e) King *v.* Paddock, 18 John. 141.
(f) Loring *v.* Steinman, 1 Metc. 204; Burr *v.* Sim. 4 Whart. 150; Bradley *v.* Bradley, 4 Whart. 173.
(g) 1 Phil. Ev. 159; Smith *v* Knowlton, 11 N. H. Rep. 191.

In consequence of this absence and presumed death, administration will be granted on his estate, and guardians may be appointed to his children; his property will vest in his heirs, subject to be divested by proof that the absentee is alive; and his wife may marry without being guilty of the crime of bigamy;(a) but upon his return he has the choice of retaking his wife, or abandoning her to her new husband.(b)

TITLE VI.—OF MARRIAGE.

235. Marriage owes its institution to the law of nature, and its perfection to the municipal or civil law. It is considered in this country as a civil contract simply, and not, as in some countries, a sacrament.

As an institution established by nature, it consists in the free and voluntary consent of both parties, and in the reciprocal faith which they pledge to each other. As a civil contract, it not only requires the free consent of the parties, but also that that consent shall be lawful, that is, conformable to the laws of the state where the contract takes place.

236. Viewed in this light, *marriage* is a contract, made in due form of law, by which a free man and a free woman reciprocally engage to live with each other during their joint lives, unless it shall be lawfully dissolved within that time, in the union which ought to exist between husband and wife, for the purpose of perpetuating their species, to assist each other, and to share a common destiny as to the good or evil which shall happen to them. By the terms free man and free woman, here used, are meant, not only that they are free, and not slaves, but also, that they are clear of all bars to a lawful marriage.(c)

(a) By the English Stat. 1 Jac. I., C. 1, the wife is exempted from punishment, if she marry after an absence of seven years; and the principles of this statute have been adopted in the United States generally, though the time is not always the same.

(b) Kenley *v.* Kenley, 2 Yeates, 207.

(c) Shelf. on M. & D., C. 1, S. 1; Dig. 23, 2, 1; Ayl. Parer. 359; Stair's Inst. tit. 4, s. 1.

This subject will be examined by taking a rapid view of, 1, the qualities required to contract marriage; 2, of the form of marriage; 3, of the place where it is made; 4, of the proof of marriage; 5, of void and voidable marriages; 6, of the effects of a lawful marriage; 7, of the dissolution of marriage; 8, of second marriages.

CHAPTER I.—OF THE QUALITIES OR CONDITIONS REQUIRED TO CONTRACT MARRIAGE.

237. Every person arrived at the age of puberty, may contract marriage, unless prevented by some legal bar, or some cause which forbids such marriage. These bars to marriage may be arranged into the following classes:

1. Want of competent age.
2. Want of consent.
3. A former marriage subsisting.
4. Consanguinity or affinity.
5. Want of consent of parents.
6. Civil death.
7. Crime of adultery.

SECTION 1.—OF THE WANT OF COMPETENT AGE.

238. The end of marriage is the procreation of children and the propagation of the species. Before arriving at *puberty*, persons are by nature incapable to contract a lawful marriage; because they do not possess these qualities. But the age of puberty varies according to climate and circumstances, and a general rule must exist to establish this period. The Roman and canon law fix it, in males, at fourteen; and, in females, at twelve years of age. This rule has been adopted by the common law.

If, therefore, a boy under fourteen, and a girl under twelve years, marry, this marriage is inchoate and imperfect, and may be avoided by them on attaining their respective ages.(*a*)

(*a*) 1 Bl. Com. 436.

SECTION 2.—OF THE WANT OF CONSENT.

239. The *consent* of the contracting parties, and not cohabitation, forms the essence of marriage: *Nuptias consensus, non concubitus facit.*(a) If there is no consent, when there is only an appearance of it, the contract is null, and may be so declared by a competent tribunal. When, for example, there is, 1, a want of reason; 2, constraint or duress; 3, mistake or fraud; or 4, fraud on account of impotency.

§ 1.—Of the want of Reason.

240. The *want of reason* renders the party absolutely incapable of giving his consent to a marriage, and makes the contract invalid.(b) But, a man becoming insane afterward, does not destroy the marriage, which was legal when made.(c)

§ 2.—Of Constraint and Duress.

241. When there has been actual or physical *constraint*, as where a woman is taken and carried away against her will, and violence has been used and continues at the time of the ceremony, it is evident there was no consent, and therefore, the marriage may be annulled by her.

But the constraint may simply be moral and concealed: the body may be free, but the mind constrained. This constraint may arise from bad treatment or anterior threats, and the fear which is the consequence may determine a woman against her will to declare that she consents. This is a consent only in appearance. If the violence amount to duress, the marriage will be void; but if the threats are not of this nature, although perhaps the marriage cannot be declared null on that ground, yet evidence of such acts,

(a) Dig. 50, 17, 30; Id. 35, 1, 15; Co. Litt. 33.
(b) 1 Roll. Ab. 357; Middleborough *v.* Rochester, 12 Mass. 363; Clement *v.* Matison, 3 Rich. 93.
(c) Dig. 23, 1, 8, and 2, 16; 1 Bl. Com. 438, 439.

it is presumed, would be evidence of fraud, and, on this ground, the marriage might be declared void.(*a*)

Reverential fear, such as that of displeasing a passionate father, is not sufficient to cause the marriage to be annulled. There must be an actual and present fear: *Metum præsentem esse oportet, non suspicionem inferendi ejus.*(*b*)

The constraint, too, must have had the marriage for its object. For example, a powerful and violent neighbor threatens you with death; to appease him, you offer him your daughter in marriage, and she consents to marry him to save your life; the marriage would not be null for want of consent, because the threats had nothing to do with the proposed marriage.(*c*)

§ 3.—Of Error and Fraud as to the Persons.

242. When any contract is made, and the subject matter of such contract is mistaken by one of the parties in consequence of the fraud of the other; as if a man professing to sell me paint, shows me an article which has all that appearance, and in consequence of his fraud in concealing its true character, I am deceived, and instead of paint he sells me an article which is not paint, I may avoid the sale.(*d*)

So there is no valid consent if, intending to marry Mary, I marry Sarah, through the *concealment* or the *fraud* of the latter. It is almost impossible to give an example of a marriage where, in modern times, there has been a physical mistake as to the person, yet a case has been recorded where it occurred.(*e*)

243. An error of this kind can scarcely fall on any thing except the moral or social condition of the person. It may be observed generally, that when the error falls only on some advantages of fortune, or some

(*a*) 2 Greenl. Ev, § 464. (*b*) Dig. 4, 2, 9.
(*c*) Boehmer, Jus Ecclesiasticum Prot., in tit. de Spons. § 139.
(*d*) Borrekins *v.* Bevan, 3 Rawle, 26; Jennings *v.* Gratz, 3 Rawle, 168.
(*e*) Gen. xxix. 23.

moral qualities of the party, it is no cause for annulling the marriage; as, if believing Mary to be rich and virtuous I married her, and afterward ascertained she was poor and vicious, the marriage would still be good.(*a*)

244. A grave question might be raised in a case where a woman by fraud, had induced a man to marry her in a free state, by making him believe she was free, when in fact she was, at the time of the marriage, a slave in another state. The marriage would probably be attacked on the ground that the slave could not make such a contract, yet, being in a free state, she could not be considered there as a slave,(*b*) and if the contract is valid where made, it is in general good every where.(*c*)

§ 4.—Want of Consent on account of Fraud in relation to Impotency.

245. By *impotence* is meant the incapacity for copulation or propagating the species. It has been used synonymously with sterility.

Impotence is curable or incurable; when it is curable it is no cause either for declaring the marriage null or for a divorce; when it is incurable it may be good cause for a divorce, but the marriage is not for that cause void *ab initio*.(*d*)

SECTION 3.—OF A FORMER MARRIAGE SUBSISTING.

246. A *subsisting marriage* is a complete bar to a new one.(*e*) The person who would marry a second time pending the first marriage would be guilty of bigamy, and punishable criminally as such, unless he or she proved that the second marriage was contracted

(*a*) See 2 Hagg. Cons. R. 248; Benton *v.* Benton, 1 Day, 111.

(*b*) Prigg *v.* Pennsylvania, 16 Pet. 539.

(*c*) Story, Confl. of Laws, § 121.

(*d*) See Bac. Ab. Marriage, etc., E 3; 1 Bl. Com. 440; Com. Dig. Baron and Feme, (C 3); Beck's Med. Jur. 67; Code 5, 17, 10.

(*e*) Sellers *v.* Davis, 4 Yerg. 503; Jones *v.* The State, 5 Blackf. 141.

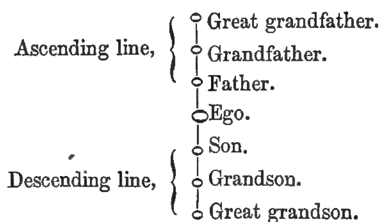
in good faith. This takes place when the husband or wife has been absent for seven years without being heard from, as has already been observed.(*a*) But as the marriage cannot be dissolved by mere absence, the husband may, at any time afterward, declare such second marriage null.(*b*) The absence merely purges the felony.

SECTION 4.—OF THE BAR OF CONSANGUINITY AND AFFINITY.

247. *Consanguinity* or *kindred* is the relation subsisting among all the different persons descending from the same stock or common ancestor.(*c*)

The series of persons who have descended from a common ancestor, placed one under the other in the order of their birth, is called a *line*. The line connects successively all the relations by blood to each other.

248. There are two lines, the direct and the collateral. The following paradigm will explain the direct line.

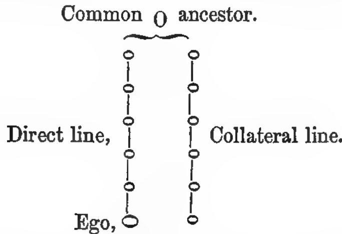


The direct line is divided into two parts: the ascending line, which, commencing at *ego* the *propositus* takes in the father, grandfather and great grandfather; and the descending line is that, which, counting from the same person, descends to his son, grandson and great grandson.

249. The collateral line is a series of persons who descend from a common ancestor. It is called col-

(*a*) Ante, B. 1, part 2, t. 5.
(*b*) Kenley *v.* Kenley, 2 Yeat. 207; Fenton *v.* Fenton, 4 John. 52.
(*c*) 2 Bl. Com. 202.

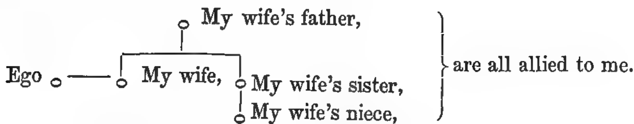
lateral, *quisa à latere,* because it is composed of two direct lines which descend along side of each other in setting out from the common ancestor, which is the point of their union, as in the following example:

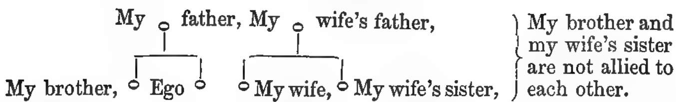


250. A *degree of kindred* is the distance which exists between two of the nearest relations. The degrees are counted by the number of generations, in such a way that there are as many degrees as there are persons born, either in a direct or collateral line.

The word degree of kindred is a metaphorical expression, borrowed from the genealogical figures on which kindred were represented. Formerly the form of a stairs (*gradus*) or a ladder was given to this table.

251. *Affinity* or *alliance* is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife, as that in which she herself stands to them, and gives to the wife the same reciprocal connection with the relations of the husband: so that there is an affinity or alliance between the relations of the wife and the husband, and *vice versâ.* This will appear by the following paradigms:





252. The *bars* to marriage may be classed as follows:

1. Those which subsist because there is a consanguinity in a direct line. Ascendants and descendants are not permitted to marry with each other. This rule is founded in nature, and perhaps in no nation are such marriages allowed.

2. Those which subsist because there is a collateral kindred between the parties; as between the brother and sister, the uncle and the niece,(*a*) but it is not easy to say what are the established degrees within which collaterals cannot marry in the several states, and there are distinctions among them.(*b*)

3. Those where there is a near affinity between the parties. In some states the marriage of a man to his sister-in-law has been dissolved for that cause,(*c*) while in others such marriage would be valid.(*d*)

SECTION 5.—OF THE WANT OF CONSENT OF PARENTS.

253. In general the consent of parents is not required in order to give validity to a marriage. In some states there are provisions giving a right to the father to sue for a penalty the clergyman or magistrate who shall marry his minor child.(*e*)

It is to be regretted that paternal authority is not more respected, for whenever that is disregarded other duties are neglected.

SECTION 6.—OF CIVIL DEATH.

254. A person who is civilly dead, having no capacity to make a contract, of course cannot marry.

SECTION 7.—OF THE CRIME OF ADULTERY.

255. By the Roman law, which has been adopted in some of the United States, a person who had com-

(*a*) Burgess *v.* Burgess, 1 Hagg. Cons. R. 384, 386. Sed vide Sutton *v.* Warren, 10 Met. 451.

(*b*) 2 Kent, Com. 83; Harrison *v.* Burwell, Vaugh. 206; S. C. 2 Vent. 9; Butler *v.* Gastrell, Gilb. Eq. R. 156; Story, Confl. of Laws, § 115, n.

(*c*) Comm. *v.* Perryman, 2 Leigh's R. 717.

(*d*) Story, Confl. of Laws, § 115.

(*e*) 2 Kent, Com. 86.

mitted adultery, and for this cause was divorced, at the suit of the innocent party, could not afterward marry the partner of his or her guilt.(*a*) But if, to evade the law, he is married in a state where such marriage is valid, and he returns to his own state, the marriage cannot be impeached on that ground.(*b*)

CHAPTER II.—OF THE FORM OF MARRIAGE.

256. Various forms have been adopted in the several states, and they have, each, received the sanction of the courts. And though in perhaps all the states of the Union, there are statutes regulating the celebration of the marriage rites, and inflicting penalties on all who disobey their injunctions, yet, in general, it may be stated, that in the absence of a positive statute, declaring that a marriage not celebrated in the manner it prescribes, shall be absolutely void, or that none but certain designated persons shall solemnize a marriage, any marriage regularly made according to the common law would be valid, although the regulations of the statute may not have been observed.(*c*) These will be briefly considered by taking a view of, 1, the persons before whom the marriage is to take place; 2, the form or ceremony to be used.

SECTION 1.—OF THE PERSONS BEFORE WHOM THE MARRIAGE MUST TAKE PLACE.

257. Marriage being but a civil contract, it may be entered into, by the common law, before a magistrate, a clergyman, or simply before witnesses. It is not indispensable that a clergyman should be present. Among some of the religious sects, the Quakers for example, the only persons present are the witnesses, who are generally the guests at the wedding. In some

(*a*) 1 Toull. n. 555; Act of Pennsylvania of 13th March, 1813.

(*b*) Putnam *v.* Putnam, 8 Pick. 433. See Phillips *v.* Gregg, 10 Watts, 168.

(*c*) 2 Kent, Com. 91, 92; Hantz *v.* Sealey, 6 Binn. 405; Milford *v.* Worcester, 7 Mass. 48, 55; Londonderry *v.* Chester, 2 N. H. R. 268; Reeves, Dom. Rel. 196, 200, 290; The State *v.* Murphy, 6 Ala. 765.

of the states, certain persons have been designated who are authorized to marry.

SECTION 2.—OF THE FORM OR CEREMONY TO BE USED.

258. No particular *form* is requisite, but the parties must take each other for husband and wife, in the present tense. The consent of the parties is all that is requisite, and as marriage is a contract *jure gentium*, that consent is all that is needful by natural or public law. If the contract be made *per verba de presenti*, though not consummated by cohabitation, or if made *per verba de futuro*, and followed by consummation, it will be a good marriage, unless prohibited by positive regulations to the contrary.(*a*)

259. A promise to marry at a future time, cannot be construed into a marriage, though it may afford an action for its breach.

On the same principle, a declaration of marriage, however distinctly applicable to the present time, if it incorporate words which make it conditional, would probably be considered as insufficient; as where the man wrote to the woman thus: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, *in the event of a child being born in consequence of the present connection between us*." This was held to be no marriage by the laws of Scotland, on the ground that there was no present engagement.(*b*)

CHAPTER III.—OF THE PLACE WHERE THE CONTRACT OF MARRIAGE IS MADE.

260. As a general rule, a marriage which is valid by the law of the place where it is celebrated, is good everywhere; if invalid there, it is invalid everywhere.(*c*)

(*a*) Fenton *v.* Reed, 4 John. 52; Jackson *v.* Winne, 7 Wend. 47; 2 Kent, Com. 87; 2 Greenl. Ev. § 460; Cram *v.* Burnham, 5 Greenl. R. 213; Bac. Ab. Marriage, A; Hants *v.* Sealy, 6 Binn. 405.

(*b*) Burton's Man. of the Laws of Scotl. Priv. Rights, c. 1, s. 1.

(*c*) Story Confl. of Laws, § 113; 2 Kent, Com. 92; Morgan *v.* McGhea, 5 Humph. 13; Phillips *v.* Gregg, 10 Watts, 158.

261. But to this rule there are several exceptions:

1. *Incestuous marriages* would not be holden good in any of the United States. But the incest must be such as is generally understood to be so, at least by Christian states. And a person who married two wives, where polygamy is allowed, would not be considered as having contracted a legal marriage with the second.(*a*)

2. When the positive law of the country *prohibits* such marriage. But it was holden in a case in Massachusetts,(*b*) that when the parties left the state for the purpose of evading the statute law, and of marrying in opposition to it, and, being married, returned to it, the marriage was deemed valid, if valid according to the laws of the place where it was made.

3. Where, in *cases of necessity*, a marriage is celebrated, not according to the laws of the country where it takes place, but according to the laws of the country of the parties; as, for example, where persons reside in factories, in conquered places, or in desert or barbarous countries, or in countries of an opposite religion. In these cases such contract is held valid on the ground of necessity.(*c*)

CHAPTER IV.—OF THE PROOF OF MARRIAGE.

262. It is usual for a magistrate or clergyman, who officiates at the making of the marriage, to make a record of it, and also to give a certificate of it, signed by himself, to the parties. In those religious societies, also, where marriages take place without the agency or presence of a magistrate or clergyman, a record of them is kept, and a certificate, signed by the parties and the witnesses, is delivered to the former.

263. Marriage may be proved either by direct testimony or by the evidence of facts, from which it may

(*a*) Story, Confl. § 114

(*b*) Medway *v.* Needham, 16 Mass. 157; Putnam *v.* Putnam, 8 Pick. 433, S. P. But see Williams *v.* Oates, 5 Iredell, 535, *contrà*.

(*c*) Story, Confl. § 118. See Ruding *v.* Smith, 2 Hagg. Cons. R. 371, 384; Latour *v.* Teesdale, 8 Taunt. 830.

be inferred.(*a*) Evidence of this kind is indispensable upon the trial for bigamy or for adultery, and in actions for criminal conversation. In such cases, the marriage must be proved to have been valid in all respects, for, without this proof, there is no evidence of guilt.(*b*)

264. The affirmative sentence or judgment of a court having jurisdiction of the question of marriage or no marriage, is conclusive evidence of the marriage, as *res judicata*.(*c*)

265. Proof by witnesses present at the celebration,(*d*) or by an examined or certified copy of the register of the marriage, when such register is required by law, with proof of the identity of the parties, is sufficient.

266. In civil causes, other than actions for seduction, marriage may also be proved by reputation, the declarations and conduct of the parties, and other circumstances usually attending that relation.(*e*)

267. General reputation is admissible to prove the fact of marriage of the parties spoken of.(*f*)

268. Declarations by the parties made *ante litem motam*, may be given in evidence to prove a marriage.(*g*)

269. The conduct of the parties may also be given in evidence to prove a marriage. It is competent for the party on whom the affirmative of the issue lies, to show the conduct of the parties, their conversations and letters, addressing each other as man and wife;(*h*) their appearing in respectable society, and there being received and considered as husband and wife; the assumption by the woman of the name of the

(*a*) Jewell's Lessee *v.* Jewell, 1 How. U. S. 219; s. c. 17 Pet. 213; Weaver *v.* Cryer, 1 Dev. 337; Taylor *v.* Shemwell, 4 B. Munr. 575.

(*b*) The State *v.* Hodgskins, 1 App. 155.

(*c*) 1 Greenl. Ev. § 484, 493, 544, 545.

(*d*) Comm. *v.* Norcross, 9 Mass. 492; Comm. *v.* Littlejohn, 15 Mass. 163.

(*e*) Senser *v.* Bower, 1 Pennsyl. 452.

(*f*) Evans *v.* Morgan, 2 C. & J. 455; Weaver *v.* Cryer, 1 Dev. 337; Taylor *v.* Shemwell, 4 B. Monroe, 575; Selser *v.* Bower, 1 Pennsyl. 450.

(*g*) Jackson *v.* Clan, 18 John. 346; Forney *v.* Hallacher, 8 S. & R. 159.

(*h*) Alfray *v.* Alfray, 2 Phill. Ecc. R. 547.

man ;(a) and any other such conduct. Their cohabitation as husband and wife is presumed to be lawful until the contrary appears.(b)

270. When a contract in writing is essential to the marriage, either in consequence of some public law or of some rule of the religious community to which the parties belong, and when in fact the contract has been reduced to writing, though it was not required, such writings are admissible to prove the marriage. And a certificate of marriage, though ordinarily not in itself evidence of the fact it recites, yet if properly kept, and produced from the proper custody, may be read as collateral proof.(c)

271. After the death of the parties, or of either of them, the marriage cannot be avoided,(d) and after a lapse of thirty years and the death of all the parties, legitimacy will be presumed on slight proof.(e)

CHAPTER V.—OF VOID AND VOIDABLE MARRIAGES.

272. Marriage produces different effects toward the spouses and their issue, when it is void, from those which are produced when it is merely voidable. A *void marriage* is one which is as if it had not been made, the spouses receive no benefit whatever and acquire no right from it, and their issue is illegitimate. A *voidable marriage* is one which, for some defect, may become void; but, till it is attacked on that ground, it is good.

SECTION 1.—OF VOID MARRIAGES.

273. Marriages are void on account of some *radical vice*, which cannot be cured. These defects may be classed as follows:

1. When they *violate a law of nature*, as marriages

(a) Habback, Ev. of Succession, 247.
(b) Telts v. Foster, 1 Tayl. 121; Allen v. Hall, 2 N. & M. 114.
(c) Habback Ev. of Succession, 258; 2 Greenl. Ev. § 463.
(d) Co. Litt. 33 a; 1 Bl. Com. 434; Bouham v. Badgley, 2 Gilman, 622.
(e) Johnson v. Johnson, 1 Desaus. 595.

between lineal ascendants and descendants, as between father and daughter.

2. When the spouses are related to each other within any other degree of consanguinity *forbidden by law*.(*a*)

3. When an act of assembly or other legislative act *declares them void*.(*b*)

4. When both or either of the parties are wholly *incapable of consenting;* as in the case of a lunatic.(*c*)

5. When either of the parties is *married* at the time of such marriage.(*d*)

6. When the marriage is tainted with *fraud*.(*e*).

SECTION 2.—OF VOIDABLE MARRIAGES.

274. A voidable marriage is one which has some force and effect, but which, on account of some inherent quality, may be annulled and avoided; as, where a minor under fourteen years of age marries, he may avoid the marriage on coming of age; but if he sanctions it, after that period, it will be valid, and cannot afterward be impeached on that ground.

CHAPTER VI.—OF THE RIGHTS AND DUTIES ARISING FROM MARRIAGE.

275. This chapter will be divided into three sections: in the first will be considered the rights and duties of the husband; in the second, the rights and duties of the wife; in the third, their obligations toward their children, and their rights to them.

SECTION 1.—OF THE RIGHTS AND DUTIES OF THE HUSBAND.

276. Persons who marry, contract by the marriage, reciprocally toward each other, the obligation to live together during the existence of the marriage; and they may be considered, in some sense, as one indivi-

(*a*) Moore *v.* Whitaker, 2 Harring. 50.
(*b*) The State *v.* Hooper, 5 Ired. 201.
(*c*) Wrightman *v.* Wrightman, 4 John. 343.
(*d*) Sellers *v.* Davis, 4 Yerg. 503; Jones *v.* The State, 5 Blackf. 141.
(*e*) Scott *v.* Shufeldt, 5 Paige, 43.

dual; *Erunt duo in carne una.*(a) For this reason the very being of the wife is, for most purposes, merged in that of her husband, and it is under his protection and cover that she performs every thing; hence she is called a *feme covert*, and her state during the marriage is denominated *coverture.*(b)

§ 1.—Of the obligations of the husband.

277. He is bound to receive his wife at his home and treat her there as a husband should do, that is, furnish her with all the necessaries and conveniences which his fortune enables him to do, and which her situation requires; but this does not include such luxuries as, according to her fancy, she deems necessaries.(c)

By the term *necessaries* is meant all such things as are proper and requisite for the sustenance of man. Whenever the husband by his misconduct has obliged his wife to take up necessary things on credit, he must pay for them, though he may have previously warned the tradesman not to trust her; but if her own misbehavior has reduced her to want, he cannot be charged, unless the things furnished, other than the necessaries of life, are not sent back when he has it in his power to return them, although he may not then be living with her.(d)

It is his duty to love his wife, and to bear with her faults, and, if possible, by mild means to correct them, and he is required to fulfil toward her his marital promise of fidelity, and can, therefore, have no lawful carnal connection with any other woman, without a violation of his obligations.

As he is bound to govern his house properly, he is liable for its misgovernment, and he may be punished for keeping a disorderly house, where his wife had the

(a) 1 Bl. Com. 442; Co. Litt. 112.
(b) 1 Bl. Com. 442.
(c) 1 Hagg. 35; S. C. 4 Eccl. R. 411, 312.
(d) Waithman *v.* Wakefield, 1 Campb. 120.

principal agency; and he is liable for her acts, as for her slander or trespass.

He is also liable for his wife's debts incurred before coverture, provided they are recovered from him during their joint lives; and, generally, for such as are contracted by her during coverture. In this latter case she is presumed to act as his agent.

§ 2.—Of the rights of the husband.

278. Being the head of the family, the husband has a right to establish himself wherever he may please; in this he cannot be controlled by his wife; and he may manage his affairs in his own way. He may make whatever contracts may suit him, and acquire and sell property. His real estate, however, will be liable for his wife's dower, unless she releases it according to certain prescribed forms.

During a barbarous age, the husband had the power to correct or whip his wife, in order to bring her into subjection; this is now considered unlawful in some, and perhaps all the states of the Union.(*a*)

SECTION 2.—OF THE RIGHTS AND OBLIGATIONS OF THE WIFE.

§ 1.—Of the obligations and liabilities of the wife.

279. The wife is bound to love her husband, to be faithful to him, to do all in her power to promote their common interest, to perform toward him all the marital duties. She is bound to follow him wherever he may desire to establish himself within the United States,(*b*) unless by acts of injustice, or such as are contrary to his marital duties, the husband renders her life or happiness insecure.

She is not liable to pay any obligations she enters into during the coverture, either for purchases, or for the payment of any money.(*c*) When she makes a

(*a*) See 1 Bl. Com. 444.
(*b*) Chretien *v.* Her Husband, 5 N. S. 60.
(*c*) Jackson *v.* Vanderheyden, 17 John. 167.

contract for necessaries she is presumed to act by authority of her husband, and he alone is liable for them.

280. When she commits a criminal act, she is responsible as any other person, unless in cases where the crime is not *malum in se*, and it is committed in the presence of her husband.(*a*) But if it appear she acted independently of him, she will be responsible even in such a case.(*b*)

She is liable for her torts, as though she were not married; as trespass, slander, and the like.

§ 2.—Of the rights of the wife.

281. She has a right to the love and affection of her husband, to such part of his fortune as may be necessary and proper, taking his circumstances into consideration.(*c*) But this is only upon the condition that she fulfil her own duties; for, if she were to elope with another man, she would not be entitled to his alimony.(*d*)

SECTION 3.—OF THE DUTIES OF PARENTS TOWARD THEIR CHILDREN.

282. The duties of parents toward their children vary according to the fact whether they are legitimate or illegitimate. These will be separately considered.

§ 1.—Of legitimate children.

283. A *legitimate child* is one who is born in lawful wedlock, or within a competent time afterward. It is a principle of the common law, that when a child is born during the coverture of his mother, her husband is presumed to be the father: *Pater is est quem nuptiæ*

(*a*) Rosc. Cr. Ev. 785; Comm. *v.* Neal, 10 Mass. 152; Martin *v.* Comm., 1 Mass. 347; Comm. *v.* Trimmer, 1 Mass. 476.

(*b*) Hale, P. C. 516; 1 Russ. on Cr. 16, 20; State *v.* Collins, 1 McCord, 355; Jones *v.* State, 2 Blackf. 484.

(*c*) Bascom *v.* Bascom, Wright, R. 632; Chunn *v.* Chunn, 1 Meigs, 131.

(*d*) Holmes *v.* Holmes, Walker, 474. See Daily *v.* Daily, Wright, 514.

demonstrant.(*a*) But this presumption may be rebutted.(*b*)

284. The principal obligations which parents owe their children are their maintenance, their protection, and their education.

1. Parents are bound to *maintain* their children. In the first place will be considered who is bound; secondly, what the maintenance shall be; and, thirdly, when it shall cease.

First, the obligation to maintain children arises from one of the first laws of nature, which the civil law seconds and sanctions. This right of support, and the duty corresponding to it, extend to the father, grandfather, mother, and grandmother and other ascendants. If neglected, this duty will be enforced by the courts, provided the parties are of sufficient ability.(*c*)

Secondly, the obligation of parents to support their children extends to the necessaries of life, including food, lodging and clothing, in a just proportion between the wants of the child and the ability of the parents. Nothing fixed or certain can be demanded; there is always something relative in ascertaining the amount due.

Thirdly, the extent of the obligation. No parent is bound to provide a maintenance for his issue, unless the children are impotent and unable to work, either through infancy, disease or accident. Hence it follows, that when a child has attained an age sufficient to support himself, has been restored to ability, or has been cured from disease, the parents are no longer bound to support him.(*d*)

285.—2. A parent is bound to *protect* his children,

(*a*) 1 Bl. Com. 446; Tate *v*. Penne, 7 N. S. 548, 553.

(*b*) Commonwealth *v*. Shepherd, 6 Binn. 283; 1 Browne's R. Appx. xlvii. See post B. 1, part 2, t. 7, c. 1.

(*c*) Hillsboro' *v*. Deering, 4 N. Hamp. R. 86; Harland's case, 5 Rawle, 323.

(*d*) 1 Bl. Com. 449.

but this duty is so well enforced by the law of nature, that it requires but little aid from the civil law. A parent may justify an assault and battery in defence of his child, and he may uphold his children in their quarrels and lawsuits, without incurring the guilt or punishment of the crime of maintenance.

286.—3. The *education* of children is not enforced by the civil or municipal law. Nature has implanted in the human breast a strong desire to see children prosperous and happy, and it is owing to this that parents spend so much time and money to educate their children. Besides, by the laws of many of the states, the people are educated at the public expense.

§ 2.—Of illegitimate children.

287. This head will be divided by considering, 1, the legal duties of parents toward such children; and 2, the rights and incapacities of such children.

Art. 1.—*Of the legal duties of parents toward illegitimate children.*

288. The parent of a bastard child is bound to maintain him during his childhood, until he can maintain himself; on a failure to do so, the public authorities, guardians or overseers of the poor, or by whatever name they may be known, can, under the statute regulations in the several states, institute proceedings against the parent, who is known as the *putative father*.(*a*)

Art. 2.—*Of the rights and incapacities of illegitimate children.*

289. The rights of bastard children are very few, being principally such as they acquire. They are, as has been before observed, entitled to maintenance, but they can inherit nothing, being considered as nullius filius. This harsh rule has been somewhat modified in

(*a*) Bac. Ab. Bastardy, (E.) Bouv. ed.

some states.(*a*) A bastard may gain a name by reputation, though he has none by inheritance. In general, the place of his domicil of origin is that of his mother.

CHAPTER VII.—OF THE DISSOLUTION OF THE MARRIAGE.

290. The contract of marriage is dissolved by death, natural or civil, and by divorce.

SECTION 1.—OF THE EFFECTS OF DEATH.

291. Death has the effect of dissolving the marriage; for, by its very terms, it was to continue only till that change should take place. On the death of one party, the other is free to marry again; but decency requires that no marriage should take place till at least the end of one year; and, in the case of women, this time is absolutely requisite in order that it may be known who is the father of any child she might have.

With regard to property, the real estate of the wife and her choses in action are restored to her on the death of her husband; and she has a dower in his real estate, of which he was seised. On her death, her real estate descends to her heirs, unless, under a power, she has made a will devising it, subject to her husband's right by curtesy, when he is entitled to it.

On the death of the wife, the liability of the husband, to be sued for her debts, *dum sola*, ceases; and on the death of the husband his representatives are not liable for such debts.

SECTION 2.—OF DIVORCES.

292. In its most extensive sense, the word *divorce* signifies the lawful separation of husband and wife:

(*a*) In Connecticut the bastard child inherits the mother's real estate, Heath *v.* White, 5 Conn. 228; and bastard children of the same mother, inherit from each other, Brown *v.* Dye, 2 Root, 280; and the same just rule is established in Kentucky, by statute, 3 Dana, 233; and in Massachusetts, Rev. St. ch. 61, §§ 2 and 3. In Virginia, and in Louisiana, a bastard child, acknowledged by his parents, who have since intermarried, is put on the same footing with children born in wedlock. Rice *v.* Efford, 3 H. & M. 225; Civ. Code of Lo., art. 913.

Divortium à diversitate mentium dictum est, quia in diversas partes sunt qui distrahunt matrimonium.(a)

There are two kinds of divorce, namely, *à mensâ et thoro*, which merely separates the parties, without destroying the contract; and the divorce which severs the tie, *quoad fœdus et vinculum* which is a dissolution of the marriage contract: this is commonly called a divorce *à vinculo matrimonii.*

It will be proper to treat of this subject in two sections: 1, of *divorces à vinculo;* and 2, of *divorces à mensâ et thoro.*

§ 1.—Of divorces à vinculo.

293. We will inquire, 1, for what causes a divorce *à vinculo* will be granted; 2, its effects.

Art. 1.—*For what causes a divorce à vinculo will be granted.*

294. The divorce *à vinculo* was never granted by the ecclesiastical courts except for the most grave reasons. These, according to Lord Coke, are *causa præcontractus; causa metus; causa impotenia, seu frigiditatis; causa affinitatis; et causa consanguinitatis.*(b)

In the United States divorces *à vinculo* are granted generally by the legislatures of the several states, for such causes as may be sufficient to induce the members to vote in favor of granting them. But in some of the states the legislatures are prohibited from granting them ;(c) and in others they can be granted by the legislature only after the courts have granted them for specified causes.(d)

The courts, in nearly all the states, have the power to decree divorces for grave causes, provided for and defined in their acts of assembly. These may be classed into those which occurred before marriage, and those which have happened since.

(a) Dig. 24, 2, 2.
(b) Co. Litt. 235 a.
(c) Const. of Wisconsin, art. 4, s. 24.
(d) This is the case in Mississippi.

295.—1. The causes which existed *before* marriage are, precontract, or the marriage of one of the parties existing at the time of the marriage sought to be dissolved; consanguinity, or that degree of kindred within which marriage is forbidden by law; impotence, when incurable;(*a*) idiocy, lunacy, or other mental imbecility, which renders the party subject to it incapable of making a contract; fraud, when it has been exercised to induce the marriage; and in some states, affinity within certain degrees.(*b*)

296.—2. Divorces may also be granted for causes which have arisen *since* the marriage took place, the principal of which are adultery and cruelty.

Adultery, or the criminal carnal connection between one of the spouses and any person of the opposite sex. But if the adultery has been condoned, that is, forgiven by the innocent spouse, which forgiveness is evidenced by cohabitation, a divorce will not be granted.(*c*) Nor will adultery be a sufficient cause for a divorce when the party complaining has been guilty of the same offence.(*d*)

Cruelty, which consists in those acts which affect the life, the health, or even the comfort of the party aggrieved, and give a reasonable presumption of bodily hurt.(*e*)

Desertion, which is the act of one of the spouses in leaving the other, without just cause, for the purpose of causing a perpetual separation. The time which must elapse after the malicious desertion, is generally regulated by statute in the several states.

(*a*) Keith *v.* Keith, Wright's R. 518.

(*b*) Verm. Rev. Stat. t. 16, c. 63, s. 1.

(*c*) Barnes *v.* Barnes, Wright, 475: Questel *v.* Questel, Wright, 491; Bouv. L. D. Condonation; Quincy *v.* Quincy, 10 N. H. Rep. 272; Phillips *v.* Phillips, 4 Blackf. 131; Hall *v.* Hall, 4 N. H. Rep. 462.

(*d*) Christianberry *v.* Christianberry, 3 Blackf. 203.

(*e*) Bouv. L. D. Cruelty. By the French Law, while divorces were granted, one of the causes was the libel or slander of one of the spouses by the other. In our jurisprudence, I am not aware that the wife has any remedy against her husband for slander.

In some states the *condemnation to punishment* for some infamous crime,(*a*) and being charged with an infamous crime, and a fugitive from justice.(*b*)

Having formed a *connection with some religionists* whose opinions and practices are inconsistent with the duties of marriage is, in some states, cause for divorce.(*c*)

Refusal on the part of the husband, when of sufficient ability, *to provide necessaries* for the subsistence of his wife, is also a cause for divorce in some states.(*d*)

Habitual drunkenness is also a sufficient cause by statutory provisions in some of the states.

Art. 2.—Effects of a divorce à vinculo.

297. This divorce severs the marriage tie, and the husband and wife can marry again, in general, as if they never had been married before, provided, (in some states) that when they have been divorced for adultery, they shall not marry the partner of their guilt.(*e*)

298. The effects of such a divorce on the property of the wife are various in the several states. When the divorce is for the adultery, or other criminal acts of the husband, in general the wife's lands are restored to her;(*f*) when it is caused for the adultery, or other criminal acts of the wife, the husband has in general some qualified right of curtesy to her lands; when the divorce is the consequence of some preëxisting cause, as consanguinity, affinity, or impotence,

(*a*) Ark. Rev. St. c. 50, s. 1, p. 333.

(*b*) Laws of Lo. Act of April 2, 1832,

(*c*) In Kentucky and Maine. Dyer *v.* Dyer, 5 N. H. Rep. 271.

(*d*) In Vermont and Rhode Island. See Amsden *v.* Amsden, Wright's R. 66.

(*e*) Ante, n. 255. This is also the rule of the civil law. Poth. Du Mariage, part 3, c. 3, art. 7; 1 Toull. n. 555.

(*f*) Estate of Kintzinger, 2 Ashm. 455; Barber *v.* Root, 10 Mass. 260; Star *v.* Pease, 8 Conn. 541. In Massachusetts, the interest acquired by a judgment creditor of the husband, by a levy of his execution upon the rents and profits of the wife's real estate, is determined and defeated by a decree of divorce *á vinculo* in favor of the wife. Barker *v.* Root, 10 Mass. 260.

in some states, as Maine and Rhode Island, the lands of the wife are restored to her.(*a*)

A divorce *à vinculo* is in general a *bar to dower;* but in Connecticut, Illinois, New York, and, it seems, in Michigan, dower is not barred by a divorce for the fault of the husband. In Kentucky, when a divorce is caused for the fault of the husband, the wife takes as if he were dead.(*b*)

§ 2.—Of divorces à mensâ et thoro.

299. A divorce *à mensâ et thoro* is a decree of a competent tribunal, that husband and wife shall be separated.

Art. 1.—*For what causes granted.*

300. This divorce is never granted for causes arising before the marriage. The causes for which it is decreed are in general cruelty, desertion or such other abuses as render the life of the innocent party burdensome.

Art. 2.—*Effect of a divorce à mensâ et thoro.*

301. This divorce is a mere separation, and does not affect the rights of the parties as to property. And if the husband is bound by the decree to pay the wife alimony, and he does pay it, he is not responsible for her future debts.(*c*)

In England, it has been expressly decided that a woman divorced *à mensâ et thoro,* living separately from her husband, cannot sue nor be sued as a feme sole.(*d*) But in Massachusetts, a different rule has been adopted.(*e*)

The divorce *à mensâ et thoro,* is only a legal separa-

(*a*) 1 Hill. Ab. 51, 2.

(*b*) 1 Hill. Ab. 61, 2.

(*c*) Bac. Ab. Baron and Feme, (M); Ellah *v.* Leigh, 5 T. R. 679.

(*d*) Lewis *v.* Lee, 3 B. & Cr. 291; See Lean *v.* Shultz, 2 W. Bl. 1195; Marshall *v.* Rutton,, 8 T. R. 845; Bar. Ab. Baron and Feme, (M).

(*e*) Dean *v.* Richmond, 5 Pick. 461. Read the forcible argument of Parker, C. J.

tion, terminable at the will of the parties, the marriage continuing in regard to every thing not necessarily withdrawn from its operation by the divorce; for example, if there be a divorce *à mensâ et thoro*, and afterward a legacy be given to the wife, by the common law the husband may release it.(*a*)

TITLE VII.—OF PATERNITY AND FILIATION.

302. Having examined the forms, obligations, rights and duties which arise from marriage, and the manner in which it is dissolved, it is natural, in the next place, to explain the principal end of marriage, paternity, filiation, and legitimacy.

Those children who are born in wedlock, or under the sacred veil of marriage, are alone *legitimate*. Legitimacy confers on them the rights of family and kindred, of which natural children, born of an illicit union, alike reproved by morality and law, are deprived.

It seems, therefore, proper to lay down the rules which point out with certainty paternity and filiation, either legitimate or illegitimate.

For that purpose this title will be divided into three chapters; the first will treat of legitimate children, born in wedlock; the second, of the proof of legitimacy; and the third, of natural children.

CHAPTER I.—OF LEGITIMATE CHILDREN BORN IN WEDLOCK.

303. *Paternity* and *filiation* are correlative terms, the first of which signifies the quality of father, and the second that of child. Filiation arises from the birth which we receive from such a father or from such a mother.

The mother is always known by evident signs; whether married or not, she is always certain: *mater*

(*a*) 5 Pick. 468; Bac. Ab. Baron and Feme, D; 1 Roll. Ab. 343; Stephens *v.* Tolty, Cro. Eliz. 908.

semper certa est etiamsi vulgò conceperit.(a) There is not the same certainty as regards the father; the mother is alone certain of the fact, and the relations may not know, or feign ignorance, as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

304. When the mother is married, her husband is presumed to be the father of the children born during the coverture; or, if her husband be dead, the presumption is still that he was the father, provided the child has been born within a competent time after the coverture determined. This presumption arises whether the child was conceived during the coverture or before: *pater is est quem nuptiæ demonstrant.*(b)

The rule is founded on a double presumption: one that there has been a cohabitation between the parents, not only before birth, but before and at the time of the conception of the child: and the other, that the mother has faithfully observed the vow which she made to the husband at the time of marriage. Of these two presumptions, the first one only is essential. The innocence of the mother is always presumed.

It is then the marriage, the actual or presumed cohabitation, and presumption of innocence, always favored by the law, which forms the first principle adopted in relation to filiation, as the foundation of society. The child born in wedlock has for its father the husband of its mother.

305. But a child is conceived a long time before his birth. He lives in *ventre sa mère* before he is born.

He may then be conceived before the marriage, and be born while it subsists. In this case he is presumed to be legitimate, although the marriage may have taken place but a very short time before its birth;(c) or, having been conceived during the marriage, it may not have been born until after that contract was dis-

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(a) Dig. 2, 4, 5.
(b) Dig. 2, 4, 5.
(c) 1 Bl. Com. 454, 455.

solved: in this case it will be presumed legitimate, if born within a competent time afterward.

306. In doubtful cases, in order to fix a term before or after which a child shall not be legitimate, recourse was had to another presumption that the child was born after a certain period of gestation.

By common consent, the courts have fixed the period of gestation, or the time during which the human female who has conceived carries the embryo or fœtus in her uterus, at forty weeks, or ten lunar months,(*a*) but this may vary one, two, or even three weeks.(*b*) In point of fact, however, the duration of human pregnancy is not very certain, and probably is not the same in every woman.(*c*) The civil code of Louisiana, copying the code civil Français, has fixed the period of gestation.(*d*)

There are three classes of cases in which the legitimacy may be contested: conception and birth during the marriage; conception before and birth during the marriage; and conception during the marriage and birth after. These will be examined separately.

SECTION 1.—EXCEPTIONS TO THE RULE THAT THE CHILD BORN IN WEDLOCK IS THE CHILD OF THE MOTHER'S HUSBAND.

307. The rule that the husband of the mother is the father of the child, born in lawful wedlock, or within a competent time after its dissolution, is founded on a presumption, and a presumption is but a conjecture by which we draw from a known fact a consequence, which renders probable a doubtful fact, which we seek to know.

Marriage is the known fact, whence we conclude that the child born during its existence, or within a competent time afterward, is the offspring of the hus-

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(*a*) Cyclop. of Practical Med. vol. 4, p. 87.

(*b*) Co. Litt. 123 b.; 1 Beck's Med. Jur. 478.

(*c*) Chit. Med. Jur. 409; Dewees' Midwifery, 125; 1 Paris and Fonbl. 218, 230; 1 Foderé, Méd. Lég. § 407—416.

(*d*) B. 1, t. 7, c. 2.

band. But this consequence being neither necessary nor indubitable, it may not be just; and this presumption, like every other, may therefore be rebutted or disproved.

308. Whenever it is evident that cohabitation cannot have taken place between the husband and wife at the time of conception, the rule cannot apply. This evidence is established—

1. By proof of the absolute and perpetual *impotence* of the husband; which impotence has been defined to be the incapacity for copulation or perpetuating the species.

2. The *separation* of the husband and wife, during the time in which the woman became pregnant.

3. *Temporary incapacity*, in consequence of a grave sickness of the husband.

4. Any other circumstance which shows that the husband *has not cohabited* with his wife.

The fact that at the time of the conception of the child the husband and wife did not cohabit with each other, is a negative fact which cannot be established directly alone. It is established indirectly by proving the impossibility of a contrary fact: for example, it cannot be proved directly that the husband and wife did not cohabit, but if it be proved that the wife was in the United States at the time of conception, and that the husband was travelling in Europe for two years immediately before the birth of the child; or if it be proved that the wife was free and the husband was in prison, and remained unseen by the wife, the fact of non access will be made out by the proof of the absence or the imprisonment.

SECTION 2.—OF CHILDREN BORN IN LAWFUL WEDLOCK, BUT CONCEIVED BEFORE MARRIAGE.

309. It is a rule of law that the child born during wedlock, but begotten before marriage, is presumed to

be legitimate.(*a*) But the presumption of paternity may be rebutted by positive proof to the contrary; as, where the husband and wife were white, and the child proved to be a mulatto.(*b*)

SECTION 3.—OF CHILDREN BORN AFTER THE DISSOLUTION OF THE MARRIAGE.

310. A child born within the time allowed for gestation, namely, forty weeks, is presumed to be legitimate; but there does not seem to be any positive time fixed by the common law on this subject.(*c*)

CHAPTER II.—OF PROOF OF FILIATION.

311. This proof may be made in four different ways: by evidence of possession; by the testimony of witnesses; by private writings, and by public registers. Proof may be made against filiation.

SECTION 1.—OF THE PROOF OF FILIATION BY EVIDENCE OF POSSESSION.

312. When the husband and wife have cohabited together as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been, during that time, guilty of infidelity.(*d*) After a lapse of thirty years, and the death of all the parties, legitimacy will be presumed on slight proof.(*e*)

313. If the family by their conduct show a tacit recognition of relationship, it will be evidence of it; as, when the father is proved to have brought up the party as his legitimate son, this amounts to the daily assertion that the son is legitimate.(*f*)

(*a*) 1 Bl. Com. 454, 455. In the French law, to raise the presumption of paternity, the child must have been conceived as well as born in lawful wedlock.

(*b*) Burden *v*. Burden, 3 Dev. 548.

(*c*) Note by Harg. & Butler to 1 Inst. 123 b.; 1 Rolle's Ab. 356, l. 10; Cro. Jac. 541; Palm. 9.

(*d*) Cope *v*. Cope, 1 Moo. & Rob. 269; 1 Greenl. Ev. § 28.

(*e*) Johnson *v*. Johnson, 1 Desaus. 595.

(*f*) Berkley Peerage case, 4 Camp. 416.

SECTION 2.—OF PROOF OF FILIATION BY THE TESTIMONY OF WITNESSES.

314. The fact of the *accouchement*, may be proved by the direct testimony of one who was present, as a physician, a midwife or other person. This is sufficient to prove the birth, and also the filiation, pedigree or kindred. But it is not always possible to prove this fact, particularly at a great distance of time, and, in that case, other verbal testimony may be given.

315. Although in common cases, hearsay is not evidence, yet in cases of pedigree, such evidence is allowed. By *pedigree*, is understood the state of the family, as far as regards the kindred of the different members, their births, marriages and deaths.

In order to ascertain the kindred of an individual, it is material to know how he was treated and acknowledged by those who were interested in him, or sustained the relations of blood or affinity toward him.

This may be proved by evidence of what deceased persons, related to the one in question, either by consanguinity or affinity, said of him.(*a*) And the general repute in the family, proved by the testimony of a surviving member of it, falls within the same rule.(*b*)

SECTION 3.—OF PROOF OF FILIATION BY PRIVATE WRITINGS.

316. An entry made by a deceased parent or other relation, in a Bible, family missal, or other book, or in any document or paper, stating the fact and date of the birth of a child or other relative, is regarded as the declaration of such parent, or relative, in a matter of pedigree. The correspondence of deceased members of the family, recitals in family deeds, wills, and other solemn acts, are original evidence in all cases, where the oral declarations of the parties are admissible.(*c*)

(*a*) Vowles *v.* Young, 13 Ves. 140; Whilelock *v.* Baker, 13 Ves. 514; Jewell *v.* Jewell, 1 How. S. C. R. 231; S. C. 17 Pet. 213.

(*b*) Doe *v.* Griffin, 15 East, 203.

(*c*) Ph. and Am. on Ev. 229; 1 Phil. Ev. 216; 1 Greenl. Ev. § 104.

SECTION 4.—OF THE PROOF OF FILIATION BY PUBLIC REGISTERS.

317. Public registers, authorized by law to be kept, such as registers of births and marriages, made pursuant to the statutes of any of the United States,(*a*) are admitted as competent evidence of the facts they contain; but they are not evidence of any fact not required to be recorded, and which did not occur in the presence of the officer. A register of baptism, for example, taken by itself, is evidence only of that fact; nor is the mention of the child's age any evidence of the day of its birth, in certain cases.(*b*)

When the books cannot be procured, an examined copy, duly sworn to, is always admissible.(*c*)

But whether the book itself be produced, or an examined copy, evidence of identity must always be given.

SECTION 5.—OF PROOFS AGAINST FILIATION.

318. Proof against the legitimate filiation, may be made by evidence that the party is not the child of the mother whom he pretends to be, and, the maternity being proved, that he is not the child of the husband of the mother.

CHAPTER III.—OF NATURAL CHILDREN.

319. This chapter will be divided into two sections. In the first will be considered, who are natural children; and in the second, the legitimation of such children.

SECTION 1.—WHO ARE NATURAL CHILDREN.

320. The term *natural* children has two meanings. In contradistinction to legitimate children, it signifies

(*a*) Milford *v.* Worcester, 7 Mass. 48; Sumner *v.* Sebec, 3 Greenl. 223; Richmond *v.* Patterson, 3 Ohio, 368; Jackson *v.* King, 5 Cowen, 237; Stoever *v.* Whitman, 6 Binn. 416; Huntley *v.* Comstock, 2 Root, 99; Woodward *v.* Spitler, 1 Dana, 179.

(*b*) Burghart *v.* Angerstein, 6 C. & P. 690.

(*c*) 1 Greenl. Ev. § 485.

that they are born out of lawful wedlock; and in opposition to adopted children, it means that they are the actual offspring of their parents. It is only in the first sense here given, that natural children will be considered in this chapter.

Natural children have been divided into three classes; first, those born of persons who were free, and might, at the time of conception, have lawfully married, these are called simply *natural children;* secondly, those who are the offspring of persons related by consanguinity or affinity within certain degrees, and these are *incestuous natural children;* and, thirdly, those whose parents, or one of them, was married to another person than the father or mother of such children, and these are denominated *adulterous natural children.* These distinctions are unknown to the common law, though they have been adopted in some of the United States.(*a*) The last two classes cannot become legitimate by any act of their parents.

321. In Louisiana, a further division is made: illegitimate children are classified into those whose fathers are known, and these are strictly called natural children; and those whose fathers are unknown, who are called *bastards*.(*b*)

322. A natural or illegitimate child is called a *bastard*. A bastard is one who is born of an illicit union, and before the lawful marriage of his parents.

A man is a bastard if born—

1st. Before the lawful marriage of his parents, but although he may have been begotten while his parents were unmarried, yet, if afterward, they married together, and he is born during the coverture, or after it shall have been determined, he is legitimate.(*c*)

2dly. If begotten and born during the coverture, under circumstances which render it impossible that the husband of the mother can be the father, he will

(*a*) Civil Code of Lo., art. 217.
(*b*) Civil Code, art. 220.
(*c*) 1 Bl. Com. 455, 456.

be a bastard. But, unless there is an impossibility that the husband can be the father, the rule that he is so is universal: *pater is est quem nuptiæ demonstrant.*(a)

3dly. A child may be a bastard if born beyond a competent time, (generally considered forty weeks,) after the dissolution of the marriage. But the time of gestation is not absolutely fixed by the law.(b)

SECTION 2.—OF THE LEGITIMATION OF NATURAL CHILDREN.

323. By the common law of England, adopted generally in the United States, children cannot be legitimated by the subsequent marriage of their parents, because the policy to permit legitimation of such children, it is urged, is against morals, and "a great discouragement to the matrimonial state."(c)

On the contrary, for the purpose of suppressing concubinage, the Roman emperors established the rule that the subsequent marriage of the parents should legitimate the children:(d) in so very different a point of view may the same institution be seen.

The canon law adopted the same rule, and the reason assigned is to favor repentance and a return to good morals, and because it is founded in equity.

324. In this country, several of the states have adopted the rule, and passed statutes making legitimate, children born before the marriage of their parents, but who, after such marriage, have been acknowledged by them.

The subsequent marriage of parents legitimates the child in Illinois, but he must be afterward acknowledged. The same rule seems to have been adopted in Indiana, Missouri and Louisiana. An acknowledg-

(a) Dig. 2, 4, 5.

(b) Co. Litt. 123, a; Harg. and Butler's note to Inst. 123, a; 1 Beck's Med. Jur. 478; Cyclop. of Pr. Med. vol. 4, p. 87, art. Succession of Inheritance. In Louisiana the time is fixed; the Code has adopted the rule of the French Code Civil. Civ. Code of Louis. b. 1, t. 7, c. 2. Vide ante, B. 1, part 2, t. 7, c. 1.

(c) 1 Bl. Com. 455.

(d) Code, lib. 5, t. 27, l. 5, 6 et 11.

ment of illegitimate children, of itself, legitimates in Ohio; and, in Michigan and Mississippi, marriage alone, between the reputed parents, has the same effect. In Maine, a bastard inherits to one who is legally adjudged, or in writing, owns himself to be the father. A bastard may be legitimated in North Carolina on application by the putative father to court, either where he has married the mother or she is dead, or married to another, or lives out of the state.

In a number of states: namely, in Alabama, Connecticut, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, North Carolina, Ohio, Rhode Island, Tennessee, Vermont and Virginia, a bastard takes by descent from his mother, with certain modifications, regulated by the laws of these states.(*a*)

325. Numerous private laws have been passed to legitimate children born out of lawful wedlock; these laws are enacted at the request of the individuals to be benefited, and provide for the rights of third persons whom they might otherwise affect.

TITLE VIII.—OF PATERNAL POWER.

326. The family is constituted by marriage, which has been examined in title sixth, and title seventh has been the subject of paternity and filiation, or an inquiry into the persons who compose the family. Under the eighth title will be considered paternal power, or the means of maintaining order in the family, by regulating by wise principles this most sacred magistracy, established by nature herself, anterior to all laws and agreements or compacts.

But this authority, which receives the sanction of law, ought to be exercised for the protection and direction of the children, and when, by its abuse, it becomes the means of oppression, so far from being supported by law, the parents will be deprived of it.

(*a*) 2 Hill, Ab. ss. 24 to 35; Civil Code of Louis., art. 241.

Naturally this authority belongs to the wife as well as to the husband, but by the policy of law, she does not possess this power, being herself under the power of her husband.

In general the husband is alone vested with parental power over the children, and on his death this authority, subject to certain modifications, is vested in the mother.

327. It will be perceived that every thing relative to paternal power has not been collected under this title, other matter will be found better placed under other heads.

This title will be divided into four chapters ; in the first will be examined the general duties of children toward their parents; in the second, the right of the parents to control their children ; in the third, the right of the father to his son's labor; and, in the fourth, will be considered the power of the father and mother over natural children.

CHAPTER I.—OF THE GENERAL DUTIES OF CHILDREN TOWARD THEIR PARENTS.

328. The lawful *obligations* enjoined upon children, which they are bound to fulfil toward their parents, are obedience and assistance during their minority; and generally they are bound, by statutory provisions, to maintain their parents who are in want, when they have sufficient ability to do so.(*a*) Their *duties* are to honor and respect them during their whole lives.

After they arrive at their majority, their obligations cease, if we except that of alimony ;(*b*) but their duties never end.

CHAPTER II.—OF THE RIGHT OF PARENTS TO CONTROL THEIR CHILDREN.

329. To enable the parents to perform their duties toward their children, and for their benefit, the law has invested them with considerable authority.

(*a*) Poth. Du Mariage, partie 5, c. 1, art. 2, § 2. See 2 Kent's Com. 207.
(*b*) State *v.* Shreeve, Coxe, 230.

The father has the power to take his children, while in their minority, wherever he will; he may send them to school, place them in college, put them out to a trade, and provide for them as he may think proper.(*a*)

330. But in case of a separation between the husband and wife, and a dispute arises as to the custody of the children, when all things are equal, the courts will give the custody to the father in preference to the mother; but whenever the good of the children requires it, they will be delivered to the mother, or even to a stranger.(*b*)

331. Parents may correct their children for lawful cause, with moderation, and for their good. A malicious whipping could not be justified, and might possibly render the parent amenable to the criminal law.(*c*) The right of correction which they possess may be transferred by them to teachers, and to masters with whom the children may be placed, who are to exercise it with moderation, for the benefit of the child; and for any wanton abuse of it, they are liable to punishment.

CHAPTER III.—OF THE RIGHTS OF THE FATHER TO THE LABOR OF THE CHILD.

332. As the father is bound to support his child during his minority, the law gives him, in return, the right to his labor or the fruit of it, while he lives with him and is maintained by him.(*d*) But this right ceases in the following cases:

1. If he puts him out as an apprentice to learn a

(*a*) Matter of Wollstencraft, 4 John. Ch. R. 80; Comm. *v.* Addicks, 5 Binn. 520; Ex parte Crouse, 4 Whart. 9.

(*b*) 4 John. Ch. R. 80; Comm. *v.* Nutt, 1 Browne, 143; Comm. *v.* Addicks, 2 S. & R. 174; Matter of Kottman, 2 Hill, S. C. R. 263; U. S. *v.* Green, 3 Mass. 482.

(*c*) Com. Dig. Pleader, 3 M 19; Hawk. c. 60, s. 23, and c. 62, s. 2;—c. 29, s. 5.

(*d*) The Etna, Ware, 462; Steele *v.* Thatcher, Ware, 91; Stone *v.* Pulsipher, 16 Verm. 428; Lord *v.* Poor, 10 Shep. 569; Shute *v.* Dorr, 5 Wend. 204; Benson *v.* Remington, 2 Mass. 113.

trade or business, for then the master is entitled to such labor.

2. When he neglects to perform his duties of providing for his child, and abandons him, or does any other act from which may be implied an emancipation of the minor. In such case he tacitly authorizes him to labor for others.(*a*)

3. When by an express agreement the father sells to the child the remaining time of his minority.(*b*)

CHAPTER IV.—OF THE POWER OF THE FATHER AND MOTHER OVER NATURAL CHILDREN.

333. The powers of parents over their natural children are nearly the same as those over their legitimate issue. But they do not owe alimony by the common law to their parents, nor are their parents bound to give them alimony after they have attained their full age.

The right of custody is in the mother in preference to the father.(*c*) Next to her the putative father is entitled to such custody.(*d*)

TITLE IX.—OF MINORITY OR INFANCY AND GUARDIANSHIP.

334. This title will be divided into two chapters; the first will treat of minority or infancy; and the second, of guardianship or tutorship and curatorship.

CHAPTER I.—OF MINORITY AND INFANCY.

335. The complete and full development of the physical forces of man, require a number of years; that of his moral faculties is still slower. No being is less capable to protect himself than man in his

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(*a*) Ware, 462; Godfrey *v*. Hays, 6 Ala. 501; Jenney *v*. Alden, 12 Mass. 375; Morse *v*. Welton, 6 Conn. 547; United States *v*. Mertz, 2 Watts, 406; Gale *v*. Parrott, 1 N. H. Rep. 28.

(*b*) 2 Verm. 290; U. S. *v*. Mertz, 2 Watts, 408; Galbraith *v*. Black, 4 S. & R. 207; 6 Conn. 547.

(*c*) Comm. *v*. Fee, 6 S. & R. 255; People *v*. Landt, 2 John. 375; Carpenter *v*. Whitman, 15 John. 208; Wright *v*. Wright, 2 Mass. 109.

(*d*) Comm. *v*. Anderson, 1 Ashm. 55.

infancy; as he grows up, he acquires strength and intelligence, but his growing passions require a regulating experience, which he has not yet attained.

It is then of the utmost importance, to his own interest, that man in his infancy, and until he has attained a sufficient maturity to manage his affairs, should be confided to the care, direction and advice of guardians capable of protecting him, and serving him for guides. Hence the origin of guardians, whose duties are regulated by law.

336. The person to whom is delegated the authority to take care of an infant or minor, during his minority, is called a *guardian of the person;* in the civil law, a *tutor;* when such person is appointed to take care of the property of the minor, he is known by the name of *guardian of the estate;* in the civil law, the *curator.* The minor over whom a guardian has been appointed is called a *ward;* in the civil law, a *pupil.* The office of a guardian is a *guardianship;* in the civil law, a *tutorship* or a *curatorship,* according to circumstances.

337. The age at which man no longer requires aid and advice for his conduct, is not the same in every individual; some being precocious, and others slow at arriving at maturity; but as the law cannot ascertain all these diversities, a period has been fixed which is uniform as to all.

338. The time fixed by law when all individuals of both sexes arrive at their full age, and acquire fully all their political and civil rights, is the completion of their twenty-first year.(*a*)

But it is to be observed that by the civil computation of time, which differs from the natural computation, a man is reputed to be twenty-one years of age, the first instant of the last day of the twenty-first year next before the anniversary of his birth, because the last part of the delay having once commenced, it is

(*a*) Co. Litt. 171.

considered as ended.(*a*) If, for example, a person were born at any hour of the first day of January, 1830, (even but a few minutes before twelve o'clock of the night of that day,) he would be of full age at the first instant of the thirty-first day of December, 1851, although nearly forty-eight hours before he had actually attained the full age, according to years, months, days, hours and minutes, because there is, in this case, no fraction of a day.(*b*)

CHAPTER II.—OF GUARDIANSHIP, TUTORSHIP OR CURATORSHIP.

339. There are several kinds of guardians, these must be particularly described and distinguished; to benefit the ward, the guardian must be a man capable of protecting and taking care of him; the guardian is required to perform a variety of duties, and is bound by certain obligations; his power must end. These several subjects will be examined in as many sections.

SECTION 1.—OF THE SEVERAL KINDS OF GUARDIANS.

340. Of the several kinds of guardians at common law, some are obsolete, and others have been superseded. They will be here enumerated together with others created by statute.

341.—1. Guardian by *nature* is the father, and, on his death, the mother; this guardianship extends only to the custody of the person,(*c*) and continues till the child shall arrive at the age of twenty-one years.(*d*)

Guardianship by nature must not be confounded with paternal power, the former is instituted in favor of the child and is a burden; the latter is a right, and is in favor of the father and mother.

(*a*) Savigny, Dr. Rom. § 182.

(*b*) 1 Sid. 162; S. C. 1 Keb. 589; 1 Bl. Com. 464, 465, note (13) by Chitty: 1 Lill. Reg. 57; Com. Dig. Enfant A; Savig. Dr. Rom. §§ 383, 384. See Cov. on Conv. Ev. 182, 183.

(*c*) Genet *v.* Talmadge, 1 John. Ch. R. 3; Miles *v.* Boyden, 3 Pick. 213; Hyde *v.* Stone, 7 Wend. 354.

(*d*) Co. Litt. 84 a.; South *v.* Williamson, 1 Har. & J. 147.

A guardian by nature has no power to lease the lands of the infant,(*a*) nor to receive a legacy due to him.(*b*)

342.—2. Guardian by *nurture* is one who becomes guardian when the infant is without any other, and the right belongs exclusively to the parents, first to the father, and then to the mother.(*c*) It extends only to the person, and determines at the age of fourteen years. This species of guardianship has become obsolete.

343.—3. A guardian in *socage* is one who has the custody of the infant's lands as well as his person. This guardianship was given by the common law to the next of blood of the child to whom the inheritance could not possibly descend. This species of guardianship has become obsolete, and does not perhaps exist in this country, for the guardian must be a relation by blood who cannot possibly inherit, and such case must rarely exist.(*d*) It ceases at the age of fourteen years.(*e*)

344.—4. *Testamentary* guardians. The stat. of 12 Car. II., c. 24, the principles of which have been reenacted generally throughout the United States, gave power to the father to appoint a guardian for his children by his last will and testament.(*f*) And a guardian may be appointed whether the child be *in esse* or *in ventre sa mère*. These guardians supersede the claim of any other, and extend to the person, and real and personal estate of the child. They continue till the child arrives at full age. It does not appear to be settled whether the marriage of a testamentary female

(*a*) May *v.* Calder, 2 Mass. 55; Anderson *v.* Darby, 1 N. & M. 369.
(*b*) Miles *v.* Boyden, 3 Pick. 213.
(*c*) Kline *v.* Beebe, 6 Conn. 494.
(*d*) Combs *v.* Jackson, 2 Wend. 153; Fonda *v.* Vanhorne, 15 Wend. 631; Putnam *v*, Ritchie, 6 Paige, 390.
(*e*) Byrne *v.* Van Hoeson, 5 John. 66.
(*f*) Balch *v.* Smith, 12 N. H. Rep. 437.

ward would determine the guardianship before she acquired her full age.(a)

In Connecticut the father cannot appoint a testamentary guardian.(b)

345.—5. Guardians *appointed* by the courts, by virtue of some statutory power. These are either guardians of the person, tutors; or guardians of the estate, curators. Guardians by nurture and in socage having become obsolete, have been essentially superseded in practice by the appointment of guardians by courts of chancery, orphans' courts, probate courts, and such other tribunals as have jurisdiction to make such appointments.

346.—6. A guardian *ad litem* is one appointed by the court, when an infant is sued in a civil action or proceeding, to defend him in the same. Every court, when an infant is sued in a civil action, has the power to appoint a guardian *ad litem*, when he has no guardian; for, as an infant cannot appoint an attorney, he would be without a remedy if such a guardian were not appointed. The power and duty of a guardian *ad litem* are confined to the defence of the suit.(c) A guardian *ad litem* differs from a *prochein ami*, or next friend, the latter being one, who, without being appointed guardian, sues in the name of the infant for the recovery of the rights of the latter, or does such other acts as are authorized by law.(d)

SECTION 2.—WHO MAY BE A GUARDIAN.

347. As the guardian is a mandatary(e) appointed by law, to act in the place of the minor or infant, it is requisite that he should be *sui juris* and capable of

(a) Mendes *v.* Mendes, 1 Ves. 89; Reeve's Dom. Rel. 328; 2 Kent, Com. 225, 226; vide post, n. 362.

(b) 1 Swift's Dig. 48.

(c) F. N. B. 27; Co. Litt. 88 b, note (16), 135 b, note (1).

(d) Commonwealth *v.* Roach, 1 Ashm. 27; Edwards on Parties, 182 to 204.

(e) Granby *v.* Amherst, 7 Mass. 1; Manson *v.* Felton, 13 Pick. 206.

performing the duties of his appointment.(a) He cannot have any interest adverse to those of his ward, and if he is known to have any such, he will not be appointed.

An executor of an estate will not be appointed guardian of an infant who claims such estate, because they may have different interests, and the law does not put the duties of a man in opposition to his interest.(b)

A person under his full age, or a minor, cannot of course be appointed to take care of another minor.

One under the power of another, although possessing understanding, as a married woman; and an infamous person, are not qualified for this trust.

SECTION 3.—OF THE DUTY OF A GUARDIAN.

348. The administration of a general guardian extends over the person and the property of the ward. In the first place let us examine what concerns the person; and, secondly, the duties which relate to the property of the ward.

§ 1.—Of the duty of the guardian toward the person of the ward.

349. In general the guardian stands to the ward *in loco parentis;* but he is not so in every respect, as for example, the father is entitled to his son's labor; on the contrary, if the ward earns any thing it is not for the benefit of the guardian, but his own.(c) All the acts of the guardian are to be for the benefit of the ward. He is bound

To take care of the person of the ward;

To exercise, when needful, proper power of restraint;

To place him apprentice or in some situation to earn his own living;

To represent him in all civil acts, and in actions.

(a) Co. Litt. 886; Bac. Ab. Guardian B.
(b) Jackson *v.* Sears, 10 John. 435.
(c) But see Bass *v.* Cook, 4 Porter, 390.

The care of the person includes the obligation to provide for the support and education of the ward, and generally the guardian may use a sound discretion in these respects; but in cases of doubt or difficulty he may apply to the competent tribunal for directions.(*a*)

The guardian may properly restrain his ward from acts which are illegal or improper,(*b*) and he is generally authorized to place him out apprentice, but in this he will use the precaution of consulting the mother, if living, or if not, some other relatives of the ward. The business to which the minor is bound must be a proper one; a guardian cannot bind his ward as a servant, unless by authority of some statute.(*c*)

He is bound to appear for him in all cases in which he sues or is sued, because the ward cannot appoint an attorney.

§ 2.—Of the administration of the estate of the ward.

350. The acts of the guardian in relation to the property of his ward may be divided into two classes, namely, when he acts alone and of his own authority; and when he acts under the direction of a competent tribunal.

Art. 1.—When the guardian acts alone.

351. He may perform alone all acts of simple administration, which do not extend beyond the time during which he is to be guardian; for example, he may lease the minor's real estate, but the lease must not extend beyond the time when the ward will be of full age.(*d*) As he is, in all these acts, the legal mandatary and representative of the ward, they have the same binding force as if they had been performed by the minor himself, after he had attained his age of twenty-one years. Hence the maxim of the Roman

(*a*) Harris *v.* Richardson, 4 Dev. 279; Ex parte Ralston, R. M. Charlt. 119; Bybec *v.* Thorp, 4 B. Munroe, 313.

(*b*) Wood *v.* Gale, 10 N. H. R. 247.

(*c*) Respublica *v.* Keppele, 1 Yeates, 233.

(*d*) Ross *v.* Gill, 4 Call, 250; Truss *v.* Old, 6 Rand. 256.

law, which is founded in reason; *tutor domini loco habetur*.(*a*)

His first duty is to make an inventory of all the property of his ward. This inventory should contain in detail a list of all the goods and claims belonging to his ward. And for all personal property which the guardian receives, he must account, either for its value when he has parted with it, and it cannot be found, or for the articles themselves, when they are in his hands. As the guardian may sell or dispose of the personal estate, goods which he has sold for the purpose of the trust cannot be recovered by the ward in an action against the purchaser.(*b*)

352. With regard to the real estate, it may be observed that the guardian has no further control with, or concern over the real estate, than what relates to the leasing of it, and receiving the rents and profits, and keeping it in order. He may lease it, as has been observed, for the term during which he has a right to control it, and no longer.(*c*)

353. Guardians will not be permitted to turn the personal property of an infant into real property, or real property into personalty, because it may not only affect the rights of the infant, but also of his representatives, if he should die under age.(*d*) If the guardian should, under particular circumstances, make a change, beneficial to the infant, such as the court would have ordered, it will afterward be sanctioned by the court.(*e*)

354. As the guardian is bound to render an account, he is required to keep one. He cannot reap any benefit from the use of the ward's money, nor do any

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(*a*) Dig. 26, 7, 27.

(*b*) See Bonsall's Case, 1 Rawle, 266; Field *v.* Scheffelin, 7 John. Ch. 150; Ellis *v.* Essex M. Bridge, 2 Pick. 263; Bowman's Appeal, 3 Watts, 369.

(*c*) Genet *v.* Tallmadge, 1 John. Ch. R. 561; Jones *v.* Ward, 10 Yerger, 160; 7 John. Ch. R. 154; Doe *v.* Hodgson, 2 Wils. 129; Snook *v.* Sutton, 5 Halst. 133; Bac. Ab. Leases, etc. I 9.

(*d*) 1 Fonbl. Eq. B. 1, c. 2, § 5, note (*b*).

(*e*) Inwood *v.* Twyne, Amb. 417; S. C. 2 Eden's R. 148, and note.

thing adverse to his interest. If he settles a debt upon beneficial terms, or purchases a claim against the ward at a discount, he does not receive the benefit, but it accrues to the ward.(*a*)

355. For any wasteful expenditures, the guardian would not probably be allowed; but the courts would not weigh these in golden scales, if the guardian acted in good faith.

Art. 2.—When the guardian must have the sanction of the court.

356. Power is given to various tribunals, known by different names in the several states, to direct guardians in many instances, and to authorize them to perform acts which are of too much importance to be trusted to a single individual. Among these are the power to sell the real estate of the minor, to make improvements, and to spend certain sums beyond the income of a minor's estate for his support and on his account.

When money is directed to be invested in certain securities, the courts have in general authority to approve of such investment, and if the money happen to be lost, the loss will fall upon the ward and not upon the guardian, who has received the sanction of the court.

Art. 3.—Of the guardian's account.

357. The guardian is required to furnish an account to the tribunal, which has jurisdiction of such matter, whenever called upon, but always at the determination of his guardianship. During the minority of the ward, any one acting as the next friend of the ward, may call upon the guardian to file his account for proper cause shown.

In this account all the transactions must appear which have taken place between the guardian and the ward;(*b*) and if the guardian were indebted in his

(*a*) 2 Kent, Com. 229.

(*b*) Crowell's Appeal, 2 Watts, 295.

individual account to himself as guardian, he will be presumed to have received the amount in his capacity of guardian.(*a*) It should contain all the moneys which have come to his hands, the dates when received, and show how the money has been employed. On the other hand, it ought to state all the moneys disbursed, for what purpose they have been paid out, the date when paid, and to whom. Interest ought to be charged on both sides.(*b*) The guardian is entitled to commissions, the amount of which is regulated by the courts, in proportion to his trouble and risk; but he is not allowed to pay any one for the management of the estate, which he ought to have done in person.(*c*)

When one person is guardian of several wards, he is required to keep separate accounts with each.(*d*)

SECTION 4.—OF THE END OF THE GUARDIAN'S POWER AND OF HIS DISCHARGE.

358. The duties of a guardian cease by lapse of time; by the removal or discharge of the guardian by a competent tribunal; by the death of the ward or guardian; and by operation of law.

§ 1.—Of the discharge of the guardian by lapse of time.

359. A guardian may be appointed by testament until the minor shall attain a certain age, or until a condition shall be fulfilled; as for example, an appointment until the minor shall attain his age of fourteen years, and then allowing him to choose his own guardian under the authority of a competent court; or until another one of the testator's children shall arrive of full age, and that from that time the elder shall be guardian of the younger.

(*a*) O'Neill *v.* Herbert, C. W. Dudley, Eq. R. 30; Adm. of Johnson *v.* Ex'r. of Johnson, 2 Hill's Ch. 285.

(*b*) Hayward *v.* Ellis, 13 Pick. 272; Karr *v.* Karr, 6 Dana, 3; Hendricks *v.* Huddleston, 5 Sm. & Marsh. 422.

(*c*) Eichelberger's Appeal, 4 Watts, 84.

(*d*) Baker *v.* Richards, 8 S. & R. 12. See Hampton's Case, 17 S. & R. 144.

At common law, if a guardian be appointed for a child under fourteen years old, his duties and obligations cease when the infant arrives at the age of fourteen years and chooses another guardian in his place.(*a*) But until another is appointed, the first shall act.(*b*)

The guardianship ends, of course, when the minor attains his full age of twenty-one years, for no authority can be exercised over a freeman *sui juris*.

§ 2.—Of the removal or discharge of a guardian by a competent court.

360. A guardian may be discharged at his own request, upon good cause shown, such as inability from age or other cause to attend to the duties of the trust; but this is never done until he has filed an account and offered to pay the balance in his hands to his successor.

He may be removed by the court for cause shown, for example, that he is wasting or mismanaging the estate; that he refuses or neglects to give security when ordered to do so by the court; and habitual drunkenness, as evidence of mismanagement, has been holden to be a sufficient cause.(*c*)

§ 3.—Guardianship ends by the death of either the guardian or the ward.

361. On the death of the guardian those who represent him are required to give such an account of his guardianship as it is in their power to make. And if two persons are appointed guardians for one ward, during his minority, or until further order, the guardianship is at an end on the death of one of them, and there must be a new appointment.(*d*)

Immediately on the death of the ward all the guardian's functions cease, because the property in his hands has become, by that event, vested in others.

(*a*) 1 Bl. Com. 463.
(*b*) 7 Cowen, 36; Byrne *v*. Van Hoesen, 5 John. 66.
(*c*) Kettletas *v*. Gardner, 1 Paige, 488.
(*d*) Bradshaw *v*. Bradshaw, 1 Russ. 528.

The guardian is then required to make out his account.

§ 4.—When the guardianship is discharged by operation of law.

362. When a female ward marries, at common law the guardianship determines, because immediately on the marriage, the husband becomes her guardian; for it would be inconsistent with the marital rights that any one should have the control of another man's wife.(*a*)

TITLE X.—OF MAJORITY, AND OF SANITY AND INSANITY.

363. The rule that a man attains his majority at the age of twenty-one years accomplished, is perhaps universal in the United States. At this period every man is in the full enjoyment of his civil and political rights; he has no other guardian than the law, which watches over all alike. He is released from all legal personal ties whatever, which he owed to others on account of his infancy, but he is bound by duty to respect and honor his parents.

364. But owing to the infirmities of human nature, and of accidents, to which all men are subject, the law has wisely provided for the protection of those who are unable to take care of themselves. When, therefore, an individual loses his reason, or otherwise becomes incapable of governing himself, the law provides a guardian, or committee, to take care of his person and estate, and deprives him of this general right of self-government.

365. It is to be observed that sanity is always presumed, and that the party who alleges insanity, must prove it, except when it has once been established, and then it must be shown not to exist.(*b*)

(*a*) 2 Inst. 260; Kettletas *v.* Gardner, 1 Paige, 488. See Matter of Whitaker, 4 John. 378; Roach *v.* Garvan, 1 Ves. 159. Vide ante, n. 344.

(*b*) 1 Hale's P. C. 33; Shelf. on Lun. 36; Armstrong *v.* Tinnons, 3 Harring, 342; Jackson *v.* Van Dusen, 5 John. 144; Lee *v.* Lee, 4 McCord, 183; Jackson *v.* King, 4 Cowen, 207.

366. Before a person can be deprived of his civil and political rights, on the ground of insanity, an inquisition must be found, in due form of law, that he is of unsound mind, and the court must give it the sanction of their judgment; then the party is deprived of the right of making contracts, and can exercise no civil or political rights, and in general is not criminally responsible for his acts. This state, in the civil law, is called *interdiction.*

367. It will be proper to inquire for what causes a party may be interdicted, or when a commission of lunacy will issue or an inquisition be found; into the proceedings in lunacy; of the consequences of finding a man *non compos;* and of the restoration of the lunatic: these subjects will be considered in four chapters.

CHAPTER I.—FOR WHAT CAUSES AN INTERDICTION OR COMMISSION OF LUNACY WILL ISSUE OR AN INQUISITION BE FOUND.

368. The causes for which a commission will be issued and an inquisition found are those which arise from a defect of the understanding; and those which are the effect of bad habits, which the unfortunate subject of them cannot control. They will be severally examined.

369.—1. By *non compos mentis* is meant that state of the intellect which renders a person of unsound mind, memory and understanding. This is a generic term, and includes all the species of madness, whether such madness arise from idiocy, sickness, lunacy, or drunkenness. It is nearly similar to insanity.(*a*)

370.—2. *Insanity* is a continued impetuosity of thought, which for the time being unfits a man for judging and acting in relation to the matter in question, with the composure requisite for the maintenance of the social relations of life. But it is almost impossible to give any satisfactory definition of insanity,

(*a*) Co Litt. 247; 4 Co. 124; 1 Phillim. R. 100.

which shall, with precision, include all cases of insanity and exclude all others.(*a*)

371.—3. *Unsoundness of mind*, or unsoundness of memory, are expressions which have been used in several statutes, and sometimes indiscriminately, to signify, not only lunacy, but permanent adventitious insanity, as distinguished from idiocy.(*b*)

372.—4. *Idiocy* is that condition of mind in which the reflective, or all or part of the affective powers, are either entirely wanting, or are manifested to the least possible extent. It is generally the consequence of organic defect. But although a person may have a weak mind, yet if he appears to be capable of acquiring by conversation and instruction such a competent understanding as to enable him to govern himself and his estate, and a memory sufficient to retain the knowledge which he may acquire, he is not to be considered in law as an idiot.(*c*) According to Lord Coke, persons born deaf, dumb and blind, are to be considered as idiots, because the senses, which are the inlets of knowledge, are closed.(*d*) But science had not in his time yet been able to teach such unfortunate beings. Now, such persons being taught not only to comprehend others, but to convey their ideas by writing,(*e*) would probably be considered as persons born deaf and dumb who can write, and convey their ideas.(*f*)

373.—5. *Lunacy* is a disease of the mind, which is differently defined as it applies to a class of disorders, or only to one species of them. As a general term, it includes all the varieties of mental disorders, not

(*a*) Ray, Med. Jur. § 24.

(*b*) Lord Ely's case, 1 Ridg. Parl. Cas. 518; 3 Atk. 171.

(*c*) Lord Ely's case, 1 Ridg. P. C. 522.

(*d*) Co. Lit. 42 b.

(*e*) A young woman named Laura Bridgeman, born deaf, dumb, and blind, could read by means of touch, and wrote a very good hand, when seen by the author at the Blind Asylum in South Boston.

(*f*) Dickinson *v.* Blisset, 1 Dick, 268. See Brower *v.* Fisher, 4 John. Ch. 441.

fatuous; in this sense, it is synonymous with *non compos mentis*, or of *unsound mind*. But in a more restricted sense, lunacy is the state of one who has had understanding, but who, by disease, grief or other accident, has lost the use of his reason.(*a*)

374.—6. *Imbecility* is that state of an individual who, without having entirely lost his reason, is of such weak mind, that he is incapable of governing his person or managing his property, Imbecility and weakness of mind may exist in different degrees, between the limits of absolute idiotcy on the one hand, and perfect capacity on the other.(*b*)

375.—7. *Demency* is the condition of one who is habitually deprived of reason.

376.—8. *Habitual drunkenness* is also such a malady, that, in some states, by statutory provisions, it is a sufficient cause for supporting a commission of lunacy, or a commission in the nature of a commission of lunacy.

377.—9. Being a *spendthrift*, is, in some states, a sufficient cause for depriving a person of his civil rights. He is described in a statute to be a person, who, by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate, as to expose himself or his family to want and suffering, or expose the town to charge and expense, for support of himself and family.(*c*)

378. In order to support a commission of lunacy, there must be proof that the individual is of such *unsound mind*, that he is incapable of taking care of his person and of managing his estate. If he can do this, it does not matter how eccentric he may be in other respects. He who is mistaken in speculative ideas, palpably false, is a visionary man, but, if he can take care of his person and manage his estate, he cannot be

(*a*) 1 Bl. Com. 304.

(*b*) Shelf. on Lun. 6; Stock on Non Comp. Mentis, 5; Dods *v.* Wilson, Const. R. 448.

(*c*) Rev. Stat. of Verm. t. 16, c. 65, 1, 9.

found to be of unsound mind. Insanity is not always obvious; on the contrary, it is frequently extremely difficult to detect it, as it frequently eludes the grasp of the observer; whether it did or did not exist at a particular period, is oftentimes a perplexing question to courts and juries.(*a*)

379. The state of unsoundness of mind must have been *habitual*. A man is not to be condemned for isolated acts, for the wisest is sometimes absent. Sickness, a violent passion, a great affliction may temporarily eclipse the clearest mind. But when a man is habitually unreasonable, and his mind manifests itself in a healthy state only by intervals, and the language and the daily acts of the individual are those of an insane man, then there is an habitual state of demency.(*b*)

But although, in order to found proceedings in lunacy, it is requisite that the insanity should be habitual, yet it is not necessary it should be continued. Some are crazy who have lucid intervals, during which they appear to have their reason, but these lucid periods not being habitual, they are not the less liable to a commission of lunacy.

380. As the finding a man a lunatic, deprives a citizen of the free exercise of his rights; as it takes away from him the use and disposition of his property, and frequently of his liberty and of his actions; and as it also causes him extreme displeasure, and is injurious to his reputation, it ought to take place only in cases of necessity, and when his own interest, rather than that of his family, requires it, for his interest is in general alone considered. But, when the man is so crazy that he becomes dangerous to society, the commission of lunacy is issued, and the inquisition is found more for the benefit of society than for the advantage of the crazy man.

(*a*) Singleton's Will, 8 Dana, 221.
(*b*) See Cornwell *v.* Tennessee, Mart. & Yerg. 147.

381. Upon principle, it seems that a commission of lunacy ought not to be issued against an infant, because, in general, as the court has power over the infant and his estate, the proceeding seems unnecessary; but such a commission has been issued upon the ground that, under certain circumstances, there would be more ample power given in lunacy in managing the estate of the ward.(*a*)

CHAPTER II.—OF THE PROCEEDINGS IN LUNACY.

382. In this chapter will be considered—1, upon whose application a commission will be issued; 2, the duty of the commissioners; 3, appointment of a committee, and their duties.

SECTION 1.—UPON WHOSE APPLICATION A COMMISSION OF LUNACY WILL BE ISSUED.

383. The right to apply for a commission of lunacy, is inherent in the father or mother against the child, and *vice versa*. A husband may prefer a petition against his wife, and *vice versa*. And any other relation, or even a stranger has been allowed to present a petition for that purpose.(*b*) But the nearest relations of an alleged lunatic will be preferred to strangers, unless there be a special cause.(*c*)

In the absence of relations, or when the public security requires it, as where the lunatic is furious, the attorney general may present the petition.(*d*)

SECTION 2.—OF THE DUTY OF COMMISSIONERS.

384. The persons appointed by the court having jurisdiction of the case, to execute a commission of lunacy, are called *commissioners*. They are required

(*a*) Shelf. on Lun. 90, 91.
(*b*) 1 Coll. on Lun. 377; Shelf. on Lun. 93; Ex parte Ogle, 15 Ves. 112.
(*c*) Ex parte Tomlinson, 1 V. & B. 59.
(*d*) 1 Coll. on Lun. 125; Shelf. on Lun. 93.

to execute the commission in a proper place, in a proper manner, and to make a proper return to it.

§ 1.—Of the place where the commission must be executed.

385. It is but reasonable that the commission should be executed in such place that the lunatic may be seen, if required, and where his friends are to be found, who may see that his interests are protected, and where he may himself appear and defend himself.(*a*) Accordingly the common order of the court or chancellor who has jurisdiction of the case, directs that the commission of lunacy shall be executed in or near the place of residence of the supposed lunatic.(*b*)

§ 2.—Manner of executing the commission of lunacy.

386. In obedience to the exigency of the commission, the sheriff is bound to summon the number of jurors therein directed; the commissioners and the jury being impanelled sit together, and compose the court which is to try whether the person alleged to be a lunatic, is so or not. The jury are all sworn or affirmed, and then hear such evidence as the commissioners admit. The witnesses must be examined openly in the presence of the commissioners, the jury, the alleged lunatic, and all other persons who may happen to be present.

At least twelve of the jury must agree to find against the alleged lunatic, before the inquisition can be found; and where the statutes require but twelve jurors they must be unanimous.

The commission and the verdict must be consistent with each other upon the face of the record, that is, the inquisition must be in the words of the commission or in equivalent words.

(*a*) Ex parte Cranmer, 12 Ves. 445. See 1 Par. & Fonbl. Med. Jur. 294, n. (*a*).

(*b*) Shelf. on Lun. 95, 96.

§ 3.—Of the inquisition and traverse.

387. The inquisition is an examination of the facts authorized to be inquired into, made by the commissioners and the jury; the instrument of writing on which their decision is made is also called an *inquisition*. Its requisites are the following:

It must state where it was taken;

When it was taken;

Before whom and by what authority;

The names of the jurors, and their qualifications;

Of what they were charged to inquire;

Their finding;

The date of their finding;

The signatures of the commissioners and of the jurors who consent to it.

The finding against a person *non compos mentis* should state the fact positively that he is an idiot,(*a*) *non compos mentis*, or of unsound mind. Inquisitions have been quashed with returns finding persons in the following conditions, namely: "Not sufficient to manage his person and estate;"(*b*) "not of sufficient understanding to manage her own affairs;"(*c*) "not a lunatic, but incapable;"(*d*) "not a lunatic, yet not proper to take care of his affairs during his fits;"(*e*) "weak for the last twenty years;"(*f*) "worn out with age, and incapable of managing her own affairs;"(*g*) "by reason of old age and sickness is so deprived of reason as to be unable to manage his estate," has each been held not to be a finding of *non compos* within the statute of Pennsylvania.(*h*)

When the inquisition is quashed as repugnant or for

(*a*) Prodgers *v.* Frazier, 3 Mod. 43; 1 Vern. 16.
(*b*) Ex parte Read, 1 Atk. 160; 2 Inst. 4051.
(*c*) Ex parte Harvey, 3 Atk. 169.
(*d*) Ex parte Ashton, 3 Atk. 169.
(*e*) Ex parte Hals, 2 Ves. sen. 405.
(*f*) Hubsey's Case, 3 Atk. 173.
(*g*) Wall's Case, 3 Atk. 173.
(*h*) John Beaumont, 1 Whart. 52.

some other legal cause, the course is to issue a new one by beginning *de novo*,(*a*) and not to direct a *melius inquirendum*.(*b*)

388. The principles of the statute of the 2 and 3 Edw. VI., c. 8, s. 6, which authorize any person who shall feel himself aggrieved by such office or inquisition, to traverse the same, have been generally adopted either by statutes or in practice; so that either the person found to be a lunatic or his friends may claim a trial by jury.(*c*)

SECTION 3.—OF THE APPOINTMENT OF COMMITTEES.

389. Upon the return of an inquisition, when there is no traverse, or after the finding of a jury that the party is *non compos mentis*, a lunatic, or of unsound mind, the court appoint a committee to take care of the person and estate of the lunatic, or to take care of the person only or of the estate only.

§ 1.—Of the committee of the person.

390. In the selection of the committee of the person of a *non compos*, the next of kin are generally preferred. But the choice is made for the benefit of the lunatic and not of the committee, and, for sufficient reasons, a stranger will be preferred.(*d*)

The committee is required to administer all the comfort and amusement which the nature of the case will admit, and the funds of the lunatic afford; and when the unhappy person is not under the immediate care of the committee, the latter ought to engage suitable persons to watch over him, and, with the aid of a physician, do all they can to restore him to health.(*e*)

(*a*) Hals' Case, 2 Ves. sen. 405.
(*b*) Ex parte Cranmer, 12 Ves. 454.
(*c*) Shelf. on Lun. 115.
(*d*) Shelf. on Lun. 138, 139.
(*e*) Shelf. on Lun. 142. See, as to his duties, Naylor *v.* Naylor, 4 Dana, 346; In the matter of Taylor, 9 Paige, 611.

In the performance of its arduous duties, the court upon application will protect and aid the committee by their advice and direction.(*a*)

§ 2.—Of the committee of the estate.

391. The heir at law is selected in the appointment of the committee of the estate in preference to others, because he has the greatest inducement to take good care of it,(*b*) and a relation will, *cæteris paribus*, be preferred to a stranger.(*c*)

In the management of the estate, the committee is considered as a mere commissioner of the court, acting under its direction and control, and is responsible to the court as a receiver, removable in its discretion.(*d*)

The committee is bound to file an account whenever required by the court, and is liable generally as a guardian, and entitled to a just compensation for its services.

CHAPTER III.—CONSEQUENCES OF FINDING A MAN NON COMPOS MENTIS.

392. When a person has been found to be *non compos*, an idiot, a lunatic, or one of unsound mind, he is deprived of the right of making any contract, bringing or defending an action, or indeed of performing any of the various acts required of a man *sui juris*. He does everything by his committee. Actions may be brought by the committee in the name of the lunatic, and actions brought against the latter must be defended by the committee. The lunatic cannot exercise any civil or political right, and he is incapable of committing any crime.(*e*)

These disabilities relate to the time that the inquest

(*a*) In the matter of Lynch, 5 Paige, 120; Matter of Heller, 2 Paige, 199; In the matter of Livingston, 9 Paige, 440.
(*b*) 1 Bl. Com. 304.
(*c*) Ex parte Le Heup, 18 Ves. 227.
(*d*) Bolling *v.* Turner, 6 Rand. 584.
(*e*) See Stock on Non Comp. Ment. *passim*.

have found as the commencement of the malady;(*a*) and acts before office found are voidable.(*b*)

CHAPTER IV.—OF THE RESTORATION OF THE LUNATIC.

393. On the recovery of the lunatic and his restoration to health, it is unjust to deprive him of his rights, and he may be restored by a proper application to the court. The course is, not to make void from the beginning all the proceedings which have taken place, because that would make all persons who acted under them trespassers. The practice is, to supersede the commission, or annul all future effects.

For this purpose the lunatic presents a petition to the court, which should always be in his own name;(*c*) and, upon inspection, the affidavits of respectable physicians, and other evidence to satisfy the court, a supersedeas will be granted.(*d*) But this is not a matter of right, for the court may either direct an issue to try the question of sanity, or order a traverse.(*e*)

The effect of the *supersedeas* is, to restore the lunatic to all his civil and political rights, and to entitle him to the return of his property.

TITLE XI.—OF MASTER AND APPRENTICE.

394. Apprenticeship is a contract entered into between a person who understands some art, trade or business, called the *master*, and another person, during his or her minority, who is called the *apprentice*, with the consent of his or her parent or next friend, by which the former undertakes to teach such minor his art, trade or business, and to fulfil such other covenants as may be agreed upon; and the latter agrees to serve the master during a definite period of time, in such art, trade or business. The term during which

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(*a*) Pearl *v.* McDowell, 3 J. J. Marsh, 658.
(*b*) Jackson *v.* Gumaer, 2 Cowen, 552.
(*c*) Ex parte Stanley, 2 Ves. sen. 25.
(*d*) Ex parte Bumpton, Mos. 78.
(*e*) Stock on Non Comp. Ment. 113.

the apprentice is to serve is also called his *apprenticeship*.

395. In most of the states of the Union particular acts have been made to regulate the important relation of master and apprentice, and to their provisions recourse must be had to ascertain the local laws. Their principles alone will be here considered.

CHAPTER I.—OF THE PARTIES TO THE CONTRACT OF APPRENTICESHIP.

SECTION 1.—OF THE MASTER.

396.—1. When there is but one master, it is clear he must become a party to the agreement. To be bound by the contract, he must be *sui juris* and capable of entering into engagements generally. One incapable to make a contract cannot therefore take an apprentice, as a married woman or a lunatic.

397.—2. When the contract is made with several masters, they should all join in the indenture, and be bound to fulfil the covenants toward the apprentice. An indenture, under seal, executed by one of two partners in trade, on behalf of the firm, was therefore held to be void.(*a*)

SECTION 2.—OF THE APPRENTICE; HIS PARENT, GUARDIAN, OR NEXT FRIEND.

398.—1. Although the infant cannot bind himself alone, and the law has wisely provided a shield for him from oppression in the person of his parent or those who represent him, yet it has left him the choice of his future course of life so far as to require his consent to form the important contract of apprenticeship; and, except in cases where the local laws have otherwise provided, as in the case of binding out apprentices by the guardians or overseers of the poor, he must be a party to the indenture.(*b*)

(*a*) Taylor's Case, 1 Browne, Rep. Appx. 73.

(*b*) Commonwealth *v.* Moore, 1 Ashm. 123; Matter of McDowles, 8 John. 328; Ivins *v.* Norcross, 2 Penn. 977: Stringfield *v.* Hieskell, 2 Yerg. 546. See 1 Mason, 78; 2 Dall. 199; 1 Ashm. 267; 7 Mass. 147.

399.—2. To protect the apprentice, the father, when living, and not legally incapable, must join in the indenture;(*a*) and if he be dead, the mother, at least in Pennsylvania, stands in his place.(*b*) If the infant have a guardian, he may consent in the place of his parents; and if he have none, he may be bound by his next friend, and such next friend need not have been appointed by legal authority.(*c*) An indenture executed by a sister was held valid, (*d*) but of course the master of the apprentice cannot act as his next friend.(*e*)

400.—3. When children have no parents, and become a charge upon the public, the overseers of the poor or similar officers may bind them out under the local laws, without their consent;(*f*) but they must in general have gained a settlement in the place where they are bound.

CHAPTER II.—OF THE SERVICES TO BE RENDERED.

401. An apprentice must be bound to learn an art, trade, business or mystery.(*g*) The intention of the law is to place him in a position in which he may make a livelihood; and that while he works to increase

(*a*) Commonwealth *v.* Crommie, 8 Watts & Serg. 339.

(*b*) Supplee's Case, 6 S. & R. 340.

(*c*) Commonwealth *v.* Deacon, 6 S. & R. 526.

(*d*) Roache's Case, 1 Ashm. 27.

(*e*) Commonwealth *v.* Kennedy, 1 S. & R. 366.

(*f*) Ramsay *v.* Ellsworth, 1 Penn. 445; Commonwealth *v.* Jennings, 1 Browne, 197; Curry *v.* Jenkins, Hardin, 498.

(*g*) The usual form of an indenture of apprenticeship is, that the master will teach the apprentice his "art, trade or mystery." An *art* has been defined to be the power of doing something not taught by nature or instinct; or, a collection of certain rules for doing any thing in a set form. Eun. Dial. 2, p. 74. The arts are divided into mechanical and liberal arts: the former are those which require more bodily than mental labor; they are usually called *trades*, and those who pursue them are called *artisans* or *mechanics*. The *liberal arts* are those which have for their sole or principal object works of the mind, and those who are engaged in them are called *artists*. By *trade*, in its narrow sense, is understood the business of a particular mechanic, as the trade of a carpenter, shoemaker, and the like. Bac. Ab. Master and Servant, D 1. *Mystery* has nearly the same meaning as trade; it is a word derived from the French *mestier*, now written *mêtier*, and signifies a trade, art or occupation. 2 Inst. 668; 2 Hawk. c. 23, s. 11.

the wealth of his master, he shall gather that stock of knowledge which may be useful to him in after life. A minor must therefore be bound to some useful employment, at which he may in after life make his living.

It has been held that a father may bind his son to serve three years as a sweep;(*a*) and the overseers of the poor have a right to bind a poor child to do any lawful work the master may see fit to employ him in;(*b*) or a girl to learn the art, trade and mystery of a housewife.(*c*)

CHAPTER III.—OF THE FORM OF THE CONTRACT OF APPRENTICESHIP.

402. Though a menial servant may engage himself to serve his master by parol or by writing not under seal, yet to bind an apprentice the form of the contract must be an indenture under seal.(*d*) An agreement, not sealed, signed by the minor, his mother, and step-father, and by the master, by which it was stipulated that the minor should go on a whaling voyage, and do duty on board the ship, and that the master should furnish an outfit, was held not to constitute a contract of apprenticeship.(*e*)

CHAPTER IV.—OF THE DURATION OF THE APPRENTICESHIP.

403. In general the contract of apprenticeship entered into by a minor cannot extend beyond his minority, but it may be for a less period, according to the agreement of the parties. The general rule is that infants may be bound, the males till the age of twenty-one years, and the females till the age of eighteen. One who is of full age may bind himself

(*a*) Commonwealth *v.* Moore, 1 Browne, 275.

(*b*) Bowes *v.* Tibbits, 7 Greenl. 475.

(*c*) Commonwealth *v.* Jennings, 1 Browne, 197.

(*d*) Ex parte Ruggles, 10 S. & R. 416; Hall *v.* Gardner, 1 Mass. 172; Dowd *v.* Davis, 4 Dev. 61; Squire *v.* Whipple, 1 Verm. 69.

(*e*) Nickerson *v.* Easton, 12 Pick. 110. In Ohio, and perhaps some other states, the agreement need not be sealed. Walk. Intr. 245.

apprentice,(*a*) but he is not liable to the summary remedy given, in cases of apprentices, by the act of assembly of Pennsylvania; the proper remedy against such apprentice is by an action of covenant on the indenture.(*b*)

CHAPTER V.—OF THE ASSIGNMENT OF THE INDENTURE.

404. In the selection of a master the parties are always influenced by something of a personal nature; either the master is the friend of the family of the apprentice, or he is remarkable for his good morals, or knowledge of his trade, or for some other consideration of a personal nature which has induced the choice, and the apprentice is committed to his care in consequence of this good opinion, and in the full confidence that he will not only instruct him in his trade or calling, but will also be careful of his health, morals and safety.

For these reasons, unless there is an express agreement in the indentures, an apprentice cannot be assigned over to another master, for his instruction and care, although it be apparent that the new master could and would instruct him to as great advantage as the first.(*c*) And when there is power given by the indenture to assign, it must be exercised by the persons authorized; where the indenture is to the master, his heirs and assigns, not naming his executors, the latter cannot assign it.(*d*)

As the contract requires for its validity the consent of the father or of those who stand in *loco parentis*, it follows that it cannot be changed without their consent; an agreement between the master and apprentice, altering the persons to whom the latter was bound, is invalid, unless ratified by the parent or those

(*a*) Commonwealth *v.* St. Germans, 1 Browne, 24.
(*b*) Commonwealth *v.* Sturgeon, 2 Browne, 205.
(*c*) Hadnut *v.* Bullock, 3 Marsh. 300. See Cochran *v.* Davis, 5 Litt. 118; Davis *v.* Cockburn, 8 Mass. 299.
(*d*) Commonwealth *v.* King, 4 S. & R. 109.

standing in *loco parentis*,(a) but this is perhaps owing to the peculiar wording of the statute of Pennsylvania, where the decisions were made.

Between the master and the assignee the assignment is valid as a covenant for the services of the apprentice, though such assignment may not bind the apprentice, and if the latter serve the new master, there is no failure of the consideration of the assignment.(b) If, however, the apprentice continue with his new master, with the consent of all parties and his own, it is a continuation of the apprenticeship.(c)

CHAPTER VI.—OF THE DUTIES OF THE MASTER.

405. The principal duties of the master are, 1, to teach the apprentice; 2, to fulfil all the covenants he has agreed to perform; 3, to protect the apprentice and defend him.

SECTION 1.—OF THE OBLIGATION TO TEACH THE APPRENTICE.

406. The principal object of putting a minor apprentice is to cause him to be taught some useful employment. The master is, therefore, bound to instruct him, *bona fide*, in the knowledge of the art or trade he has undertaken to teach him; but he is not bound to disclose secrets which are peculiar to himself, and which are his exclusive property, unless by his covenant in the indenture he has agreed to do so, or such agreement may be presumed from the circumstances. He cannot dismiss him, on account of his want of aptitude to learn the trade, but having in good faith endeavored to teach him, he will be excused for not making a good workman, if the apprentice is incapable of learning the trade.(d)

(a) Commonwealth *v.* Vanlear, 1 S. & R., 248; Commonwealth *v.* Jones, 3 S. & R. 158.

(b) Nickerson *v.* Howard, 19 John. 113.

(c) The King *v.* Stockland, Dougl. 70.

(d) Barger *v.* Caldwell, 2 Dana, 131.

SECTION 2.—OF THE OBLIGATION OF THE MASTER TO PERFORM HIS COVENANTS.

407. Standing in the place of the father, the master is required to watch over the morals of the apprentice; and not only by prudent advice, but by his exemplary conduct, and fulfilling all the duties of a father toward him, encourage him in the path of virtue. He is also bound to keep toward him all his covenants mentioned in the indenture; and as the covenants on the part of the apprentice to serve, and of the master to teach and provide, are independent, if the apprentice by reason of an incurable accident or illness, becomes unable to learn, the master must still fulfil his engagement, and he cannot dismiss the apprentice or put an end to the contract by his own authority.(*a*)

He cannot abuse his authority, either by bad treatment or by employing his apprentice in menial employments, wholly unconnected with the business he has to learn; nor send him out of the state where he lives, unless such removal is provided for in the indenture, or arises from the nature of the contract, as in the case of an apprentice to a seaman.(*b*)

He cannot dismiss his apprentice except by application to a competent tribunal, upon whose decree, in a proper case, the indenture may be cancelled.

After the apprenticeship is at an end, he cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

SECTION 3.—OF THE DUTIES OF THE MASTER TO PROTECT HIS APPRENTICE.

408. The master may justify an assault and bat-

(*a*) Powers *v.* Ware, 2 Pick. 451.

(*b*) Commonwealth *v.* Edwards, 6 Binn. 202; Commonwealth *v.* Deacon, 6 S. & R. 526; Coffin *v.* Bassett, 2 Pick. 357.

tery in the lawful defence of his apprentice. In this respect he has the same right as if he were his son.

CHAPTER VII.—OF THE RIGHTS OF THE MASTER.

409. The master is entitled to the services of the apprentice and to all the profits arising from his lawful labors. In case his apprentice is induced to leave him, or is harbored by a stranger, to his prejudice, the master may recover damages against the wrong-doer by action; but in such case the master must prove the defendant knew the condition of the apprentice; for, if he was not aware of that fact, he was not guilty of any offence against the master, and, as every one is presumed to be free, the burden of proving such knowledge will rest upon the master.(a) Though the hiring an apprentice without knowing his condition will not render the defendant liable, yet harboring him afterward will subject him to an action, without a demand or refusal.(b)

The master may enforce all his lawful commands, and, for that purpose may correct his apprentice with that moderation which a father would use toward his children. In this he will be fully justified, but any excessive or cruel beating will subject him to the consequences of an unlawful and unjustifiable battery.

CHAPTER VIII.—OF THE DUTIES AND RIGHTS OF AN APPRENTICE.

410. For all these advantages, which the apprentice reaps from the contract of apprenticeship, he is, on his part, bound to obey all his master's lawful commands; to take care of his property and promote his interest; and to perform all the covenants he has entered into by the indenture; to use his best endeavors to learn the trade or business he has undertaken to acquire, and work at it diligently for the benefit of

(a) Stewart v. Simpson, 1 Wend. 376; Ferguson v. Tucker, 2 Har. & John. 182.

(b) 2 Harr. & John. 182.

his master; to remain in his master's service during all the term for which he has engaged; but from this last general rule must be excepted the case when the apprentice becomes unable to fulfil his engagement, on account of the derangement of his health or other infirmity which would render him permanently unable to follow the profession he desires to embrace.

411. The apprentice may justify an assault and battery in the lawful defence of his master.

CHAPTER IX.—OF REMEDIES BETWEEN THE MASTER AND APPRENTICE.

412. The statutes which regulate the contract of apprenticeship give summary remedies to both the master and apprentice for the violation of the covenants entered into between them. These disputes are in general referred to the sessions of the peace, and the power of these courts extends generally to all cases, even to the dissolution of the contract.

CHAPTER X.—OF THE DISSOLUTION OF THE CONTRACT.

413. This contract may be dissolved in various ways, the principal of which are the following:

1. By the agreement of the parties; but in this case not only the consent of the apprentice would be necessary, but also that of the father, guardian, or next friend; for as it was required to make the contract, it is but reasonable that the contract should not be dissolved without their assent.

2. By death of the master or the apprentice. This being a personal contract, it cannot be performed by any other. No one can teach the apprentice but the master selected for that purpose; but his estate is liable for all the other obligations for which he would have been responsible.

3. When an apprentice is bound to a firm or partnership, and the partnership is dissolved, one partner

has as good a right to the services of the apprentice as the other, and as he cannot serve both, he is perhaps not bound to serve either.(*a*)

4. On a complaint to the proper tribunal, and proof of some grave abuse of power, or great neglect in the performance of the covenants in the indenture, the indenture will be cancelled. This power is generally given to the courts by the local laws.

(*a*) Hiatt *v.* Gilmer, 6 Iredell, 450.

BOOK II.—OF THINGS.

PART I.—OF THE GENERAL NATURE OF THINGS.

414. Having considered the rights and duties of persons, which form the subject of the first book, it is proper now, in this second book, to examine, according to our plan, the things to which persons are entitled, leaving for the third, fourth, and fifth books, the consideration of actions, or the remedies for the infractions of the rights to those things or to property.

415. By the word *things* is understood whatever may become the object of a right, or of an obligation, whatever may belong to some one, all objects from which a man may receive some benefit, some advantage or something useful. Even man himself, his actions and his rights, in those states where slavery is admitted, may be considered *things*, because they may become the object of another's right.

416. Actions, also, which in another point of view, are the third object of law, may be classed with things when they are considered as a right belonging to a man, and making a part of his property, the object of the action being to obtain a thing belonging to us, though not in our possession. Hence a distinction is made between a thing in possession, or a *chose in possession*, and a thing not in possession, or a *chose in action*, for which an action must be brought to get possession.

417. Things and property are not in law synonymous expressions. The first is much more extended and general than the latter; it comprehends evey thing which exists, or which may be of some use to man, although he does not possess it, and, as yet, it makes no part of his patrimony. For example, the air, the sea, wild animals, and desert lands, which are possessed by no one, and to which no one has a title, are *things*, and not property. *Property*, on the contrary, comprehends whatever we possess or are entitled to, as a house, a

horse, a ring, &c., for it is nothing but the possession which we have, or to which we are entitled, which gives to things the character of property. In other words, things are every object which we may possess, and property whatever we possess or are entitled to.

CHAPTER I.—OF THINGS CORPOREAL AND INCORPOREAL.

418. The first division of things is in relation to their nature. It is into things corporeal and things incorporeal.

SECTION 1.—OF THINGS CORPOREAL.

419. Corporeal things are those which are visible and tangible, as a house, a field, a horse, a book, a jewel, &c.

SECTION 2.—OF THINGS INCORPOREAL.

420. Things incorporeal are those which are not the objects of sensation, but are the creatures of the mind, being rights issuing out of a thing corporeal, or concerning or exercisable within the same; as an obligation, a servitude, an easement, or a usufruct.(*a*) This subject will be considered under another head.

CHAPTER II.—OF THINGS WHICH ARE THE OBJECTS OF PROPERTY.

421. Things considered as to the property which may be had in them, are capable of being possessed by single persons exclusively of all others, by the Roman or civil law, then said to be *in patrimonio;* or incapable of being so possessed, when they are said to be *extra patrimonium.*

SECTION 1.—OF THINGS IN WHICH PROPERTY MAY BE HAD.

422.—1. Things *in patrimonio* are divided into corporeal and incorporeal when considered as to their nature; and the corporeal are again divided into

(*a*) Domat, Lois Civiles, liv. prél. t. 3, s. 2, § 3; Poth. Traité des Choses, *in princ.*

movable or personal, and immovable or real, when considered as to their kinds.

These things are capable of becoming objects of property, and may be transferred from hand to hand, and passed either by descent or by purchase. They are things in commerce, the title to which is guaranteed to their owners by the law.

SECTION 2.—OF THINGS WHICH CANNOT BE THE OBJECTS OF PRIVATE PROPERTY.

423.—2. Things *extra patrimonium*, or those in which no private property can be had by individuals, exclusively from the rest of mankind, are, 1, those which are common to all men; 2, those which belong to the public generally; 3, those which belong to cities or municipal corporations.

§ 1.—Of things common.

424. Things common are the heavens, the light, the air, and the sea, which cannot be appropriated by any man or set of men, so as to deprive others of the use of them.(*a*) It is evident that no private property can be had in the heavens, the light, the air, and the sea, which belong equally to all men, and are indispensable to their existence. All men have the right to navigate the sea, and to fish there.(*b*)

§ 2.—Of things public.

425. *Res publica*, or things public, are those the property of which is in the state, and their use is common to all its members, as navigable rivers, harbors, the sea shore, highways, bridges, and the like.

426.—1. A *river* is a natural collection of waters, arising from springs or fountains, which flow in a bed or canal of considerable width and length, toward the sea.(*c*) Rivers are public or private. A private

(*a*) Dom. Lois Civ. liv. prél. t. 3, s. 1, §§ 5, 6; Inst. 2, 1, 1.
(*b*) Dom. Lois Civ. Droit Public, liv. 1, t. 8, s. 2.
(*c*) Reynolds *v.* McArthur, 2 Pet. 417; Jackson *v.* Halstead, 5 Cowen, 216.

river is one which, owing to its shallowness, or in consequence of the obstructions which are in it, cannot commonly be navigated, and belongs to private individuals, but it is still subject to public use when it can be navigated.(*a*)

427. *Public rivers* are those in which the public have an exclusive right, that is, such as cannot be appropriated to private use. They are navigable or not navigable.

428. The term *navigable rivers*, in a technical sense, means a river in which the tide flows. The soil or bed of such a river belongs not to the riparian proprietor, but to the public.(*b*)

429. Public rivers, *not navigable*, are those which belong to the people in general, as public highways; the soil of these rivers, belongs generally to the riparian owner, but the public have the use of the stream, and the authors of nuisances or impediments on them may be punished.(*c*) But in some states, as Alabama and Pennsylvania, the bed of the great rivers belongs to the public, and not to the riparian owner.(*d*)

430. By the ordinance of congress of 1787, art. 4, relating to the north-western territory, it is provided, that the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free.(*e*) This provision does not deprive the owner of any such river, of the right to the bed of the river when he owns both the banks, or his right to the centre of the stream, the dividing line, or *filum aquæ*, when he owns one side only.(*f*)

(*a*) Executors of Cates *v.* Wadlington, 1 McCord's R. 580.

(*b*) Horne *v.* Richards, 4 Call. 441. See Pollard *v.* Hagan, 3 How. U. S. 212; Jackson *v.* Lewis, Cheves, 259.

(*c*) Ang. on Wat. Courses, 202; Call. on Sewers, 78.

(*d*) Carson *v.* Blazer, 2 Binn. 475; Shrunk *v.* Schuylkill Co., 14 S. & R. 71; Bullock *v.* Wilson, 2 Port. 436.

(*e*) 3 Story's Laws of U. S. 2077.

(*f*) Gavitt *v.* Chambers, 3 Ohio Rep. 496. See Palmer *v.* Cuyabroga County, 3 McLean, 226.

431. The owner of the land adjoining a navigable river, has an exclusive right to the soil between high and low water mark, for the purpose of erecting wharves or buildings.(*a*) The shore of a fresh water river is where the land and water ordinarily meet.(*b*)

432. When insensible additions are made to the land or shore by the washings of the sea or river, such additions are called *alluvion*. In general, the proprietor of the land to which such alluvion attaches, is entitled to the addition. The characteristic of alluvion is its imperceptible increase, so that it cannot be seen what is added each moment of time.(*c*)

433. Alluvion differs from *avulsion*. By the latter expression is meant the sudden change made by force of the water by which the soil is taken to a considerable extent and carried from one man's estate to that of another. In such case the property so removed belongs to the first owner.(*d*)

434. When an *island* is formed out of the sea or in a river, by slow and imperceptible accretion, at common law, it belongs, in the case of the sea or a navigable river, to the sovereign, and in case of rivers not navigable, that is, above that point where the sea ebbs and flows, to the owners of the adjoining lands.(*e*)

An island in a river not navigable, which has not been otherwise appropriated, if on one side of the dividing line, belongs to the owner of the bank on that side; if in the middle of the river, the owners of the

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(*a*) East Haven *v.* Hemingway, 7 Conn. 186; 1 Halst. Rep. 1; but see Commonwealth *v.* Fisher, 1 Pennsyl. 102.

(*b*) Ex parte Jennings, 6 Cowen, 547.

(*c*) See 2 Bl. Com. 262, and note by Chitty; 1 Swift's Dig. 111; Coop. Just. lib. 2, t. 1; Schultes on Aq. Rights 116; 2 Am. Law Jour. 282, 293; Inst. 2, 1, 20: Dig. 6, 1, 23; Dig. 39, 2, 9; Dig. 41, 1, 7; New Orleans *v.* United States, 10 Pet. 662; Deerfield *v.* Arms, 17 Pick. 41.

(*d*) Harg. Tr. De Jure Maris, etc. 27; Schultes on Aq. Rights, 115 to 138.

(*e*) Hale, De Jure Maris, pars 1, c. 6; Bract. lib. 2, c. 2; Inst. 2, 1, 28; Dig. 41, 1. In Pennsylvania, it will be remembered the beds of the great rivers belong to the public, although the tide does not ebb and flow there.

banks are entitled to it in severalty; in such case, the dividing line runs as if there were no island in the river. When there are several riparian owners, the island is apportioned according to their lines on the main.(a)

435.—2. A *harbor* is also public property; it is a place where ships ride with safety; a navigable water protected by the surrounding country; a haven.(b) A road, a creek, a port, an arm of the sea, are also public property, in which no individual can have any private right.

436.—3. A *road* is defined by Lord Hale(c) to be an open passage to the sea, which, from the situation of the adjacent land, and its own depth and wideness, affords a secure place for riding in safety and anchoring vessels.(d)

437.—4. A *creek* is an inlet from the sea, or a narrow passage from the shore on each side of it, which gives no harbor to ships, and is endowed with no privilege.(e)

438.—5. A *port* is a place within land, protected against the waves and winds, where the water is of a sufficient depth to afford to vessels a place of safety. It is a place to which officers of the customs are appropriated, and which includes the privilege and guidance of all members and creeks which are allotted to it.(f)

439.—6. An *arm of the sea* is a place where the sea or tide flows or reflows.(g) This term includes bays, roads, creeks, coves, ports and rivers, where the water flows and reflows, whether it be salt or fresh.(h)

440.—7. The *sea shore* is in general public property,

(a) Ingraham *v.* Wilkinson, 4 Pick. 268.
(b) Hale, De Port. Mar. c. 2; 2 Chit. Com. Law, 2.
(c) De Port. Mar. p. 2, c. 2.
(d) See 2 Chit. Com. Law, 4, 5.
(e) Com. Dig. Navigation, C. See 1 Chit. Com. Law, 726; Postlewaite's Com. Dict. h. t.
(f) 1 Chit. Com. Law, 726; Postlewaite's Com. Dict. h. t.
(g) Constable's Case, 5 Co. 107.
(h) Ang. on Tide Wat. 61.

which cannot be exclusively appropriated by individuals. It is defined to be that space of land on the borders of the sea, which is alternately covered and left dry by the rising and falling of the tide; or in other words, that space of land between high and low water.(a)

According to the Roman law, the sea shore included the land as far as the greatest wave extended in winter: *est autem littus maris, quatenùs hibernus fluctus maximus excurrit.*(b) The sea shore is said to be public as far as the place where the highest tides rise: *littus publicum est eatenus, qùa maximè fluctus exæstuat.*(c)

441.—8. The general convenience requires that all highways should belong to the public, and that no one should appropriate to his own use such highway to the inconvenience of the people. A *highway* is the generic name for all kinds of roads. They are universally laid out by public authority, and repaired at the public expense, or by direction of law.

442.—9. A *road* or *highway*, is a passage through the country, or some parts of it, for the use of the people.(d) Roads are public or private.

443. *Public roads* are of two kinds; first, such as are laid out by the government itself, and kept in repair out of the public treasury of the nation, the state, a county or other district; and secondly, those which are made and laid out by authority of law, by a corporation or company of individuals, and which are kept in repair by them.

1st. The public have the use of roads of the first class, but the owners of land over which they pass have a fee in such road, subject to the easement of the public; and the owners of the sides have *primâ facie* a

(a) Harg. Tr. 12; Stover *v.* Freeman, 6 Mass. 435; Commonwealth *v.* Charlestown, 1 Pick. 180; Peck *v.* Lockwood, 5 Day, 22; Ang. on Tide Wat. 34; 3 Kent, Com. 347. See Co. Litt. 48, b; Handley's Lessee *v.* Anthony, 5 Wheat, R. 374; Scratton *v.* Brown, 4 B. & C. 485.

(b) Inst. 2, 1, 3.

(c) Dig. 50, 16, 112. See Civ. Code of Lo., art. 442.

(d) Respublica *v.* Arnold, 3 Yeates, 421.

fee in it to the centre of the road, *ad medium filum viæ*, subject of course to the public right; but where the boundary excludes the highway, it is of course excluded.(*a*)

The proprietor of the soil of such roads, is therefore entitled to all the fruits which grow by its side,(*b*) and to all the mineral wealth they contain.(*c*)

Whenever such roads are vacated, that is, abandoned by public authority, the easement of the public is gone, and the land, discharged from it, reverts to its former owner.

2dly. Turnpikes, railroads, and other ways, authorized by the government to be made by corporations, or public companies, are the second class of public roads. These are made and kept in order by the companies to which they respectively belong, but the public have a right to travel over them, and no citizen can be prevented from going on them, in such a way as is regulated by law. In general, persons travelling on these roads are required to pay a toll.

These corporations or companies have, generally, only the right of passage over the land, which remains the property, subject to the easement, of the original owner of the land or his assigns.

444. *Private roads* are such as are used by private individuals only, and are not wanted for the public generally.

445.—10. For the convenience of the public, bridges have to be made in order to go over rivers, and other places impassable without them. A *bridge* is a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same. They are of two kinds, public and private.

(*a*) Peck *v.* Smith, 1 Conn. 103; Chatham *v.* Brainerd, 11 Conn. 60; Tyler *v.* Hammond, 11 Pick. 193. See Cook *v.* Green, 11 Price, 736; Headlam *v.* Headley, Holt's Case, 463.
(*b*) Stackpole *v.* Healy, 16 Mass. 33.
(*c*) 1 Roll. Ab. 392, l. 5.

Public bridges may be divided into, first, those which belong to the public, as state, county or township bridges, over which all the people have a right to pass, with or without paying toll. These are built by public authority at the public expense, either of the state itself, or a district or part of the state.

Secondly, those which have been built by companies, authorized by the government, over which the people have a right to pass, on the payment of a toll fixed by law.

Thirdly, those which have been built by individuals, and which have been dedicated to public uses.(*a*)

A *private bridge* is one built by a private person over his own ground, without any special authority from the government; such a bridge is not considered public, although it may be occasionally used by the public.(*b*)

§ 3.—Of things which belong to cities or municipal corporations.

446. Things which belong to cities or municipal corporations, *res universitatis*, belong so far to the public that they cannot be appropriated to private use. They belong to the corporation or body politic in respect of the property in them; but as to their use they appertain to those persons who are of the corporation, or who happen to be within the same; such as public squares, market houses, streets, and the like, which cannot be sold for private use. They differ from things public, because the latter belong to the nation or the state. The lands or other revenue belonging to a municipal corporation do not fall within this class, but are *juris privati*.

CHAPTER III.—OF THE DIFFERENT KINDS OF THINGS ESTABLISHED AS PROPERTY.

447. Things as to their different kinds established

(*a*) The King *v.* West Riding of Yorkshire, 2 East, 356; King *v.* Northampton, 2 M. & S. 262.

(*b*) The King *v.* Bucks, 12 East, 203.

by law, and considered as property, are divided into things personal, things real, and things mixed.

448. Viewed in this light, things are *property*, which is a right a man has in lands and chattels to the exclusion of all others.

449. In its most extensive sense, the word *estate* is applied to signify every thing of which riches or fortune may consist, and includes personal and real property; hence we say personal estate, real estate. And sometimes property is composed of both personal and real, and is then called *mixed estate*.

450. It is very important that the distinction between personal and real estate should be clearly marked. The manner of acquiring real and personal estate is not the same; nor is the way they are severally enjoyed, and frequently the heirs of the one are not of the other. Sometimes a testator bequeaths his real estate to one person and his personal to another.

Real estate is subject to the dower of the wife and curtesy of the husband. On marriage, at common law, the personal estate of the wife in possession, passes absolutely to the husband, and the real remains hers, subject to his curtesy.

Things attached to the freehold, as fixtures, are sometimes real and at other times personal; and things which are personal in their nature, as the keys of a house, are considered as real estate in consequence of their destination; other personal things become real, either by their accession or by the use to which they are applied. And things which are real become personal on being separated from the realty, as fruits, coal, etc.

CHAPTER IV.—OF THE ORIGIN AND NATURE OF PERSONAL PROPERTY.

451. To give a clear view of this subject, it will be requisite to inquire into, first, the origin and right of property; secondly, the possession separated from

property; thirdly, what is property and its analysis; fourthly, the division of property into perfect and imperfect.

SECTION 1.—OF THE ORIGIN AND RIGHT OF PROPERTY.

452. Although the rights annexed to property and those which are derived from it are now very extended, such was not the case formerly. Property was confounded with possession, and was lost with it. Before the establishment of the civil state, the right of the first occupant could not be fairly disputed, for when all other things were equal, it was just and natural that the right of the possessor should be preferred, for to deprive him of possession, it required a right greater than his own.

Possessed for a great length of time of a field or a tree, and having had the *use* of it, the idea soon occurred that he who abandoned his possession with an intention of returning, preserved some right of preference over others who had never had such possession, and who would, themselves, in turn lay claim to some other field or some other tree which they also had possessed for a long time. It was by this continued possession that the right not only to the use but to the *substance* became in the end so fully established in the man who had so long occupied the thing.

This right being once established was soon considered as capable of being transferred to others by the owner; and, at his death, his things being naturally taken possession of by his relatives who attended him on his death bed, the rights of the latter were, in the course of time, considered as fully established as his own had been.

The municipal or civil law has adopted the maxim that property once acquired is lost only by the act of the owner,(*a*) and that it preserves to the owner his

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(*a*) This requires a qualification, for though true in general it is not so

right to it, even after he has lost the possession without his consent, if it is to be found in the hands of a third person; unless, indeed, such third person shall have acquired a right to it by so long a time as to amount to a prescription.

Thus, by the law, property and possession, which, in primitive ages were confounded, became two distinct and independent things; two things which have nothing common between them: property is a right, a legal faculty; possession is a fact.

Property, then, is a moral quality inherent in the thing, which operates as a bond of union between the owner and the thing, and which in general can be severed only by his act.

This right of claiming the thing, wherever he should find it, is what forms the principal and distinctive character of property in the civil state.

SECTION 2.—OF POSSESSION AS SEPARATED FROM PROPERTY.

453. At the first view possession seems to be a thing clearly understood; according to Blackstone, it is "when a man has not only the right to enjoy, but hath the actual enjoyment of the thing."(a) But the subject is full of difficulty. The idea of possession will be different according to the nature of the object, or as it respects things real or things personal. And when we come to consider the persons who possess, it will not be found easy to determine who is in possession. This case has been put:

"A street porter enters an inn, puts down a bundle upon the table and goes out. One person puts his hands upon the bundle to examine it; another puts his to carry it away, saying, it is mine. The innkeeper runs to claim it in opposition to both. The porter re-

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universally; because property may be taken for public use, when the owner, on being compensated, loses his title to it.

(a) 2 Com. 389.

turns or does not return. Of these four men, which is in possession of the bundle?"

To ascertain what is possession, we must have a definite idea of it. It is proper to analyze it, and distinguish between physical and legal possession. The former does not suppose any law, it existed before there were laws; it is the detention of the subject, whether a thing or the services of man. The latter is altogether the work of the law; it is the enjoyment of a right over a thing.

In order to complete legal possession two things are requisite; first, that there be an occupancy, apprehension or taking; and secondly, that the taking be with an intent to possess, *animus possidendi;* hence persons having no will, as idiots, cannot acquire a legal possession, which is an assertion of a right.(*a*)

454. Possession, separated from property, has preserved several of its ancient prerogatives.

1. It still remains to be a means of acquiring property, when it has continued long enough to bar a right of action under the statutes of limitations, or as the civilians say, to operate a prescription.

2. The possessor has a right to be maintained in his possession, when he is disturbed in it or it is seized from him by violence. The owner himself, can regain his possession only by lawful means. But he may regain it by his own act if he can do so peaceably.

3. The principle that property is acquired by occupation, is preserved by possession and lost with it, is yet applicable to those things which have remained in a state of negative community, such as wild animals, birds and fishes, and all such things as are naturally found on the sea shore, as precious stones, shells, coral, etc. The rule is different with regard to

(*a*) Etienne, h. t.; Poth. h. t. See Abb. on Shipp. 9 et seq., and Savigny's Treatise on Possession; or the *jus possessionis* of the Civil Law; A very learned work. See also Bouv. L. D., h. t.

domestic animals, as will be seen when we come to treat of the qualified rights which men have in property.

4. Possession still preserves, in the civil state, the important prerogative of giving the possessor the right, when the title of two contending claimants are otherwise equal.

SECTION 3.—DEFINITION OF PROPERTY AND ITS ANALYSIS.

§ 1.—Definition of property.

455. Property is the lawful right which a man has in lands or chattels, to dispose of them in the most absolute manner, to the exclusion of all others.

§ 2.—Analysis of property.

456. The right of property subsists independently of the exercise which may be made of it. One is not the less owner, although he may perform no act of ownership, although it may be out of his power to do so, and even when another performs such acts unknown to him or against his will. The right consists in a legal faculty of performing those acts, by himself, or by another in his name. Property is considered as a quality inherent in the thing.

457. A distinction has been made between *property* and *domain*. By the first is understood that quality which we conceive in the thing itself, considered as belonging to such or such person exclusively of all others. By *domain* is understood the right to dispose at our pleasure of what belongs to us, which is considered the effect of property; so that according to this distinction, domain is attached to the person, and property to the thing itself. But this distinction is rather too subtle to be useful in practice; it may in theory, throw some light on the nature of the right of property.

This right is what is called *jus in re*, or a right which a man has in a thing, by which it belongs to

him; a complete and full right.(a) It is the bond of property which exists between the owner and the thing, independently of any other person; he may follow it into whose possession soever the same may be, whether the possessor has obtained it *bona fide* or otherwise. This right of following the thing which is the object of property wherever it may be found, called *jus in re*, differs from the *jus ad rem*, which is a right a man has, not in the thing, but simply in relation to the thing, against the person who has contracted toward him the obligation of delivering it to him.(b) It results from an obligation purely personal, existing between two or more designated persons, by which one is bound to give or to do something for the other.

The *jus ad rem* is the title or means of acquiring a thing in which we have a property, *jus in re*.

The exercise of the right of property consists in the performance of every thing in relation to it, not forbidden by law; for what the law does not forbid, it allows. It would be difficult, perhaps useless, to enumerate all the acts which a man may do in relation to his property; these may be reduced to three classes which correspond to the three fundamental points of property, namely; enjoyment, exclusion and disposition.

458.—1. The first class, or the right of *enjoyment*, comprehends the acts which have for their object to procure from the thing, which is the subject of property, all that is useful or agreeable; in a word, to draw from it all the possible advantages, not forbidden by law.

459.—2. The second class, or the right of *exclusion*, consists in the performance of all those acts which interdict others or prevent them from the use of the thing; to claim the thing, and repress all attempts to

(a) Poth. Dr. de Domaine de Prop. n. 1; 1 Bl. Com. 312.

(b) 1 Bl. Com. 312. This term is nearly equivalent to *chose in action*. Bouv. L. D. h. t.; 2 Woodes. Lect. 235; Poth. Du Dr. de Prop. n. 1.

invalidate the enjoyment or the disposition of the owner.

460.—3. The third class includes all those acts which are relative to the *disposition of the thing*. To dispose of a thing, is to make of it what use we please: the owner has a right to dispose of his property in the most absolute manner. This right includes that of changing the nature of the thing, to change its form, its surface, and even its substance as much as possible; in fact he may consume it. When it is said the owner has a right to abuse it, *jus abutendi*, it must be understood as used in opposition to the right of simple usage, *jus utendi*, which is the right of using without destroying the thing. But this right of abuse is not unlimited.(*a*)

This right to dispose of a thing includes that alienation, in whole or in part, by conveying the title forever or only for a limited time, purely and without conditions, in favor of one or more persons, gratuitously or for a consideration. To alienate is to transfer one's right of property to another.

This same right includes further that of abandoning the thing and the property, without transferring it to another.

The right of disposing of a thing includes also that of pledging the thing. Indeed, whenever a person binds himself, he binds all his property, and that which he may acquire, for the fulfilment of his obligation; hence the maxim, he who binds himself binds his property.

CHAPTER V.—DIVISION OF PROPERTY INTO PERFECT AND IMPERFECT.

461. Property may be divided into perfect and im-

(*a*) The owner of a horse or other animal has, it is true, power over the life of such animal, but he cannot use it in such a cruel manner as will be injurious to the community, either by his example or on account of the cruelty. And for such acts the owner of such property may be punished criminally. 6 City Hall Rec. 62; 3 City Hall Recorder, 191. So the owner of a slave cannot put him to death.

perfect. It is perfect when the owner can exercise all the rights of which it is susceptible.

It is imperfect when some of these rights have been separated; for example, a thing pledged belongs to the owner, subject to the pledge.

When the owner transfers his personal property, unless accompanied by possession, he can transfer only the rights he possesses.

PART II.—OF PERSONAL PROPERTY.

462. The phrase *movable property* does not exactly mean *personal property*. By movable property is meant every thing which in its nature may be removed, except what is appropriated to real estate by destination, as the keys of a house, and certain fixtures in mills and other buildings; personal property includes not only all movables, but also something more; the whole of which is known by the name of *chattels*. This term then includes all kinds of property, except the freehold, or things which are parcel of it.(*a*)

In considering their nature, chattels may be divided into real and personal.

TITLE I.—OF CHATTELS REAL.

463. *Chattels real* are such as either appertain not to the person immediately, but to something by way of dependency, as a box with the title deeds of lands; or such as are issuing out of some real estate, as a lease of lands, a term of years, which pass like personalty to the executor of the owner.(*b*) The duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person.(*c*) It is but per-

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(*a*) 1 Chit. Pr. 90, 91; Kendall *v*. Kendall, 4 Russ. R. 360.
(*b*) Co. Litt. 118; 2 Kent, Com. 342; 8 Vin. Ab. 296; Bac. Ab. Baron and Feme, (C 2).
(*c*) 1 Bl. Com. 386.

sonal property, although it may extend to a thousand years, because the time being fixed, it falls below a freehold.(a)

464. *Heir looms*, which are chattels considered as annexed and necessary to the enjoyment of the inheritance. Contrary to the nature of chattels, they descend to the heir, along with the inheritance, and do not pass to the executor of the last proprietor. These are charter deeds and other evidences of the title to the land, together with the box in which they are usually kept; the keys of the house, and fish in an artificial pond, and pigeons in a pigeon-house, deer in a park, are all heir looms.(b) These differ from fixtures, which will be considered hereafter.

TITLE II.—OF CHATTELS PERSONAL.

465. *Chattels personal* may be divided into those which are in possession, and those which are in action.

CHAPTER I.—OF CHATTELS PERSONAL IN POSSESSION.

466. Having already considered the nature of possession of personal property and its effects,(c) we will now consider the different kinds of such property in two articles, the first of which will treat of tangible personal property, and the second of personal property not tangible.

SECTION 1.—OF TANGIBLE PROPERTY.

467. Tangible personalty in possession includes not only things actually separated and movable, whether animate or inanimate, but also some things which, though annexed to, or proceeding out of real property, are considered in law, for some purposes and under some circumstances removable, and consequently treated as personal property; for example, a tenant's

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(a) Co. Litt. 46 a; Case of Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. Rep. 350; Bac. Ab. Legacies, (B), Bouv. ed.

(b) 1 Inst. 3 a; Id. 185 b.

(c) Ante, B. 2, pt. 1, t. 1, c. 2.

fixtures, removable during the term; growing trees when sold, though not actually severed; and emblements, whether growing corn, roots, or cultivated grass, and growing vegetables.

This tangible personal property in possession may itself be divided into two sorts: an *absolute* and a *qualified* property.

§ 1.—Of absolute property in possession.

468. Property in possession absolute, is where a man has, solely and exclusively, the right, and also the occupation of any movable chattel, so that it cannot be transferred from him, or cease to be his without his act, consent, or default; unless, indeed, when such property is taken by authority of law for public use.(*a*) In such case the owner is to be justly paid or indemnified. This kind of property is either animate or inanimate.

469.—1. *Animals* are distinguished into such as are *domitæ,* of a tame or domestic nature; and such as are *feræ naturæ,* of a wild or savage disposition. In such animals as are tame and domestic, as horses, kine, sheep, poultry, and the like, a man may have an absolute property as he may have in inanimate things, because they stay continually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.(*b*) Where slavery is established a man has an absolute property in his slave, and if he runs away, the master may retake him, or establish his right by action.(*c*)

There is a class of animals in which, although a property of some kind may be had in them, yet, on account of their inferiority, they are not the subject

(*a*) 2 Bl. Com. 389; Story on Bailm. § 93, *g*, *h*, *i*.
(*b*) 1 Bl. Com. 390; Dig. 41, 1, 6; 3 Toull. n. 373; 1 Chit. Pr. 8, 7.
(*c*) Withers *v.* Smith, 4 Bibb, 170; Plumpton *v.* Cook, 2 A. K. Marsh. 450.

of larceny; such as dogs,(a) cats, bears, foxes, monkeys, or ferrets.(b)

The law recognizes no property whatever in rooks.(c)

470.—2. *Inanimate* tangible property, either actually movable, or capable of being removed or separated without great injury to the realty, is generally known by the appropriate and technical name of *goods and chattels*. This term includes, for some purposes, money, valuable securities, and all other personal property, and even choses in action.(d)

471.—3. Growing vegetables or *emblements* are deemed personal property. By emblement is understoood the crops growing upon the land; but the word crops, as here used, signifies the products of the earth, which grow yearly and are raised by annual expense and labor, or "great manurance and industry," such as grain; but not fruits which grow on trees, which are not planted yearly, grass and the like, though they are annual.(e)

472.—4. *Fixtures* are sometimes considered as personal chattels, and, at other times, as part of the realty. Fixtures, technically speaking, are personal chattels annexed to land, and which may afterward be severed and removed by the party who has annexed them, or his personal representatives, with or without the will of the owner of the freehold.

To make a thing a fixture, it must be annexed to the freehold, either actually or by construction. The annexation must be made by joining the chattel to the freehold.(f) Once annexed, in general it becomes a part of the realty. But to this rule there are various

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(a) 4 Bl. Com. 236; Findlay *v.* Bear, 8 S. & R. 571; 12 H. 8, 3; 18 H. 8, 2; Com. Dig. Biens F.; Bac. Ab. Trover, (D.)

(b) 1 Chit. Pr. 88.

(c) 2 Bar. & C. 934; 4 D. & R. 518.

(d) 12 Co. 1; Bac. Ab. Legacies, (B.) Bouv. ed.

(e) Co Litt. 55; Com. Dig. Biens, G.; 10 B. & C. 720; 1 Chit. Pr. 92, 93; 1 Greenl. Ev. § 271; Warwick *v.* Bruce, 2 M. & S. 205; Evans *v.* Roberts, 5 B. & C. 829; Cutler *v.* Pope, 1 Shep. R. 337.

(f) Bull. N. P. 34; 3 East, 38; Poth. Des Choses, § 1.

exceptions: first, when there is a manifest intention to use the fixtures in some employment distinct from that of the occupier of the real estate; and, secondly, when it has been annexed for the purpose of carrying on trade.(*a*) But this distinction between fixtures for trade and those for agriculture, does not seem to have been admitted to prevail generally in the United States.(*b*) To entitle the tenant to remove them, he must do so within his lease.(*c*)

473. The right to remove fixtures depends on the situation of the parties who claim them. Persons standing in certain situations can claim them, when they would not be allowed to others. These classes of persons will be separately considered.

1st. When the question, as to the right of removing fixtures, arises between the executor and the heir, the ancient rule that they belong to the real estate, is strict; unless the ancestor has manifested an intention that they should be considered as personal property.(*d*)

2d. As between the vendor and vendee, the rule is as strict as between the executor and the heir; such fixtures pass to the vendee of the land.(*e*)

3d. Between the mortgagor and mortgagee, the rule seems to be the same as between the vendor and vendee.(*f*)

4th. Between the devisee and executor, the former will be considered as a purchaser, and entitled to the fixtures.(*g*)

5th. Between landlord and the tenant for years, the ancient rule is relaxed, and the right of the tenant to

(*a*) 3 East, 88; Lemar *v.* Miles, 4 Watts, 330; Vanness *v.* Pacard, 2 Pet. 137; Swift *v.* Thompson, 9 Conn. 63; Gale *v.* Ward, 14 Mass. 352.

(*b*) 2 Pet. 137; Whiting *v.* Brastow, 4 Pick. 310; Holmes *v.* Tremper, 20 John. 29.

(*c*) White *v.* Arndt, 1 Whart. 91.

(*d*) Bac. Ab. Executors, &c. (H.)

(*e*) Miller *v.* Plum, 6 Cowen, 665; Holmes *v.* Tremper, 20 John. 29; Phillipson *v.* Mallanphy, 1 Miss. 508.

(*f*) Amos & F. on Fixt. 188; 15 Mass. 159.

(*g*) See Merrington *v.* Becket, 2 Barn. & Cr. 80.

remove fixtures is the most extensive.(*a*) But this right of removal will depend rather upon the question whether the estate will be left in the same condition in which he took it.(*b*)

6th. In cases between tenants for life and their executors and the remainder-men or reversioners, the right to sever fixtures seems to be the same as that of tenant for years.(*c*)

7th. In a case between the landlord and the tenant at will, there seems no reason why the same privilege of removing fixtures should not be allowed.(*d*)

474.—5. *Stocks* in corporations are in general considered as personal property.(*e*)

§ 2.—Of qualified property.

475. By *qualified property* is understood that property which is not perfect in the hands of the possessor, but his right to it is qualified, or limited, or special.(*f*)

476. A man may have a qualified property in animals *feræ naturæ* on two accounts; first, because he has used his industry in reclaiming them, *per industriam;* and secondly, because such animals are so weak that they cannot go away, *propter impotentiam.*

When animals of a wild nature have been captured by a man, and are confined within his power, he has a qualified property in them: (g) while so confined they are his own; but as soon as they regain their natural liberty, he loses his right to them.(*h*) But the rule is different with wild animals which have been tamed;

(*a*) Elwes *v.* Maw, 3 East, 38.
(*b*) Whiting *v.* Brastow, 4 Pick. 311.
(*c*) 4 Pick. 311.
(*d*) 4 Pick. 310.
(*e*) 4 Dane's Ab. 670; 1 Chit. Pr. 96.
(*f*) Story on Bailm. § 93, g, h, i: 2 Bl. Com. 391; 2 Greenl. Ev. § 637.
(*g*) But they must be completely within his power, otherwise they may be captured by another. Young *v.* Hichens, 1 Dav. & Meriv. 592; S. C. 6 Ad. & Ell. N. S. 606; Pierson *v.* Post, 3 Caines, 175; Bac. Ab. Game; Buster *v.* Newkirk, 20 John. 75; Puff. lib. 4, c. 6; Poth. De Propriéte, prém. partie, c. 5, s. 1, n. 26.
(*h*) Dig. 41, 1, 3 et 5.

if they are in the habit of going and returning, the owner retains his property as long as this habit continues: (a) but if they have gone away a sufficient length of time to raise a presumption that they have lost the habit of returning, the *animum revertendi*, the owner loses his property in them, and they become the property of the first occupant.(b) Bees, for example, are *feræ naturæ;* but when hived and reclaimed, a man may have a qualified property in them when he hives them,(c) for till that is done he has no more property in bees upon his trees, than he has in the birds which happen to alight there.(d)

A qualified property may also be had in animals *feræ naturæ* on account of their weakness, *ratione impotentia,* as the young of birds before they can fly, and the whelps of other animals before they have the ability to go away.(e)

477. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing is capable of absolute ownership. A variety of examples of this might be given: a bailee has a qualified property in the thing bailed, and so has the bailor; the pledgor and the pledgee have also such property in the things which are the object of the bailment.

SECTION 2.—OF PROPERTY NOT TANGIBLE.

478. In considering personal chattels in possession, we have examined those which were tangible, in which could be had an absolute or qualified property; it will now be proper to take a view of those chattels in possession which are not tangible. These though in possession as respects the *right,* and consequently not

(a) Amory *v.* Flyn, 10 John. 102.
(b) Dig. 41, 1, 6.
(c) Puff. l. 4, c. 6, § 5; Inst. 2, 1, 14; 3 Toull. n. 374; 1 Bl. Com. 392.
(d) Wallis *v.* Mease, 3 Binn. 546; Sm. & M. 333; Inst. 2, 1, 14; Dig. 41, 1, 5, 2; Sed vide Goff *v.* Kitts, 15 Wend. 550; 1 Cowen, 243.
(e) See 3 Inst. 109; 1 Russ. on Cr. 153; 2 Bl. Com. 394.

strictly *choses in action*, yet differ from goods, because they are neither tangible nor visible, though the thing produced from the right be perfectly so. In this class may be mentioned *copy rights* and *patent rights*, either in books, music, busts, sculpture, engravings, prints, machines, etc. In these cases the subject matter of the right is not the book, the music, etc., produced, but the exclusive privilege of continually, for a certain time, printing or making or vending the article.

CHAPTER II.—OF CHOSES IN ACTION.

479. A *chose in action* is the right to receive or recover a debt, or money, or damages, for breach of contract, or for a tort connected with a contract, which cannot be enforced without action, and therefore termed a chose or thing in action.(*a*)

480. A distinction must be made between the security or the evidence of the debt and the thing due: a deed, a bill of exchange, a promissory note, may be all in possession of the owner, but the money or damages due on them are no less choses in action.

481. There are some differences between personal tangible property in possession, and *choses in action;* the principal of which are, *first*, when money or goods are in possession, or the defendant is entitled to immediate possession, they may be taken in execution; but, in general, a chose in action, at common law, cannot be so taken. In some of the states of the Union the money due on them may be seized by a judgment creditor by a peculiar process authorized by a special statute.(*b*) *Secondly:* The transfer of a chose in action differs from that of a personal chattel in possession, both in form and effect; for though, in general, the beneficial interest of a chose in action may be transferred by parol, and without writing, yet the legal interest does not pass so as to entitle the assignee to sue in his own

(*a*) Com. Dig. Binns; 1 Ch. Pr. 99, 140.

(*b*) In Pennsylvania, the plaintiff may issue an attachment execution, and seize such property as under a writ of foreign attachment.

name, he must use that of the assignor to enforce payment. But there is an exception to this rule; bills of exchange, and promissory notes, are by the law merchant transferable, and the legal as well as the equitable right passes to the transferee. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable. In order to perfect the transfer, the assignee of a common chose in action must give notice to the debtor, and a neglect to do so, will render a payment to the assignor without notice equally available as if the thing had not been assigned; this is unnecessary when the possession of the thing accompanies the assignment of it. *Thirdly:* A thing tangible and in possession may be the subject of a donation *mortis causa,* when it is delivered; so also bonds, bills, notes may pass by such delivery when so given. But a chose in action, not evidenced by any written security, would not pass as a gift *mortis causa. Fourthly:* A chose in possession at common law, vests in the husband upon marriage; a chose in action does not vest in him until he obtains possession.

CHAPTER III.—OF THE TIME OF ENJOYMENT OF PERSONAL CHATTELS.

482. Though the law was formerly otherwise, now property, whether personalty or realty, may be settled in any way. A bequest for life of the thing itself, or of its use only, with a limitation over upon the death of the legatee, will be supported.(*a*)

CHAPTER IV.—OF THE NUMBER OF OWNERS IN THE SAME PERSONAL CHATTELS.

483. A chattel may belong in *severalty* to one person alone; to two or more persons in *joint tenancy,* or in *common,* as well as real estate. By severalty is understood the state of property which is held by only

(*a*) Bac. Ab. Legacies, (B 2), Bouv. ed.; Patterson *v.* Ellis, 11 Wend. 260; Terry *v.* Terrel, 1 Dev. & Bat. Eq. 441.

one person in his own right, without any other person being joined or connected with him in point of interest, during the continuance of his estate.

484. *Joint tenancy* is where two or more persons hold land, tenements, or chattels, by the same title, obtained at the same time, for the same interest, and having the same possession.(*a*)

485. A *tenancy in common* is one of property held by two or more persons by unity of possession only.

486. It is a rule, that when chattels are held in ordinary and common partnerships in trade, upon the death of the joint tenants, the right of the deceased vests in his personal representatives, it being a rule that *inter mercatores jus accrescendi locum non habet*,(*b*) but the right to recover any debt due to the partnership, or for any past injury, vests in the survivor, for the benefit of himself and the representatives of the deceased. If, however, the chattel be held by persons who are not partners, as joint tenants, at common law, on the death of one the right of the deceased belongs to the other. But this has been changed by statute in a number of the states of the Union.

TITLE III.—OF THE DIFFERENT MODES OF ACQUIRING AN ORIGINAL TITLE TO PERSONAL CHATTELS.

487. Under this title will be considered the *original* modes of acquiring personal chattels. The way in which such property is acquired by *derivative* title will form the subject of the next title.

488. There is an important distinction between the effect of original and that of derived acquisition. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unlimited and unqualified, since no one but the occupant has any right to the thing, he must have the whole right of

(*a*) Gilbert *v.* Richards, 7 Verm. 203; Shaw *v.* Hearsey, 5 Mass. 521; Dott. *v.* Willson, 1 Bay, 457.

(*b*) Co. Litt. 3, 282; 1 Mer. R. 564; 1 Bl. Com. 359.

disposing of it. But with regard to derived acquisition it may be otherwise, for the person from whom the thing is acquired may not have an unlimited right to it, or he may transfer or convey it with certain reservations of right.

CHAPTER I.—OF TITLE TO PERSONAL CHATTELS BY ORIGINAL ACQUISITION.

489. Title by original acquisition, is either title by occupancy or title by intellectual labor. These will be considered in two sections.

SECTION 1.—OF TITLE BY OCCUPANCY.

490. Title by occupancy is either, 1, simple, or mere occupancy; or, 2, consequent occupancy.

§ 1.—Of simple or mere occupancy.

491. In the origin of society, we have seen that all things belonged to all men by a kind of negative community, so that each could be taken by the first occupant. In the course of time most things were appropriated and became private property, and the right to them became exclusive; but others remain still in the negative community, over which no one has a right, and, until appropriated, they belong to no one. These are subject to the same right of appropriation, and may be seized by the first occupant: *quod nullius est id ratione naturali occupanti conceditur.*(a) No one has a right to that which is *res nullius*, consequently, whoever possesses *rem nullius*, possesses that which no one has a right to take from him. It is therefore his property. In the advanced state of civilization with which we are blessed, this kind of prperty is not common, but still it may be found.

492. *Wild animals*, whether they be quadrupeds, birds, or fishes produced in the sea, the heavens or the earth, become the property, by natural law, of whoever takes possession of them. It is the same when

(a) Inst. 2, 1, 12.

the animals or birds are caught on the premises of him who seizes them, or on those of another, but this does not authorize any one to commit a trespass for the purpose of hunting.

When taken, such an animal belongs to its captor; while the animal is living, he has a qualified property, which continues while it remains in his possession; but if the animal should escape and regain its natural liberty, he loses his right. The animal has regained its natural liberty when it gets out of sight, or if in sight, is under such circumstances that pursuit would be difficult.(*a*)

493. *Gems, shells, precious stones,* found on the *sea shore,* are subject to become the property of the first fortunate finder, because they do not belong to any one.(*b*)

494. Things that have been *abandoned* by the owner, belong to the first occupant; but if the owner, repenting of having thrown away or abandoned the thing, retake it before any one else, he regains his former title. To entitle the finder to such chattels, the former owner must have wholly abandoned his title; if, as in the case of a wreck, he has parted with the possession on the ground of necessity, or with an evident intention of resuming it, the property has never been abandoned.

495. The acquisition of things tangible by occupancy, must be made *corpore et animo,* that is, by an outward act signifying an intention to possess. The necessity of an outward act to commence holding a thing in dominion, is founded on the principle that a will or intention cannot have legal effect, without an outward act declaring that intention; and, on the other

(*a*) Grot. lib. 2, c. 3, § 5; Dig. 41, 1, 3, 2. The Romans considered things taken in war, in the same light; they belonged to the captor, until they were retaken or escaped. Dig. 41, 1, 5, 7, 7; Dig. 49, 15, 19, princ.; Inst. 41, 2, 1, 1.

(*b*) Sea weed, when cast upon the shore, belongs to the owner of the adjoining land. 2 John. 313, 323. Vide 5 Verm. 223.

hand, no man can be said to have the dominion over a thing which he has no intention of possessing as his. Therefore a man cannot deprive others of their right to take possession of vacant property by merely considering it as his, without actually appropriating it to himself; and if he possesses it, without any will of appropriating it to himself, as in the case of an idiot, it cannot be considered as having ceased to be *res nullius*. The outward act or possession need not, however, be manual; for any species of possession, or as the ancients expressed it, *custodia*, is in general a sufficient appropriation.(*a*)

496. The right of acquiring personal chattels by finding, is limited to those found upon the surface of the earth. It does not extend to goods found *derelict* at sea, though abandoned without hope of recovery,(*b*) nor to goods or money found hidden in the earth, known by the name of *treasure trove*.(*c*) In England such goods belong to the crown; in this country the title to them has perhaps been seldom questioned in the hands of the finder, except by the real owner.

497. No title by occupancy can in this country be gained in *waifs*, or stolen goods thrown away or scattered by a thief in his flight, in order to effect his escape. In England they belong to the king; here this prerogative has never been adopted by the government against the true owner, and never, perhaps, put in practice against the finder, though against him there would be a better reason for adopting it.(*d*)

498. Nor can any title be gained by occupancy of *estrays*, or cattle whose owner is unknown; or of *wrecks*, or such goods as after a shipwreck are cast

(*a*) Grot. 2, 8, 11, note 1.

(*b*) 2 Kent, Com. 357, 4th ed.; The Aquila, 1 Rob. Adm. R. 32; The King *v*. Property Derelict, 1 Hagg. Adm. R. 383; Peabody *v*. Proceeds of 20 bags of cotton, Amer. Jur. No. 3, 119; The Emulous, 1 Sumn. 207; 1 Ware's R. 41.

(*c*) Leçons du Dr. Rom. § 350—352.

(*d*) 2 Kent, Com. 257, 4th ed.

upon land by the sea, and left there, within some county, so as not to belong to the jurisdiction of the admiralty, but to the common law.(*a*) The property in these is generally regulated by local statutes.

§ 2.—Consequent occupancy, or the right of accession.

499. The ownership of a thing, whether real or personal, movable or immovable, carries with it the right to all the thing produces, and to all that becomes united to it, either naturally or artificially; this is called the right of *accession*, a right grounded on that of occupancy.

The doctrine of accession has been adopted from the civil or Roman law, and, contrary to their custom, English lawyers have acknowledged the source, in this instance, from which so many wise rules flowed. It was introduced by Bracton, and the good sense of the doctrine recommended it to the courts, who incorporated it into our system.(*b*) Accession is natural or artificial.

Art. 1.—Of natural accession.

500. Natural accession consists in the right to emblements, and the right to the young of animals.

1. *Of emblements.*

501. By *emblements* is understood the crops growing in the ground. By *crops* is here meant the products of the earth which grow yearly and are raised by annual expense and labor, such as grain; but not fruits which grow on trees, not to be yearly planted, grass and the like, though they are annual.(*c*) They belong to the owner of the land, or to the tenant who occupies it, who has sown and planted it. For some purposes emblements are to be considered as personal property, for on the death of the owner, they go to

(*a*) 2 Inst. 167; Bract. l. 3, c. 3; Mirror, c. 1, s. 13, and c. 3.
(*b*) 2 Bl. Com. 404.
(*c*) Co. Lit. 55 b; Com. Dig. Biens, G.

the executor, and not to the heir; but in some respects they are treated as real estate, and, for that reason, at common law they are not the subject of larceny.(*a*)

2. Of the young of animals.

502. The owner of a female animal is entitled to all her brood, according to the maxim *partus sequitur ventrem*.(*b*) Although this rule is reversed with regard to free persons, whose offspring follow the condition of the father, yet, where slavery exists, the young of female slaves belong to the master of the mother.(*c*)

Art. 2.—Of artificial accession.

503. It is difficult, if not impossible, to reduce to general and precise rules the right of accession, which has for its objects two personal things belonging to two different owners; this right must always be subject to the rules of natural equity.

These rules may be arranged into three classes, which correspond to the three artificial kinds of accessions: 1, adjunction, or the union by adjunction of two things which belong to different owners; 2, specification, or the formation of a new species, with personal chattels belonging to another; and, 3, commixtion, or the mixture of several things belonging to several owners.

1. Of adjunction.

504. By *adjunction* is meant the union which takes place when the thing belonging to one person is attached or united to that which belongs to another, in such a manner as to form a whole, and yet separable, so that one can subsist without the other; for example, a diamond enchased in a ring; silk thread used to make another man's coat. In these cases, when the adjunction is made by mistake, the whole belongs to the owner of the principal article, upon condition, however, that he shall pay to the other the

(*a*) 3 Inst. 109.
(*b*) Dig. 6, 1, 5, 2; Inst, 2, 1, 19.
(*c*) See Fanny *v.* Bryant, 4 J. J. Marsh, 368; State *v.* Anderson, Coxe, 36.

value of the goods which have been so employed. But the law will not permit one man to gain title in another's chattels, upon the principle of accession, if he took the property wilfully as a trespasser.

2. *Of specification, or the formation of new species out of the thing belonging to another.*

505. *Specification* is the making a new species out of materials of a different nature; as, cider out of apples; flour out of wheat. When a man takes lawfully the property of another, and changes its nature by making a new species, a question arises to whom does the whole belong? In some cases the substance carries it over the form, in others the form is preferred to the substance.

It seems to be settled that whatever alteration of form any property may have undergone, if taken tortiously, the owner of the original chattel is entitled to it in its new shape.(*a*)

But if the thing changed be taken lawfully, as, when a man believing wood to belong to him, made a table out of it; or money belonging to another which he believed to be his own, and worked it up into a vase, according to the Roman law, he would be the owner of the table or of the vase, but liable to the true owners of the wood or the money for their value.(*b*) Upon the principle that the writing and the painting in the following cases is the principal, a picture painted on canvas would belong to the painter, he being liable to the owner of the canvas for its value; and the author of a poem or history, written by him by mistake on the paper of another, would belong to the author, he paying for the paper.(*c*)

If the material taken and converted into a new species cannot be changed back to what it was, as if

(*a*) Fitz. Ab. Bar. 144; Bro. Propertie, 23; Civ. Code of Lo. art. 494, 495; Church *v.* Lee, 5 John. 348.
(*b*) Inst. 2, 1, 25, 34; 2 Black. Com. 404.
(*c*) 2 Kent. Com. 362, 363; 3 Toull. n. 116.

wheat be made into flour, or apples into cider, the new articles belong to the new proprietors, and they become subject to the owners of the materials for their value.(*a*)

3. *Confusion, or mixture of several things belonging to different owners.*

506. *Confusion of goods* takes place when the goods of two or more persons become mixed together so that they cannot be separated; as, if the cider of two different persons be poured into the same barrel; when the things put together are capable of separation, the mixture is called *commixtion;* as, if the flock of sheep belonging to A, be mixed with that of B.

In cases of commixtion the property in the things is not changed; it may be separated, and the owner of each is entitled to that which belongs to him.

507. In cases of confusion the rules vary according to the circumstances.

1st. When the confusion takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares.(*b*)

2dly. When the confusion arises from inevitable accident, or by the act of a stranger, the rule of the civil law, which deemed the property to be held in common, might be adopted; and it would make no difference whether the mixture produced a thing of the same sort or not; as, if the wine of one were poured into a cask containing the cider of the other, or the gold of one and the silver of another be melted together and made into a vase.(*c*)

(*a*) Inst. 2, 1, 25, 34; Silsbury *v.* McCoon, 6 Hill, 425.

(*b*) 2 Bl. Com. 405; 6 Hill, N. Y. Rep. 405.

(*c*) The rule in these cases is thus laid down in Justinian's Institutes, lib. 2, t. 1, § 27: Si duorum materiæ ex voluntate dominorum confusæ sint, totum id corpus, quod ex confusione fit, utriusque commune est: veluti si qui vina sua confuderint, aut massas argenti vel auri conflaverint. Sed et si diversæ materiæ sint, et ob id propria species facta sit; forte ex vino et melle melsum, aut ex auro et argento electrum, idem juris est: nam et hoc casu commumem esse speciem non dubitatur. Quòd si fortuitu, et non voluntate dominorum, confusæ fuerint, vel ejusdem generis materia, vel diversæ, idem juris esse placuit. See Dane's Ab. c. 76, art. 5, § 19.

3dly. When a man mixes his own goods with those of another wilfully, and thereby make a confusion, the whole of the mass belongs to him whose rights have been invaded, and this rule has been adopted to punish the wrong-doer for his unlawful act.(*a*)

SECTION 2.—OF ORIGINAL ACQUISITION BY INTELLECTUAL LABOR.

508. The rights of an author in his writings called *literary property*, and of an inventor in his invention, will form the subject of this section.

§ 1.—Of literary property.

509. An author has an undoubted right over his unpublished compositions. No man has a right to publish the thoughts of another to the world, or to propagate their publication beyond the points to which he has given consent. But once committed to the public with his consent by printing, he is committed forever. The questions of the author's right may be considered, first, with regard to the property in his unpublished works; and, secondly, in those which have been published with his consent.

Art. 1.—Of property in unpublished works.

510. A variety of cases may arise as to the right in the author to restrain the publication of his works; these may be classed into those which relate, 1, to private letters; 2, to publication by acting or reciting; 3, to the gift or sale of the manuscript; and 4, to books printed, or in the printer's hands.

1. *Of private letters.*

511. Private letters written by one individual to another, remain the property of the writer; for some

(*a*) 2 Bl. Com. 405; and see 2 Kent, Com. 365, 4th ed.; Poph. 38, pl. 2; Ward *v.* Eyre, 2 Bulst. 323; 15 Ves. 442; Case of the Odin, 1 Rob. Rep. 208; Brackenridge *v.* Holland, 2 Blackf. 377.

purposes, there is a joint property in the right of the writer and the receiver, so that the latter will be restrained from publishing them without the consent of the writer or representatives.(*a*) Their publication will not be restrained, however, when required, 1, for the purposes of public justice;(*b*) nor, 2, where the author has authorized the publication.

2. *Of publication by acting or reciting.*

512. When a composition has been made public, not by printing or selling, but by recitation or acting, the person who for money thus gets access to the work has no right to publish it.(*c*)

3. *Of the gift or sale of manuscript.*

513. When compositions intended for publication or fit for it, by accident or donation, or any other title short of an authority to publish, come into the hands of another person, the possessor has no right to publish them, for the law protects the author in his right of reputation, as well as in his proprietary rights.(*d*)

4. *Of printed books, or books in a printer's hands.*

514. A book in a printer's hands although printed, if not published, is still in the power of the author; but the printer may have a lien over the book, though he cannot publish it.

By act of congress it is provided that any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or pro-

(*a*) Pope *v.* Curl, 2 Atk. 542; Thompson *v.* Stanhope, Amb. 737; Perceval *v.* Phipps, 2 V. & B. 13; Gee *v.* Pritchard, 2 Swanst. 402; Granard *v.* Dunkin, 1 Ball & B. 207; Dennis *v.* Leclerk, 1 Mart. Lo. Rep. 297.

(*b*) 2 Swanst. 427.

(*c*) Macklin *v.* Richardson, Amb. 694; Coleman *v.* Wathen, 5 T. R. 245.

(*d*) Duke of Queensberry *v.* Shebbeare, 4 Burr. 2330; Southey *v.* Sherwood, 2 Mer. 435.

prietor all damages occasioned by such injury, to be recovered by special action on the case, founded on this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to prevent the violation of the rights of authors and inventors, are hereby empowered to grant injunctions, in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.

Art. 2.—Of the author's property in published works, and of copy right.

515. Before the right of an author was secured to him exclusively by statute, it was questionable when once his book was made public, whether he could prevent the publication of it by others.(*a*) Several statutes were passed in England for this purpose. In the United States the right is secured to authors by certain acts of congress. It extends to the author of a book, map, chart, or musical composition, print, cut, or engraving, for a limited time. The right thus secured is called a *copy right.*

516. In considering the subject of copy right we will take a view, 1, of the legislation of the United States; 2, of the persons entitled to a copy right; 3, for what it is granted; 4, nature of the right; 5, duration of the right; 6, proceedings to obtain the right; 7, requisites after the grant.

1. *Of the legislation of the United States.*

517. The constitution of the United States(*b*) authorizes congress to secure to authors and inventors their respective writings and discoveries. In pursuance of this power several acts were passed which were repealed by the act of February 3, 1831,(*c*) saving the rights of parties, and by this act the subject is now regulated.

(*a*) Millan *v.* Taylor, 4 Burr 2303, 2417.
(*b*) Art. 1, s. 8.
(*c*) 4 Sharsw. cont. of Story's Laws of U. S. 2221.

2. *Of the persons entitled to a copy right.*

518. The person must be the author and a citizen of the United States or resident therein, and the legal representatives of such person.(*a*)

3. *For what a copy right is granted.*

519. The copy right is granted for any book or books, map, chart, or musical composition which was made or composed, but not printed at the time of the passage of the act, or which may have been made or composed afterward, or any print or engraving which the author has invented, designed, etched, engraved, or worked, or caused to be engraved, etched, or worked from his own design.(*b*)

4. *Of the nature of the copy right.*

520. The persons to whom a copy right has been lawfully granted, have the sole right and liberty of printing, reprinting, publishing, and vending the thing for which the exclusive privilege has been given.(*c*) But this must be understood with this qualification. The copy right is granted upon an implied condition that the work is not of an injurious nature; for if it be clearly inconsistent with the principles of public policy, or undoubtedly irreligious, libellous, or of an immoral and obscene description, the right will not be protected in equity, and the party complaining will be left to his remedy at law. *Primâ facie*, however, the copy right confers title, and the *onus* is on the other side to show clearly, that notwithstanding the copy right there is an intrinsic defect in the title.(*d*)

5. *Of the time of duration of the copy right.*

521. The right extends for the term of twenty-eight years from the time of recording the title of the book, etc., in the office of the clerk of the court, as

(*a*) Sec. 1, and sec. 8.
(*b*) Sec. 1.
(*c*) Sec. 1.
(*d*) See Lawrence *v.* Smith, Jac. R. 472.

directed by law.(*a*) But this right may be extended under certain regulations, for the further term of fourteen years.(*b*)

6. *Proceeding to obtain a copy right.*

522. The proceedings to obtain a copy right are very simple. The author, or his representative, is only required to deposit a printed copy of the title of the book, etc., in the clerk's office of the district court of the district where the author or proprietor may reside. The clerk makes a record of it for the fee of fifty cents, and delivers to the party a copy under seal for the like fee.

7. *Of requisites after the grant.*

523. The person to whom the copy right is granted, is required to cause to be inserted in the several copies of each and every edition published, during the term secured, on the title page or on the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz: "Entered according to act of Congress, in the year ——, by A B, in the Clerk's Office of the District Court of ——," (as the case may be.)

524. The author or proprietor of any such book, etc., shall, within three months from the publication of said book, etc., deliver or cause to be delivered a copy of the same to the clerk of the said district.

The act to establish the Smithsonian Institution for the increase and diffusion of knowledge among men,(*c*) enacts, section 10, that the author or proprietor of any book, map, chart, musical composition, print, cut or engraving, for which a copy right shall be secured

(*a*) Sec. 1.
(*b*) Sections 2, 3, and 16.
(*c*) Act of 10th of August, 1846, Pamph. Laws, p. 102.

under the existing acts of congress, or those which shall hereafter be enacted respecting copy rights, shall, within three months from the publication of said book, etc., deliver or cause to be delivered one copy of the same to the librarian of the Smithsonian Institution, and one copy to the librarian of Congress Library, for the use of the said libraries.

§ 2.—Of patent rights for inventions.

525. A man's invention is as much his property as any thing he could acquire in any way whatever, and he may therefore sell it, and in equity he is entitled to all the benefits arising from it. But unless it has been secured to him by law, others may use it and receive all the benefit of his genius and his labor. To prevent this, most governments have given to inventors the exclusive right of making, and vending to others to be used, their inventions. In the United States this right is secured by certain acts of congress. In the examination of this subject we will consider, 1, the legislation of the United States; 2, who may be a patentee; 3, for what invention a patent is granted; 4, the proceedings to obtain a patent; 5, the patent; 6, the duty or tax on patents; 7, the requisites after the patent; 8 duration of the right.

Art. 1.—Of the legislation of the United States on the subject of patents.

526. The power to regulate the subject of inventions is vested in congress,(*a*) and it rests in the sound discretion of the legislature to say when, and for what length of time, and under what circumstances the patents for an invention shall be granted. Congress may, therefore, grant a patent which shall operate retrospectively by securing to the inventor, for the future, the use of his invention, though it was in pub-

(*a*) Const. art. 1, s. 8, n. 8.

lic use and enjoyed by the community at the time the act was passed.(*a*)

The first act of the national legislature on the subject of patents was passed on the 10th of April, 1790; several supplements soon followed; the acts of the 7th of February, 1793, of 7th of June, 1794, of 18th of April 1800, of 3d of July, 1832, and of 13th of July, 1832, were intended to amend the system. But these having created some confusion, and the subject requiring new provisions, the act of 4th of July, 1836, repealed the whole of them, leaving them in force only so far as to save rights acquired under them, and for completing incipient proceedings. The existing laws on the subject are the act of 4th of July, 1836, the act of 3d of March 1837, the act of 29th of August, 1842.

Art. 2.—Of the patentee.

527. The patentee may be any person or persons having discovered or invented the thing to be patented; whether he be a citizen of the United States or an alien, he has a right to a patent on fulfilling the requirements of the law.(*b*) To entitle a party to a patent he must not only be an inventor, but the original inventor, that is, the first inventor who reduces his invention to practice.(*c*)

528. On the death of the inventor before the patent is issued, it shall be granted to the executor or administrator of such person, in trust for the heirs at law of the deceased, in case he shall have died intestate; but if otherwise, in trust for his devisees.(*d*)

529. If the inventor assigns his right, the patent shall be granted to his assignee, on his recording the

(*a*) Blanchard *v.* Sprague, 3 Sumn. 535; S. C. 2 Story, R. 164.
(*b*) Act of July 4, 1836, s. 6.
(*c*) Woodcock *v.* Parker, 1 Gallis. 438; Read *v.* Cutter, 1 Story, R. 590.
(*d*) Act of July 4, 1836, s. 10.

assignment,(*a*) and fulfilling other requirements of the law.

Art. 3.—For what invention a patent will be granted.

530. A patent will be granted for the invention or discovery of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter not known or used before such discovery or invention, and not, at the time of the application for a patent, in public use or on sale, with the consent or allowance of the inventor or discoverer.

The thing to be patented must be an *invention* or *discovery*, it must be *new* and *useful*.

By the term *useful* invention, is meant an invention which may be applied to some beneficial use in society, in contradistinction to what is injurious to morals, to the health of the people, or to the good order of society; (*b*) the term is also used in opposition to frivolous or mischievous.(*c*)

The invention or discovery must be something which the inventor has himself found out; some peculiar device or manner of producing any given effect. A patent cannot therefore be taken out for the elementary principles of motion, which philosophy and science have discovered, but only for the manner of applying them.(*d*) A patent may be taken out for an improvement on a machine, which is known and used,(*e*) but a mere change of proportions will not entitle the party to a patent.(*f*)

(*a*) Act of March 3, 1837, s. 6.

(*b*) Bedford *v.* Hunt, 1 Mason, C. C. R. 302; Kneass *v.* The Schuylkill Bank, 4 Wash. C. C. R. 9.

(*c*) Lowell *v.* Lewis, 1 Mason's C. C. R. 182; Renouard, 177; Perpig. Man. des. Inv. partie 2, c. 2; Phill. on Pat. c. 7, s. 14, p. 136.

(*d*) Woodcock *v.* Parker, 1 Gallis. 438; Blanchard *v.* Sprague, 3 Sumn. 535; 2 Gallis. 51.

(*e*) Evans *v.* Eaton, 3 Wheat. 454.

(*f*) Woodcock *v.* Parker, 1 Gallis. 438; 2 Gallis. 51.

531. Among inventors, he who is first in time, has a prior right to the patent for the invention: *qui prior est in tempore, potior est in jure.*(a) If the patentee be not the first, or original inventor, in reference to all the world, he is not entitled to a patent, although he had no knowledge of the prior existence of the invention.(b) But selling a right before obtaining the patent, does not destroy the novelty, in consequence of a proviso in the act of congress.(c) And by two other provisions in the acts of congress,(d) an invention may be patented although it may have been known in a foreign country, not exceeding six months, or may have been patented there.

532. The acts which regulate patent rights generally have already been considered. It remains to notice the act of August 29, 1842, which provides, section 3, that any citizen or citizens, or alien or aliens, having resided one year in the United States and taken the oath of his or their intention to become a citizen or citizens, who by his, her, or their own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woollen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas relief or composition in alto or basso relievo, or any new and original impression or ornament to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise

(a) Gray *v.* James, Pet. C. C. R. 394; Reed *v.* Culter, 1 Story, 590.

(b) 1 Gallis. 438; 3 Wheat. 454; Shaw *v.* Cooper, 7 Pet. 292.

(c) Act of March 3, 1839, s. 7. See the following cases as to what is or is not a sufficient novelty. Bean *v.* Smallwood, 2 Story, 408; Howe *v.* Abbott, 2 Story, 190; Stanley *v.* Whipple, 2 McLean, 35; Potts *v.* Whitman, 2 Story, 609; Winans *v.* Boston & Prov. R. R. Cor. 2 Story, 412; Geiger *v.* Cook, 3 W. & S. 266.

(d) Act of March 3, 1839, s. 6; Act of July 4, 1836, s. 8.

fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use, and sell and vend the same, or copies of the same, to others, by them to be made, used, and sold, may make application in writing to the commissioner of patents expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor, as in the case now of application for a patent: *provided*, that the fee in such cases which by the now existing laws would be required of the particular applicant shall be one half the sum, and that the duration of said patent shall be seven years, and that all the regulations and provisions which now apply to the obtaining or protection of patents not inconsistent with the provisions of this act shall apply to applications under this section.

Art. 4.—Of the proceedings to obtain a patent.

533. In this article will be considered, 1, the caveat; 2, the proceedings without opposition; 3, conflicting claims.

1. *Of the caveat.*

534. Any citizen of the United States, or alien who shall have resided in the United States one year next preceding, and shall have made oath of his intention to become a citizen thereof, who shall have invented any new art, machine, or improvement thereof, and shall desire further time to mature the same, may, on paying to the credit of the treasury the sum of twenty dollars, file in the patent office a *caveat*, setting forth the design and purpose thereof, and its principal and distinguishing characteristics, for the protection of his rights till he shall have matured his invention. The

caveat shall be filed in the confidential archives of the office and preserved in secrecy.(*a*)

If another person should, within a year from the filing of the *caveat*, apply for a patent interfering with the rights of the person who has filed his *caveat*, the commissioner of patents is required to give the latter notice by mail, who shall within three months after receiving the notice declare whether he will avail himself of the benefit of the *caveat*. If he does, he is required to file his description, specifications, drawings and model. If the claims interfere with each other they shall be considered as conflicting claims.(*b*)

If the person filing the *caveat* shall complete his patent within the year, the twenty dollars he has paid shall be allowed him on account of the duty or tax on patents; if not, no part of this money shall be returned.(*c*)

2. *Proceedings without opposition.*

535. Under this head will be examined, 1, the duty or tax to be paid; 2, the petition; 3, the description or specification; 4, the drawings, specimens and model; 5, the oath; 6, examination by commissioner.

1. *Of the duty or tax on patents.*

536. A citizen of the United States, or a foreigner who has resided therein one year, who shall have made oath of his intention to become a citizen, is required to pay into the treasury of the United States thirty dollars; subjects of Great Britain five hundred dollars; and all other persons three hundred dollars. If the application of a citizen is withdrawn, before issuing a patent, or that of a foreigner be withdrawn or rejected, two-thirds of the money he shall have so paid shall be returned to him.(*d*)

(*a*) Act of July 4, 1836, s. 12.
(*b*) Idem.
(*c*) Idem.
(*d*) Act of July 4, 1836, s. 9; Id. s. 7; Act of March 3, 1837, s. 12.

2. *Of the petition for a patent.*

537. The petition is addressed to the commissioner of patents; it states the invention, and prays for a patent.

3. *Of the description or specification.*

538. The specification is a particular and detailed account of the invention sought to be patented; it is necessary to file a specification or an instrument in writing, which must lay open and disclose to the public every part of the process by which the invention can be made useful; if the specification does not contain the whole truth of the discovery, or contains more than is requisite to produce the desired effect, and the concealment or addition was made for the purpose of deception, the patent is void; for if the specification were insufficient on account of its want of clearness and exactitude, it would be a fraud, and the patentee would obtain a monopoly without giving up his invention.(*a*)

4. *Of the drawings, specimens and models.*

539. The applicant for a patent is required to furnish drawings which shall accompany his application, with written references, when the case admits of drawings, or with specimens and ingredients, and of the composition of matter, sufficient in quantity for the purpose of experiment, when the invention or discovery is of a composition of matter; which descriptions and drawings, signed by the inventor, and attested by two witnesses, shall be filed in the patent office. He shall also furnish a model of his invention, in all cases which admit a representation by model, of a convenient size to exhibit advantageously its several parts.

5. *The oath.*

540. The applicant is required to make oath or affirmation that he does verily believe, that he is the

(*a*) 1 Bell's Com. 112, 5th ed.

original and first inventor or discoverer of the art, etc., for which he solicits a patent, and that he does not know or believe the same was ever known or used; and also of what country he is a citizen. The oath may be made in the United States, before any person authorized by law to administer oaths; and, out of the United States, before any minister plenipotentiary, chargé d'affaires, consul or commercial agent, holding a commission under the government of the United States, or before any notary public of the country in which such applicant may be.(*a*)

6. *Of the examination by the commissioner.*

541. The commissioner is required to examine or cause to be examined the application, description and specification, and pass upon the merit of the invention as being new and useful, and if he shall find the invention is not original, or is not new, or the specification defective, he shall notify the applicant of the same. The applicant may then withdraw his application or insist upon his right to a patent. In the latter case he must make oath anew, pay twenty-five dollars additional into the treasury, and then an appeal may be taken to the chief justice of the district court of the United States, for the District of Columbia, whose decision shall be final on the commissioner.

3. *Of conflicting claims.*

542. When there are conflicting claims, the commissioner is required to give an opinion on them; from his judgment, there is an appeal to the chief justice of the district court of the District of Columbia, and, in case there is no opposing party, a copy of the bill shall be served on the commissioner of patents, when the whole of the expenses of the proceeding shall be paid by the applicant, whether the final decree be in his favor or otherwise.(*b*)

(*a*) Act of July 4, 1836, s. 6; Act of August 29, 1842, s. 4.
(*b*) Act of July 4, 1836, s. 16; Act of March 3, 1839, s. 10.

Art. 5.—Of the patent.

543. Under this head will be considered, 1, the form of the patent; 2, the correction of the patent; 3, the disclaimer; 4, the assignment of the patent; 5, the extension of the right.

1. *Of the form of the patent.*

544. The patent is issued in the name of the United States, under the seal of the patent office, signed by the secretary of state, and countersigned by the commissioner of said office. It contains a short description or title of the invention, and in its terms grants to the applicant, his heirs, etc., for a term not exceeding fourteen years, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery, referring to the specification for the particulars thereof, a copy of which is annexed to the patent. It is usually dated on the day it is issued, but it may be dated on filing of the specification and drawings, not however exceeding six months prior to the actual issuing of the patent.(*a*)

2. *Of the correction of the patent.*

545. When an error has been committed, without fraud, in the description or specification, the commissioner of patents may, on the payment of the further duty of fifteen dollars by the patentee, and the surrender of the patent, grant a new one. And the original patentee may correct his description and specification by adding any new improvement he may have subsequently made, upon the payment of a like sum of fifteen dollars.(*b*) Or, he may have two patents at his choice by paying thirty dollars for each additional patent. In that case duplicate models must be deposited.(*c*)

(*a*) Act of July 4, 1836, s. 5 and 8.
(*b*) Act of July 4, 1836, s. 13.
(*c*) Act of March 3, 1837, s. 5.

3. *Of the disclaimer.*

546. When a patentee, through inadvertence, accident or mistake, has made his specification or claim too broad, he may disclaim such part, and the disclaimer shall thereafter be considered as a part of the original specification. But such a disclaimer shall not affect any action then pending.(*a*)

4. *Of the assignment of the patent.*

547. The patent is assignable at law, either as to the whole interest, or any fractional part thereof, by any instrument in writing. Such assignment, or the instrument by which a right is granted over a certain district, must be recorded in the patent office, within three months from the execution thereof,(*b*) and no charge is made for recording the same.(*c*)

5. *Of the extension of the patent right.*

548. Whenever a patentee, or his assignee or grantee, shall be desirous of getting an extension of his patent, he must apply to the commissioner of the patent office, and state his grounds. The commissioner then advertises that such an application has been made, and when and where the same will be considered. The secretary of state, the commissioner of the patent office, and the solicitor of the treasury, are a board to hear all parties interested. If it shall appear that the patentee has failed to obtain for his patent a reasonable remuneration, then the patent shall be extended for seven years longer.(*d*)

Art. 6.—*Of the after requisites to secure a patent right.*

549. Patentees and assignees of patents are required to stamp, engrave, or cause to be stamped or engraved

(*a*) Act of March 3, 1837, s. 7.
(*b*) Act of July 4, 1836, s. 11.
(*c*) Act of March 3, 1839, s. 8.
(*d*) Act of July 4, 1836, s. 18.

on each article vended, or offered for sale, the date of the patent, under the penalty of one hundred dollars.(*a*)

CHAPTER II.—OF TITLE TO THINGS ACQUIRED IN WAR.

550. The first class of cases where things are acquired not by original possession, is by the rights of war. The right and title to personal chattels is acquired in war in three ways, namely: 1, by the capture of booty; 2, by forced contributions; 3, by maritime prizes.

SECTION 1.—OF BOOTY.

551. *Booty* is the capture of personal property, by a public enemy on land, in contradistinction to prize, which is a capture of such property, by such an enemy, on the sea. After booty has been in possession of the enemy for twenty-four hours, or carried into a place of safety, *infra præsidia* of the captor, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed, *bona fide*, into the hands of a neutral.(*b*)

The right of booty belongs to the sovereign, unless where pillage is allowed, when it belongs to the individual soldiers. In modern times, it is unusual among civilized nations to seize private property as booty.(*c*)

SECTION 2.—OF CONTRIBUTIONS.

552. By *contributions* is meant a forced levy of money or property by a belligerent in a hostile country which he occupies, by which means the country is made to contribute to the support of the army of occupation. These contributions are usually taken instead of pillage.(*d*)

(*a*) Act of August 29, 1842, s. 6 and s. 5.
(*b*) Wheat. Int. Law, part 4, c. 2, § 11.
(*c*) See Vatt. liv. 3, c. 9, § 164; Poth. Dr. de Propriété, part. 1, c. 2, art. 1, § 2; Burl. N. and P. Law, part 4, c. 7, n. 12.
(*d*) Vatt. Dr. des Gens, liv. 3, c. 9, § 165; Id. liv. 4, c. 3, § 29.

SECTION 3.—OF PRIZES.

553. A *prize* is the apprehension and detention at sea, or places within the jurisdiction of the courts of admiralty, of a ship or other vessel, by authority of a belligerent power, either with the design of appropriating it, with the goods and effects it contains, or with that of becoming master of the whole or a part of its cargo.(*a*) The vessel or goods so taken are also called a prize.

554. Let us examine, 1, who may make a prize; 2, what may be captured as prize; 3, what is a sufficient capture; 4, of the right of postliminy; 5, of ransom; 6, of adjudication as to prize or no prize; 7, prize money how distributed.

§ 1.—Who may make a prize.

555. No one has a right to make war, but the government duly constituted. This power is vested in congress. It follows of course that no one has authority to make a prize unless he is duly authorized by law. When war has been declared, the public vessels of the United States are employed for this purpose, and their commanders are duly authorized to seize enemy's property on the high seas. Such prizes belong, not to the captors, but to the government. Certain portions are, however, allowed to them in certain cases.(*b*)

556. Individuals, called *privateers*, are also authorized, sometimes to arm vessels and to make war upon the enemy's commerce. In this case the privateer receives a commission from the government.(*c*) One who should make war without such a commission might be treated as a pirate, or robber on the high seas.

557. Every vessel, whether armed or not, has a right to defend itself against attack; when in self-

(*a*) The Rebeckah, 1 Rob. Adm. R. 227.
(*b*) The Dos Hermanos, 10 Wheat. 306; The Joseph, 1 Gallis. 545.
(*c*) Murray *v.* Charming Betsey, 2 Cranch, 64.

defence its commander captures a hostile vessel, he has a right to take possession and man out the prize.(*a*)

558. If a capture should be made by a non-commissioned captor, it is made for the government; the only claim the captors can sustain is one for salvage.(*b*)

§ 2.—What may be captured as a prize.

559. In general all vessels belonging to the enemy may be taken, whether they be public vessels of war, or merchant vessels belonging to individuals; for war is made not only against the government, but against all the individual members of the hostile nation.(*c*)

560. But to this general rule there are certain exceptions: 1, when an enemy's vessel has obtained a lawful passport or safe-conduct, which is a privilege granted to the enemy's vessel, exempting it from capture, during a time, and to the extent therein prescribed, either from the government or its authorized agent, provided the enemy's vessel has conformed to the conditions of the passport;(*d*) 2, when the enemy's vessel has received a license to trade, it is exempted from capture during the time prescribed, provided it has not violated any of the conditions of the license; 3, when an enemy's vessel carries a flag of truce, or is used as a cartel ship.(*e*)

561. Goods found on board of an enemy's ship, taken as a prize, and belonging to the enemy, are equally a prize with the ship; but the goods of a neutral on board the ship, are not prize goods.(*f*)

§ 3.—In what places a capture may be made.

562. A capture may be made on the high seas; it

(*a*) Haven *v*. Holland, 2 Mason, 230.
(*b*) The Dos Hermanos, 10 Wheat. 306; The Joseph, 1 Gallis. 545.
(*c*) Wheat. Int. Law, part 4, c. 2, § 4.
(*d*) Wheat. Int. Law, part 4, c. 2, § 25; Poth. Dr. de Propriété, part. 1, c. 2, s. 2, art. 2, § 2, n. 95.
(*e*) The Venus, 4 Rob. R. 289, Am. ed.; 1 Dods. 60; Pet. C. C. R. 106; Dane's Ab. c. 40, a. 6, § 7; Merl. Répert. h. t.
(*f*) Ship Resolution, 2 Dall. 1.

may also be made within the territorial limits of the United States at any place below low water mark.(*a*)

§ 4.—What is a sufficient capture.

563. *Capture* is the taking of property by one belligerent from another. It is lawful when made by a declared enemy duly commissioned, and according to the laws of war; and unlawful, when it is against the rules established by the law of nations.(*b*) To make a good capture the ship or vessel must be subdued or taken from the enemy in open war, with intent to deprive the owner of it.(*c*) But if there be submission on one side, and possession on the other, the capture is complete, although no prize master be put on board,(*d*) or when only a prize master is put on board.(*e*)

§ 5.—Of the right of postliminy on recapture.

564. *Postliminy, jus postliminii*, is that right in virtue of which persons and things taken by the enemy are restored to their former state when coming again under the power of the nation to which they belong.(*f*) But this matter is now regulated by act of congress. It is provided that in case of recaptures of persons or goods belonging to persons resident within, or under the protection of the United States, the same not having been condemned as prize by competent authority, before the recapture, shall be restored on payment of salvage of one-eighth of the value if recaptured by a public ship; and if the recaptured vessel shall have been set forth and armed before the recapture, then the salvage to be one moiety of the value. If the captured vessel previously belonged to the government of the United States, and be unarmed, the

(*a*) The Joseph, 8 Cranch, 451.
(*b*) Marsh. Ins. B. 1, c. 12, s. 4.
(*c*) The Grotius, 9 Cranch, 368.
(*d*) The Alexander, 1 Gallis. 532.
(*e*) The Alexander, 8 Cranch, 169.
(*f*) Vatt. lib. 3, c. 14, s. 204; Chit. Law of Nat. 93 to 104.

salvage is one-sixth if recaptured by a private vessel, and one-twelfth if recaptured by a public ship; if armed, then the salvage to be one moiety if recaptured by a private vessel, and one-fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays at the same rate of salvage as the vessel, by the express words of the act; but in respect to private vessels, the salvage is the same on the cargo, whether the ship be armed or unarmed.(*a*)

§ 6.—Of the right of ransom.

565. *Ransom* is an agreement between the commander of a capturing vessel and the commander of a vanquished vessel, at sea, by which the former permits the latter to depart with his vessel, and gives him a safe-conduct, in consideration of a sum of money which the commander of the vanquished vessel, in his own name, and in the name of the owners of his vessel and cargo, promises to pay at a future time named to the other. This contract is usually made in writing in duplicate, one copy of which is kept by the vanquished vessel, and is its safe-conduct, and the other by the conquering vessel, and is properly called a *ransom-bill*.(*b*)

§ 7.—Of adjudication as to prize or no prize.

566. Before the title to a prize becomes absolutely vested in the captors, it must be *condemned* by a competent tribunal.(*c*) The jurisdiction in such cases is vested in the courts of the country to which the captors belong.(*d*) We will consider, 1, what courts have jurisdiction of prize cases in the United States; 2, over what objects; 3, effect of a decree.

(*a*) The Adeline, 9 Cranch, 244.
(*b*) 1 Kent, Com. 105.
(*c*) Ship Resolution, 2 Dall. 1.
(*d*) The Invincible, 2 Gallis. 29; L'Invincible, 1 Wheat. 238.

Art. 1.—*What courts have jurisdiction in prize cases.*

567.—1. In the United States the district courts, having admiralty jurisdiction, are alone competent to try the question of prize or no prize.(*a*) As to which of the several courts of the United States shall have jurisdiction in a particular case, the rule is, that when the seizure is made within the waters of one district, the court of that district has exclusive jurisdiction, though the offence may have been committed out of the district; when the seizure is made on the high seas, the jurisdiction is in the district where the property may be brought.(*b*)

568.—2. Foreign courts of admiralty have jurisdiction of prize cases; but the court must be that of one who is a belligerent, for the courts of a neutral have no jurisdiction in such cases.(*c*)

Art. 2.—*Over what subjects prize courts have jurisdiction.*

569. As a prize court proceeds *in rem*, it can exercise jurisdiction only when the property claimed as prize has come within its territorial jurisdiction.(*d*) The prize jurisdiction extends over goods taken on the high seas, within the waters of the United States, and in foreign ports and harbors by naval forces, or by the joint operation of naval and land forces.(*e*) But it does not extend over goods taken on land.(*f*)

Art. 3.—*Effect of the decree of a prize court.*

570. The decree of a prize court of competent jurisdiction is binding and conclusive not only upon the

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(*a*) Sarportus *v.* Jennings, 1 Bay, 470; Jenkins *v.* Putnam, 1 Bay, 8; Act of September 24, 1789, s. 9; Abbott on Shipp. part 1, c. 1, n. 7; Hallett *v.* Lamothe, 3 Murph. 279.

(*b*) 6 Cranch, 281; The sloop Abby, 1 Mason, 360; The brig Little Ann, Paine, 40.

(*c*) Findlay *v.* The William, 1 Pet. Ad. Cas. 12; The Invincible, 2 Gallis. 29; Santissima Trinidad, 1 Brock, 478.

(*d*) Wheelwright *v.* Depeyster, 1 John. 471. Sed vide The Arabella, 2 Gallis. 368.

(*e*) Lindo *v.* Rodney, Dougl. 613, note.

(*f*) Id.; Slocum *v.* Wheeler, 1 Conn. 429.

parties actually litigating in the cause, but upon all others, because all who had an interest might have appeared and asserted their rights.(*a*) But if the points decided by a foreign prize court are ambiguous, they may be examined.(*b*) And, until the admiralty has exercised its jurisdiction, the question of property is open for the application of the principles of the common law.(*c*)

TITLE IV.—OF THE MANNER OF ACQUIRING PROPERTY BY CONTRACT.

CHAPTER I.—GENERAL RULES.

571. The next mode of acquiring a derivative title to property is, by contract or by obligations arising from agreements. This is the most important and most frequent way of acquiring title to property. The variety of agreements is very great, their kind is extremely varied, the rules which concern them are very extended, and very different from each other in the several kinds of contracts. There are some rules, however, which apply to all kinds of contracts.

572. Various definitions have been given of the word *contract*, either of which perhaps conveys the true idea of the word. A contract, according to Pothier,(*d*) is a convention or agreement by which two or more persons consent to form, between themselves, some lawful and binding engagement, or to rescind a preceding one, or to modify it. Blackstone(*e*) defines it to be an agreement upon a sufficient consideration to do or not to do a particular thing. A contract has also been defined to be a compact between two or more persons.(*f*)

(*a*) Cherriot *v.* Poussat, 3 Binn. 220; Sheaf *v.* 70 hogsheads, etc. of sugar, Bee, 163; Armroyd *v.* Williams, 2 Wash. C. C. 508.
(*b*) Vasse *v.* Ball, 2 Yeates, 178.
(*c*) Jenkins *v.* Putnam, 1 Bay, 8.
(*d*) Des Oblig. n. 3.
(*e*) 3 Comm. 442.
(*f*) Fletcher *v.* Peck, 6 Cranch, 136. See Civ. Code of Lo. art. 1754; Code Civ. 1101; 1 Pow. on Contr. 6.

573. Every contract imposes upon the contractor an obligation to do or to give something according to the law of the land. All obligations derive their force from the law, and therefore every obligation supposes a superior law which binds us to the performance. It is owing to this that the rule has been established that a lawful contract is considered as the law of the parties.

574. The intent of a contract is to form an obligation or engagement. In the engagement which arises from a contract we may distinguish two things very different in themselves, namely:

1st. The obligation of him who makes the promise and who fulfils a duty in executing it.

2d. The right of him who accepts the promise. The right consists in the faculty of enforcing the fulfilment of the promise in a court of justice. Duty and right, then, are correlative, and cannot exist without each other. One cannot be obligated or bound by the contract, if another cannot enforce him to accomplish his obligation or engagement.

575. He toward whom the obligation has been contracted is called the *obligee* or *creditor*; and he who is bound to fulfil it is the *obligor* or *debtor*.

CHAPTER II.—OF THE ESSENTIAL CONDITIONS OF A CONTRACT.

576. Having given some general rules relating to contracts, it will be proper now to examine the conditions essential to their validity. They are, 1, the agreement of the party who obligates himself to become bound, and the consent of the party toward whom the obligation is formed to accept it; 2, the capacity of the parties; 3, a thing which is the object of the agreement; and 4, a lawful consideration for the obligation.

There are some general rules as to the forms of contracts, but they are not always requisite to be observed in order to their validity; form frequently is

of little consequence, and substance is every thing. There is a great difference between an agreement in writing, a deed, for example, and the contract which it is intended to secure. The deed may be perfectly formal and good, and the contract may be absolutely void; as, where a man's bond is obtained by fraud, the bond may be good, and, on account of duress or fraud, the contract may be void. This distinction must always be kept in view in considering all contracts. And, on the other hand, the agreement may be good, and the instrument to secure its performance may be imperfect; as, for example, when a man lends another a sum of money which is to be secured by bond, and it is to be returned in one year, and the paper intended as a bond has not been sealed.

SECTION 1.—OF THE CONSENT OF THE PARTIES.

§ 1.—How consent is to be manifested.

577. *Consent* is an agreement to something proposed by another; it differs from *assent*, which is an acquiescence in something that has been done.(*a*) In a contract two things may be distinguished, the proposition or offers by one of the parties, and the acceptance by the other: *duorum in idem placitum consensus.* The contract begins by the offer or proposition; it is completed by the acceptance.

578. The party who makes the offer has a right to recall it until the other has acquired a right to prevent him, and, in general, this right can be acquired only by *acceptance.* Although the will of the owner is sufficient to divest him of his right, that alone has not the effect to transfer it to another. It is by the acceptance of the offer that there is a union of minds, an agreement.(*b*)

But from the moment of the acceptance of an offer, the

(*a*) Wolff, part 1, § 27, 30; Pard. Dr. Com. n. 138.
(*b*) Tucker *v.* Wood, 12 John. 190; Bower *v.* Blessing, 8 S. & R. 243.

will of the person who offered, who till then was free to retract his offer, is irrevocably bound by necessity: *contractus sunt ab initio voluntatis, ex post facto necessitatis.*

When the acceptance of an offer is made without condition, the contract is complete;(*a*) but when it is made with a condition, in general there is no binding contract. For example, I offer to sell you a thousand bushels of wheat, at a certain price, in cash, and you accept my terms, but on condition that I will take a good endorsed note at sixty days, there is no contract between us.(*b*)

But there are some cases where, although the offer and the acceptance be not the same, yet there is a valid contract: for example, A, a merchant of Philadelphia, writes to B, a merchant in Cincinnati, and offers him four cents per pound for one hundred barrels of pork, and, on the same day, B writes to A, offering to sell him one hundred barrels of pork at three cents and a half per pound, and the letters, which cross each other, are received by the parties, the contract is complete, and A shall pay B three and a half cents per pound, for the greater includes the less.(*c*)

579. The acceptance may be made by a separate paper, as between parties who are separated and contract by letter, and questions then arise as to when the acceptance is complete, whether immediately upon its being made, or whether it must be communicated to the other party. The rule is, that it must be communicated to the party offering.(*d*)

580. But the consent to bind the parties need not be express in all cases, it may be implied. It may be

(*a*) Mactier *v.* Frith, 6 Wend. 103.

(*b*) Tuttle *v.* Love, 7 John. 470; Eliason *v.* Henshaw, 4 Wheat. 225; Bruce *v.* Pearson, 3 John. 534.

(*c*) Poth. Vente, n. 26; Brown on Sales, § 223.

(*d*) Thayer *v.* Middlesex Fire Ins. Co., 10 Pick. 326; 4 Wheat. 225: McCullock *v.* Eagle Ins. Co., 1 Pick. 278; Slaymaker *v.* Irwin, 4 Whart. 369.

manifested by signs, by acts, or even by silence. A nod, a shake of the hands, have always been signs of consent; indeed, there is a contract which, owing to its being consummated in this manner, is called a hand-sale: *venditio per mutuam manuum complexionem.*(*a*) And silence, when a man is bound to speak, gives consent.(*b*)

§ 2.—**Of the want of consent in consequence of a mistake.**

581. When there is a mistake, either as to the *person* or the *thing* which is the subject of the contract, it is evident there is no agreement. When the error is respecting the substance of the thing which is the subject of the contract, the agreement is null,(*c*) but when it falls merely on a quality of that thing, the contract is valid. It is not in general the quality, but the substance of the thing which is the object of the agreement. But there are some qualities which are considered as forming the substance of the thing; as for example, if I sell you a gold watch, both of us believing that the watch shown you is of gold, you are not bound to take the watch if it be only copper gilt over.(*d*)

§ 3.—**Duress destroys the consent given.**

582. By *duress* is meant an actual or threatened violence, or restraint of a man's person contrary to law, to compel him to enter into a contract, or to discharge one.

Violence and duress annul the consent; it is evident that there is no consent when physical violence has been used over a person to constrain him to do an act.

(*a*) 2 Bl. Com. 448.
(*b*) Moore *v.* Smith, 14 S. & R. 393; 1 Greenl. Ev. § 197, 198, 199.
(*c*) Hitchcock *v.* Giddings, 4 Price, 135; Allen *v.* Hammond, 11 Pet. 63; Poth. Vente, n. 4.
(*d*) 1 Poth. Ob. n. 18. See Williams *v.* Spafford, 8 Pick. 250; Gardiner *v.* Gray, 4 Campb. 144; Shepherd *v.* Kain, 5 B. & Ald. 240; Chandelor *v.* Lopus, Cro. Jac. 4.

The constraint is generally only moral; it acts on the will, which it determines to choose between two evils. A robber meets me on the highway, with a pistol at my breast, he requires my purse or my life. I have the choice of refusing my purse and exposing my life, or *vice versâ;* but still my choice is not free, for, left free, I would choose neither alternative. The constraint was therefore absolute.

583. The duress may be in several ways, by imprisonment, *per minas*, or even duress of goods.

1. Duress by *imprisonment*, is where a man actually loses his liberty; when the imprisonment is unlawful, it is evident that the constraint is such that it will avoid the contract.(*a*) But if a man be lawfully imprisoned, it is no reason for avoiding a contract in other respects fair, although the prisoner may enter into it to obtain his liberty.(*b*)

2. Duress *per minas*, which is a well-grounded fear of loss of life, or mayhem, or loss of limb.(*c*)

3. In South Carolina, *duress of goods*, under circumstances of great difficulty, will avoid the contract.(*d*)

584. In connection with this subject, it is proper to mention that a contract made with a person drunk is void, because there is no consent.(*e*)

§ 4.—Of fraud to vitiate the consent.

585. *Fraud* is any trick or artifice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest, or prevent him from making one favorable to himself.

Fraud is a ground for annulling an agreement, and

(*a*) Stouffer *v.* Latshaw, 2 Watts. 167; 1 Bailey, 84; 3 N. H. Rep. 508.

(*b*) Shepherd *v.* Watrous, 3 Caines, 166.

(*c*) 1 Bl. Com. 131; 2 Inst. 438; 2 Roll. Ab. 124; Bac. Ab Duress; Bac. Ab. Murder, A.; Sav. Dr. Rom. § 114.

(*d*) Sasportus *v.* Jennings, 1 Bay, 470; Collins *v.* Westbury, 2 Bay, 211.

(*e*) Barrett *v.* Buxton, 2 Aik. 167. See 1 Green, 233; 1 South. 361; 1 Bibb, 168; 2 Verm. 97; 2 Rep. Const. Ct. 27.

it has much analogy with the preceding, particularly with error or mistake. Violence produces fear, which destroys consent for want of freedom; fraud induces error, which prevents consent from the beginning; for there can be no valid consent when it has been given by mistake or surprised by fraud. If an error annuls an agreement, much more must fraud have that effect. There then exists a double motive for doing so: 1, the error which induced the appearance of a consent, when it never existed; 2, the principle of justice which requires every one to repair the damage he has caused to another by his act, and which deprives him of the right to accept of a promise extorted by his artifices.

The test of fraud is an intention to deceive.(*a*)

586. Fraud is also divided into actual or positive fraud and constructive fraud.

A *positive* fraud is the intentional and successful employment of any cunning, deception, or artifice, to circumvent, cheat, and deceive another.(*b*)

Constructive fraud is such a contract or act, which, though not originating in evil design and contrivance to perpetuate a positive fraud or injury upon other persons, yet, by its necessary tendency to deceive and mislead them, or to violate public or private confidence, or to impair or injure public interests, is deemed equally reprehensible with positive fraud, and, therefore, is prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo*.(*c*)

SECTION 2.—OF THE CAPACITY OF THE CONTRACTING PARTIES.

587. Having considered in the preceding section what kind of consent is required in order to make a

(*a*) For the cases in which equity will relieve on account of fraud, see B. 5, t. 3, c. 2, s. 3.

(*b*) 1 Story, Eq. ch. 7, § 186; Dig. 4, 3, 1, 2; Dig. 2, 14, 7, 9.

(*c*) 1 Story, Eq. § 258 to 440.

binding contract, it seems proper to inquire next into the capacity of the contracting parties.

To be enabled to contract, the party must be of sound mind, in a state to give his consent with discernment, freedom and reflection.

All persons generally can be parties to contracts, unless they labor under some disability, and are declared incapable by law.

Some incapacities arise from nature, as in cases of infancy, idiocy, lunacy, or a want of understanding. The law merely gives certain rules to determine and apply them. Other incapacities are created by law, and do not arise from nature; such are the incapacities of married women, of trustees, with regard to buying trust property. This section is naturally divided into three classes of cases: 1, where the parties want understanding; 2, where they have understanding, but who, in law, are considered as wanting freedom to exercise their will; 3, where they are forbidden to contract because of some rule of policy of the law.

§ 1.—Of persons who want understanding.

588. The contracts of idiots and lunatics are not binding, because they are unable from mental infirmity to form an accurate judgment of their actions, and consequently, can give no serious consideration to their engagements.(*a*)

Contracts made with lunatics, after they have been so found by inquisition, upon proceedings before a competent tribunal, are absolutely void.(*b*) As to contracts made anterior to such finding, which generally states the time when the lunacy commenced, they are presumed to be valid;(*c*) they are not void but voidable.(*d*)

(*a*) Newl. Contr. 19; 1 Fonbl. Eq. 46, 47; Highm. on Lun. 111.
(*b*) Pearl *v.* McDowell, 3 J. J. Marsh. 658.
(*c*) Lee *v.* Lee, 4 McCord, 183; Jackson *v.* King, 4 Cowen, 207.
(*d*) Jackson *v.* Gremaer, 2 Cowen, 552. See Hutchinson *v.* Sandt, 4 Rawle, 234.

But the contract of a man of a weak mind is binding on him, when no advantage has been taken of him, and there has been no fraud in the transaction.(*a*)

589. A person in a complete state of inebriation, we have seen in the preceding section, has no agreeing mind.

590. In general the contract of an infant, however fair and conducive to his interest it may be, is not binding on him, unless the supply of necessaries to him be the object of the agreement,(*b*) or the contract be for his benefit, and authorized either by statute or some rule of law, as in the case where an infant binds himself apprentice,(*c*) or unless it is confirmed by him after he has attained his full age, and in that case the contract is no longer the contract of an infant.(*d*) But he may take advantage of contracts made with him, although the consideration were merely his own promise, as in the case of mutual promises to marry.(*e*)

When a contract entered into by an infant has been executed, and, on coming of age he rescinds it, he must restore the consideration he has received.(*f*)

591. To the general rule that an infant cannot enter into a contract, are the following exceptions:

1. When an infant is authorized to enter into the contract, by a statute; as, where he is authorized to enlist, the contract is binding;(*g*) or he may be bound to a trade.

2. He may enter into matrimony when arrived at

(*a*) Dods *v.* Wilson, Const. R. 448.

(*b*) Newl. on Contr. 2; 1 Eq. Cas. Ab. 286.

(*c*) Rex *v.* Wigston, 3 B. & Cr. 484.

(*d*) Bac. Ab. Infancy, I. 3.

(*e*) Bull. N. P. 155; Wheaton *v.* East, 5 Yerg. 41. See Whitney *v.* Dutch, 14 Mass. 457; Cannon *v.* Alsbury, 1 A. K. Marsh. 76; Willard *v.* Stone, 7 Cowen, 22.

(*f*) Keriton *v.* Elliott, 2 Bulstr. 69; 2 Eden's R. 72; Harvey *v.* Owen, 4 Blackf. 240.

(*g*) U. S. *v.* Bainbridge, 1 Mason, 71; Commonwealth *v.* Murray, 4 Binn. 487.

the age of discretion, and before majority; which, in the male, is above fourteen years, and in the female over twelve years.(*a*)

3. When an infant acts as an attorney, or trustee, or executor, his acts will in general be binding, because the *cestui que trust* has a right, if he chooses, to take the risk of the infant's competency.

4. Contracts for necessaries are considered for the benefit of the infant, and consequently binding.

§ 2.—Of persons who have understanding, but not freedom to exercise their will.

592. In contemplation of law a married woman has no separate existence from that of her husband, they in law forming but one person, and in case of a difference of opinion, his is to govern.(*b*) She has therefore no independent capacity to contract.(*c*) When a contract is made by her, for her advantage, her husband may approve of it, and enforce its performance in an action by himself and wife.(*d*) And when a person enters into an obligatian or bond to pay a married woman a sum of money, the bond is not void but voidable, and if she survive her husband, the contract will be binding and survive to her.(*e*) A married woman can make no contract to bind her husband, unless he expressly authorized her,(*f*) or the law implies such authority, as where the contract is for necessaries;(*g*) but if she leaves him on account of her adultery, he is no longer responsible, if the parties she deals with have notice of the fact.(*h*)

A person in duress, we have seen in the preceding

(*a*) Co. Litt. 79 b.; 1 Roll. Ab. 341; Bac. Ab. Infancy, &c. (A).
(*b*) Litt. s. 28.
(*c*) Com. Dig. Pleader, (2 A 1); Id. Baron and Feme, (W).
(*d*) 2 M. & S. 396, n. (b); 2 Bl. Rep. 1236.
(*e*) Brown *v.* Langford, 3 Bibb, 497.
(*f*) Webster *v.* McGinnis, 5 Binn. 235.
(*g*) Cunningham *v.* Irwin, 7 S. & R. 247: McGahey *v.* Williams, 12 John. 293.
(*h*) Hunter *v.* Boucher, 3 Pick. 280.

section, may avoid his contract, because he never gave his free consent to it.

§ 3.—Of persons who are unable to contract because it is against the policy of law.

593. Trustees, executors, administrators, guardians, attorneys, and all other persons who act in a fiduciary capacity, are incapable of becoming parties to contracts personally, which they make for the benefit of others.(*a*)

594. Alien enemies cannot in general contract with American citizens, without the license of the government either express or implied.(*b*)

595. By act of congress(*c*) it is provided that "no sum exceeding one dollar shall be recovered from any seaman or mariner (in the merchant service) by any person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended."

596. A slave can make no contract whatever, except one with his master respecting his manumission, because, with this exception, he is considered not as a person but as a thing.(*d*)

SECTION 3.—OF THE THINGS WHICH MAY BE THE OBJECT OF A CONTRACT.

597. No contract can exist unless there be something for its object. The object of a contract may be a thing properly speaking, (*res*) which the obligor agrees to deliver; or an act (*factum*) which the obligor binds himself to perform or not to do. Not

(*a*) Den *v.* Wright, 2 Halst. 175; Sheldon *v.* Sheldon, 13 John. 220; Campbell *v.* Penn. Life Ins. Co. 2 Whart. 53; Jackson *v.* Walsh, 14 John. 407; 7 Watts, 387; 3 Binn. 54; 13 S. & R. 210; 5 Watts, 304.

(*b*) 1 Kent, Com. 163, 4th ed.

(*c*) 1 Story, Laws of U. S. ch. 56, s. 4, p. 109.

(*d*) Ketletas *v.* Fleet, 7 John. 324; The case of Tom, 5 John. 365; Williams *v.* Brown, 3 Bos. & Pull. 69; Hall *v.* Mullin, 5 Har. & John. 190. See Catiche *v* The Circuit Court, 1 Mis. 608; Sally *v.* Beaty, 1 Bay, 260.

only things, properly speaking, may be the object of a contract, but simply their use or possession; for example, when a horse is hired, it is the use of the horse rather than the animal which is the object of the agreement; and when one gives a thing in pledge, it is rather the possession of the thing than the thing itself which is given. Other examples will suggest themselves.

598. Things taken in their most extensive acceptation, from which man may obtain some use, advantage or benefit, may be the object of a contract. They may be things present which the contracting party has in possession, or they may be such as have only a potential existence; as the next year's corn, the next cast of a fisherman's net, the good-will of a trade.(*a*)

599. But there is an exception to the general rule that future things may lawfully be the object of a contract, as an expectancy, or the right of the heir apparent to an estate; this cannot be sold.(*b*) This exception, however, does not apply to a marriage settlement.(*c*)

600. But whether present or future, the thing which is the object of the contract must be, 1, possible; 2, ascertained; 3, useful to one of the contracting parties; 4, in commerce; 5, not forbidden by law.

§ 1.—Impossible things cannot be the object of a contract.

601. An *impossibility* is that which cannot be done agreeably to the order of nature. It is a maxim that no one is bound to perform an impossibility; *à l'impossible nul n'est ténu.*(*d*) But it is proper to consider what is the nature of an impossibility. It is either

(*a*) Dig. 18, 1, 8; Grantham *v.* Hawley, Hob. 132; Robinson *v.* McDonnell, 5 M. & S. 228; Robinson *v.* Mauldin, 11 Ala. 977.

(*b*) Bouv. L. D. Catching bargain; Careton *v.* Leighton, 3 Mer. 667; Earl of Portmore *v.* Taylor, 4 Simons, R. 482; Gibson *v.* Jeyes, 6 Ves. 266; Peacock *v.* Evans, 16 Ves. 512.

(*c*) 1 Kent, Com. 468, note b, 4th ed.

(*d*) 1 Swift's Dig. 93,

absolute, when it applies to every one; or relative, when it exists with regard to certain individuals only. Again, the thing may be impossible at the time of the agreement, or it may become so afterward.

It is evident that if one promise to perform an act absolutely impossible, the contract is void; as a promise to deliver alive a horse which was dead at the time of the agreement, when the death of the horse was unknown to the person binding himself to deliver him.

But if the impossibility be only relative, if the promise could be performed by another, although the promisor is incapable to perform it; as, if a person totally ignorant of navigation should undertake to navigate a ship to Europe, or a blacksmith to make a coat, the obligor would be bound.

When a contract depends upon an impossible condition which is to be performed, it is null; when the condition is that the party shall not perform the impossibility, then the contract is binding.

When such a contract depends upon a precedent condition, which becomes impossible by the act of God; as if an estate is to arise or a duty to commence on such precedent condition, it can never have effect.(*a*)

§ 2.—Things intermediate cannot be the subject of a contract.

602. To make a valid contract, the matter which is to be the subject of it ought to be determinate, for if the thing which is its object is so described that it cannot be known, there is no contract; as if the obligor had promised to do something, or to sell an animal, such promise would be considered as void. But if the object of the agreement can be ascertained, although the individual thing be not mentioned, as a horse, the contract is valid; in that case the seller is acquitted of his obligation by delivering a horse, and he has the choice to say which horse he will deliver.(*b*)

(*a*) Co. Litt. 206; Roll. Ab. 420; Bac. Ab. Conditions, (M).
(*b*) Co. Litt. 145 a; Poth. Ob. n. 247.

He has the right of election, that is, the right to choose which of two or more things he will do; it being a rule in cases of election that he who is to do the first act, has the right of election.(*a*)

§ 3.—Useless things cannot be the object of a contract.

603. According to the civilians, an agreement by which the contracting party binds himself to perform a perfectly useless thing, is void; as, if he engages not to go out of his house for a month.(*b*) The law will not allow one man to alienate part of his liberty without a just reason, nor another, by a vain caprice, to cramp his freedom. Besides, the only remedy of the obligee for a violation of an agreement is to recover damages for its breach, and none could be recovered where none had been sustained, as it is impossible to fix any value on things which are entirely useless.

But it is not easy to say what is perfectly useless. If I am bound to deliver to you a Greek book, which you cannot read, and which you never will learn to read, still it is useful, because you may sell it or exchange it, and by that means derive some pecuniary advantage; and it is the pecuniary benefit which the law considers, in order to judge whether the agreement is obligatory or not.

§ 4.—Things out of commerce cannot be the object of a contract.

604. In this country there are but few things which cannot be bought and sold, or which are out of commerce. We have seen, when considering the nature of property, that some things in consequence of their nature cannot be appropriated, such as the air, the sea, rivers and other things, which belong to no one, but of which every one has the use.

Sovereign rights, such as the right to vote, to

(*a*) Bac. Ab. Election, (B).
(*b*) Wolff, part. 3, §§ 798 et 799.

nominate to office, or to hold an office, cannot be the object of a contract.(a)

A freeman cannot be sold, or sell himself to others as a slave.

There are some things which are used by the public, which, though not in commerce, because they are required for public use, and because no one has authority to sell them, yet might be sold by special power to be given by law for that purpose; as, for example, public roads which belong to the commonwealth; or they may be vacated, and the soil will in general revert to the former owner.

§ 5.—Of unlawful things as objects of a contract.

605. When a contract has for its object the performance of an unlawful act, *malum in se*, as a covenant to rob or kill a man, or to commit a breach of the peace, it is absolutely null and void.(b)

606. A contract entered into in violation of a statute, which declares it void, is absolutely so.(c)

607. An agreement against public policy will not be enforced in a court of justice,(d) as an agreement to prevent competition on a sale under an execution;(e) so also an agreement to reprint a literary work secured by copy right to a third person, in violation of such right.(f)

608. When a contract is to restrain a party generally from carrying on trade throughout the state, it is unlawful and void;(g) but if it is to restrain him

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(a) Outon *v.* Rodes, 3 Marsh. 433; Carlton *v.* Whitcher, 5 N. H. Rep. 196; Cardigan *v.* Page, 6 N. H. Rep. 183; Tappan *v.* Brown, 9 Wend. 175.

(b) Shep. To. 163; Co. Litt. 206, b.

(c) Mabin *v.* Coulon, 4 Dall. 298; Biddis *v.* James, 6 Binn. 321; Seidenbender *v.* Charles, 4 S. & R. 159.

(d) Toler *v.* Armstrong, 4 Wash. C. C. 297; 11 Wheat. 258.

(e) Jones *v.* Caswell, 2 John. Cas. 29; Thompson *v.* Davies, 13 John. 112; 6 John. 194; 8 John. 444.

(f) Nicholas *v.* Ruggles, 3 Day, 145.

(g) Nobles *v.* Bates, 7 Cowen, 307.

only in a particular place, it is not so,(*a*) because in the first case the public lose the benefit of the party's industry, but, in the latter, it may be exercised in another place, and it is of no consequence to the public whether a man pursues his business in one place or in another.

609. A contract which has for its object champerty or maintenance, is, in general, void.(*b*) And so is a contract for future illegal cohabitation, though one made for past cohabitation is valid.(*c*)

§ 6.—Of choses in action.

610. In general *choses in action* cannot be the subject of a contract at law, but they are assignable in equity; to this, however, there are exceptions, as where the chose in action is assignable by the law merchant, as bills of exchange and promissory notes, or where it is so assignable by virtue of some statutory provision.(*d*)

SECTION 4.—OF THE CONSIDERATION OF A CONTRACT.

611. A *consideration* is the motive or reason which moves the contracting party to enter into a contract;(*e*) it is the cause or inducement of the agreement: *id quod inducit ad contrahendum.*

A consideration of some sort or other, is so absolutely requisite to the formation of a good contract, that a *nudum pactum*, or an agreement to do or to pay any thing on one side, without any compensation to the other, is absolutely void in law.(*f*) But it must be remembered that some contracts, owing to their form, import a consideration, and it is not required to prove

(*a*) 7 Cowen, 307; Pierce *v.* Fuller, 8 Mass. 223: Perkins *v.* Lyman, 9 Mass. 522; Pyke *v.* Thomas, 4 Bibb. 486.

(*b*) Thurston *v.* Percival, 1 Pick. 415; Redman *v.* Sanders, 2 Dana, 70; Spencer *v.* King, 5 Ham. 183; Whitaker *v.* Cone, 2 John. 58.

(*c*) Bac. Ab. Obligations, (E).

(*d*) White *v.* Buck, 7 B. Monr. 546; Lewis *v.* U. States, 1 Morr. 199; Licey *v.* Licey, 7 Barr, 251.

(*e*) 2 Bl. Com, 443; Vin. Ab. Consideration A.

(*f*) Dr. & Stud. D. 2, c. 24.

one; as a bond, specialty or deed, and a bill of exchange or promissory note.(*a*)

The consideration must be some benefit to the party by whom the promise is made, or to a third person at his instance; or some detriment must be sustained, at the instance of the party promising, by the party in whose favor the promise is made,(*b*) as forbearance to sue,(*c*) a mutual promise,(*d*) the compromise of a doubtful claim.(*e*)

612. When considered as to their kinds, considerations are good or valuable; when as to their effect, they are legal or illegal; when as to their nature, they are moral or immoral; when in respect to time, they are executed or executory; they are also concurrent and continuing; divisible and indivisible.

§ 1.—Of good considerations.

613. A *good* consideration is that which arises from relationship or the ties of blood, or natural love and affection; as when a man grants an estate to a near relation, for that and for no other reason. Such a consideration is sufficient to support a contract between the parties, but not against the creditors of a grantor. The statutes of 27 Eliz. c. 4, and 13 Eliz. c. 5, make such voluntary conveyances void against creditors. The principles of these statutes, which have indeed been copied from the civil or Roman law,(*f*) though they may not have been substantially reënacted, prevail generally throughout the United States.(*g*)

(*a*) 2 Bl. Com. 445; Schuylkill Nav. Co. *v.* Harris, 5 W. & S. 28.

(*b*) Miller *v.* Drake, 1 Caines, 45; Powell *v.* Brown, 3 John. 100; Townley *v.* Sumrall, 2 Pet. 182; Seaman *v.* Seaman, 12 Wend. 381; Violett *v.* Patton, 5 Cranch, 142; Gray *v.* Brackenridge, 2 Pennsyl. 75.

(*c*) Lonsdale *v.* Brown, 4 Wash. C. C. 148; Sidwell *v.* Evans, 1 Pennsyl. 385; Lemaster *v.* Burckhart, 2 Bibb, 30.

(*d*) Society in Troy *v.* Perry, 6 N. H. Rep. 164; Wightman *v.* Coates, 15 Mass. 1; Willard *v.* Stone, 7 Cowen, 29.

(*e*) Zane *v.* Zane, 6 Munf. 406; Hoge *v.* Hoge, 1 Watts, 216.

(*f*) Dig. 42, 8, 25, 11; 2 Bell's Com. 182.

(*g*) Bouv. L. D. Voluntary conveyances.

§ 2.—Of a valuable consideration.

614. A *valuable* consideration is where some benefit arises to the party who makes a contract or promise, or some loss or inconvenience to the other party. This may be by the payment of money or of any other thing, or the promise to pay money or to deliver any other thing, or to perform or refrain from doing any act whatever.(*a*) This amount is immaterial.(*b*)

615. Valuable considerations may be divided into various classes: 1, such as arise from benefit and injury; 2, forbearance; 3, mutual promises; 4, assignment of a chose in action; 5, consideration moving from third persons.

Art. 1.—*Consideration arising from benefit or injury.*

616. The essence of every valuable consideration is, that it should create some benefit to the party promising, or cause some loss, trouble, inconvenience or prejudice to the party to whom the promise is made.(*c*) The amount of benefit received, or inconvenience suffered, is of no consequence.(*d*)

Art. 2.—*Of forbearance.*

617. By *forbearance* is understood the act by which a creditor waits for the payment of the debt due to him by the debtor, after it has become due; in other words, it is an agreement by a creditor with his debtor, not to sue him, for some time, when he had the right to sue immediately. This being a benefit to one party, and an inconvenience to the other, is a sufficient consideration.(*e*)

(*a*) Violett *v.* Patton, 5 Cranch, 142.

(*b*) Stewart *v.* The State, 2 Har. & Gill. 114; Knobb *v.* Lindsey, 5 Ham. 471.

(*c*) Com. Dig. Action on the case upon assumpsit, B. 1; Bac. Ab. Agreements, B 2.

(*d*) Knight *v.* Rushworth, Cro. Eliz. 469; Brooks *v.* Ball, 18 John. 337; Wilkinson *v.* Oliveira, 1 Bing. N. C. 490.

(*e*) Etting *v.* Vandelyn, 4 John. 237; 2 Nott & McCord, 133; 2 Binn. 510.

To be valid, the forbearance must suspend the right to sue until the time agreed upon has passed.(*a*) It must be of some right, but even a doubtful claim will be sufficient for this purpose.(*b*)

Art. 3.—Mutual promises.

618. *Mutual* promises, made at the same time, and in the same transtraction, are binding on both parties, unless one be absolutely void, for then they are not binding on either. But if a promise be voidable, as in the case of an infant, the other is bound until the infant shall avoid it.(*c*)

Art. 4.—When the assignment of a chose in action is a sufficient consideration.

619. The assignment of a *chose in action* is a sufficient consideration of a promise by the debtor to pay the assignee; if, for example, Paul assign Peter a bond by mere endorsement, the legal title to sue will remain in Paul, but the equitable right to receive the money will be in Peter; now if the debtor make a promise to Peter to pay him the money due on the bond, the latter may recover the amount in action upon this last promise.

Art. 5.—When the consideration moves from a third person.

620. In simple contracts, if one person make a promise to another, who furnished the consideration, for the benefit of a third, although no consideration move from such third person, it is binding, and either party to whom it is made may maintain an action upon it, provided there be a privity between the parties.(*d*)

(*a*) Com. Dig. Action upon the case upon assumpsit, B 1; Dane's Ab. Index, h. t.

(*b*) Thornton *v.* Fairlie, 2 Moor, 397; Richardson *v.* Mellish, 2 Bing. 229.

(*c*) Com. Dig. Action upon the case upon assumpsit, B 14; Willard *v.* Stone, 7 Cowen, 22; Boynton *v.* Kellogg, 3 Mass. 189.

(*d*) Ham. on Part. 79; Tipper *v.* Bicknell, 3 Bing. N. C. 710; Wilson *v.* Coupland, 5 R. & Ald. 228.

§ 3.—Of legal considerations.

621. A *legal* consideration is one which is authorized by law; these are always sufficient to support a contract.(*a*) In contradistinction to a *moral* obligation, such consideration is one which may be enforced at law.

§ 4.—Of illegal considerations.

622. An *illegal* consideration is one forbidden, or which is against policy or good morals; a contract founded on such a consideration cannot be enforced; as, where it is usurious,(*b*) or it is for future illicit cohabitation,(*c*) or for lodgings let for the purpose of prostitution,(*d*) or for printing a libel.(*e*)

If a contract grow immediately out of an immoral or illegal act, or be connected with it, it is invalid. But if it be wholly disconnected from the illegal act, and founded on a new and independent consideration, it may be enforced, though the illegal act was known to the party to whom the promise was made, and he was the contriver of it.(*f*)

§ 5.—Of a consideration arising from a moral obligation.

623. A *moral* obligation is the duty which one owes and which he ought to perform, but which he is not legally bound to fulfil. A distinction must be made between those which are founded on a natural right, as the obligation to be charitable, to be grateful and the like, and those which are supported by an antecedent good and valuable consideration; as, to pay a debt barred by the act of limitation, or from which the debtor is discharged by the bankrupt laws. The for-

(*a*) Cook *v*. Bradley, 7 Conn. 57.
(*b*) Solomon *v*. Jones, 3 Brev. 54.
(*c*) 3 Burr. 1568.
(*d*) 1 B. & P. 340; 1 Esp. R. 13.
(*e*) Poplett *v*. Stockdale, Chit. on Contr. 217, Am ed. of 1827.
(*f*) Hodgson *v*. Temple, 5 Taunt, 181; Toler *v*. Armstrong, 4 Wash. C. C. 297; S. C. 11 Wheat. 258.

mer are not a sufficient consideration to support a contract, but the latter will be sufficient.(*a*)

§ 6 —Of an immoral consideration.

624. An *immoral* consideration is one contrary to good morals, and is therefore invalid. It is not sufficient to support a contract; as if a man were to give his obligation to a woman upon condition she would live with him in adultery, the obligee could not recover.(*b*)

§ 7.—Of an executed consideration.

625. An *executed* consideration is one that is past; as, for example, where the defendant gave the plaintiff a writing as follows: "In consideration of your having endorsed the following mentioned notes, drawn by A in your favor, we do hereby hold ourselves accountable to you for them, in the same manner as though said notes were drawn by us."(*c*) A past or executed consideration, is, in general, insufficient to support a contract,(*d*) but a promise to pay a sum of money on a consideration executed, if it was induced by the *request* of the defendant, or for some *previous duty*, or if the debt be *continuing* at the time, or it is barred by some rule of law, or some provision of a statute, as the act of limitations, is sufficient to maintain an action.(*e*)

§ 8.—Of an executory consideration.

626. An *executory* consideration, is one which is to

(*a*) Lonsdale *v.* Brown, 4 Wash. C. C. 86; S. C. 4 Wash. C. C. 148; Wiling *v.* Peters, 12 S. & R. 177; Scouton *v.* Eislord, 7 John. 36; Maxim *v.* Morse, 8 Mass. 127.

(*b*) 3 Burr, 1568.

(*c*) Bulkley *v.* Landon, 2 Conn. 404.

(*d*) Comstock *v.* Smith, 7 John. 87; Livingston *v.* Rogers, 1 Caines, 584; Chaffee *v.* Thomas, 7 Cowen, 358.

(*e*) Lonsdale *v.* Brown, 4 Wash. C. C. 148; Bell *v.* Morrison, 1 Pet. 373; Cook *v.* Bradley, 7 Conn. 57; Levy *v.* Cadet, 17 S. & R. 126; Searight *v.* Craighead, 1 Pennsyl. 135; Mills *v.* Wyman, 3 Pick. 207; Carson *v.* Clark, 1 Scam. 113.

be performed; as if a man promise to pay another one hundred dollars, at a future time, for a horse. Executory considerations, when the subject of them is not unlawful, are always sufficient.

§ 9.—Of concurrent considerations.

627. A *concurrent* consideration is one which is given by one party, at the same time that another is given to him; such considerations are mutual and binding; as mutual promises between a man and a woman, both capable of marrying, that they will marry each other.(*a*) In general the promises must be reciprocally binding, but the promise of an infant to marry another is sufficient.(*b*)

§ 10.—Of continuing considerations.

628. A *continuing* consideration is one which in point of time remains good and binding, although it may have served before to support a contract; as in consideration that the defendant had become, and was, the plaintiff's tenant, he undertook to manage the farm in a husband-like manner.(*c*) Such a consideration is in many cases sufficient to support a promise.

§ 11.—Of divisible and indivisible considerations.

629. When a consideration consists of one entire thing, it is said to be *entire* or *indivisible;* when of several things, it is *divisible.*

It is a general rule, that when the consideration consists of several distinct matters, each having a fixed value, and some of such matters are illegal, the contract is void *pro tanto,* but it is supported by what is lawful.(*d*) But if the entire consideration of a contract is against law, the contract is void *in toto.*(*e*)

(*a*) Willard *v.* Stone, 7 Cowen, 22; Babcock *v.* Wilson, 5 Shepl. 372; Whitehead *v.* Potter, 4 Ired. 257; Boyd *v.* Fox, 8 Misso. 574.

(*b*) 7 Cowen, 22.

(*c*) 1 Saund. 320, e. note (5).

(*d*) Frazier *v.* Thompson, 2 W. & S. 235.

(*e*) Woodruff *v.* Hinman, 11 Verm. 592; 2 W. & S. 235.

§ 12.—Of the failure of the consideration.

630. Few men enter into a contract without a consideration, but sometimes the consideration is only apparent and not real. It may be, first, that the cause or motive which induced me to enter into an engagement, may never have existed, or ceased to exist at the time of making the contract; secondly, the consideration which induced me to contract, and which existed only in hope, may have failed; it is evident then that my engagement was made without consideration.

631.—1. As an example of the first kind, may be mentioned the case where a man who is heir at law of another, finding a will made by the latter by which he bequeathed a thousand dollars to a third person, gives his obligation to such third person for that sum, and, afterward discovers a codicil by which the legacy is revoked, the obligor will not be bound to pay his obligation, because the consideration has wholly failed; for where one through a mistake acknowledges himself under an obligation, which the law does not impose upon him, he is not bound by it.(*a*)

632.—2. An agreement to pay a sum of money for a tract of land, when in fact the land was the obligor's already, is an example of the second class; another example may be mentioned of a man who agreed to purchase another's obligation, and it was afterward discovered such obligation was forged. A total failure of consideration and a want of consideration is the same thing.

CHAPTER III.—OF THE EFFECT OF CONTRACTS.

633. The immediate effect of a contract is to produce a right in favor of one of the contracting

(*a*) See Warder *v.* Tucker, 7 Mass. 449; May *v.* Coffin, 4 Mass. 347; McDonald *v.* Neilson, 2 Cowen, 139; Freeman *v.* Baynton, 7 Mass. 483; Poth. Ob. part 1, c. 1, a. 3, § 8; Addis. on Contr. 25.

parties, and to impose a corresponding obligation or duty upon the other. These rights and duties vary *in infinitum;* they depend upon the nature and the object of the contract, and on the clauses and conditions which the parties have agreed upon. But still there are numerous effects which are common to all contracts, whatever may be their nature, or whatever clauses may have been agreed upon; these will be considered in the first section. In the second and third, the effects common to certain kinds of agreements will be examined; as the agreement to deliver and the obligation to do or not to do a particular thing. The question of damages will form the subject of the fourth section. The fifth will treat of the construction of agreements; and the sixth of agreements as affecting third persons.

SECTION 1.—OF GENERAL RULES AS TO THE EFFECT OF CONTRACTS.

634. The first and the principal effect of all contracts is to confer on each of the contracting parties the reciprocal right to constrain the other to execute them, to bind the parties and to oblige them as firmly as the law would have done. The law sanctions agreements, it lends them its aid when made conformably to its requirements, and raises them to the dignity of laws between the parties. But although they are laws, they are but private laws, always within the power of the contracting parties, and they may be revoked, changed or modified at their pleasure, while they do not affect the rights of third persons. When the contract confers a right of that kind on a stranger, it cannot be changed by the contracting parties; for example, where a trust is created for the benefit of a third person, unknown to him, he may subsequently enforce it.(*a*)

(*a*) Berley *v.* Taylor, 5 Hill, 577.

635. Another effect of a contract is, that all matters of equity and of usage are to be taken as a part of the contract, according to its nature. In considering the nature or substance of a contract, three things may be distinguished: 1, what is of its essence and substance; 2, what belongs to its nature; 3, what is accidental to it.

636.—1. Things which form the *essence* of the contract are those without which it cannot subsist, a want of one of which renders the contract null, or changes it to another contract; for example, it is of the essence of a sale that there be a thing which is the subject matter of the contract, a price in money, and the consent of the parties as to the thing and as to the price: *res, prætium, et consensus.* If one of these three is wanting, it is evident that there is no contract, or that the agreement is not a sale.

1st. There is no *contract* if the consent has been given in mistake or obtained by fraud, because then there is no agreement.

2dly. There is no contract if the thing contracted for was *not in existence;* as if I buy your house, and, at the time, it had been destroyed by fire; or your horse, and, at the time, he was dead.

3dly. There is no *consideration* if I sell you a clock, which I received from my father as a legacy, for the price my father gave for it, and it turns out that my father had received it from his uncle as a gift.

4thly. There is no *price* if I sell you a piece of personal property for another which you sell to me; in that case there is no contract of sale, because it is of the essence of that contract that there should be a price paid in money; the contract is an exchange or barter. In the first three cases there is no contract whatever, and in the last a different one.

637.—2. The things which form the *nature* of the contract, are those which, without being of its essence, are nevertheless a part of it, although the contracting parties have not said any thing about them; these are

things understood to exist at the time, namely, usage and equity.(*a*) But such usage or custom must not be opposed to law.(*b*) And it will have no effect, if the parties have expressly so agreed.(*c*)

The difference between those things which are of the essence, and those which are of the nature, of the contract, is this: the contract cannot subsist if one thing which is of its essence be wanting, as a price in a sale; but it may be good although one thing partaking of its nature be absent; as in the case of a loan, it is of its nature that the thing loaned should be at the risk of the lender, but the parties may agree that it shall be at the risk of the borrower, and the contract remains the same.

638.—3. The things which are *accidental* to the contract, are those which not being understood, either in law, usage, or equity, are not mentioned in a special clause in the agreement; for example, credit being given on a sale, is accidental to that contract; the price must be paid in cash where nothing is said about it.(*d*)

SECTION 2.—OF THE OBLIGATION TO DELIVER THE THING CONTRACTED FOR.

639. In general, when by the agreement the contracting party obligates himself to deliver the thing which is the object of the contract, *without any specific designation of the thing*, as to deliver a hundred bushels of corn, or to deliver a horse, or to pay a sum of money, he is bound to deliver or to pay these, notwithstanding he may have set such aside for the purpose of completing his engagement, and they have

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(*a*) Shultz *v.* Dickey, 5 Binn. 287; Lodwicks *v.* Ohio Ins. Co., 5 Hamm. 436; Sewall *v.* Gibbs, 1 Hall; 612; Barber *v.* Brace, 3 Conn. 9; United States *v.* Arredondo, 6 Pet. 715; Sampson *v.* Gazzam, 6 Porter, 123.

(*b*) Scheiffeling *v.* Harvey, Anth. 56.

(*c*) Wayne *v.* Steamboat General Pike, 16 Ohio, 421.

(*d*) New York Firemen's Ins. Co. *v.* De Wolf, 2 Cowen, 56.

been destroyed; for, in these cases, the rule is *res perit domino.*

And, for the same reason, the contractor may sell them, and the purchaser will have a good title, or he may bequeath them by his will, and they will be no further liable for the contract than to be subject to the payment of his debts.

640. But when the parties have agreed upon a *specific article*, the one loses and the other acquires the title to it; as if A sell a particular horse to B, or one hundred bushels of corn, which have been measured, and separated from the rest of the seller's corn, the title passes, so as to render the purchaser liable for all losses occasioned by the destruction of the property, subject, however, to the right of the seller to demand payment before he parts with it.(*a*)

SECTION 3.—OF THE OBLIGATION TO DO OR NOT TO DO.

641. Man may engage his services and his actions in every thing which is not forbidden by law, public order, or good morals; but the obligations arising from such engagements differ from obligations to deliver property, as to their effect. If I have promised for a valuable consideration to deliver you my horse, you may compel me to give up the possession; but if I have agreed to serve you as a clerk, no power on earth can force me to act as your clerk; or if I have done what I promised I would not do, the judge may punish me, but there is no power to recall the past.

In these cases the creditor may recover damages, and these the law presumes are a full satisfaction for the breach of my agreement.

There are some cases when a court of equity will decree a specific performance, and consider that done

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(*a*) Simmons *v.* Swift, 5 B. & C. 862; Potter *v.* Coward, 1 Meigs, 22; M'Coy *v.* Moss, 5 Port. 88; Smyth *v.* Craig, 3 W. & S. 14; Willis *v.* Willis, 6 Dana, 48; People *v.* Haynes, 14 Wend. 546; Howland *v.* Harris, 4 Mason, 497.

which it has decreed should be done. But this jurisdiction will not be exercised where there is an adequate remedy at law.(a)

642. If the thing the obligor has bound himself not to do, is a thing that can be removed, as the erection of a dam to the injury of the mill of the obligee, he may be compelled to remove it.

SECTION 4.—OF DAMAGES FOR THE BREACH OF A CONTRACT.

643. The contractor is bound not only to fulfil all the engagements in his agreement, but, as we have seen, is liable for all the additional obligations which equity, usage and the law attach to his contract, according to its nature. The principal of these is to pay damages which result from his default.

644. By *damages* is understood the indemnity given by law to be recovered from the wrong-doer by a person who has sustained an injury, either in his person, property, or relative rights, in consequence of the acts of another.

§ 1.—Of the causes and faults for which damages may be recovered.

645. Damages have accrued to the obligee whenever the contract has not been fulfilled at the time and place appointed. The want of execution and delay arise from three causes, the fraud or want of good faith in the obligor, his fault, and finally, a foreign cause beyond his control, commonly called the act of God, or inevitable accident arising from physical causes.

Art. 1.—*Cases of fraud and want of good faith.*

646. Whenever the obligor, with a design to injure the obligee, has not executed his contract, there is a *fraud*. There is a want of *good faith*, when, without a design to wrong the obligee, the obligor fails in his engagements for the purpose of getting an advantage to himself; as, when a contractor abandons a contract

(a) 2 Story on Eq. § 718; Eden on Inj. c. 3, p. 27.

which he has made to get a more profitable one; or when he neglects the affairs of another, which he has undertaken to perform, to attend to his own; or when he fails in his engagements by the omission of that attention which the most careless take of their own own affairs; as if he leave in an open exposed place a thing which could be easily carried away or injured, which had been confided to him, and loss arises in consequence of it. This is indeed a species of fraud, to prefer knowingly our own interest to the accomplishment of our duty; or not to do those acts toward others which the most careless and the least diligent perform; *magna culpa dolus est.*(a)

647. When there is either fraud or want of good faith, the least punishment which can be inflicted on the delinquent party, is to make him repair the injury he has done, by the payment of damages.

648. No one is allowed to stipulate that he shall not be responsible for fraud, or for his wilful neglect.(b) But by a special contract a party may limit the extent of his responsibility for the delivery of goods delivered to him to be carried.(c)

Art. 2.—Of foreign causes of damages, beyond the party's control.

649. When damages arise from a foreign cause beyond the party's control, no one is bound, in general, to repair the injury: *casum nemo præstat.*(d) But to this general rule there are several exceptions.

1st. When one of the parties has agreed specially to answer for fortuitous events or for the act of God.(e)

2dly. When the fortuitous event has been preceded by some fault on his part, without which the loss would not have occurred; as, if a man borrow a

(a) Dig. 50, 16, 226. McCracken *v.* Hair, 2 Speers, 256; Powers *v.* Mitchell, 3 Will. 545.

(b) Camden, etc. Rail Road Co. *v.* Burke, 13 Wend. 611; Beckman *v.* Shouse, 5 Rawle, 179.

(c) Bingham *v.* Rogers, 6 W. & S. 495.

(d) Day *v.* Ridley, 16 Verm. 48.

(e) Gaither *v.* Barnet, 2 Brev. 488.

horse to go to one place, and goes to another, in consequence of which the loss happens.(*a*)

3dly. When the obligor is in default in completing his contract; as, if a loss happen to the thing borrowed after the time fixed for its return.(*b*) But to this liability there is a limitation in the case, where the thing would have been equally lost in the hands of the obligee; for in that event it is not the fault of the obligor, and the rule *res perit domino* applies.

In these cases the burden of proof lies upon the party who has neglected to execute his contract, to show that he was justified by a foreign cause.(*c*)

§ 2.—Of damages arising from the mere default of the contractor.

650. When a party is in default, or *in morâ*, by non-fulfilment of his agreement, he is immediately responsible in damages to the other party. In order to ascertain whether a debtor is in default, we must distinguish whether the obligation was pure and simple, which is one contracted without condition, or whether when thus contracted, the condition has been performed.

The execution of a pure or simple obligation may be required immediately without any delay;(*d*) that of an obligation payable at a future day, cannot be required until the time has expired, that is, until the time fixed for the payment has arrived, and the debtor has the whole day to fulfil his engagement.

A conditional obligation is not due until the condition has been fulfilled; after that it classes among the pure obligations.

651. It is frequently requisite to make a demand

(*a*) Tollenere *v.* Fuller, 1 Rep. Cons. Ct. 117.

(*b*) Wheelock *v.* Wheelwright, 5 Mass. 104; Homer *v.* Thwing, 3 Pick. 492; Schenck *v.* Strong, 1 South. 87; McNeilly *v.* Brooks, 1 Yerg. 75.

(*c*) Murphy *v.* Staton, 3 Munf. 239; Ewart *v.* Street, 2 Bailey, 157; Bell *v.* Reed, 4 Binn. 127.

(*d*) Bank of Columbia *v.* Hagner, 1 Pet. 455; 4 Rand. 346; 8 John. 374; 5 Cowen, 516; 1 Con. 404; 1 Blackf. 233; 1 Bibb, 166.

in order to put the debtor in default; this will depend upon the express or implied stipulations of the parties. In the sale of property, for example, to be paid for on delivery, a demand must be made before the commencement of an action for the non-delivery.(a) On the same principles, a request on a general promise to marry is requisite, unless the party has put himself in a situation that it is out of his power, as when he has married another.(b)

§ 3.—Of the extent of the damages, and how they are ascertained.

652. Damages may be ascertained and the amount fixed, 1, by the law; 2, by the agreement; and 3, by the jury.

Art. 1.—*Of damages fixed by law.*

653. When the obligation is for the payment of a sum of money, the damages for the non-payment when due are fixed by law, and are simply for the lawful interest from the time when the money became due.

In some cases this is but a poor compensation; for want of the money the creditor may have been compelled to have recourse to merciless usurers; he may have had to sustain an action for a debt he owed, and been compelled to pay costs, have had his property sacrificed under an execution, etc.

But as it would be almost impossible to ascertain the true extent of damages in these cases, the law considers them too remote.(c) On the other hand, it does not require the creditor to prove that he has actually sustained any loss whatever.

654. In a class of cases the law fixes the damages beyond the simple legal interest. When a bill of exchange is protested for non-acceptance or non-payment, the holder may recover, in addition to the

(a) Rawson *v.* Johnson, 1 East, 204; Bach *v.* Owen, 5 T. R. 409; Hosmer *v.* Clark, 2 Greenl. 308.

(b) 1 Chit. Pr. 57, note (a); 2 C. & P. 634; 2 D. & R. 55.

(c) Harwood *v.* Tappan, 2 Speers, 536; Porter *v.* Woods, 3 Hump. 56.

interest, damages for exchange and reëxchange. The amount of these vary in the different states of the Union and in foreign countries.(*a*)

Art. 2.—Of damages ascertained by the acts of the parties.

655. The parties to a contract having entered into an agreement for the performance or the non-performance of certain acts, the violation of which would be an injury, may agree that the damages shall be estimated at a certain sum, which is called *liquidated damages.* In such cases this shall be the damages paid. Liquidated damages differ from a penalty in this, that the courts will relieve from a penalty because it is a forfeiture.(*b*)

Art. 3.—Damages how ascertained by the jury.

656. Where the law has not fixed the damages, and the parties have not agreed as to the amount, this, being a matter of fact, must be ascertained by the jury, who are in such cases the sole judges; but still there are some general rules to which they are subject.

1st. The delinquent shall answer for all the injury which results from the immediate and direct breach of his engagement, but not for any remote consequences,(*c*)

2dly. In cases of an eviction, on a covenant of seisin and warranty, the rule seems to be to allow the consideration money, with interest and costs.(*d*)

3dly. When the obligee is bound to deliver goods on a certain day and fails to do so, the amount of the damages is the value of the goods on that day.(*e*)

(*a*) See Bouv. L. D. h. t.

(*b*) 1 H. Bl. 232. The civil law appears to agree with these principles. Inst. 3, 16, 7; Toull. liv. 3, n. 809; Civil Code of Lo. art. 1928, n. 5.

(*c*) Hunt *v.* D'Oreal, Dudley, S. C. Rep. 180; Fagan *v.* Newton, 1 Dev. 20.

(*d*) Pearson *v.* Davis, 1 McMullin, 37; Earle *v.* Middleton, Cheves, 4 Dana, 251; Logan *v.* Moulder, 1 Pike, 313. But in Massachusetts, the measure of damages is the value of the land at the time of eviction, with interest. Begelow *v.* Jones, 4 Mass. 512.

(*e*) Davis *v.* Shields, 24 Wend. 322; Hanna *v.* Harter, 2 Pike, 397; Ward *v.* Burr, 5 Blackf. 116; Smethurst *v.* Woolston, 5 Watts & S. 106.

4thly. When damages have been sustained in consequence of the acts of a common carrier, it frequently becomes a question whether the value of the goods at the place of embarkation, or the port of destination, is the rule to establish the damages ascertained. It has been ruled that the value at the port of destination is the proper criterion.(*a*)

657. But there are many cases where the amount of damages must be estimated by circumstances; for example, the damages resulting from a breach of promise of marriage, and this must be left entirely to the consideration of the jury. In case of an abuse of power, the court will remedy the evil, when they find excessive damages, by granting a new trial.

SECTION 5.—OF THE CONSTRUCTION OF AGREEMENTS.

658. Construction has been briefly defined to be the art to discover the thoughts which are expressed in words or writings; or it is the most probable explanation of what appears obscure or ambiguous.(*b*)

659. Several causes force us to have recourse to construction, or, as the civilians call it, interpretation: 1, the imperfection of language, and the ignorance or neglect of persons who write agreements, which is unhappily an inexhaustible source of obscurity and ambiguity, of which men sometimes unjustly, but at other times rightly, take advantage; 2, agreements do not bind merely by what they contain, but they are to be accompanied by the equity, and the usage or the law which relate to them. This section will therefore be divided into, 1, the consideration of the ambiguities in agreements themselves, whether verbal or written; and 2, in the interpretation which consists in giving to obligations the necessary consequences of agreements, although they be not expressed.

(*a*) Gillingham *v.* Dempsey, 12 S. & R. 186; 8 John. 213; 10 John. 1; 14 John. 170; 15 John. 24.

(*b*) 1 Pow. on Contr. 370.

§ 1.—Of the construction of obscure or ambiguous agreements.

660. The doctrine of interpretation or construction belongs properly to logic, which teaches us how to direct our minds in search of truth. The rules of construction are in fact the means offered to discover the true sense of agreements, which are either obscure or ambiguous. These rules are the fruits of the experience of ages; they are remarkably clear in the Roman law, and from this source all other systems have drawn.

661. In considering the subject of the construction of laws, many of the rules which apply to contracts, and wills or testaments, are to be found. Under the present head will be examined the rules which relate to contracts generally, and to wills.

1st Rule. When a construction is to be put on a writing, it is to bear that which the words in their literal and natural meaning signify, and, if that be clear of doubt, no other construction can be given.(*a*)

2d Rule. As agreements are to be formed by the mutual consent of the contracting parties, each one is bound to explain himself clearly, one what he asks, the other what he promises. It is then by discovering their common intention, that what is obscure or ambiguous in the agreement is to be explained.

3d Rule. The common intention of the parties, what both understood, is to be preferred to the grammatical sense of the terms. It is a maxim of law that *mala grammatica non vitiat chartam*.(*b*)

4th Rule. When a clause is capable of two significations, it should be understood in that which will have some operation, rather than in another in which it will have none.(*c*)

5th Rule. One clause in an agreement ought to be

(*a*) Hawes *v.* Smith, 3 Fairf. 429.
(*b*) Co. Litt. 223.
(*c*) Archibald *v.* Thomas, 3 Cowen, 284.

so construed with other clauses that the whole may stand if possible. And when several instruments in writing are made at the same time, between the same parties, relating to the same subjects, they constitute but one agreement; and the court will presume they were executed in the order best calculated to effect the intent of the parties.(*a*)

6th Rule. When words taken literally lead to a manifest absurdity, they will be construed if possible to avoid it. For example: 1, when words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected; as, if, in a contract of sale, the price of the thing, should be admitted to have been received, and the seller should promise *not* to deliver the commodity.(*b*) 2. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference of the context; as, if the contract stated that the seller had promised to sell to the buyer a horse, for the consideration of one hundred dollars, and for the purpose of completing the contract, the seller had delivered the horse to the buyer, and the buyer promised to pay him "one hundred for the same," the word *dollars* would be supplied.(*c*)

7th Rule. When a peculiar meaning has been stamped upon words by the usage of a particular trade or a particular place, in which the contract is made, such technical and peculiar meaning will prevail.(*d*)

8th Rule. However general the terms in which an agreement is conceived may be, it comprises only those things respecting which it appears that the con-

(*a*) Newall *v.* Wright, 3 Mass. 138; Hunt *v.* Livermore, 5 Pick, 395; Rogers *v.* Kneeland, 13 Wend. 114.

(*b*) Simpson *v.* Vaughan, 2 Alk. 32.

(*c*) Booth *v.* Wallace, 2 Root, 247. See Boyd *v.* Brotherson, 10 Wend. 93; Conner *v.* Routh, 7 How. Miss. 176; Finley *v.* Acock, 9 Miss. 841.

(*d*) Ellmaker *v.* Ellmaker, 4 Watts, 89; 4 East, 135; 7 Taunt. 272; 1 Stark R. 504.

tracting parties proposed to contract, and not others of which they never thought.

9th Rule. When the object of the agreement is to include universally things of a given nature, the general description will include all the particular articles, although they may not have been in the knowledge or thoughts of the parties; as where a son inherited a large estate from his mother, buried her with her jewels, worth two thousand dollars, and subsequently made a sale of all he inherited for thirty thousand dollars; after this, a thief broke into the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance.(*a*)

10th Rule. What is at the end of a phrase, commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase. For instance, if in the contract of a sale of a farm, it is said to be sold with all the corn, small grain, fruits, and cider, that have been got this year, the terms *that have been got this year*, refer to the whole phrase, and not to the cider only; it would have been otherwise if it had been said all the cider that *has* been got this year, for the expression is in the singular, and refers to the cider and not to the rest of the phrase, with which it does not agree in number.

11th Rule. A deed is to be taken most strongly against the agent or contractor, and in favor of the other party. *Verba fortius accipientur contra proferentem.* As if a tenant in fee grants to any one an estate for life, generally, it shall be construed to be an estate for the life of the grantee.(*b*)

(*a*) 6 Robins. Lo. R. 488.

(*b*) Plowd. 156; 2 Bl. Com. 380.

12th Rule. If the words will bear two senses, one agreeable to, and the other against law, that sense shall be preferred which makes the contract lawful;(*a*) as if a tenant in tail makes a lease to have and to hold during life generally, it shall be construed a lease for his own life only, for that stands with the law; and not a lease for the life of the lessee, which is beyond his power to grant.(*b*)

13th Rule. If there be two clauses in a deed, so totally repugnant to each other that they cannot stand together, the first shall be received and the last rejected. In this a deed differs from a will, for, in the latter, if there be two such repugnant clauses, the latter shall stand.(*c*) This is owing to the nature of the two instruments, for a first deed and last will are always most available in law. But still if they can be reconciled, it is the duty of the courts to do so.(*d*)

14th Rule. Wills are expounded with more liberality than contracts, for various reasons; in the first place, the devisor is frequently without assistance when making his will; secondly, in giving words another than the usual meaning, the testator runs the risk of not being understood, but he cannot by that deceive any one, nor prejudice the vested rights of another.(*e*) The intention of the testator must be gathered from the whole will, and when discovered it is to govern in its construction, if not inconsistent with rules of law, though technical words have not been used.(*f*)

§ 2.—Of the construction to determine the natural consequences of an agreement, although not expressed in the writing.

662. Agreements are obligatory not only by what

(*a*) Co. Litt. 42.
(*b*) 2 Bl. Com. 280.
(*c*) Moore *v.* Dudley, 2 Stew. 170; Boraley *v.* Lammont, 3 H. & J. 4.
(*d*) 2 Bl. Com. 381.
(*e*) 2 Bl. Com. 381; Dig. 50, 17, 12.
(*f*) Smith *v.* Bell, 6 Pet. 68; Richardson *v.* Noyes, 2 Mass. 56; Ingliss *v.* Trustees, 3 Pet. 113.

is expressed, but by all the consequences which arise from equity, usage, and the law, according to their nature. Thus there are three sources whence the accessory obligations arise and become connected with the principal: *equity*, *usage*, and *law*.

1. *How far equity is to be considered in the construction of contracts.*

663. Equity ought to accompany all the acts of men; it ought to be their main spring: it ought particularly to rule in agreements made by a man with his fellows, not only in the agreement itself, but in all the negotiations which have taken place between the parties, though in general these will not be considered, when the contract has been reduced to writing, unless there has been a fraud.

664. The following is an example of equity which attends a contract. I suggest to a painter to paint a certain picture, and I agree that I will pay him a certain sum if I like it. After the work is done, I decline taking it, on the allegation I do not like it, without any sufficient reason. The painter has a right to recover from me the price, upon the ground of equity. I am bound to approve of it if it be well done, and it will not be left to my whim to decide unjustly to the injury of another.(*a*)

665. It is on equity that the rules of law are founded, and which are only a development of the great Christian precept, do not do to others what you wish they should not do to you. But although equity is always a supplement to the law, we must not forget the principal rule of construction that agreements are to be construed according to the plain meaning of words, and not in accordance with an imaginary equity.

2. *Of usage in the construction of agreements.*

666. When a usage is fully established it is the law of the trade, and the presumption is that the parties

(*a*) See Guier *v.* Page, 4 S. & R. 1; 20 Wend. 431; 2 Campb. 532.

intended to conform to it, when they have been silent on the subject.(*a*) Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and of acts of doubtful and equivocal character, or to ascertain the true meaning of particular words in an instrument when these words have various senses.(*b*) But usage is never admitted to contradict or substantially vary an agreement or its legal import.(*c*)

3. *Effect of the law on the construction of contracts.*

667. The law is a supplement to many contracts, when they have not been made in violation of its precepts. The implied warranty of title in case of eviction is only a natural consequence of the contract of sale of personal estate, when nothing has been expressly provided on the subject.(*d*)

668. In general, the validity of a contract depends upon the law of the place where it has been made; if valid there it is valid, in general, every where;(*e*) and *vice versâ*, if void or illegal there, it is in general void every where.(*f*) To this rule, there are some exceptions: 1. A contract in violation of our laws or the laws of God, will not be enforced here.(g) 2. One nation will not regard or enforce the revenue laws of another.(*h*)

669. When the contract is entered into in one place to be executed in another, there are two *loci contractus;* the *locus celebrati contractus*, and the *locus solutionis;*

(*a*) Dig. 50, 17, 34.

(*b*) The Reeside, 2 Sumn. 569; Stultz *v* Dickey, 5 Binn. 287; Ludwicks *v.* Ohio Ins. Co., 5 Ham. 436; United States *v.* Arredundo, 6 Pet. 715.

(*c*) Renner *v.* Bank of Columbia, 9 Wheat. 581.

(*d*) Reed *v.* Barber, 3 Cowen, 272; Colcock *v.* Reid, 3 McCord, 513; Dorsey *v.* Jackman, 1 S. & R. 42.

(*e*) Story, Confl. of Laws, § 242.

(*f*) Story, Confl. of Laws, § 243.

(*g*) Forbes *v.* Cochrane, 2 B. & Cr. 448, 471.

(*h*) Boucher *v.* Lawson, Cas. Temp. Hardw. 85, 89, 194.

the former governs in every thing which relates to the mode of construing the contract, the meaning to be attached to the expressions, and the nature and validity of the agreement; but the latter governs as to the performance of the contract.

SECTION 6.—OF THE EFFECT OF AGREEMENTS WITH REGARD TO THIRD PERSONS.

670. The force of obligations arises from the consent of the parties to the contract. It is therefore evident that they can have no effect except between the contracting parties, and that they cannot be lawfully injurious to third persons who had no power to act in relation to them.

But contracts are too often infected with frauds prejudicial to the creditors of one of the contracting parties. These frauds are contrary to the good faith which is required in all agreements, and it is not limited to the contracting parties. Good faith, fairness and honesty are equally due to all persons who are interested in that which passes between the contracting parties. This is what results from the sublime gospel morality, of which the law for the most part is only the development; "all things whatsoever ye would that men should do unto you, do ye even so to them."(a)

671. Fraud avoids a contract, *ab initio*, both at law and in equity, when its object has been to cheat third persons, as well as when one of the parties has cheated the other.(b) This is an actual or *positive* fraud.

672. A *constructive* fraud is an act, which, though not intended as a fraud, yet because of its tendency to mislead or deceive has all the mischievous effects of a fraud. Constructive frauds are such as are either against public policy, in violation of some special confidence or trust, or operate substantially as a fraud

(a) Matth. vii. 12.

(b) Fonbl. Eq. 3d ed. 66, note, 6th ed. 122, and notes; Newl. Contr. 352.

upon private rights, duties, or intentions of third persons.(*a*)

673. Several statutes were passed in England, copied indeed from the Roman law,(*b*) to prevent frauds to third persons. The principles of the statutes, though they may not have been substantially enacted in the United States, prevail generally throughout the Union.(*c*)

By the statute of 3 Henry VII., c. 4, all gifts of goods and chattels in trust for the donor were declared void; and by the statute of 13 Eliz. c. 5, gifts of goods and chattels, as well as land, by writing or otherwise, made with intent to delay, hinder or defeat creditors, were rendered void as against the persons to whom such frauds would be prejudicial; provided that the provisions of this statute shall not extend to *bona fide* purchasers.

Soon after the passage of this statute a case arose(*d*) in which the court said that the following circumstances were badges of fraud:

1. The gift of a man's property in general, without exception of the donor's apparel, of any thing of necessity.

2. The fact that the donor continued in possession, and used the goods as his own; and by means thereof traded with others, and defrauded and deceived them.

3. It was made in secret.

4. It was made pending the writ.

5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and fraud is always appareled and clad with a trust.

6. The deed expresses that the gift was made honestly, truly, and *bona fide; et clausula inconsueta semper inducunt suspicionem.*

(*a*) Story, Eq. Ch. 7, § 258 to 440.

(*b*) Dig. 42, 8, 5, 11; 2 Bell, Com. 182.

(*c*) Reade *v.* Livingston, 3 John. Ch. 481; 8 Wheat. 229; Den *v.* De Hart, 1 Halst. 450; Bac. Ab. Fraud, C, Bouv. ed.

(*d*) Twyne's case, 3 Co. 81; S. C. under the name of Chamberlayne *v.* Twyne, Moore, 638.

In general, these badges of fraud are so considered in the United States, but they are sometimes viewed as *prima facie* evidence only, and it depends upon circumstances how far they operate.(*a*) Again, the reënactment of the principles of these statutes varies in the several states, so that there must of course be a difference in the decisions of the different states.

By the 27 Eliz. c. 4, it is enacted that all conveyances, grants, charges, leases, estates, encumbrances, and limitation of uses, of, in, or out of any lands, tenements or hereditaments, made with intent to defraud such persons as have purchased or shall purchase in fee simple, etc., the same lands, etc., shall be null and void.

Whenever a voluntary conveyance is made, a presumption of fraud properly arises upon this statute, which presumption may be repelled by showing that the transaction on which the conveyance was founded, virtually contained some conventional stipulations, some compromise of interests or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcilable with the supposition of an intent to deceive a purchaser. But, unless so repelled, such a conveyance, coupled with a negotiation for sale, is conclusive evidence of statutory fraud.

CHAPTER IV.—OF THE DIFFERENT KINDS OF AGREEMENT.

674. The several kinds or classes into which agreements may be arranged for the purpose of aiding the memory and of considering the principles by which they are governed, may be multiplied almost to infinity, if we consider the different things which may

(*a*) See Hamilton *v.* Russel, 1 Cranch, 309; Conard *v.* Atlantic Ins. Co., 1 Pet. 449; Bissel *v.* Hopkins, 3 Cowen, 189; Meeker *v.* Wilson, 1 Gallison, 419; Clow *v.* Woods, 4 S. & R. 285; Young *v.* M'Clure, 2 Watts & Serg. 147; Welsh *v.* Hayden, 1 Pennsyl. 57; Cowden *v.* Brady, 8 S. & R. 510; Sterling *v.* Vancleve, 7 Halst. 285; Adams *v.* Wheeler, 10 Pick. 199; Ulmer *v.* Hills, 8 Greenl. 326; Barr *v.* Hatch, 3 Ham. 529.

be the objects of contracts, the clauses which the contracting parties may add to them, and which change their nature, the rights and duties which result from them, the condition of the persons who contract whether they be *sui juris* or not, and the manner of executing or causing them to be executed. But multiplying the classes without need, would be adding obscurity to a subject which requires to be made clear.

675. Before proceeding to the consideration of the several kinds of contracts, it is proper to notice that in general they are divided into three principal classes: 1, contracts of record, such as judgments, recognizances, and statutes staple; 2, specialties, or contracts under seal, such as bonds and deeds; 3, simple contracts, or contracts by parol. All contracts not of record nor under seal are considered as simple or parol contracts, whether they be in writing or not in writing.

676. A judgment is the decision or sentence of the law given by a court of justice or other competent tribunal, as the result of proceedings instituted therein. The law presumes that every man has undertaken to be bound by a judgment against him.

677. A recognizance is an obligation of record entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law, which is therein specified.

678. Statutes, both statute staple and statute merchant, are forms of contracts in England, by which the lands of the debtor are made responsible for his debts.(*a*)

679. The form of contracts under seal and not under seal will be discussed in another place.(*b*)

680. The subject will be considered, by taking a view, in separate sections, of contracts as they are, 1, joint and several; 2, conjunctive and disjunctive;

(*a*) 2 Bl. Com. 160.
(*b*) B. 4, part 1, tit. 4, c. 6.

3, divisible and indivisible; 4, dependent and independent; 5, principal and accessory; 6, certain and hazardous; 7, gratuitous and onerous; 8, limited and unlimited contracts, as to the time of their performance; 9, conditional and unconditional; 10, penal; and 11, illegal and fraudulent.

SECTION 1.—OF JOINT AND SEVERAL AGREEMENTS.

681. An individual may make an agreement with several others, by which he promises to perform some act to them jointly, or to pay to each of them something separately; or several individuals may promise to one or more others that they will jointly perform certain things, or they may promise that the performance shall be by each of them, each binding himself independently of the other. The effect of these obligations depends upon the will of the contracting parties, but it not unfrequently happens that owing to the ignorance of the person who has drawn up the agreement, or from some other cause, it becomes difficult to say what is the intention; to ascertain this, the courts have adopted certain rules which will be here examined.

§ 1.—When the promise is made to several persons.

682. It is a general rule that when a contract is made in favor of several persons *jointly*, who have a joint interest, as to pay to A and B one thousand dollars, they must join in the recovery of the money;(a) and if one of them dies, whether he be a partner, joint obligee, or otherwise entitled to some interest in a contract, not running with the land, the legal right survives to the other obligee. But in commercial contracts, although the legal title remains alone in the survivor, yet he is accountable to the executors or personal representatives of the deceased: *jus accrescendi inter mercatores pro beneficio commercii locum non habet*.(b)

(a) 1 Saund. 153, note 1; Sorsbie *v.* Park, 12 M. & W. 156—158; Slingsby's Case, 5 Co. 18 b; Spencer *v.* Durant, Comb. 115; Addis. on Contr. 273.

(b) Co. Litt. 182 a.

But when the obligation is to several persons, to each a part, as for example, to pay to A five hundred dollars, and to B five hundred dollars, the right does not go to the survivor.(*a*)

§ 2.—When the promise is made by several persons.

683. When two or more persons *join* in an obligation, promise, or agreement to perform a certain thing, they are all liable, and on failure to fulfil their engagement, they must all be sued together. In their contracts partners always bind themselves jointly, for one has an implied authority to bind the rest in any thing relating to the partnership.

Members of a club, which is a temporary association of persons for some special purpose, are generally jointly obligated to perform their agreements, and they may bind each other when specially authorized, or the authority may necessarily be implied.(*b*)

684. But it frequently happens that the debtors are bound both *jointly* and *severally;* when they are jointly responsible, and they are also individually responsible, at the choice of the creditor. The usual formula in these cases, is this: "We jointly and severally promise;" or, "We or either of us promise." Any other expression, however, which clearly shows that the parties intend to be severally and individually responsible, will be sufficient; as, "We promise each for the whole."

685. When the contract is *joint only*, and one of the obligors dies, the others are alone responsible at law, though the assets of the deceased may be reached in equity. But when the contract is several as well as joint, or simply several, the survivors are each

(*a*) Shaw *v.* Sherwood, 1 Cro. Eliz. 729; Servante *v.* James, 10 B. & Cr. 410.

(*b*) Story, Partn. 144; Colly. Partn. 31; Wordsw. Joint St. Co. 154; Sawyer *v.* Meth. Episc. Soc. in Royalton, 18 Verm. 405; Slocum *v.* Fairchild, 7 Hill, 292.

responsible for the whole, and the representatives of the deceased are also liable at law.

686. The payment by one of several joint debtors, discharges the others from the debt, and the debtor who has satisfied the obligation, is entitled to recover from the others a just contribution; and if the amount which each debtor was to pay has not been expressed, the presumption is that they were equally liable.(*a*)

SECTION 2.—OF CONJUNCTIVE, DISJUNCTIVE, OR ALTERNATIVE AGREEMENTS.

§ 1.—Of conjunctive agreements.

687. A *conjunctive* agreement is one which contains several things which are to be performed, the whole united by a conjunction, to indicate that they are all equally the object of the contract: for example, if I promise for a lawful consideration to deliver to you my copy of the Life of Washington, my Encyclopædia, *and* my copy of the History of the United States, I am bound to deliver all of them, and cannot be discharged by delivering one only; and I may deliver either in discharge of my contract *pro tanto*. But if my contract had not been in the conjunctive, but a unit or entire contract, as, if I promised, for the same consideration, to deliver to you all my library, (the very books in question,) you would not have been bound to receive a part in discharge of my obligation, because no one can be compelled to receive only a part of what is due to him on an entire contract.

688. There are several contracts, where a sum is to be paid in instalments; as an agreement to pay on the first day of January, one thousand dollars, and on the first day of July, another thousand dollars, although both engagements may be contained in the same agreement. In this case the creditor may compel the debtor to pay one instalment before the other becomes

(*a*) See Lawrence *v.* Cornell, 4 John. Ch. R. 545; 1 Bibb, 562.

due; and the creditor may make a good legal tender of one instalment, without tendering the other.

§ 2.—Of a disjunctive or alternative agreement.

689. An agreement may be made by which the debtor shall be obliged to deliver one of two things which are the object of the contract; this is called an *alternative* or *disjunctive agreement;* as if, for a valuable consideration, I promise to deliver to you my copy of the Life of Washington, or my copy of the History of the United States; it is evident I owe you but one of these books and not both, and I have the choice to deliver to you either in discharge of my engagement, unless I have also agreed to let you have the choice.(*a*) Or, if I have agreed to deliver to you from seven hundred to a thousand barrels of meal, I have the choice to deliver to you the greater or the lesser amount.(*b*)

690. The contract may be to pay a certain sum at one time, or a certain sum at another time; in that case the debtor has the right to choose whether he will pay the lesser sum at the first time mentioned, or the greater sum at the other time; as where A agreed to pay B eight dollars per acre for a tract of land, in two several payments, and in case of default in either payment, then nine dollars an acre at a further specified time.(*c*)

691. When an agreement is in the conjunctive, but it is impossible for it to be so performed, *it shall be taken* in the disjunctive; as, where a man bound himself and his executors to do a certain thing, it was impossible to perform it, because no man has executors while he is living, and after his death he cannot join them in the performance of the agreement.(*d*)

(*a*) Choice *v.* Mosley, 1 Bailey, 136.
(*b*) Disborough *v.* Neilson, 3 John. Cas. 81; Small *v.* Quincey, 4 Greenl. 497.
(*c*) Smith *v.* Sanborn, 11 John. 59; Pate *v.* Hicks, Bendl. 158; Bac. Ab. Rent, (D), Bouv. ed.
(*d*) Roll. Ab. 444; Bac. Ab. Conditions, (P), Bouv. ed.

692. On the other hand, when in form the engagement is disjunctive or alternative, but, in fact, the party has no choice, it is then an *absolute agreement;* as, where I promised to deliver you one thousand dollars, or to make you a deed for a house which both of us believed to be mine, and afterward it is discovered that the house was yours and not mine, I am absolutely bound to pay you a thousand dollars.(*a*)

693. The right to choose which of two things is to be delivered to fulfil an alternative obligation, called the *right of election,* is vested in the party to whom it is given by the agreement; but when there is no one selected to exercise this right, it belongs to the first agent, or he who is to do *the first act,*(*b*) and on his failure to exercise it in proper time, the right passes to the other party.(*c*)

Once made, the election is binding on the party: *electio semel facta, et placitum testatum, non patitur regressum.*(*d*)

SECTION 3.—OF DIVISIBLE AND INDIVISIBLE AGREEMENTS.

694. The end of this doctrine of the divisibility and indivisibility of contracts is to ascertain when they may be *enforced in part,* or *paid in part,* without the consent of the opposite party. When the debt is due and payable by one person to another, although susceptible of division by its nature, it must be executed between the parties as if it could not be divided. For example, I owe you one thousand dollars, this sum may be conveniently divided into two of five hundred dollars, but you cannot sue me for only five hundred as a part, and I cannot compel you to take five hundred dollars on account; a tender of less than the whole amount due is not a valid tender.

(*a*) Poth. Obl. n. 249.
(*b*) Co. Litt. 145 a.
(*c*) Viner Ab. Election, B, C; Poth. Ob. n. 247; Bac. Ab. Elections, (B).
(*d*) Co. Litt. 146; 11 John. 241.

695. As I cannot transfer a greater right than I have, I cannot *assign a part* of the debt you owe me, so as to vest in my assignee a right to demand it and to sue you separately.

696. But when a contract is to do *several things at several times*, it is divisible in its nature, and each part may be separately enforced; as, when the defendant, being the keeper of an office for procuring crews of vessels, in consideration of the plaintiff's engagement to furnish such supplies and advances as might be necessary in the business, promised to pay the plaintiff a certain sum for each man shipped, and to repay the advances, it was held that though the agreement was entire, the performance was several, and that an action would lie for each breach of the defendant's promise.(*a*) So, also, where the defendant by public advertisement offered a reward for a parcel of bank notes which had been lost, he was held liable to the finder of a part of them for a proportion of the reward.(*b*)

697. But sometimes when the creditor and debtor are each alone, in making the contract, still it may be divided or apportioned. This happens particularly in the case of rents. This may take place in two ways; 1, by the act of the reversioner alone; and, 2, by virtue of particular statutes.

1. When there is a subsisting obligation on the part of the tenant to pay a certain rent, the reversioner may sell his estate in different parts, to as many persons as he may deem proper, and the lessee or tenant will be bound to pay to each a proportion of the rent.(*c*) It is usual for the owners of the reversion to agree among themselves as to the amount which each is to receive, but when there is no agreement, the rent will be apportioned by the jury.(*d*) On the

(*a*) Badger *v.* Titcomb, 15 Pick. 409.
(*b*) Symmes *v.* Frazier, 4 Mass. 344. See Aldrich *v.* Fox, 1 Greenl. 316.
(*c*) Bank of Pennsylvania *v.* Wise, 3 Watts, 404; Farley *v.* Craig, 6 Halst. 262; Nellis *v.* Lathrop, 22 Wend. 121; Co. Litt. 158 a.
(*d*) 3 Kent, Com. 470.

other hand, when the owner of a rent charge purchases a part of the land, out of which it issues, the whole rent charge is extinguished.(*a*) But there is a difference when part of the land comes to him by operation of law, as by descent, for then the rent charge is apportionable, the tenant and the heir being bound to pay according to the value of the lands held by them respectively.(*b*) A rent service is apportionable in both cases.(*c*) The rent may also be apportioned if part of the land out of which the rent charge issues is evicted by title paramount.

2. Rent may also be apportioned by descent and judicial sales.

It may be apportioned as to time, by virtue of the English statute 11 Geo. II., c. 19, s. 15, the principles of which have been reënacted with some modifications or adopted in the several states. It provides that when rent is due by a tenant for life, and he dies during the currency of a quarter, or year, or other division of time at which rent was made payable, it shall be apportioned to the day of his death.

698. When the contract is entire, that is, when the consideration is entire on both sides, the entire fulfilment of the promise, by either of the parties, as a condition precedent, is required before an action can be maintained; as where a sailor agreed to perform services on a certain voyage, for the whole time, for the consideration of thirty guineas, and he died during the voyage, it was held that the contract was entire, and that the whole service, which was a condition precedent to the payment of wages, not having been performed, no part of the thirty guineas could be recovered.(*d*)

(*a*) Co. Litt. 147, 148. See 1 Swanst. R. 338, note *a*.
(*b*) Co. Litt. 49; Bac. Ab. Rent, M.
(*c*) Co. Litt. 49.
(*d*) Cutter *v*. Powell, 6 T. R. 326; Vin. Ab. Apportionment, where the author states a controversy he had with Sir John Strange, on this subject. See Jennings *v*. Camp, 13 John. 94; 1 Swanst. 338, note.

SECTION 4.—OF DEPENDENT AND INDEPENDENT AGREEMENTS.

699. When there are promises on both sides in an agreement, it becomes a question whether one party is bound to perform his, before the opposite party shall be required to fulfil those on his side. This depends upon the contract of the parties, and the manner in which they have expressed themselves in the writing. When the performance of one depends on the prior performance of the other, the agreements or covenants are said to be *dependent*.(*a*) *Independent* covenants, on the contrary, are those where either party may recover damages from the other for the injury he may have sustained, by a breach of the covenants in his favor, and when it is no excuse for the defendant to allege a breach of covenants on the part of the plaintiff.(*b*)

700. The true criterion to know whether covenants or agreements are dependent or not, is the intention of the parties, and this is to be discovered from the order or time in which the acts are to be done, rather than from the structure of the agreement, or the arrangement of the words.(*c*) And mutual covenants will be construed as dependent or independent covenants, as it may best concur with the design of the whole instrument, and effectuate the intention of the parties.(*d*)

701. To discover the intention of the parties, four rules have been suggested; the first two relate to dependent, and the last two to independent contracts.(*e*)

1st. When the mutual covenants go to the whole

(*a*) McCrelish *v.* Churchman, 4 Rawle, 26; Tompkins *v.* Elliot, 5 Wend. 496.

(*b*) Cook *v.* Johnson, 3 Mis. 239; Couch *v.* Ingersoll, 2 Pick. 300.

(*c*) Goodwin *v.* Lynn, 4 Wash. C. C. 714; Speake *v.* Sheppard, 6 Har. & John. 85.

(*d*) Wright *v.* Smith, 4 W. & S. 527; Adams *v.* Williams, 2 W. & S. 227.

(*e*) Platt on Cov. 80.

of the consideration on both sides, they are mutual conditions, the one precedent to the other.(*a*)

2d. Where a day certain is appointed for the payment of the money; if the day is to occur after the time in which the consideration for which the money is payable ought to be performed, the performance of the consideration is a condition precedent to the payment of the money.(*b*)

3d. When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.(*c*)

4th. When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance.(*d*)

SECTION 5.—OF PRINCIPAL AND ACCESSORY AGREEMENTS.

702. A *principal* agreement, sometimes called a primary obligation, is that which is the principal object of the engagement, that which has been contracted mainly for itself; for example, the principal or primitive obligation of the seller is to deliver the thing sold, and to transfer the title to it.

The *accessory* or secondary obligation is to pay damages if he fails to do so.

703. There are two kinds of accessory obligations.

(*a*) Boone *v.* Eyre, 1 H. Bl. 273, note; 2 W. Bl. 1312; Howland *v.* Leach, 11 Pick. 151.

(*b*) Bailey *v.* White, 3 Ala. 330.

(*c*) Cook *v.* Johnson, 3 Mis. 239.

(*d*) Millens *v.* Cabiness, Minor, 21; Wilcox *v.* Ten Eyck, 5 John. 78; Botts *v.* Perine, 14 Wend. 219; Couch *v.* Ingersoll, 2 Pick. 300; Seers *v.* Fowler, 2 John. 272.

1. Those which are a *necessary consequence* of the principal obligation, and which arise naturally in consequence of the non-execution of the principal engagement, without any other or particular agreement; for example, damages become due by law and in equity, as a consequence of a breach of the agreement by an act of the debtor, which has happened since the agreement.

2. Those which *arise from a clause* expressly inserted in the agreement, by which the party who is bound promises to pay a certain sum or deliver some other thing, in case he does not fulfil his principal engagement in due time; as where the parties agree that on failure to complete the contract, the delinquent shall pay liquidated damages.

Sometimes the accessory engagement takes the place of the principal, which is then annulled, so that the creditor cannot require its performance; for example, if the thing sold is lost through the fault of the seller, or while the title was in him, there then subsists only the accessory obligation of paying damages.

Sometimes the accessory obligation attaches to the principal without destroying it; they subsist together. For example, if the maker of a promissory note does not pay it when due, he owes the amount of the note and all the interest which afterward accrues.

704. There is another kind of principal engagement and another species of accessory obligation. When a man engages to perform a certain thing for himself, he enters into a principal obligation; when he agrees to become a surety, his obligation is an accessory.

SECTION 6.—OF CERTAIN AND HAZARDOUS AGREEMENTS.

705. Considered in relation to their effects, contracts are either certain or hazardous.

§ 1.—Of certain contracts.

706. A contract is certain when the thing to be

done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated. These contracts are regulated by the rules which have been stated in relation to contracts generally.

§ 2.—Of hazardous contracts.

707. A contract is hazardous when the performance of that, which is one of its objects, depends on an uncertain event, such as insurance, gaming, wagers. These will be considered under another head, when we come to treat of particular contracts.

SECTION 7.—OF ONEROUS AND GRATUITOUS CONTRACTS.

§ 1.—Of onerous contracts.

708. An *onerous* contract is one which is made for a *valuable* consideration given or promised, however small, such as sale, hiring, partnership, barter, and the like.

§ 2.—Of gratuitous contracts.

709. A *gratuitous* contract is one by which one of the parties procures for the other an advantage *without any benefit* to himself, such as commodatum, deposit, mandate, donation or gift, and becoming security for another. The subjects of commodatum, deposit and mandate we will examine when we come to consider the law of bailments to which they belong.

Art. 1.—Of gifts.

710. A gift of personal chattels is the act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person who accepts it, *without any consideration* whatever. It differs from a grant, sale or barter in this, that in each of these cases there must be a consideration;

and a gift, as the definition states, must be without a consideration.(*a*)

The manner of making the gift may be in writing, or verbally, and, as far as personal chattels are concerned, they are equally binding.(*b*)

711. Gifts are divided into gifts *inter vivos* and gifts *causâ mortis*. They are also divided into simple or proper gifts, that is, such as are to take immediate effect without any condition ; and qualified or improper gifts, or such as derive their force upon the happening of some condition or contingency; as, for example, a *donatio mortis causâ*.

1. *Gifts inter vivos.*

712. A gift *inter vivos* is one made by one or more persons, without any prospect of immediate death, to one or more others.

Gifts *inter vivos* are so called to distinguish them from gifts in contemplation of death or *mortis causâ*, for they differ essentially. 1. A gift *inter vivos*, when completed by delivery, so passes the title to a thing that it cannot be recovered back by the giver;(*c*) the gift *mortis causâ* is always upon the implied condition that the giver may at any time during his life revoke it.(*d*) A gift *inter vivos* may be made by the giver at any time; the *donatio mortis causâ* must be made by the donor while in peril of death. In both cases there must be a delivery.

Without a delivery a gift *inter vivos* has no effect whatever.(*e*)

Gifts may be made expressly or by implication. A gift will be implied when a father, on the marriage of his daughter, sent home with her personal property suitable for her condition.(*f*)

(*a*) 2 Bl. Com. 440.
(*b*) Perk. § 57 ; 2 Bl. Com. 441.
(*c*) McKane *v.* Bonner, 1 Bailey, 113.
(*d*) Wells *v.* Tucker, 3 Binn. 366.
(*e*) Noble *v.* Smith, 2 John. 52 ; Ewing *v.* Ewing, 2 Leigh, 337.
(*f*) McCluney *v.* Lockhart, 4 McCord, 251. See Grangiac *v.* Arden, 10 John. 293.

A gift will be considered fraudulent, if made by a man in insolvent circumstances; but a gift of property is not void merely because the giver was indebted at the time.(*a*)

2. *Of donatio mortis causâ.*

713. A gift in prospect of death, *donatio mortis causâ*, is the act of a person who, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, to keep as his own, in case of the death of the giver.(*b*) This gift is always upon the implied condition that if the donor dies, the donee shall possess it absolutely; and that if the donor should survive or repent of having made the gift, then the donee shall return it to the donor.

714. This amphibious gift so far resembles a legacy, that it is ambulatory and incomplete during the donor's life; it is, therefore, revocable by him,(*c*) and is subject for his debts upon a deficiency of assets.(*d*) But in the following particulars it differs from a legacy; it does not fall within an administration, nor are any acts of the executor required to give a complete title to the donee.(*e*)

715. The following circumstances are necessary to constitute a good *donatio mortis causâ:*

1. That the thing given be personal property,(*f*) but it is not requisite it should be in possession; a bond,(*g*) bank notes,(*h*) and a check,(*i*) offered for payment during the life of the donor, will be so considered.

(*a*) Mateer *v.* Hissim, 3 Pennsyl. 160; Howard *v.* Williams, 1 Bailey, 575.

(*b*) 2 Bl. Com. 514. See Adams *v.* Nicholas, 1 Miles, R. 90, 112, the learned opinion of Jones, J.; Nicholas *v.* Adams, 2 Whart. 17.

(*c*) Wells *v.* Tucker, 3 Binn. 366; 7 Taunt. 231.

(*d*) Barneman *v.* Sedlinger, 3 Shep. 429.

(*e*) 1 Rop. on Leg. 20.

(*f*) Wells *v.* Tucker, 3 Binn. 366, 370; Wright *v.* Wright, 1 Cowen, 598.

(*g*) 3 Binn. 370.

(*h*) 2 Bro. C. C. 612.

(*i*) 4 Bro. C. C. 286.

2. That the gift be made by the donor in peril of death, or during his last illness, and to take effect only in case the giver die.

3. That there be an actual delivery of the subject to and for the donee, in cases where such delivery can be made. But such delivery can be made to a third person for the use of the donee.(a)

Art. 2.—Of suretyship.

716. Suretyship is a collateral agreement by which one or more persons bind themselves for another already bound, either in whole or in part, as for his debt, default or miscarriage, to one or more others.

The principal must be liable or the contract of suretyship cannot exist; if a man promise that a married woman shall pay her bond given during coverture, the promisor does not become a surety but a principal, because the woman was not bound.(b) So the surety becomes a principal, if he guarantees the payment of a void obligation.(c)

The surety may become bound for a less sum than the principal, but never for a greater, and, if he do, the contract will be void for the excess.(d)

In general the contract is entered into on the part of the surety, without any pecuniary consideration as between himself and the obligee, so that as it regards himself, the contract is gratuitous, yet a consideration may be paid to the surety to enter into it.

As to its form, the contract of suretyship may be in writing or verbally: and where the statute of frauds, 29 Car. II., c. 3, is in force, or its principles have been adopted, the agreement "to answer for the debt, default, or miscarriage of another person," must be in writing.

(a) 3 Binn. 370.
(b) Pitm. on P. & S. 13; Burge on Sur. 6; Poth. Ob. n. 106.
(c) 2 Ld. Raym. 1066; 1 Burr. 363.
(d) Burge on Sur. 4, 5.

The contract of suretyship will be more fully treated of, when we come to consider the nature of particular contracts.

SECTION 8.—OF LIMITED AND UNLIMITED CONTRACTS AS TO THE TIME OF THEIR PERFORMANCE.

717. Every obligation is pure and simple, or conditional or payable at a future time. When time is given or limited for the payment or performance of a contract, this time is called its *term*. An obligation is pure or simple, when there is not attached to the contract either a condition or a term; in that case it receives all its effects the moment the contract is concluded, and it may be enforced without delay.(*a*)

A conditional agreement arises the moment the condition has been fulfilled; till then its existence and consequently its execution are suspended.

A contract to be fulfilled at a future day, like a pure or simple engagement, arises the moment the agreement has been concluded; but it differs from it in this, that its execution is suspended until the term arrives; in other words, although it is owing, it is not payable till it becomes due.

718. The term, or delay authorized by law, in fulfilling a contract, is certain or uncertain; express or implied; it is of right or the consequence of some provision of law.

§ 1.—Of a certain and uncertain term.

719. The term is certain when the time for fulfilling the obligation or for making payment must come certainly; as, I promise to pay you one thousand dollars on the fourth of July, 1876.

It is uncertain, when the day fixed for the performance is unknown; and it may be uncertain in several ways. It may be uncertain whether it will ever

(*a*) Kendall *v.* Talbot, 1 A. K. Marsh. 321; Payne *v.* Mattox, 1 A. K. Marsh. 164.

arrive, or if it shall arrive, when it will come; for example, I promise to pay you so much when you shall marry, or when you are elected president of the United States. This double uncertainty is rather a condition than a term.

It may be uncertain as to the day when the time shall come, although the time it will come, if it does come, be not uncertain, as when you arrive at the age of thirty years. This is also in the nature of a condition.

The term may be fixed at a time which is uncertain but which must come, as I promise to pay you so much the next day after the death of Titius.

§ 2.—Of express or implied terms.

720. The term is express, when it is particularly stated in the agreement; implied, when it is not. If, for example, a workman should agree with you to mow your grass or to reap your wheat, it is evident he could do it only during the season when those crops are to be gathered, and the contract could not be enforced before, although it was made on the first day of January; but, if on that day, he had promised to pay you a sum of money, he would be obliged to pay it at once.

§ 3.—When the term is of right, and when it will be postponed by law.

721. The time of payment is a right when it is agreed upon, either expressly or by implication, and no longer delay can be given to the creditor without violating the law of the contract.

722. But sometimes, from public considerations, though the right of the creditor be not taken away, yet the remedy he has against his debtor is suspended. This is never done to favor an individual, but because the public good requires that he should be left free to attend to his public duties, unembarrassed by his private concerns.

Members of the national and state legislatures are, in general, free from suits or actions, while the body to which they belong is in session, and for a reasonable time in going to and returning from the seat of government.(a)

Electors under the constitution of the United States, or of the several states, while attending to their duties as such, and going to, staying at, or returning from an election, *eundo, mŏrando, et redeundo*, cannot be served with process on civil contracts. And soldiers in the actual service of the United States, are also privileged; so are parties and witnesses while attending court; and if any writ demanding bail issued against them in a civil case be executed on them, the court will discharge them; or if a summons be served on them, the service of the writ will be set aside.

723. But, although the obligor, under these circumstances, cannot be compelled by action to pay his debt, yet this case differs from the one where the debt is owing, but is not due; for example, a debt due by a person privileged cannot be collected until the end of the time of the privilege, as if it were not due, but if the privileged person should sue the other, the latter may set off the claim he has against the plaintiff, because the right exists, and it is the remedy only which is suspended.

724. By the almost universal practice among merchants in this country, the holder of a bill of exchange or promissory note cannot demand payment of it, nor protest it, till the end of three days after it becomes due, by the terms of the contract, which three days are called *days of grace*.

725. In most, if not in all the states, the debtor is allowed a time after judgment has been rendered against him, upon giving security to pay at a future day, in violation of the letter of the contract; and it is justifiable only on the ground that when the parties

(a) Jeff. Man. § 3; Story on the Const. §§ 856 to 862.

deal, they agree tacitly to make the laws of the land, as far as they operate on their contracts, a part of them.

§ 4.—Whether the performance may be before the term has expired.

726. In general, the term or time allowed for the performance of the agreement is for the benefit of the debtor, and, with the consent of the creditor, he may doubtless pay the debt or discharge himself, before his obligation is exigible. But without such consent, has he the right to do so?

If the agreement is to pay a sum of money at the end of a year, with interest, it is evident he cannot pay before the end of the term without the consent of the creditor, unless he offers to pay interest for one year. But even then, a question may be fairly raised whether he can so pay. The creditor may have no place for his money till the end of the time, or he may be in a place where the possession of money, if known, would endanger his life, and it would be imposing a burden upon him to compel him to take care of it, and run all risks of its loss; besides, there are times when money is not worth so much as at other periods: for example, when certain banks which regulate the currency, have extensive issues, money is less valuable than at other and different times. Upon principle it is evident that the debtor cannot throw a burden on the creditor, and that it is no difference whether the thing to be paid is money or any thing else. Suppose you agree to deliver me a pair of horses on the first day of April, have you a right to deliver them to me on the first day of January, and by that means compel me to winter them, when they are useless to me? If you have no right to make me keep the horses, by what authority or justice can you compel me to keep the money?

§ 5.—How time is computed in ascertaining when the thing is due.

727. It is always of importance to know when a debt becomes due. The creditor cannot sue till the time has expired, nor can he set off his claim against the demand of his debtor. The day on which the debt becomes due, *terminus ad quem*, is undoubtedly included in the term; and the creditor cannot sue till the next day. If, therefore, I have promised to pay you on the fourth of July, you cannot sue me till the fifth. When the end of the term is determined in this precise manner, no difficulty can arise.

728. But when it is not, as when on the first day of January I promise to pay you in ten days, in a month or a year, a question arises if the term *à quo*, the first day of the term is included in the delay. The rule is, that unless something appears in the contract to the contrary, the first day is not included, and the bill due in ten days would not be due till the end of the eleventh day, and no suit could be brought till the twelfth.(*a*) To prevent the interminable difficulties which would arise if time was computed by days, hours and minutes in such cases, the rule is to exclude the day *à quo*, there being for this purpose no fractions of days.(*b*)

729. But another difficulty arises in the computation of months. Astronomical months are composed of the time which is employed by the sun in performing one-twelfth part of his course around the zodiac; all these months are, therefore, of equal length. The civil months, January, February, March, etc., are unequal, and the question arises how shall they be com-

(*a*) Homes *v.* Smith, 4 Shep. 181; Ewing *v.* Bailey, 4 Scam. 420.

(*b*) Portland Bank *v.* Maine Bank, 11 Mass. 204. But the rule that there are no fractions in a day, will not be so applied as to do injustice, as where a sale was made of real estate in trust, and it was registered a short time, less than a day, before an execution was issued, the fiction was made to yield to the justice of the case. Metz *v.* Bright, 4 Dev. Batt. 173; In the matter of Richardson, 2 Story, R. 571; Johnson *v.* Pennington, 3 Green, 188.

puted when the payment is to be made in so many months? The rule is, to compute by civil or calendar months.(a)

SECTION 9.—OF CONDITIONAL AND UNCONDITIONAL CONTRACTS.

730. A conditional contract is one subject to a condition, an unconditional contract is one which does not depend on any condition whatever.

In its most extended sense, the word condition signifies a clause in an agreement which has for its object to suspend, to rescind, or to modify the principal obligation; or, in a will, to suspend, revoke, or modify the devise or bequest.(b)

731. Conditions *suspend* the obligation, when they are to have no effect until they are fulfilled; as, if I bind myself to pay to you a thousand dollars on condition that the ship Thomas Jefferson shall arrive in the United States from Havre; the contract is suspended until the arrival of the ship.

732. Sometimes the non-performance of the condition *rescinds* the contract; as, if I sell to you my horse on condition that he shall be alive on the first day of January, and, before that day, he dies.

733. A condition may *modify* the contract, and change it to some extent from what it was before, leaving it in full force as to some parts of it, and of no force as to others; for example, if I sell to you two thousand bushels of corn, upon condition that my crop shall produce that much, and it produces only fifteen hundred bushels, the contract is modified, it is for fifteen hundred bushels and no more.

734. In a more confined sense, a condition is a future and uncertain event, on the existence or non-existence of which is made to depend, either the ac-

(a) Churchill *v.* Merchants' Bank, 19 Pick. 532; Thomas *v.* Shoemaker, 6 Watts & Serg. 179.

(b) Inst. 3, 16, 4; Voet, ad Pand. l. 28, t. 7; Co. Litt. 201 a.

complishment, the modification, or the rescission of an obligation or testamentary disposition.

735. A condition is created by inserting the very word *condition*, or *on condition*, in the agreement or will; there are, however, other words that will do so effectually, as *proviso*, *if*, etc.(*a*)

736. The principal points of view under which conditions are considered, are, 1, their several kinds; 2, their effect; and 3, their performance. These will be discussed in three articles.

§ 1.—Of the kinds of conditions.

737. Conditions are of various kinds; 1, as to their *form* they are express or implied; 2, as to their *object*, they are lawful and unlawful; 3, as to *the time when they are to take effect*, they are precedent or subsequent; 4, as to their *nature*, they are possible or impossible; 5, as to their *divisibility*, they are copulative or disjunctive; 6, as to their *operation*, they are positive or negative; 7, as to *their agreement with the contract*, they are consistent or repugnant; 8, as to their *effect*, they are resolutary or suspensive. These will be severally considered.

Art. 1.—*Of express or implied conditions.*

738.—1. When a party enters into a contract, and is desirous to do so upon a condition, he is carefully to have that condition stated in the agreement, so that no mistake in relation to it can take place; this is called an *express* condition.

739.—2. But there are many conditions which, though not thus expressed, are not the less binding, and these are *implied* conditions. They exist tacitly in all contracts and wills, although they have not been expressed, *quæ tacite insunt*. These implied conditions may arise from three different causes: 1, from the law, which supplies them; 2, from the nature of the

(*a*) Bac. Ab. Conditions, (A).

contract, or of the things which are its objects; 3, from the presumed will of the contracting parties or of the testator.

1st. From the law, as the revocation of a will, in case of after-born children; that tenant for life shall not commit waste.(*a*)

2d. From the nature of the thing, as when the thing which is the object of the agreement does not exist, but may exist at a future time; as if I sell you the colt which my mare, now pregnant, may bring forth, and she meets with an accident which produces an abortion, it is evident that there has been no sale; the agreement was subject to the tacit or implied condition that a colt should be born.

3d. Implied conditions may arise from the probable intention of the contracting parties, or of the testator. An example is given in the Roman law. If I bequeath to Titius one thousand dollars, upon condition that my ship shall arrive from Europe; and in another part of my will I add these words: I do hereby *add* to the legacy given to Titius five hundred dollars; the second legacy is considered as given on the same condition that my ship shall arrive from Europe.

Again, I bequeath to you one thousand dollars which Titius owes to me, and at my death it is found that Titius owes to me nothing; or I give to you the sum of one thousand dollars which is in my fire-proof, and at my death there is no money there; the legacy fails in both cases, because they were given upon condition, one that Titius should owe me, and the other that I should have the money in my fire-proof.

Art. 2.—Of lawful and unlawful conditions.

740.—1. A *lawful* condition is one made in consonance with the law; this must be understood of the law as existing at the time of making the condition, for no change of the law can change the force of the

(*a*) Co. Litt. 233, b.

condition. For example, a conveyance was made to the grantee on condition that he should not alien until he arrived at his full age. When the condition was imposed, twenty-five years was the age of majority in the state, and it was afterward changed to twenty-one. After the law was so changed the grantee aliened and made a second conveyance after he attained the age of twenty-five years. The first was declared to be invalid.(*a*)

741.—2. An *unlawful* condition is one forbidden by law. Unlawful conditions have for their object, 1st, to do something *malum in se*, or *malum prohibitum;* 2, to omit the performance of some duty required by law; 3, to encourage such act of omission; 4, to do something contrary to public policy; as where a testator gave to his wife a legacy on condition that she should not marry. But a distinction must be observed between a condition and a limitation. When the thing is given until a certain event shall arrive, it is a limitation and it is good; as, "I give to my wife five hundred dollars a year until she shall marry, or while she remains my widow;" this ceases on marriage. But if the form of the bequest had been, "I give five hundred dollars a year to my wife during her life, provided she shall not marry," this is a condition contrary to the policy of law in respect to marriage, and void.(*b*)

Art. 3.—Of precedent and subsequent conditions.

742.—1. A condition *precedent* is one which must be performed before the estate vests, or the obligation becomes binding.(*c*)

743.—2. A condition *subsequent* is one which enlarges or defeats an estate or right already created.

(*a*) Dugal *v.* Fryer, 3 Mis. 40; Collins *v.* Clamorgan, 6 Mis. 169; Collins *v.* P. Clamorgan, 5 Mis. 272.

(*b*) Bac. Ab. Conditions, (H); 2 Bl. Com. 155; 10 Co. 41; Co. Litt. 236 b; 1 Vern. 483, n.

(*c*) Vanhorne *v.* Dorrance, 2 Dall. 317; Conrod *v.* Conrod, 2 Virg. Cas. 138.

Sometimes it becomes a matter of great importance whether the condition be precedent or subsequent. When a precedent condition becomes impossible by the act of God, no estate or right vests; but if the condition be subsequent, the estate or right becomes absolute.(a)

Whether a condition shall be considered as precedent or subsequent, depends not upon the form or arrangement of the words, but on the manifest intention of the parties on the fair construction of the agreement.

Art. 4.—Of possible and impossible conditions.

744.—1. A condition is *possible* when it may be performed, and there is nothing in the laws of nature to prevent its performance. But sometimes a possible condition becomes impossible in consequence of a circumstance added to it; as, a condition to build a large house in one day.

745.—2. An *impossible* condition is one which cannot be accomplished according to the laws of nature.

There are impossibilities which are perpetual and others which are not so, as that a blind man should see. The impossibility is perpetual, when the organs of sight are entirely destroyed; it is temporary when sight may be restored by a surgical operation.

Impossibilities are also absolute and personal or merely relative; I cannot, for example, make a picture or a statue like those made by the best artists. When the impossibility is not natural but relative, the condition is binding and must be performed; as if I engage to fulfil a condition to make a watch, the condition is binding, although it is impossible for me to perform it, because it is a thing which may be done by another. But besides, although in my present situation I cannot make a watch, I may learn the art, and in the end make one. Thus most of the impossibilities which are

(a) Co. Litt. 206, 208; Bac. Ab. Conditions, (M); Hughes *v.* Edwards, 9 Wheat. 489. See 6 Pet. 691; 4 Cowen, 39.

not so in their nature, may cease by the aid of art, and the conditions to perform them are valid.

746. But the condition may have been impossible from the beginning. When such conditions are *in faciendo*, the contract is void; when they are *in non faciendo*, they do not render the contract void, if the impossibility be physical; but they may have that effect when the impossibility is moral or legal.

747. When the condition becomes impossible by the act of God, it either vests the estate or right, or it does not, according as it is precedent or subsequent, as already explained.(*a*) When it becomes impossible by the act of the party who imposed it, the estate or right is rendered absolute.(*b*)

Art. 5.—*Of copulative and disjunctive conditions.*

748.—1. A *copulative* condition is one containing several distinct matters, the whole of which are made precedent to the vesting of an estate or right; in this case the whole of the condition must be performed, or the estate or right can never arise.(*c*)

749.—2. A *disjunctive* condition is one in which the party to be affected by it has the right to perform one or the other of several alternatives.

Art. 6.—*Of positive and negative conditions.*

750.—1. A *positive* condition is where the thing which is the subject of it *must* happen; as, if I marry.

751.—2. A *negative* condition is where the thing which is the subject of it *must not* happen; as, if I do not marry.(*d*)

Art. 7.—*Of consistent and repugnant conditions.*

752.—1. A *consistent* condition is one which agrees with all other parts of the contract, or which by a just construction can be reconciled with every other part.

(*a*) Co. Litt. 206 a, 218 b.
(*b*) Bac. Ab. Conditions (M); Roll. Ab. 420.
(*c*) 2 Freem. 186.
(*d*) Poth. Ob. n. 200.

753.—2. A *repugnant* condition is one which is contrary to the contract itself; as, if I grant to you a house and lot in fee, upon condition that you shall not alien, the condition is repugnant and void, as being inconsistent with the right granted.(*a*)

Art. 8.—Of resolutory and suspensive conditions.

754.—1. A *resolutory* condition is one which has for its object, when accomplished, the revocation of the principal obligation; for example, I will sell to you my crop of cotton, if my ship America does not arrive in the United States within six months. My ship arrives within one month, my contract with you is revoked.(*b*)

755.—2. A *suspensive* condition is one which suspends the fulfilment of the obligation until it has been performed; as, if I bind myself to pay to you a hundred dollars upon condition that the ship Thomas Jefferson shall arrive from Europe. The obligation in this case, is suspended until the arrival of the ship, when the condition having been performed, the contract becomes absolute, and it is no longer conditional. A suspensive obligation is in fact a condition precedent.(*c*)

§ 2.—Of the effect of the condition.

756. Properly speaking, a condition has only the effect to suspend the obligation. To analyze this, let us examine conditions at three different times.

1. When the condition is depending, and it is uncertain whether it will happen or not.

2. When it has happened.

(*a*) Bac. Ab. Conditions, (L.) See Taylor *v.* Mason, 9 Wheat. 325; Newkerk *v.* Newkerk, 2 Caines, 345; McWilliams *v.* Nisly, 2 S. & R. 513.

(*b*) There is a difference between a resolution and a rescission. The former is the act by which a contract which existed and was good is rendered null; it always presupposes the contract to have been valid, and it is owing to some cause posterior to the agreement that the resolution takes place; while rescission, on the contrary, supposes that some vice or defect annulled the contract from the beginning.

(*c*) Vide post, B. 2, pt. 1, tit. 5, art. 1, c. 10, s. 1.

3. When it has failed, or it is certain it will not happen.

Art. 1.—Effect of the condition while it is depending.

757. Before the happening of a condition precedent, there exists no obligation, it is then only in expectation; the property in the thing, which is the object of a conditional agreement or a conditional legacy, remains with him who is bound to deliver it under a condition. The thing continues at his risk, if it should be entirely lost. If, for example, I bind myself to deliver to you a particular horse, upon condition that you pay to me two hundred dollars within ten days, and before the time expires the horse dies, the contract is dissolved, and the loss is mine.

Art. 2.—Effect of the condition when performed.

758. The moment the condition has been performed, it is to be considered as if the obligation had then been made without condition, that is, the obligation which till then was suspended, acquires its full force and becomes binding; as, if I promise to pay to you one thousand dollars, if you will marry my niece, I become bound to pay to you the money as soon as you have married her.

The performance of a resolutory condition immediately destroys the obligation; as, for example, the payment of the money mentioned in the condition of a common bond, destroys the obligation.

Art. 3.—Of the breach of the condition.

759. In general a breach of a condition in a conveyance, will forfeit the estate granted, or entitle the party to a reëntry.(*a*) And if a lease is to become null on the breach of a condition, it becomes so, *ipso facto*, on the breach of the condition, and cannot be set up by a

(*a*) Gray *v.* Blanchard, 8 Pick. 284; Johnson *v.* Topping, 1 Wend. 388; Jackson *v.* Pike, 9 Cowen, 69.

subsequent recognition.(a) In most cases an action on the agreement may be sustained for damages on the breach of the condition.

§ 3.—Of the performance of conditions.

760. In general the condition must be literally accomplished, *in formâ specificâ*, but they may be performed by an equivalent, *per æquipollens*, when such appears to have been the intention of the parties; and this intention is naturally presumed when one of them has not apparently any interest that it should be accomplished in one way rather than another; for example, I have promised to pay you one hundred dollars, but before the term of payment has arrived I die; it is of no consequence to you whether the condition be fulfilled by my executor or myself.(b) In a case, however, where the condition must be performed by me personally, as if I promised to marry Maria, then it cannot be performed by my executor.

761. When the condition consists of several parts, one of which was not possible to be performed at the time of making the agreement, the other must be performed.(c) But if the condition be in the disjunctive or alternative, which gives the party the right to perform the one or the other, and one becomes impossible by the act of God, the whole will, in general, be excused.(d)

SECTION 10.—OF AGREEMENTS WITH A PENAL CLAUSE.

762. A penal clause in an agreement is, as the word indicates, that which imposes on a person the necessity of paying a sum of money or other thing, to punish him for not having executed a prior obligation, or for having delayed in its execution. The object of such a clause is to insure the primary obligation. A

(a) Kenrick *v.* Smick. 7 Watts & Serg. 41
(b) Roll. Ab. 451.
(c) Bac. Ab. Conditions (Q), 1.
(d) Bac. Ab. Conditions (Q), 1.

penal clause in an agreement supposes two obligations, one of which is the primitive or principal, and the other the conditional or accessory; for example, I promise you to tear down a house which obstructs your view, or to pay you one thousand dollars: two distinct promises are here plainly distinguishable; 1st, to tear down my house; 2dly, to pay to you one thousand dollars.

763. A penal differs from an alternative obligation; for an alternative obligation is but one in its essence, while a penalty always includes two distinct engagements, and, when the first is fulfilled, the other is void.

764. When a breach of a penal agreement has taken place, the obligee has his option, in those cases which cannot be relieved in equity, to require the fulfilment of the first obligation, or the payment of the penalty, when the penalty is considered as liquidated damages.

765. It is difficult in many cases to distinguish between a penalty and liquidated damages.(*a*) In general the courts have considered the sum reserved by such agreement to be a penalty rather than as stipulated damages. The sum will be considered as a penalty, and not as stipulated damages, in the following cases:

1. When the parties to the instrument have expressly declared the sum to be a penalty, and no other intent can be collected from the instrument.

2. When, from the face of the instrument, as in the case of a money bond, it is sufficiently clear that a penalty was meant.(*b*)

3. When it is doubtful whether the sum was intended as a penalty or not, and a certain damage or debt is made payable on the face of the instrument.

4. When the agreement was evidently made for

(*a*) Gowen *v.* Garrish, 3 Shep. 273.

(*b*) Taylor *v.* Sandiford, 7 Wheat. 13; Watts *v.* Sheppard, 2 Ala. 425.

the attainment of another object, to which the sum specified is wholly collateral.

5. When the agreement contains several matters, of different degrees of importance, and yet the sum is payable for the breach of any, even the least.(*a*)

6. When the contract is not under seal, and the damages may be ascertained and estimated; and this although the parties have expressly declared the sum to be liquidated damages.(*b*)

766. A court of equity may relieve from a penalty, after a forfeiture, upon the performance of the contract or offer to perform; but not in the case where the penal clause is for liquidated damages.

767. A penal clause will be considered as ascertaining liquidated damages, in the following cases:

1. When the damages are uncertain and not capable of being ascertained by any known rule; whether the uncertainty lies in the nature of the subject matter itself, or in the peculiar circumstances of the case.(*c*)

2. When, from the nature of the case and the tenor of the agreement, it is clear that the damages have been the subject of a fair calculation and adjustment between the parties.(*d*)

768. The force of the penalty remains unaffected, although the condition may have been partially performed; as, in a case where a penalty was one thousand dollars, and the condition was to pay an annuity of one hundred dollars which had been paid for ten years; the penalty was still valid.(*e*)

SECTION 11.—OF ILLEGAL AND FRAUDULENT AGREEMENTS.

769. After having taken a genenal view of the dif-

(*a*) Owens *v.* Hodges, 1 McMullan, 106.
(*b*) Watts *v.* Sheppard, 2 Ala. 425.
(*c*) Bright *v.* Rowland, 3 How. Mis. 398.
(*d*) 2 Greenl. Ev. § 259; 2 Story, Eq. § 1318. Pearsan *v.* Williams, 24 Wend. 244, S, C.; 26 Wend. 630; Gammond *v.* Howe, 2 Shep. 250.
(*e*) Blackmer *v.* Admr. of Blackmer, 5 Verm. 355.

ferent kinds of lawful agreements, it will be proper here to consider those which are illegal and fraudulent.

When things which are illegal both by the natural and by the civil law are the object of an agreement, as to kill a man, it is evident that they cannot form the object or the matter of a contract, and that no one can lawfully bind himself to perform them. It is a crime to promise or agree to perform such an act, a greater to execute it. The contract is therefore null; and so far from being compelled to keep his engagement, the promissor is bound to refuse, and the law will not aid either party to complete or fulfil such a contract; on the contrary, the common law maxim is, *ex turpi contractu oritur non actio.* And if the contract has been executed, and the consideration for doing the unlawful act has been paid, he who paid it cannot recover it back. When the parties are both in fault, the preference is given to the possessor. This is the rule of the Roman law. *Si et dantis et accipientis turpis causâ sit, possessorem potiorem esse, et ideò repetitionem cessare.*(*a*) The general rule is, that neither courts of law nor equity will interpose to grant relief to the parties, when an illegal agreement has been made, and both parties are *in pari delicto.* The law leaves them where it finds them, according to the maxim, *In pari delicto potior est conditio defendentis et possidendis.*(*b*)

To this rule there are some exceptions; when a contract has been executed in despite of a statute or rule of public policy prohibiting it, relief will be granted in some cases, not only by setting aside the agreement, but by ordering a repayment of money under it. But relief will never be granted when the parties are *in pari delicto,* except to promote public policy. In these cases it is not the benefit of the party, but of the public, which is regarded.(*c*)

(*a*) Dig. 12, 5, 8.

(*b*) See the copy of a bill filed by a highwayman against another, to compel him to account for the profits of robberies committed on joint account. 2 Poth. Obl. by Evans.

(*c*) See Newbold *v.* Sims, 2 S. & R. 317.

Though formerly a distinction was made between *mala prohibita* and *mala in se*, no such distinction prevails now; every act is considered to be illegal in itself, which is expressly forbidden, either by statute or otherwise;(*a*) and the law is the same, although the statute may not declare the contract to be void.(*b*)

Illegal contracts are void at common law, and because they are so declared by statute.

§ 1.—Of contracts void at common law.

770. The contracts void at common law, are, 1, those which are void on account of their immorality; 2, those contrary to public policy; and, 3, those which are fraudulent.

Art. 1.—Of immoral contracts.

771.—1. The object of the law is the promotion of good morals and the general happiness; it will not, therefore, give its sanction to illicit cohabitation, and a contract which is made in consideration of such cohabitation is void.(*c*) A great distinction, however, must be perceived between a contract which has for its object such a violation of the law, and one which is intended to repair any injury which may have arisen in consequence of a previous breach of the law in this respect. A contract in consideration of future illicit intercourse is void, but one made under seal to repair the injury done is valid.(*d*)

With the same object of promoting morality, contracts made with a woman by letting her a house for the purpose of prostitution, and from the profits of

(*a*) Bank of U. S. *v.* Owens, 2 Pet. 538; Wales *v.* Brooks, 3 Ves. p. 612; Aubert *v.* Maze, 2 Bos. & Pull. 374.

(*b*) Seidenbender *v.* Charles, 4 S. & R. 159; Mitchell *v.* Smith, 1 Binn. 118; 17 Verm. 105. But see Strong *v.* Darling, 9 Ham. 201.

(*c*) Winnibiner *v.* Weisiger, 3 Monr. 35; Trovinger *v.* McBurney, 5 Cowen, 253; Sherman *v.* Barrett, 1 McMullan, 147.

(*d*) 1 Story, Eq. Jur. § 296; Bac. Ab. Obligations, (E); Gibson *v.* Dickie, 3 M. & Selw. 463; Binnington *v.* Wallis, 4 R. & Ald. 659; Whaley *v.* Norton, 1 Vern. 483; Matthew *v.* Hanbury, 2 Vern. 187.

which the rent was to be paid,(*a*) or furnishing her with goods to enable her to carry on her unlawful course, and out of the profits to pay for them,(*b*) is void.

772.—2. A contract made in relation to a libel, will not be enforced; nor a contract for the sale of libellous pictures,(*c*) or for printing a libellous book,(*d*) because the publication of a libel is a misdemeanor.

Art. 2.—Contracts in violation of public policy.

773. The law aims at promoting the public good, and whatever encourages public morals, or the interests of society generally, is considered as being the object of public policy. Whatever contract is made which would violate public policy, if enforced, is therefore void. Among the contracts which are in violation of public policy, may be classed the following: those which are in restraint of trade; or lawful marriage; or which concern marriage brokage; or wagers and gaming; or trading with a public enemy; or lending money on usury; or a contract made against public duty.

774.—1. Although an agreement may be founded on a legal and valuable consideration, if its object be a *general* or *total* restraint of trade as to one of the parties, it is absolutely void, because it is against policy that an individual should be absolutely idle.(*e*) But if the restraint be only partial, restricting the party from using his trade within certain reasonable limits of territory, or portions of time, or confining it to particular persons, the contract would not be invalid as being in restraint of trade.(*f*)

(*a*) Girardy *v.* Richardson, 1 Esp. R. 13; Crisp. *v.* Churchill, cited in 1 Bos. & Pull. 340.

(*b*) Jennings *v.* Throgmorton, R. & M. 251.

(*c*) Forbes *v.* Johnes, 4 Esp. R. 97.

(*d*) Gale *v.* Leckie, 2 Stark. 107.

(*e*) Mitchell *v.* Reynolds, 1 P. Wms. 181, 190; Nobles *v.* Bates, 7 Cowen, 307; Ross. *v.* Sadybeer, 21 Wend. 166; Alger *v.* Thacker, 19 Pick. 51.

(*f*) Hinde *v.* Gray, 1 Mann. & Gr. 195; S. C. 1 Scott, N. R. 123; 7 Cowen, 307; Chappel *v.* Brockway, 21 Wend. 157.

The rule which considers a contract made in restraint of trade to be void, does not apply to cases where the party who agrees to the restraint, sells a secret of art, binding himself not to use it, or conveys a patent right to another, who is afterward to have the sole use of the invention.(*a*)

775.—2. A contract in restraint of *marriage*, by which one of the parties is bound not to marry at all, or to marry a person who is not reciprocally bound to marry the obligor, is void,(*b*) for it is the interest of society that all persons should be left free to marry. And a condition in a devise that the devisee shall not marry is void, if the condition be subsequent; but if it be a precedent condition, the devisee will not be entitled to the devise unless the condition has been performed.(*c*)

776.—3. Marriage brokage contracts are void.(*d*) By *marriage brokage* is meant the act by which a person interferes, for a consideration to be received by him, between a man and a woman for the purpose of promoting a marriage between them; the money paid for such service is also called by this name.

777.—4. *Wagers* and *gaming* are not unlawful by the common law, but they are much discouraged by the courts, and restrained by statute. This subject will be more fully considered elsewhere.

778.—5. Trading with an enemy *without license* is unlawful, and in general contracts made with him are void, for it cannot be allowed that the two governments are at war and enemies, and individuals belonging to them are at peace. Partnerships existing between citizens or subjects of two nations which become enemies, are dissolved by a war between them.

(*a*) Bryson *v.* Whitehead, 1 Sim. & Stu. 74; Vickery *v.* Welch, 19 Pick. 526.

(*b*) Baker *v.* White, 2 Vern. 215; 1 Story, Eq. Jur. § 277.

(*c*) 1 Story, Eq. Jur. § 288; Co. Litt. 206.

(*d*) 1 Fonbl. Eq. b. 1, c. 4, s. 10, note (s); 1 Story, Eq. Jur. § 263; Newl. on Contr. 469; Boynton *v.* Hubbard, 7 Mass. 118; Roberts *v.* Roberts, 3 P. Wms. 74, n.

To this general rule that trading with an enemy makes the contract void, there are several exceptions.

1st. When the parties have a license from their respective governments, but in such cases they must confine themselves strictly within the limits of the license given.

2dly. When the party dealing with an enemy does not know that he is such: in this case he may enforce his contract after the peace.

3dly. When the contract is made from necessity. Ransom bills, which are bills made by the master of a captured vessel during war in favor of the conqueror, on condition that he will let the vanquished ship depart, and give him a safe conduct, will be valid, unless positively restricted by some special law.(*a*) Other contracts made with an enemy from necessity will also be valid.(*b*)

779.—6. Usurious contracts are unlawful, and in some states they are void. Usury is the illegal profit which is required by the lender of a sum of money, from the borrower, for its use. To constitute a usurious contract the following circumstances are requisite: 1, a loan of money; 2, an agreement that the money lent shall be returned at all events; 3, that more than legal interest shall be paid.

1st. There must be a loan of money in contemplation of the parties, and if there be a loan, however disguised, it is sufficient; but a *bona fide* sale of a bill of exchange or promissory note is not usurious, although it may be sold below its value.

2dly. There must be an agreement that the principal shall be returned at all events, for if the return depend upon a contingency, there can be no usury; as in the case of insurance, annuities, and bottomry, which are all lawful whatever rate of interest may be charged, if there be no fraud.

(*a*) 1 Kent, Com. 105, 4th ed.; Maissonaire *v.* Keating, 2 Gallis, 336.

(*b*) Story on Bills, § 101, 103; Bayl. on Bills, c. 2, s. 9; 6 Taunt. 237; 8 T. R. 548.

3dly. The agreement must be to take more than lawful interest for the use of the money. There must be an *agreement* to take such unlawful interest, for a mistake in *fact*, as the making a miscalculation, will not render the contract usurious so as to avoid it, but the debtor will be relieved as to the surplus. A mistake of *law* will not, however, excuse the lender, because every one is bound to know the law.(*a*) As to the *amount of interest* which may be taken, it may be stated that any amount not allowed by the law of the place where the contract is made, will render the contract usurious, and if void there, it will be void every where.(*b*) Any interest, however exorbitant, which can be lawfully charged at the place where the contract was made, will not be usury.

780.—7. Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, as, the commission of an assault and battery, the publication of a libel, the concealing of a felony, and the like, are absolutely void. And so is an agreement to compensate a public officer for doing an act which is forbidden by law, or omitting to do one which the law commands.(*c*) But where the interest is not to induce the officer to neglect his duty, but to test a legal right, an agreement with an officer to indemnify him for not executing an execution, was held to be good.(*d*) All contracts which are founded on a violation of public trust and confidence,(*e*) and agreements for the maintenance of suits, or for champerty,(*f*) embracery,(g) bribery, and extortion, are void.

(*a*) Lloyd *v.* Scott, 4 Pet. 205; Comyn on Usury, s. 2; Buckley *v.* Guidland, Cro. Jac. 678.

(*b*) For the laws regulating the rates of interest in the several states of the Union, see Bouv. L. D. h. t.

(*c*) Doty *v.* Wilson, 15 John. 381; Kneeland *v.* Rogers, 2 Hall, 579; Hodson *v.* Wilkins, 7 Greenl. 113.

(*d*) Clarke *v.* Foxcroft, 6 Greenl. 296.

(*e*) Fuller *v.* Dame, 18 Pick. 472; The Vauxhall Bridge *v.* Earl Spencer, 2 Madd. R. 356.

(*f*) Thurston *v.* Percival, 1 Pick. 415; Beldin *v.* Pitkin, 2 Caines, 147.

(*g*) 4 Bl. Com. 140.

Art. 3.—Of fraudulent contracts.

781. To obtain justice is the object of the law, consequently fraud is what it most abhors, and if any contract be tainted with fraud it declares it void, whatever may be the form in which it may be clothed. But when performed, the contract will be binding on the party who has been guilty of the fraud, if the other party insists, because no one is allowed to take advantage of his own wrong.(*a*)

Indeed, a contract by which a party should agree that it should be valid notwithstanding a fraud, would be void.(*b*) By *fraud* is meant any trick or contrivance employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. The fraud may consist either, first, in the misrepresentation, or, secondly, in the concealment of a material fact, and these form the essentials of fraud. Thirdly, frauds as to third persons.

1. *Of misrepresentations.*

782. *Misrepresentation* is the statement made by one party to a contract to the other, that a thing relating to it is in fact in a particular way, when he does not know it is so, and in truth it is not as represented. In order to avoid the contract the representation must have been both false and fraudulent; and when a man asserts that to be true, which he does not know to be so, and which in fact is false, he is guilty of stating a falsehood which bears all the features of fraud.(*c*) The fraud must work an injury, for damage without fraud, or fraud without damage, is not sufficient to give a

(*a*) Steel *v.* Brown, 1 Taunt. 381; Taylor *v.* Weld, 5 Mass. 116; Deady *v.* Harrison, 1 Stark. 60.

(*b*) Clef des Lois Romaines, verbo Dol. For the different kinds of fraud, see B 2, part 1, t. 4, c. 2, s. 1, § 4; B. 2, pt. 1, t. 4, c. 3, s. 6.

(*c*) Schenieder *v.* Heath, 3 Camp. 506; Adamson *v.* Jarvis, 4 Bing. 66; 3 Com. 413; Cochran *v.* Cummings, 4 Dall. 250.

cause of action.(a) But every misstatement will not be considered fraudulent so as to avoid the contract; when a misrepresentation has been made without fraud, respecting a matter which the person to whom a communication was made, and who had an interest in it, should not have taken upon trust, but was bound to inquire into himself, and had the means of ascertaining the truth thereof, there would be no responsibility.(b) Nor will such a misrepresentation be sufficient to set aside the contract, when the party was not deceived; as if the seller of a piece of cloth should represent it to be black, when in fact it was gray, and the buyer saw it. And, on the other hand, the representation may appear to be true, but if false in fact, it will make the party responsible; as when a man wanted credit and represented he was worth a certain sum of money of his own property, and referred to his father, and, on being asked, the father said he had, when in truth he had lent him the money, the father was held responsible for the false representation.(c)

2. *Of concealment.*

783. *Concealment* is the unlawful suppression of any fact or circumstance, by one of the parties to a contract, from the other, and which in justice ought to be made known.(d) It is only when the party is bound in justice to divulge the fact that silence or concealment is fraudulent; for the general rule is, in other cases, that mere silence will not avoid the contract, although it may operate as an injury to the party from whom the fact is concealed; as, for example, where Peter knowing there is a mine in Paul's land, buys the land from Paul without disclosing the fact to him, knowing, at the same time, that Paul is ignorant of it.(e) But the concealment of a material fact, which

(a) 3 Bulstr. 95.
(b) 1 Chit. Pr. 836.
(c) Cobbett *v.* Brown, 5 Bingh. 35.
(d) 1 Fonbl. Eq. B. 1, c. 3, § 4, note (*n.*); 1 Story, Eq. Jur. § 207.
(e) Fox *v.* Makreth, 1 Bro. C. C. 420.

the party is bound to disclose, as in the cases of insurance, will vitiate the contract, although such concealment may only be the effect of negligence, inadvertence or mistake.

3. *Of fraud upon third persons.*

784. When treating of the effect of agreements with regard to third persons this subject was considered; it is not requisite that it should be again examined here.(*a*)

§ 2. Of contracts void by statute.

785. Contracts in violation of a statute are utterly void, whether the subject matter or the consideration of the contract be forbidden by law. Sometimes a statute *expressly* prohibits or enjoins an act; at other times the act is prohibited, or a prohibition is enjoined by *implication* only; in either case a contract in violation of its provisions is void.(*b*) But to render the contract void, it must violate the provisions of the statute, for if it be only connected with some incidental matter which is illegal, and not in violation of the terms of the statute, it will be valid; for example, where the plaintiff sold tobacco, without first obtaining a license as required by the statute, it was held he could sue the buyer, for the sale was wholly independent and collateral to the illegality.(*c*) Again, if an act in violation of law has already been committed, a subsequent agreement, which, though founded on such breach of the law, constituted no part of the original inducement or consideration of the illegal act, will be valid.(*d*)

786. Sometimes a contract is made between two parties to enable one of them to violate the provisions

(*a*) Ante, B. 2, part 1, t. 4, c. 3, s. 6, n. 657.

(*b*) Fergusson *v.* Norman, 5 Bing. 80; De Bignis *v.* Armistead, 10 Bing. 107.

(*c*) Johnson *v.* Hudson, 11 East, 180; Wetherell *v.* Jones, 3 B. & A. 221.

(*d*) Armstrong *v.* Toler, 11 Wheat. 258, 271, 276; 1 Wheat. 408; The George, 2 Wheat. 278; Connan *v.* Bryce, 3 B. &. Ald. 179.

of a statute, and sometimes an act is done by one without any agreement as to the violation of the statute, which enables the other to break a penal law; as when a man lends another money to lay an unlawful wager. In such case, if the lender lends it to enable the borrower to lay the wager, on condition he shall so lay it, the transaction is unlawful; but if it be lent without any such understanding, and afterward the borrower uses it to lay the unlawful wager, then the loan is lawful; it being a rule that when the plaintiff can make out his case without showing that he violated the law, he shall recover.(*a*)

787. Some statutes are directly prohibitory, and their provisions are conditions precedent, directly affecting the contract; others, on the contrary, are merely directory in their terms; and these terms, when not complied with, are only collateral to the agreement; in these last the contract is not void. For example, the law requires that the assignment of a patent or a deed of conveyance shall be recorded, yet if it be not done, the assignment in the one case, or the deed in the other, will not be void as between the parties.(*b*)

788. When the contract is *entire* and any part of it is unlawful the whole is void; but if the agreement be to do two acts, for a sufficient and lawful consideration, and one of them be void and capable of separation from the other acts which are lawful, the contract is binding as to the latter acts, and void for the remainder. And it matters not whether the part which is void be declared so by statute, or made so by the common law, unless indeed the statute declares expressly such a contract to be void,(*c*) though once the contrary doctrine was entertained, and it was said that when a

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(*a*) Swan *v.* Scott, 11 S. & R. 155; Thomas *v.* Brady, 10 Penn. St. R. 170; Faikney *v.* Reynous, 4 Burr. 2069; Petrie *v.* Haney, 3 T. R. 419; Carsan *v.* Rambert, 2 Bay, 560; Barjeau *v.* Walmsley, 2 Strange, 1249.

(*b*) Brooks *v.* Ryan, 2 Story, 542.

(*c*) Mouys *v.* Leake, 8 T. R. 411; Doe *v.* Pitcher, 6 Taunt. 359.

contract violated a statute, although it was divisible, it was void.(*a*)

CHAPTER V.—OF THE EXTINCTION OF OBLIGATIONS.

789. Having explained how agreements are formed, what is required for their validity, what things may be the subject of agreements, what are their effects, their different kinds and their modification, we will next consider how they are extinguished.

790. There are numerous ways of extinguishing or annulling agreements, either in whole or in part. They may be reduced to the following:

1. By the mutual consent of the parties, under which class may be placed, 1, release; 2, compromise; 3, renewal of the obligation, either by the debtor himself, called a novation, or by a third person, called a delegation; 4, accord and satisfaction.
2. Sometimes by one of the parties alone, when one has the power to declare the contract at an end.
3. The accomplishment of the obligation or payment.
4. By confusion, when the duty to pay and the right to receive is in the same person.
5. By loss of the thing.
6. By judgment, or an award which declares the contract null.
7. By the death of the creditor or the debtor.
8. By set off, or defalcation.
9. By lapse of time.
10. By neglect to give notice.
11. By legal bars.

SECTION 1.—OF EXTINGUISHMENT OF CONTRACTS BY THE ACT OF BOTH PARTIES.

791. It is evident that the parties may at any time change their contract by mutual consent, for although

(*a*) Norton *v.* Simms, Hob. 14.

the agreement is a law to them, it is subject to their joint will to annul, change or modify it, as it was to make it. A contract may be extinguished by the acts of the parties in several ways.

§ 1.—By release.

792. A debt, obligation or engagement may be extinguished by a release. A *release* is a discharge of a right of action, which the releasor has against the releasee. Releases may be considered, 1, as to their form; 2, their different kinds; 3, their effect; 4, by whom they are to be made; 5, to whom.

Art. 1.—*As to the form of a release.*

793. The operative words of a release are remise, release, quit-claim, discharge and acquit; but other words will answer the purpose.(*a*)

The subject which is to be released must be specially mentioned, or such general terms must be used that they include it. Littleton says a release of all *demands* is the best and strongest release.(*b*) Lord Coke, on the contrary, says *claims* is a stronger word.(*c*)

A *covenant not to sue* has, in general, the effect of a release, as between the covenantor and the covenantee; but it does not operate as a release to the joint obligors with the covenantee, they being liable as if it had not been given.(*d*)

The release must be under seal;(*e*) a parol release, without payment or satisfaction, is no extinguishment of the debt, for there does not appear to be any consideration for it.(*f*)

(*a*) Sid. 265; Cro. Jac. 696; 9 Co. 52.

(*b*) § 508.

(*c*) Co. Litt. 291 b.

(*d*) Crane *v.* Alling, 3 Green, 423; Durell *v.* Wendell, 8 N. H. Rep. 369.

(*e*) Bender *v.* Sampson, 11 Mass. 42. See Johnson *v.* Kerr, 1 S. & R. 25.

(*f*) Sigourney *v.* Sibley, 21 Pick. 101; Miller *v.* Hemler, 5 Watts & Serg. 486.

Art. 2.—Different kinds of releases.

794. Releases are either express or implied. *Express* releases are made by deed, by which the creditor distinctly discharges the debtor from all obligation. A release may be *implied* from the acts of the creditor; as when he releases one of two joint obligors or joint debtors, the law presumes he intends to discharge both, because if one only were discharged, and a recovery should be had against the other, the latter could claim contribution from the one who had been discharged, and thus, circuitously, he could be made to pay the debt, or a part of it, from which he had been released. A release will also be implied where the creditor delivers to the debtor the obligation he holds against him; as he then will be presumed to have given him the debt. When a debtor has pledged an article as security for the debt, the return of the pledge to the debtor will not be presumed as a release of the debt.

Art. 3.—Of the effect of a release.

795. A release has the effect to discharge the releasee and all persons who are jointly bound to the releasor with him, also all their heirs, executors and administrators, and all their joint and several estates. After a release has been made, the releasee may be a witness, if there be no other cause for his being rejected but his interest.

In general a release will be restrained by the particular occasion of giving it;(*a*) for example, a release by the creditor will discharge all demands which are mentioned in it, as being due or owing by the debtor to the creditor in his own right, but not to demands due to him as executor, unless they are expressly stated.(*b*)

(*a*) 3 Lev. 273; Palm. 218.
(*b*) Wiggins *v.* Norton, R. M. Charlt. 15.

Art. 4.—By whom the release must be made.

796. The creditor has alone the power to make a release in his own right. None but he can discharge the obligation; but he may do this personally or by his agent.

A release by one partner of the firm, binds all the partners;(*a*) and so a release by one of several joint creditors will bind them all;(*b*) and a release by a husband, for the personal abuse of his wife, is a good bar to the joint action of the husband and wife for the same cause.(*c*)

Art. 5.—To whom a release is to be made.

797. It is evident that a release can be made to the debtor only; it is however considered as made to him, although it may be to his guardian, committee, tutor, curator, or other person lawfully representing him.

When there are several joint debtors a release to one will be a release to them all,(*d*) but then the release must be under seal.(*e*)

§ 2.—By compromise.

798. The parties, as has been already observed, may change or alter their contracts; they may, therefore, where there is a claim of right on one side and denial upon the other, settle the matter in dispute by a *compromise*, which is an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon.

799. The following are the principal points relating to compromises:

1. Its *form*, which may be in writing or not in

(*a*) Pierson *v.* Hooker, 3 John. 68; Salmon *v.* Davis, 4 Binn. 375.
(*b*) Kimball *v.* Wilson, 3 N. H. Rep. 96.
(*c*) Southworth *v.* Packard, 7 Mass. 95.
(*d*) United States *v.* Thompson, Gilp. 614; Bunson *v.* Kincaid, 3 Pennsyl. 57; Willings *v.* Consequa, Pet. C. C. 301; Sed vide Blakey *v.* Blakey, 2 Dana, 460.
(*e*) Shaw *v.* Pratt, 22 Pick. 305; Smith *v.* Bartholomew, 1 Met. 276.

writing; if in writing, it may be under seal or not under seal.

2. The *subject* of the compromise must be something *uncertain*, for if it be certain, a payment of a part will not discharge the rest, for want of a consideration. The compromise of a doubtful claim is a good consideration to uphold the contract, and the merits and demerits of the several claimants will not be investigated for the purpose of setting aside a compromise otherwise fairly made.(*a*)

3. As to the *parties*, it must be made by one having a right and capacity to enter into the contract. When there is but one person on each side, it must be made by him or his authorized agent.

A compromise may be made by a partner so as to bind the firm; and though a partner cannot in general enter into a contract under seal, by which he will bind the firm to perform certain acts, yet he may release or compromise an obligation under seal, where the firm have no act to perform.(*b*)

Without a special authority, an attorney has no right, strictly speaking, to make a compromise for his client; yet the court will not be inclined to disturb such a compromise when there has been no fraud nor surprise,(*c*) particularly when the principal has acquiesced in it for years.(*d*)

4. As to its *effect*, the compromise puts an end to the suit, if it be proceeding, and bars any suit which may be afterward instituted for the same cause. But it will be set aside by chancery, or at law, when it has been obtained by fraud or misrepresentation.(*e*)

(*a*) Union Bank *v.* Geary, 5 Pet. 114; Fisher *v.* May, 2 Bibb, 449; Worrall's Accounts, 5 Watts & Serg. 111; Hoge *v.* Hoge, 1 Watts, 216, 217; O'Keson *v.* Barclay, 2 Pennsyl. 531.

(*b*) Bruen *v.* Marquand, 17 John. 58; Smith *v.* Stone, 4 Gill & John. 310; Pierson *v.* Hooker, 3 John. 68.

(*c*) Holker *v.* Parker, 7 Cranch, 436.

(*d*) Mayer *v.* Foulkrod, 4 Wash. C. C. 511.

(*e*) Hoge *v.* Hoge, 1 Watts, 163; Anderson *v.* Bacon, 1 Marsh. 51; Mosby *v.* Leeds, 3 Call, 439.

§ 3.—Of the extinguishment of the contract by renewal.

800. When a new debt is substituted by the parties for an old one, this is called in the civil law by the convenient term of *novation*. The old debt is extinguished by the act of the parties. A novation may be made in three different ways, which form three distinct kinds of novations.

801.—1. The first takes place, without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former; as, if I owe to you a thousand dollars on a note which falls due on the first day of January, and I give to you a new note on that day payable on the first day of April, and you deliver to me the first note. Here is a contract by which not only the first note is discharged, but all the collateral engagements connected with it; if you had a guarantee of that note, it will not be a guarantee of the last. This kind of novation has no appropriate name, and is called simply novation.

802.—2. The second kind of novation is that which takes place by the intervention of a new debtor, where another person becomes debtor instead of the former debtor, and is accepted by the creditor, who thereupon discharges the first debtor. The person thus becoming debtor for another, who in consequence is discharged, is called expromissor, and this kind of novation, *expromissio*.

803.—3. The third kind of novation takes place by the intervention of a new creditor, when a debtor, for the purpose of being discharged from his original creditor, by order of that creditor, contracts some obligation in favor of a new one.

It must be remembered that there can be no novation unless the old debt is absolutely discharged; whether it be so discharged or not depends upon the intention of the parties. If one indebted to another

by simple contract give his creditor a promissory note, made by himself for the same sum, without any new consideration, the new note shall not be deemed a satisfaction of the original debt, unless so intended and accepted by the creditor.(*a*) But if he transfer the new note, he cannot sue on the original contract as long as the note is out of his possession.(*b*)

When a security of a higher nature is given it extinguishes the original obligation; as, where a bond is given for a simple contract debt, the latter is extinguished.(*c*) But in order to have that effect, it must be between the same parties: a bond by one partner in the partnership name, which bound only the partner who gave it, does not extinguish a partnership debt.(*d*) And to have this beneficial effect, the bond must be taken for the debt itself, and not as a collateral security.(*e*)

804. But besides this mode of extinguishing a debt by novation, properly speaking, there is another way of doing it by what the civilians call a *delegation*, which is indeed a kind of novation, and is the substitution of a new debtor, who becomes bound to pay the creditor, sometimes unknown to him, in the place of the old debtor, who is discharged. This substitution may take place in several ways:

1. Between the creditor and his debtor, without the consent of the third person who becomes bound in the place of the first debtor. I owe you one thousand dollars, and, in order to acquit my obligation, I transfer to you my right to receive the same sum which is due to me by Titius. The effect of this agreement

(*a*) Witherby *v.* Mann, 11 John. 513; Maddin *v.* Edmondson, 10 Mis. 643; 15 S. & R. 162; 1 Hill, N. Y. Rep. 516; 2 Wash. C. C. 191; Pet. C. C. 266; 6 W. & S. 165; 9 Watts, 273; 10 Pet. 532.

(*b*) Steamboat Charlotte *v.* Lumm, 9 Mis. 64; 1 Pet. 267.

(*c*) Settle *v.* Davidson, 7 Miss. 704; Van Vliet *v.* Jones, 1 Spencer, 340; Gardiner *v.* Hurst, 2 Rich. 601.

(*d*) Bond *v.* Aitken, 6 Watts & Serg. 165; Flemming *v.* Lawhorn, Dudley, So. Car. 360; but see Jacobs *v.* McBee, 2 McMullan, 348.

(*e*) Day *v.* Geal, 14 John. 404.

will depend upon our intentions. If you have not discharged my obligation, it is merely an authority which I have given to you, and which you have accepted, but still I remain liable to you; if Titius does not pay you I am liable. This is the common case of the transfer of a bill of exchange or promissory note, endorsed by the debtor.

2. But if you accept such bill or note made by Titius, and endorsed by him in blank, and accept him as your only debtor, then my debt is extinguished and there is a novation.

§ 4.—Of extinguishment by accord and satisfaction.

805. The fourth way of extinguishing an obligation by the act of both parties, is by *accord and satisfaction*, which is the settlement of a dispute or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured.

Accord and satisfaction in some respects resemble the contract of sale; *dare in solutum, est quasi vendere.* There is, however, some difference; 1, the contract of sale may be perfect without actual delivery of the thing sold, but accord is not sufficient without satisfaction; 2, when a person pays what he supposed he was owing, and he does not owe so much, he may recover the excess, in an action for money had and received; not so when property other than money has been given in payment: example, I owe you truly one hundred dollars, but we both supposed the debt to be two hundred dollars; instead of paying you the money I give you a horse estimated at two hundred dollars, as an accord and satisfaction of the debt, I cannot recover the difference; on the other hand, where a debt has been discharged by accord and satisfaction for less than its amount, an action cannot be supported for the balance;(a) 3, he who sells goods which are not in

(a) Stafford *v.* Bacon, 2 Hill, 253; S. C. 25 Wend. 384; Williams *v.* Stanton, 1 Root, 426; Blinn *v.* Chester, 5 Day, 360.

his possession does not guarantee the title,(a) but it would be no satisfaction unless the title to the thing actually passed.(b) The consideration of this subject will be resumed in the sequel.

SECTION 2.—OF THE EXTINCTION OF THE CONTRACT BY THE ACT OF ONE OF THE PARTIES.

806. Sometimes a contract may be annulled by one of the parties, as where there is a special clause in the agreement that one of the parties shall have the power to annul the agreement within a certain time; or when it results from the nature of the contract, as when two persons are in partnership and no time is limited for its duration, either party may annul it at pleasure. Again, a mere mandate or letter of attorney may be revoked by the constituent at any time.

SECTION 3.—OF PAYMENT.

807. The most natural way of extinguishing an obligation which a man has contracted, is doubtless to fulfil his promise by delivering to his creditor the thing due, if the obligation consist in delivering the thing; and in fulfilling the act promised, if the obligation consist in doing a thing. This is what is called paying, and which the Latins energetically called *solvere*, to *unbind* one's self, to *untie* the knot or lien of the obligation: *solvere dicimus eum qui fecit quod focere promisit*. But in a more general acceptation of the word, are included all manner of extinguishing obligations by which the creditor is or ought to be satisfied, and the debtor becomes free.

808. To understand this subject it will be proper to consider, 1, by whom the payment is to be made; 2, to whom; 3, what is to be paid; 4, when the payment is to be made; 5, where it is to be made; 6, the effect of the payment; 7, how payment is to be appro-

(a) Cro. Jac. 197.
(b) Poth. Vente, n. 602, 604.

priated; 8, effect of a tender and payment of money into court.

§ 1.—By whom the payment is to be made.

809. The payment may be made by the real debtor or other persons from whom the creditor has a right to demand it; an agent may make payment for his principal, and any mode of payment by the agent, accepted and received as such by the creditor, as an absolute payment, will have the effect to discharge the principal, whether known or unknown, and whether it be in the usual course of business or not.

When several persons are liable for the same debt, payment may be made by any one, and it will discharge all the rest,(*a*) because the creditor is entitled to one satisfaction only.

The moment the creditor, as such, has received payment, it is clear he can have no further claim; if, therefore, a third person, a stranger, pay the debt, without the consent of the debtor, but in his name, the payment will be good.(*b*)

§ 2.—To whom payment is to be made.

810. To be valid, the payment must be made to the creditor himself, or his assigns, if known, or to some person authorized by him, either expressly or by implication.

Art. 1.—*Of payment to the true creditor.*

811. By *creditor* must be understood not only the person with whom the contract was made, but also his executors, administrators and assigns.

To make a valid payment to the creditor himself, or to those who represent him, he must at the time be capable of administering his estate, he must be *sui juris*. If therefore the creditor was, at the time of the

(*a*) Boggs *v.* Lancaster Bank, 7 Watts & Serg. 331.
(*b*) Harrison *v.* Hicks, 1 Port. 423. See Keller *v.* Leib, 1 Pennsyl. 220.

payment, either a minor or a married woman, or one found *non compos* by inquisition, a payment to him would be void, unless perhaps the money so paid had gone to the actual use of such creditor, as if it had been applied to pay his debts, which the guardian, the husband, or the committee, were bound to pay.

In case the original creditor should have assigned a chose in action, not assignable at law, as a book debt, or a note not negotiable, a payment to the assignor without notice of such assignment is good.

When the debt is due to several joint creditors, payment to one is in general a valid payment.(*a*)

Art. 2.—Of those who are authorized by the creditor to receive payment.

812. When a payment is made to those whom the creditor has appointed to receive the money for him, it is considered as if made to himself. It therefore follows:

1. That it is of no consequence who the agent or attorney in fact may be, whether he be an infant or a feme covert.

2. That the authority given must be by one *sui juris*, for if an infant or married woman were to give a letter of attorney to receive a debt, payment to the attorney would not be good, because the debtor could not have made a valid payment to such infant or married woman.

813. The authority given to an attorney expires by the death of the constituent; if a woman, by her marriage; or if given to an attorney at law, it ends with a substitution of another.(*b*) But till notice of the change or implied revocation, payment to the attorney would be good.(*c*)

(*a*) Scott *v.* Trent, 1 Wash. 77; Marrow *v.* Starke, 4 J. J. Marsh. 367.
(*b*) Weist *v.* Lee, 3 Yeates, 47.
(*c*) 3 T. R. 215; Poth. Ob. n. 513, French ed.

Art. 3.—*Of those who are invested by law to receive payment.*

814. Payment to those who are authorized by law to receive payment, instead of the real creditor, is always valid. The law authorizes the guardian of a minor, the committee of a lunatic, the husband of a woman, when there is no trust, the executors of a deceased person, the assignees of an insolvent or of a bankrupt, to receive a payment of what is due to them respectively, and their discharges will be good.

Art. 4.—*Of those who are authorized by the agreement to receive payment.*

815. The contract sometimes points out a third person to whom payment is to be made, a payment to him will then be good; as if I sell you my house for five thousand dollars, three thousand dollars payable to me in six months, and two thousand dollars payable in one year to Titius to whom I am indebted, and who has agreed to receive the money in payment of my debt. This last sum must be paid to Titius, but this is only on condition that he shall retain his rights to act *sui juris,* and he has not transferred his rights to another.

Art. 5.—*How payments may be validated.*

816. When a payment has been made to one who, in reality, had no just right to receive it, it is as if no payment had been made; but, if afterward, the creditor does certain acts, by which he sanctions it, then it becomes valid, and the debtor is discharged. Such payment may be made effectual in several ways.

1. By express ratification, which is the approbation of the creditor given after the payment. A ratification has a retrospective effect, and binds the creditor from the time of payment, and is equivalent to an original authority, according to the maxim *omnis ratihabitio mandate æquiparatur.*(*a*)

(*a*) Wood *v.* Carpenter, 4 Wend. 219; Odiorne *v.* Maxcy, 13 Mass. 178,

2. The second case is an implied ratification, as, where the money received in payment has been used to liquidate and pay the debts of the creditor for whom it was received, or where the creditor has acted in such a way as to raise a presumption that he acceded to the payment.(*a*)

3. A third case is where the debt has been bequeathed to the person who received the money without authority.

§ 3.—Of the thing to be paid, and how the payment is to be made.

817. The principal points to be examined under this head, are, 1, whether one thing may be paid for another; 2, whether the creditor be bound to receive what is due to him in instalments; 3, how the thing which is due is to be paid; 4, in what state the thing paid ought to be.

Art. 1.—*Whether one thing may be paid for another.*

818. What is due must be paid in order to make a good payment, and a creditor is not bound to receive any thing but what he has contracted for. If, however, he should receive one thing instead of another, the debt would be extinguished, though this would not be a payment, but an accord and satisfaction.

But sometimes, by the agreement, there is due one of several things; as when the obligor promises to pay one thousand dollars or one thousand bushels of wheat. The election in these cases to pay which he pleases is in the debtor, so that he has the right to pay either, and the creditor can require nothing else. He cannot, however, deliver a part of each, and the right does not extend beyond the time of payment.(*b*)

182; S. C. 15 Mass. 39; Ruggles *v.* Washington county, 3 Mis. 496; Baker *v.* Byrne, 2 Sm. & Marsh. 193.

(*a*) Bredin *v.* Dubarry, 14 S. & R. 27; 3 Mis. 496; Shaw *v.* Nudd, 8 Pick. 9.

(*b*) Co. Litt. 145 a; 7 John. 465; 2 Bibb, 171.

An obligation for money payable in collateral articles, may be discharged by paying the money.(a)

Art. 2.—Whether the creditor is bound to receive what is due by instalments.

819. As a general rule, the creditor cannot be compelled to receive what is due to him by the debtor in parts; an offer to pay a part does not therefore suspend the interest even for the part tendered. But when there are several independent obligations, he may tender the amount of one of them, and the creditor is required to receive it. And when there are several instalments due, the creditor is bound to receive payment of one of them.

Art. 3.—How the thing which is due ought to be paid.

820. Payment is made by the delivery of the thing which is due and transferring the property to the creditor. If, therefore, the thing paid is of no value, as if a debtor were to pay in counterfeit coin, or in bank notes of a broken bank, or which were counterfeits, it is clear there would be no payment.(b) Again, if my debtor were to deliver me a thing in payment which was my own, there would be no discharge of my claim.

Art. 4.—In what state the thing should be when paid.

821. When the thing due is certain and specific, it may be paid or delivered in the condition it is, on the day of payment, whatever may be its deterioration, provided it has not been injured by the debtor or those for whom he is responsible, as his servants. If I sell you my horse deliverable on the first day of April, and in the mean time he meets with an accident

(a) Sessions *v.* Ainsworth, 1 Root, 181; Poth. Obl. n. 533.

(b) Eagle Bank *v.* Smith, 5 Conn. 71; Markle *v.* Hatfield, 2 John. 455; State Bank *v.* Welles, 3 Pick. 394; Hargrave *v.* Dusenberry, 2 Hawkes, 326; Thomas *v.* Todd, 6 Hill, 340; 11 Verm. 576. But see Bayard *v.* Shunk, 1 W. & S. 92; Lowry *v.* Murrell, 2 Port. 280.

without any fault of mine, or those for whom I am responsible, and loses an eye, a delivery of the horse with that defect will discharge my obligation.

But if I sell you one of my horses, and I have a dozen, without designating which, I will not discharge my obligation to you by delivering one which has become blind of one eye since our contract; in such case I am to deliver you a sound horse, because at the time of my engagement all my horses were sound.

§ 4.—When the payment is to be made.

822. The payment ought to be made when the thing is due, but a payment may be made before it is payable; for example, a note payable six months after date, may, with the consent of the creditor, be paid the next day after its date. Where two terms are mentioned for the time of payment, as where goods were sold at six or nine months, the creditor may elect which term he pleases.(*a*)

When no time of payment is mentioned in the agreement, it is due the moment the contract is completed.(*b*)

The term of promissory notes and bills of exchange is generally extended three days beyond the time mentioned in the contract, which days are called days of grace;(*c*) but in some states the days of grace have been abolished.

§ 5.—When payment is to be made, and at whose expense.

823. The payment must of course be made at the place agreed upon by the contract; but in the absence of such agreement it must be made according to the presumed intention of the parties, which may be

(*a*) Price *v.* Nixon, 5 Taunt. 338.

(*b*) Bank of Columbia *v.* Hayner, 1 Pet. 455.

(*c*) Thomas *v.* Shoemaker, 6 Watts & S. 179; Cookendorfer *v.* Preston, 4 How. U. S. 317; Central Bank *v.* Allen, 4 Shep. 41. In Louisiana the days of grace are no obstacle to a set off, the bill being due for this purpose, before the expiration of those days. Lo. Code, art. 2206.

ascertained by the nature of the thing to be delivered, and by the custom or usage of the place, which always forms a part of every contract.(*a*)

824. In general the debtor, for a money obligation, is required to find the creditor and pay him,(*b*) for no demand is necessary before suit brought, an action being a sufficient demand.

825. When bulky articles are sold, and there is no place mentioned where the delivery shall be made, they are to be delivered at the place where the things were at the time of the sale. If I sell you my crop of wheat, you are to take it out of my barn, if it was there at the time of sale, and I must give you notice that it is ready for you.(*c*) And if, after the obligation became due, the debtor separated the articles which were to be paid from others of the same kind, for the purpose of making a payment, they would be the creditor's, and if they were destroyed he would have to bear the loss, according to the rule *res perit domino*.(*d*)

§ 6.—Of the effect of a payment.

826. The effect of a payment is to extinguish the contract and all its accessories, and to liberate those who were debtors.

Art. 1.—*When a payment may extinguish several obligations.*

827. This happens when the thing given in payment is the same thing which forms the object of another obligation; for example, if I have sold you, in payment of a sum of money you had lent me, the thing which I had pledged to you, this payment which I make you by the delivery of the thing, extinguishes at the same time the resulting obligation of

(*a*) Boynton *v.* Veazie, 11 Shep. 286.
(*b*) Sanders *v.* Norton, 4 Monr. 464; Littell *v.* Nichols, Hardin, 66.
(*c*) Evarts *v.* Butler, Brayt. 216; Trotter *v.* McAfee, 1 Stew. 59; Leedom *v.* Phillips, 1 Yeates, 527; Bates *v.* Conkling, 10 Wend. 389; Zinn *v.* Rowley, 4 Penn. St. R. 169.
(*d*) Zinn *v.* Rowley, 4 Penn. St. R. 169.

the loan, and that resulting from the sale of the thing which I sold you.

828. This may take place when there are several creditors; as, if Peter be indebted to Paul one hundred dollars, and Paul being indebted to James, Paul gives an order to Peter to pay James this money; the payment by Peter to James discharges both the obligations due by Peter to Paul, and Paul to James. This rule applies also when there are several debtors for the same thing, as where John is principal, and Joseph as security. The payment by John will discharge both Joseph and himself.

Art. 2.—Of payment made by one of several debtors.

829. We have seen that a debtor may be liberated by the payment of a different obligation than his own; when one of two debtors pays the debt, the others are of course liberated, whether they be principal debtors or only sureties. But when the surety pays the debt he is entitled to stand in the place of the creditor, and to be subrogated to all his rights against the principal.(*a*) By *subrogation* is meant the act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution for an old creditor and the succession to his rights: *transfusio unius creditores in alium.*

Art. 3—Of partial payments.

830. Regularly a part payment cannot be insisted upon by the debtor of an entire debt or obligation, but if the creditor receives it, his claim is discharged *pro tanto*. But when a debt is due by instalments, the debtor has a right to pay each instalment separately, but not a part of each.

§ 7.—Of appropriation of payments.

831. By *appropriation* is meant the application of

(*a*) Ebenhardt's Appeal, 8 Watts, 327.

the payment of a sum of money, made by a debtor to his creditor, to one of several debts which are due by the former to the latter. It is frequently of much importance to the parties to which of such debts the payment should be appropriated; some debts are better secured than others, or there may be a surety or a pledge given for one and not for another. It is not always easy to say how the appropriation ought to be made. Some rules have been made for the purpose of ascertaining the rights of the parties; these will now claim our attention.

832.—Rule 1. When a debtor owes several debts to the creditor and he pays money on account to him, he has a right to direct the application of the payment to which debt he pleases, by doing so at the time of payment; this is called the *right* of appropriation.(*a*)

833.—Rule 2. If the debtor neglect to make the appropriation at that time, then the right *passes to the creditor;*(*b*) and he is not bound to make the application at the time of the receipt of the money. But when once made, as by rendering an account, bringing suit, and declaring in a particular way, the appropriation cannot be changed.(*c*)

834.—Rule 3. When neither party avails himself of the power to make the appropriation, the courts will, as far as possible, make it according to the apparent interest of the parties, and with a view to do equity both to them and their sureties.(*d*) To this general rule there are several corollaries.

1. The application must be made to that debt which is most beneficial to the debtor.(*e*)

(*a*) Oliver *v.* Phelps, 1 Spencer, 180; Bacon *v.* Brown, 1 Bibb, 334; Starrett *v.* Barber, 7 Shepl. 457; Selfridge *v.* Northampton Bank, 8 W. & S. 320.

(*b*) White *v.* Trumbull, 3 Green, 314; Salleck *v.* Turnpike Co., 13 Conn. 453.

(*c*) Bank of N. A. *v.* Meredith, 2 Wash. C. C. 47.

(*d*) Emery *v.* Tichout, 13 Verm. 15; 3 W. & S. 550; 5 W. & S. 542.

(*e*) Gwinn *v.* Whitaker, 1 Har. & John. 754; Dorsey *v.* Garraway, 2 Har. & John. 402; Logan *v.* Mason, 6 W. & S. 9.

2. When the debts are of an equal nature, the payment must be presumed to be made to discharge the oldest.(*a*)

3. When the debts are of the same date, and equal in every other respect, the payment will be appropriated proportionally among them.

4. When principal and interest are both due, the payment will be first applied to the interest.(*b*)

5. When one debt is due and another is not, the payment will be applied to the first.(*c*)

6. Courts will apply payments to do justice to sureties and relieve them, whenever they can.(*d*)

7. When there are several debts, and the payment corresponds exactly to one of them, it will be so applied.(*e*)

8. When there are several items in an account, and some of them cannot be recovered while others may be enforced, and a payment is made, it will be applied to the latter.(*f*)

9. When a member of a firm is indebted, and the firm owe the same person, a payment made by such partner will be presumed to be on his own account.(*g*)

10. When several persons are interested in the notes on which suit is brought, and a partial payment is made on the judgment obtained on them, a surety shall have a proportionate credit.(*h*)

(*a*) United States *v.* Kirkpatrick, 9 Wheaton, 720; Fairchild *v.* Holly, 10 Conn. 175; Berghaus *v.* Alter, 9 Watts, 386.

(*b*) Jones *v.* Kilgore, 2 Rich. Eq. 63; Baines *v.* Williams, 10 S. & M. 113.

(*c*) Peebles *v.* Dee, 1 Dev. 341; Spires *v.* Harnot, 8 W. & S. 17; Jencks *v.* Alexander, 11 Paige, 619; Seymour *v.* Sexton, 10 Watts, 255; Bacon *v.* Brown, 1 Bibb, 334; Righter *v.* Stall, 3 Standf. Ch. R. 608.

(*d*) Postmaster General *v.* Norvell, Gilp. 106; Harker *v.* Conrad, 12 Serg. & R. 391; Brander *v.* Phillips, 16 Pet. 121; Myers *v.* United States, 1 McLean, 493.

(*e*) Huger *v.* Bocquet, 1 Bay, 497.

(*f*) Hilton *v.* Burley, 2 N. Hamp. 193; Rackley *v.* Pearce, 1 Kelly, 241. See Ayer *v.* Hawkins, 19 Verm. 26.

(*g*) Johnson *v.* Boone, 2 Harring. 172.

(*h*) Blackstone Bank *v.* Hill, 10 Pick. 129.

§ 8.—Of payment of money into court.

835. Payment of money into court is the actual deposit of money with the clerk or prothonotary of the court in a particular case, made by the defendant to answer the plaintiff's demand. To make such a payment valid there must have been a previous tender, or the payment of the money must be made with leave of court.

Although such payment is not made to the creditor himself, yet it has the effect of a payment when made, and, if it is not in full, it has that effect *pro tanto*.(a) To give it that effect, however, the money must be paid either, first, after plea of tender pleaded, or, secondly, by leave of court.(b) When money is paid in under other circumstances, it is paid in at the risk of the defendant.(c)

The payment of money into court, admits the right of the plaintiff to it, and, even when the plaintiff fails in his suit, it will be answerable for costs.(d) The plaintiff may take it out, but the defendant cannot.(e)

When the amount paid in is sufficient to pay the plaintiff's claim for principal, interest and costs, up to the time of payment, he can recover no other costs against defendant.(f)

SECTION 4.—OF THE EXTINGUISHMENT OF AN OBLIGATION BY CONFUSION.

836. By confusion is meant the concurrence of two qualities in some subject, which mutually destroy each other.(g) This confusion may be of goods or of rights. When the qualities of debtor and creditor are united in the same person, there arises a confusion of rights.

(a) Murray *v.* Bethune, 1 Wend. 191.
(b) Mazych *v.* McEwen, 2 Bailey, 28.
(c) Currie *v.* Thomas, 8 Port. 293.
(d) Jenkins *v.* Cutchens, 2 Miles, 65; Clement *v.* Bixler, 3 Watts, 248.
(e) 1 Wend. 191.
(f) State Bank *v.* Holcomb, 2 Halst. 193.
(g) Poth. Obl. n. 641; 3 Bl. Com. 405; Story, Bailm. § 40.

§ 1.—When this confusion arises.

837. When a man is indebted to a woman or *vice versâ*, and they marry together, the debt is immediately extinguished, because in both instances the husband is bound to pay and entitled to receive. So if the creditor bequeath the obligation to the debtor. But there is an exception, when a bond is given by the intended husband to the intended wife with a view that it should take effect after his death; here there is no confusion.(*a*) Indeed, in that case the husband could not be entitled to recover; there could not, therefore, be any confusion of rights.

§ 2.—Of the effect of confusion.

838. The moment the confusion takes place, the right to receive and duty to pay are extinct, and if the principal obligation is thus extinguished all collaterals are also satisfied.

SECTION 5.—OF THE EXTINGUISHMENT OF THE OBLIGATION BY THE LOSS OF THE THING.

839. There can be no obligation or debt unless something be due, which is the object of the obligation; hence it follows that if what is promised becomes extinct, no payment can be made. If, for example, for the price of one hundred dollars, which you are to pay me on the first day of January, I agree to deliver you my horse Napoleon, and in the mean time he dies, there is no contract subsisting.

But when the obligation is in the alternative, as, if I had promised you to deliver my horse Napoleon, or my pair of oxen, on the death of the horse, I would be obliged to deliver you the oxen.

SECTION 6.—OF THE EXTINGUISHMENT OF A CONTRACT BY A JUDGMENT OR AWARD.

840. A final judgment in favor of the obligor against

(*a*) Com. Dig. Baron et Feme, D.

the obligee, on a suit founded on the obligation, when rendered by a competent tribunal, has the effect to extinguish the obligation, whether such judgment be obtained on the ground of nullity, or fraud, or any other cause whatever; for it is a maxim that *res judicata*, or the decision of a legal or equitable issue by a competent jurisdiction, is a complete bar to any future action: *res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.*

An award made by arbitrators chosen by the parties, if made according to the requisitions of the law, is of equal force for this purpose.

SECTION 7.—OF THE EXTINGUISHMENT OF A CONTRACT BY THE DEATH OF EITHER OF THE PARTIES.

841. In general, contracts are not extinguished by the death of either of the parties, for unless they are strictly personal, that is, to be performed by the contractor in person, they bind the heirs, executors and administrators of the contracting party, for the parties bind all their personal representatives and all the estate they then own or may afterward acquire.

842. But there are debts or obligations which are extinguished by the death of one or other of the parties. Such as are personal in the sense above mentioned; as where a man binds himself to teach an apprentice, the contract is at an end the moment the master or apprentice dies, so far as to require its further enforcement, but the remedies for a previous breach remain; other examples will be easily suggested, the contracts of principal and agent, and the principal contracts of bailment, are of this kind.

SECTION 8.—OF EXTINGUISHMENT OF A CONTRACT BY A SET OFF.

843. When parties dealing together have claims against each other, one may deduct the amount which

is due to him from the claim which is made against him, and this is called a *set off*.

Set off is authorized by the statute of 2 Geo. II., c. 24, the principles of which have been reënacted in this country, or have been adopted by the courts.

§ 1.—In what cases a set off is allowed.

844. A set off can take place only in actions on contracts for the payment of money, as assumpsit, debt, or covenant. The set off does not operate of itself, the defendant must plead it,(*a*) but he way waive his right and bring a cross action against the plaintiff.(*b*)

845. The demands to be set off must be mutual, and due in the same right,(*c*) and they must be certain, for unliquidated damages cannot be set off.(*d*) The claim must be good, subsisting at the time, and not barred by the act of limitation.(*e*)

846. Though in general the debts do not extinguish each other, yet, perhaps owing to the wording of the statutes, in some states they have that effect, and operate upon the rights of the parties before an action is brought; as in the cases when a man becomes a bankrupt or insolvent, or when he dies, the balance only can be recovered after making the proper set off.(*f*)

§ 2.—Between what parties a set off is allowed.

847. No set off is allowed except between the parties in the suit,(g) and when it is admitted between

(*a*) Northampton Bank *v.* Balliet, 8 Watts, 39.

(*b*) Hinckly *v.* Walters, 9 Watts, 179; 5 Taunt. 148; 2 Campb. 594.

(*c*) Waln *v.* Wilkins, 4 Yeates, 461; Darrock *v.* Hay, 2 Yeates, 208; Hurlburt *v.* Ins. Co., 2 Sumner, 471; Wolfe *v.* Washburn, 6 Cowen, 261.

(*d*) McKinley *v.* Bellows, 3 Blackf. 31; State *v.* Welsted, 6 Halst. 397; Hepburn *v.* Hoag, 6 Conn. 613.

(*e*) Crist *v.* Garner, 2 Pennsylv. 251; Williams *v.* Gilchrist, 3 Bibb, 49.

(*f*) See Krause *v.* Beitel, 3 Rawle, 199; McDonald *v.* Webster, 2 Mass. 498; Knapp *v.* Lee, 3 Pick. 452.

(*g*) Columbia *v.* Harrison, 2 Rep. Const. Ct. 213; Johnson *v.* Bridge, 6 Cowen, 693; Gregg *v.* James, Breese, 107.

them, it must be in the same right; a claim against the plaintiff in a representative capacity, cannot, therefore, be set off in a suit brought in an individual capacity.(*a*) Nor can a claim against the intestate's estate, which arose since his death, be set off in an action by the administrator.(*b*)

SECTION 9.—OF EXTINGUISHMENT OF A CONTRACT BY LAPSE OF TIME.

848. Time does not usually annihilate a contract, for when one becomes bound he is so until the contract is performed, or he is otherwise discharged, not only himself, but his heirs, executors, and administrators. But a contract may be made by which the contractor may bind himself only for a certain time; as, for example, to become security for a club for one year; to perform service for one year. In all contracts after the end of the time, the party is discharged, unless he has before the expiration of the time broken his contract, and in that event he is liable for damages.

SECTION 10.—OF THE DISCHARGE OF THE CONTRACT BY NEGLECT TO GIVE NOTICE.

849. In nearly all contracts the debtor remains bound, although he has no notice of the breach of the contract by one for whom he is surety. If you become surety that another shall pay me for goods he bought of me, and at the time appointed for the payment he fails to pay, you are still bound to me, although I have given you no notice. But a different rule is observed in relation to endorsers of commercial paper; on failure of payment of a bill of exchange by the acceptor, notice must be given to the drawer and endorsers, and if a promissory note be not paid at maturity, such a notice must be given to the endorsers, or they will be discharged.

(*a*) Grew *v.* Burditt, 9 Pick. 265; Prewettit *v.* Marsh, 1 Stew. & Port. 17.
(*b*) Fry *v.* Evans, 8 Wend. 530. See Beale *v.* Coon, 2 Watts, 183.

SECTION 11.—OF THE LEGAL BARS WHICH MAY BE INTERPOSED AGAINST THE RECOVERY OF A DEBT.

850. Sometimes it happens that although a debt has not been paid, it cannot be recovered by action; the law has interposed a perpetual objection to its recovery, by taking away the remedy, which interposition is called a bar: *exceptio peremtoria.*(a) These bars arise from, 1, the act of limitations; 2, lapse of twenty years; 3, discharge of a defendant who has been arrested under a *capias ad satisfaciendum;* 4, bankruptcy.

§ 1.—Of the bar arising from the acts of limitations.

851. It is a maxim of the common law that a right never dies, and doubtless this is consonant with justice; but in the management of human affairs, it is extremely difficult to retain the evidence of the payment of a debt. Accidents may destroy it, if it be in writing, and death will bury it in the tomb with the witness, when we depend upon verbal proof. To remedy these evils the statutes of 32 H. VIII., c. 2, and 21 Jac. I., c. 16, were passed in England, by the latter of which it was enacted, That

"§ 3. All actions of trespass *quare clausum fregit,* all actions of trespass, detinue, action sur trover, and replevin, for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise, between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought, shall be commenced and sued within the time and limitation expressed, and not after (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions

(a) Co. Litt. 303 b; Steph. Pl. Appx. xxviii.

for trespass, debt, detinue, and replevin, for goods or cattle, and the said action of trespass, *quare clausum fregit*, within six years next after the cause of such action or suit, and not after, and the said actions of trespass, of assault, battery, wounding, and imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after, and the said actions upon the case for words within two years next after the words spoken, and not after.

"§ 4. If in any one of the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party, plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and not after.

"§ 5. In all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant shall disclaim in his plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass is by negligence or involuntary, the defendant shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them the plaintiff shall be enforced to join issue, and if the said issue be found for the defendant, or the plaintiff shall be nonsuited, the plaintiff shall be clearly barred from the said action or actions, and all other suits concerning the same.

"§ 6. If any person shall be entitled to any such

action of trespass, detinue, action *sur* trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned, or beyond the seas, that then such person shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment would have done."

This statute, with many modifications, has been reenacted in the several states; its general principles have been retained in those states where the common law has prevailed over the civil law. In Louisiana a system assimilating to the civil law has been adopted. This subject will be considered under four heads: 1, in what cases the action will be barred; 2, by what law the contract will be barred; 3, when the right of action accrued; 4, when the statute may be avoided.

Art. 1.—*In what cases the action will be barred.*

852. It is a general rule that all contracts founded on *specialties* are not within the statute. The statute applies to actions of account, upon the case, and of debt grounded upon any lending or contracts without specialty; and all actions of debt for the recovery of arrearages of rent which shall not have been commenced and sued within six years next after the cause of such action or suit.

853. Although the words of the act do not carry expressly an action of *assumpsit,* yet the courts have construed its provisions to extend to cases within the same reason.

854. The statute applies also to an action of *debt*

founded on a *contract* made between the parties; but when the action of debt is founded upon *construction of law*, the statute cannot be pleaded.(*a*) When the liability of the defendant is created not merely by the act of the parties, but by the express terms of a statute, the plaintiff is not barred.(*b*)

855. The English statute,(*c*) which has been copied in most of the United States, almost *verbatim*, contains an exception that "such accounts as concern the trade of merchandise, between merchant and merchant, their factors or agents," shall not be barred by its provisions. When a plaintiff brings suit upon such an account, and the statute is pleaded, the plaintiff must reply and show by proof, that the action is brought upon an account between merchant and merchant. In such case, the replication and proof must conform to the statute in each of those particulars, namely, that the claim of the plaintiff is founded on an *account*(*d*) which concerns the *trade of merchandise*,(*e*) and that it is *between merchant and merchant*.(*f*)

856. As the liability of a defendant upon a *judgment* is created by the law, the act of limitations is not pleadable to it. But this rule applies only to domestic judgments; the rule that the statute is not pleadable to a judgment does not apply to a *foreign* judgment. Such a judgment is generally considered merely as *primâ facie* evidence of the debt, and of no higher nature than a simple contract, and a necessary consequence of this is that the statute of limitations may be pleaded to it.(*g*) A distinction, however, has been made between a foreign judgment where the record showed

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(*a*) Pease *v.* Howard, 14 John. 479.
(*b*) Bullard *v.* Bell, 1 Mason, 243.
(*c*) Statute of Limitations of 21 Jac. I., c. 16.
(*d*) Spring *v.* Gray, 5 Mason, 525; S. C. 6 Pet. 155; Cottam *v.* Partridge, 4 M. & G. 271; 4 Scott, N. R. 819; Mandeville *v.* Wilson, Cranch, 15.
(*e*) 5 Mason, 529; 6 Pet. 155.
(*f*) 5 Mason, 530; Hancock *v.* Cook, 18 Pick. 32.
(*g*) Pease *v.* Howard, 14 John. 479.

that it was founded upon a specialty or on a simple contract; in the first case the act of limitation is not pleadable, because it could not have been a bar in the original suit.(*a*)

857. Although the words of the statute are that it shall apply to "all actions of debt grounded upon any lending, or contract without specialty, all actions of debt *for arrearages of rent*," yet if the rent be created by indenture, or under seal, it has been held that the statute is no bar.(*b*)

858. In general, courts of equity are equally bound with courts of law to give the statute its full operation. But when the subject matter of the suit is a *trust*, the statute does not operate. To exempt a trust from the bar of the statute, it must possess the following qualities: 1, it must be a direct trust; 2, it must be of the kind exclusively belonging to a court of equity; 3, the question must arise between the trustee and the *cestui que trust*.(*c*) The statute is no bar when there is an express trust, so long as the fiduciary relation exists; but this rule does not apply when there is only an implied trust, or when he who holds the legal title denies or disclaims it.(*d*)

859. The statute of limitations in general leaves the *government* untrammeled by its provisions, unless expressly restricted, or by necessary implication it is included.(*e*) But when a debt due is barred before the instrument, which is the evidence of it, is assigned

(*a*) Richards *v.* Bickley, 13 S. & R. 395.

(*b*) Freeman *v.* Stacey, Hut. 109; Kane *v.* Bloodgood, 7 John. Ch. 90.

(*c*) Lyon *v.* Marclay, 1 Watts, 275. See Wisher *v.* Ogden, 4 Wash. C. C. 631; Rush *v.* Barr, 1 Watts, 120; Finney *v.* Cochran, 1 W. & Serg. 118; Doebler *v.* Snavely, 5 Watts, 225; Spottswood *v.* Dandridge, 4 Hen. & Mumf. 139; Singleton *v.* Moore, Rice, Eq. 110; Talbot *v.* Todd, 5 Dana, 199; Houseal *v.* Gibbes, 1 Bail. Eq. 482; Cooke *v.* Williams, 1 Green's Ch. 209; Paige *v.* Hughes, 2 B. Monroe, 438; Stephen *v.* Yandle, 3 Hayne, 221; Gist *v.* Heirs of Cattel, 2 Desaus. 53; Thomas *v.* White, 3 Litt. 177; Coster *v.* Murray, 5 John. Ch. 224; Benzoin *v.* Lenoir, 1 Car. Law Repos. 508; Shelby *v.* Shelby, Cooke, 182; Pinson *v.* Ivey, 1 Yerg. 297.

(*d*) Walker *v.* Walker, 16 S. & R. 379.

(*e*) Lindsey *v.* Miller, 6 Pet. 666; United States *v.* Hoar, 2 Mason, 311;

to the United States, the statute of limitation will be a bar.(*a*)

Art. 2.—By what law the remedy will be barred.

860. The act of limitations of the place where the suit is brought, or the *lex fori,* as the civilians call it, regulates the rights of the parties. The act does not affect or change the contract, it operates only on the remedy, for the right remains, although the plaintiff may be barred of his remedy by the statute. If the statute of limitations in the state in which the parties lived, and where they made the contract, should limit the time for bringing a suit on a book account to four years, and after the expiration of that time the debtor should remove to another state, where, by its laws, the claim could be recovered by suing at any time before the expiration of six years from the time when the contract was made, he could doubtless recover, although the contract was barred by the laws of the state where it was made; which shows that the debt was not extinguished, although it was barred.(*b*)

Bagley *v.* Wallace, 16 S. & R. 245; Birch *v.* Alexander, 1 Wash. R. 34; Stoughton *v.* Baker, 4 Mass. 522; Steward's Lessee *v.* Mason, 3 Har. & J. 507; Commonwealth *v.* McGowan, 4 Bibb, 62; Weatherhead *v.* Bledsoe, 2 Tenn. Rep. 352; Commonwealth *v.* Johnson, 6 Penn. St. Rep. 136; Johnson *v.* Irwin, 3 S. & R. 292; Bagley *v.* Wallace, 16 S. & R. 245; Commonwealth *v.* Hutchinson, 10 Penn. St. Rep. 466.

(*a*) The United States *v.* Buford, 3 Pet. 29.

(*b*) See Sturgis *v.* Crowningshield, 4 Wheat. 122, 200, 207. Mr. Justice Story has given the reasons for this rule with his usual clearness. He says, "In regard to statutes of limitation or prescription, there is no doubt, that they are strictly questions affecting the remedy, and not questions upon the merits. They go, *ad litis ordinationem,* and not *ad litis decisionem,* in a just juridical sense. The object of them is to fix certain periods, within which all suits shall be brought in the courts of a state, whether they be brought by subjects or by foreigners. And there can be no reason, and no sound policy, in allowing higher or more extensive privileges to foreigners than to subjects. Laws, thus limiting suits, are founded in the noblest policy; they are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs from the ambiguity and obscurity of transactions. They presume that claims are extinguished, because they are not litigated within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or *laches* of the

For the same reason, where, by the *lex loci contractùs*, the act of limitation was no bar for seventeen years, and the suit was brought in a state where the statute barred the claim in six years, it was held the plaintiff could not recover.(*a*)

Art. 3.—*When the right of action accrued.*

861. The statute begins to run from the time when the creditor could lawfully have commenced an action to recover his claim. The time does not commence to run from the time when the contract was made, for it might happen that six years, the limited time, might expire before the suit could be brought, as where a note is made payable seven years after date. Before the statute begins to run, the creditor must, therefore, have *a full and complete cause of action*. When a period is fixed by the contract, there can be but little doubt as to the time when the action must be brought.(*b*)

When the time to call for the debt is *optional with the creditor*, as when a note is payable on demand,(*c*) or where the defendant promised to return money borrowed, "when called on to do so,"(*d*) the time commences at the date of the transaction or making of the contract. Upon the same principle, the statute begins to run from the time of the monthly balance,

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party himself. They quicken diligence, by making it in some measure equivalent to right. They discourage litigation, by burying in one common receptacle all the accumulations of past times, which are unexplained, and have now become inexplicable. It has been said by Voet with singular felicity, that controversies are limited, lest they should be immortal, while men are mortal; *ne autem lites immortales essent, dum litigantes mortales sint.*" Confl. of Laws, § 576.

(*a*) Nash *v.* Tupper, 1 Caines, 402; Decouche *v.* Savetier, 3 John. Ch. 190.

(*b*) Banks *v.* Coyle, 2 A. K. Marsh. 564; Jones *v.* Conway, 4 Yeates, 109; Odlin *v.* Greenleaf, 3 N. Hamp. 270; Richman *v.* Richman, 5 Halst. 114.

(*c*) Presby *v.* Williams, 15 Mass. 193; Easton *v.* McAllister, 1 Misso. 662; Larason *v.* Lambert, 7 Halst. 247; Newman *v.* Kettell, 13 Pick. 418; Wenman *v.* Mohawk Ins. Co. 13 Wend. 267.

(*d*) Darnall *v.* Magruder, 1 Harr. & Gill. 439; Laforge *v.* Jayne, 9 Penn. St. R. 410.

struck in a bank book of a depositor, because then the action accrued.(*a*)

If a *demand is necessary* to entitle the plaintiff to bring a suit, the statute commences running only from the time of the demand, for until a demand is made, no action accrues. This is the case when a factor has not accounted over; to entitle the principal to an action, he must have made a demand, and from that time only, does the act begin to run.(*b*)

The statute does not begin to run, when there is an entire contract, until it is *wholly completed*, because till then the plaintiff has no cause of action; as where a man engages to serve another for one year for the consideration of two hundred dollars, as he can maintain no action till he has fully performed the services, the act will not begin to run till that time.(*c*) So the statute begins to run, on a claim for work and labor, from the time when the work was finished, and not from the period when the contract was made;(*d*) nor against the claim of an attorney for professional services, before a demand is made or the professional relation has been dissolved.(*e*)

Art. 4.—When the statute may be avoided.

862. There are several ways by which the statute may be avoided: by proof of, 1, that the plaintiff was under some one of the disabilities mentioned in the statute; or, 2, that the debtor has acknowledged the debt, and by a new promise rendered himself liable to pay it; or, 3, that the cause of action was fraudulently concealed from the defendant, during the period when he could have brought an action.

(*a*) Union Bank *v*. Knapp, 3 Pick. 96.

(*b*) Topham *v*. Braddick, 1 Taunt. 572; Wright *v*. Hamilton, 2 Bailey, 51. See Little *v*. Blunt, 9 Pick. 488.

(*c*) Ante n. 698.

(*d*) Zeigler *v*. Hunt, 1 McCord, 577.

(*e*) Foster *v*. Jack, 4 Watts, 334.

1. *Of the disabilities.*

863. The statute of James contains a proviso, "that if any person or persons, that is or shall be entitled to any such action of trespass, etc., be or shall be at the time of any such cause of action, given or accrued, or fallen or come, within the age of twenty-one years, *feme covert, non compos*, imprisoned or beyond seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large, or returned from beyond seas, as other persons having no other impediments should have done."

864. The uniform construction which has been given to this proviso is, that when it is incumbent on the plaintiff to prove that he labored under any disability, he must show that it was a *continuing* disability from the first; for, when once the statute begins to run, no subsequent disability will impede it.(*a*) If therefore a female infant has a cause of action, the *infancy* would take the case out of the statute, but should she attain her full age and the next day marry, her *coverture* would not prevent the operation of the statute, because the statute having once begun to run, it does not stop.(*b*)

865. The disability arising from *absence*, or being out of the country, is usually expressed by the phrase *beyond sea*, which has been adopted in imitation of the English statute; in that country, the expression is perfectly correct; but on a continent like ours, the expression is vague. These words have not received the same construction in all the states, though in

(*a*) Peck *v.* Randall, 1 John. 165; Rogers *v.* Hillhouse, 3 Conn. 398; Crosier *v.* Gano, 1 Bibb, 257; Carlisle *v.* Stitler, 1 Pennsyl. 6.

(*b*) Carlisle *v.* Stitler, 1 Pennsyl. 6.

general they are held to be equivalent to being *out of the jurisdiction*, that is, beyond the reach of process.(*a*) When, therefore, in time of war, a part of the territory of a state was actually and exclusively occupied by the enemy, a person within the enemy's line was considered as out of the state, within the meaning of the statute of limitations.(*b*)

The moment that the party *returns* to the state, in the case of a defendant, when he openly shows himself, so that a writ might be served upon him, the statute begins to run, and, having taken its course, it never stops on account of any subsequent disability. What shall be considered a return will depend upon circumstances. In the case of a defendant his return must be open, and such as would enable the plaintiff, by using due diligence, to serve process upon him. A temporary and transient return, in a remote part of the state, so that the plaintiff had not seasonable notice, or if the defendant concealed himself except on Sundays, so that no writ could be served upon him, it is not such a return as will bring the case within the operation of the statute.(*c*)

2. *Of the acknowledgment or promise of the defendant.*

866. When the statute has been pleaded by the

(*a*) In Pennsylvania, the term "beyond sea," signifies "out of the limits of the United States." Thurston *v.* Dawes, 9 S. & R. 288; Ward *v.* Hallam, 2 Dall. 217; S. C. 1 Yeates, 329. In Maryland, it means "out of the jurisdiction of the state." Pancoast *v.* Addison, 1 Harr. & John. 350; Brent *v.* Tasker, 1 Har. & McH. 89. The term used in Kentucky, is "out of the country," which signifies out of the state. Mansell *v.* Israel, 3 Bibb, 510. In Connecticut, it was held that Halifax, in the province of Nova Scotia, was not beyond sea. Gustin *v.* Brattle, Kirby, 299. In Georgia, the expression beyond sea, means out of the state. Murray's lessee *v.* Baker, 3 Wheat. 541. In Virginia, beyond sea is equivalent to out of the commonwealth. Faw *v.* Roberdeau's executor, 3 Cranch, 174. In Tennessee, a person who resided out of the state, but in another state, was held not to reside beyond seas. Pike *v.* Greene, 1 Yerg. 465.

(*b*) Sleght *v.* Kane, 1 John. Cas. 76, 81.

(*c*) Fowler *v.* Hunt, 10 John. 464; Byrne *v.* Crowningshield, 1 Pick. 263; Crosby *v.* Wyatt, 10 Shepl. 156; Ruggles *v.* Keeler, 3 John. 264; Ang. on Lim. 223.

defendant, if the plaintiff can avoid the bar, by showing that the defendant has acknowledged the debt, within the time prescribed by the statute, he should reply a *new promise*, within the period limited. By a new promise is understood a contract made between the original parties or their representatives, after the original promise has, for some cause, been rendered invalid, by which the promissor agrees to fulfil his original promise.

When the plaintiff has replied a new promise, he must prove that such an *express* promise has been made. To prevent perjuries, in several of the states of the Union, it is required that such a promise should be in writing; but, in the absence of any statutory provision, such new promise may be proved by parol evidence. But it is indispensable that there should be an express promise; it may be raised by implication of law, from the *acknowledgment* of the party. To be valid, such acknowledgment must contain an unqualified and direct admission of a present subsisting debt, which the debtor is liable and willing to pay.(*a*) When the acknowledgment is conditional, the plaintiff must prove that the condition has been performed, or performance tendered.(*b*)

An implied acknowledgment arises from the existence of *mutual accounts* between the parties, when there are items on both sides within the period of limitation, and the case is taken out of the statute.(*c*) The courts presume that when a party makes a charge against another on a mutual account that he thereby admits, as regards himself, that the account is unsettled, when

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(*a*) Angell on Lim. 234—237; Guier *v.* Pearce, 2 Browne, R. 35; Miles *v.* Moodie, 3 S. & R. 211; Eckert *v.* Wilson, 12 S & R. 397; Fries *v.* Boisselire, 9 S. & R. 128; Yoxtheimer *v.* Keyser, 11 Penn. St. R.; Bell *v.* Morrison, 1 Pet. S. C. 362, 365; Porter *v.* Hill, 4 Greenl. 41; Stanton *v.* Stanton, 2 N. Hamp. 496; Bell *v.* Rowland, Hardin, 301.

(*b*) Laforge *v.* Jayne, 9 Penn. St. R. 410; Wetzell *v.* Bussard, 11 Wheat. 309.

(*c*) Tucker *v.* Ives, 6 Cowen, 193; Cogswell *v.* Oliver, 2 Mass. 247.

a defendant has made such a charge, it has been holden sufficient to save the plaintiff's account;(*a*) but if the items in the defendant's accounts are all of an earlier date, though some of the plaintiff's charges may be within the time limited by the statute, all the claims will be barred, except those items charged within the time.(*b*)

These promises and acknowledgments can be replied to the plea of the statute, only in cases where the original obligation arose on a contract; for, when the cause of action arises *ex delicto*, or is given by positive statute, irrespective of any promise or neglect of duty of the party, as in the case of actions against executors or administrators, upon the contract of him whom they represent, the new promise or acknowledgment, however unequivocal and positive, will not revive the cause of action, if once barred by lapse of time.(*c*)

3. *When fraud will prevent the operation of the statute.*

867. Another mode of avoiding the bar of the statute, is by proof of *fraud* in the defendant, committed under such circumstances as to conceal from the plaintiff all knowledge of the fraud, and thus preventing him from asserting his rights, until a period has elapsed beyond the time limited by the statute. In order to entitle himself to show this, the plaintiff must make replication of the fact, for he cannot give it in evidence under the issue formed on a plea of the statute.(*d*)

(*a*) Davis *v.* Smith, 4 Greenl. 337; Sickels *v.* Matther, 20 Wend. 72.

(*b*) Gold *v.* Whitcomb, 14 Pick. 188.

(*c*) Parkman *v.* Osgood, 3 Greenl. 17; Dawes *v.* Shed, 15 Mass. 6; Thompson *v.* Brown, 16 Mass. 172; Hurst *v.* Parker, 1 B. & Ald. 92; Oothout *v.* Thompson, 20 John. 277.

(*d*) See Sherwood *v.* Sutton, 5 Mason, 143; Bree *v.* Holbeck, 2 Dougl. 654.

§ 2.—Of the bar arising from lapse of time.

868. The lapse of twenty years, without explanatory circumstances, raises the presumption of certain facts, and, after that time, the party against whom the presumption has been raised, will be required to prove a negative, and show that the fact is otherwise.

After twenty years from the time it became due, a bond, mortgage or other specialty, will be presumed to have been paid.(*a*) And the same presumption arises that a judgment has been paid, if no steps have been taken by the plaintiff after its rendition.(*b*)

When a debt is payable by instalments and secured by a penal bond, the presumption of payment arising from the lapse of time applies to each instalment as it falls due.(*c*)

But in all these cases the presumption may be easily rebutted, by showing the payment of interest during that time, an admission that the debt was not paid, or other circumstances which rebut the presumption.(*d*)

§ 3.—Of the effect of the arrest of a defendant under a *capias ad satisfaciendum.*

869. When the defendant has been arrested under a *capias ad satisfaciendum,* and he is voluntarily discharged by the plaintiff, he cannot be retaken, nor can his property be afterward seized.(*e*) Indeed, the rule has been extended so far, that if one of several joint debtors has been arrested on a *capias ad satisfaciendum,* and he has been subsequently discharged by the creditor, this extinguishes the judgment as to all the

(*a*) 1 Greenl. Ev. § 39.

(*b*) Kennedy *v.* Executors of Donoon, 3 Brev. 476; Boardman *v.* De Forest, 5 Conn. 1.

(*c*) The State *v.* Lobbis Admr. 3 Harring. 421.

(*d*) 2 Harring. 124; 9 N. Hamp. 398; Best on Presumptions, part 1, ch. 2 and 3; Matth. on Pres. ch. 19 and 20. See Cowen's Note to 1 Phil. Ev. 160, note 307, vol. 3, p. 316.

(*e*) Cooper *v.* Bigelow, 1 Cowen, 56. Owing to statutory provisions the rule is not the same in South Carolina, Eggart *v.* Barnstine, 3 McCord, 162; nor in Ohio, King *v.* Kerr, 5 Ham. 154.

debtors, so that neither of them can afterward be taken in execution.(*a*) But the taking in execution the body of one of two joint trespassers, is not such a satisfaction of the judgment, as to bar an action against his co-trespasser.

§ 4.—Of the effect of bankruptcy to discharge the debt.

870. In general, bankruptcy discharges not only the person of the debtor, but all property he may acquire afterward.

But in all the cases mentioned in this section, if the debt has not been paid, there remains such a moral obligation, that a promise to pay it, made after the remedy is gone, will revive it, so that an action will lie on a new promise for which the old debt is a sufficient consideration.(*b*)

CHAPTER VI.—OF THE FORM OF AGREEMENTS.

871. It is not sufficient to make agreements, they must be made in such a way that they can be proved and established in a court of justice whenever required; and in some cases to be valid, they must be reduced to writing, in order to comply with certain statutory provisions.

Contracts are divided, as to their form, into those which are of record, those in writing, and those not in writing. These will be considered in three separate sections.

SECTION 1.—OF CONTRACTS OF RECORD.

872. The principal of these is a *recognizance*, which is an obligation of record, entered into before a court or officer, duly authorized for that purpose, with a condition to do some act required by law to be done, or to

(*a*) Ransom *v.* Keyes, 9 Cowen, 128; Bailey *v.* Kimbal, 1 Chip. 151. See King *v.* Kerr, 5 Ham. 154; Scott *v.* Colmesnil, 7 J. J. Marsh, 416; Sheldon *v.* Kibbe, 3 Conn. 214.

(*b*) Maxim *v.* Morse, 8 Mass. 127; Field's case, 2 Rawle, 351; Kingston *v.* Wharton, 2 S. & R. 208.

refrain from doing some act forbidden by law, which is therein specified.(*a*)

As to their *form*, recognizances are mere acknowledgments before the court, judge, or magistrate, having authority to take the same. It is a short entry on the record, of the substance of the engagement, without the same being signed by the recognizor.

A recognizance is taken for a certain sum, with a condition that the cognizor will pay a debt, or do some other thing.

SECTION 2.—CONTRACTS IN WRITING.

873. Much difference exists between a contract under seal and one not under seal, though both be in writing.

§ 1.—Of contracts under seal.

874. A contract under seal is called a *specialty*, or *deed*. A deed is an instrument under seal, written or printed, containing some contract or agreement, and which has been delivered by the parties.(*b*) This is the generic name for all writings under seal, whether they relate to the conveyance of lands or other matters. But the word deed is, in a more confined sense, used to designate a conveyance of real estate. A specialty is a written agreement under seal.(*c*)

The subject will be divided into three parts: 1, of the form; 2, of the matter and effect of a deed; 3, of the kinds of deeds.

Art. 1.—*Of the form of a deed.*

875. The deed must contain a contract, it must be under seal, and it must be delivered.

1. *Of the contract.*

876. It is evident from our definition of a deed, that

(*a*) 2 Bl. Com. 341; Bro. Ab. h. t.; 1 Chit. Cr. Law, 90.
(*b*) Co. Litt. 171; 2 Bl. Com. 295; Shep. Touch. 50.
(*c*) Taylor *v.* Glazer, 2 S & R. 502; Mitchell *v.* Parham, Harper, 1.

some contract must be the object of the instrument, for if it were not for this, there would be no deed in the true meaning of the word. An epistolary letter is a writing, sealed and delivered, but it is not a deed. And a blank piece of paper, signed, (which was a writing,) sealed and delivered, and afterward written upon, was held to be no deed.(*a*)

2. *Of the seal.*

877. To made a valid deed, a writing must be sealed, for if it has no seal it is no deed; the question then arises as to what is a seal. A seal is defined to be an impression upon wax, wafer, or some other tenacious substance capable of being impressed.(*b*) Lord Coke defines a seal to be wax, with an *impression*.(*c*) "*Sigillum*," says he, "*est cera impressa, quia cera sine impressione non est sigillum.*" It is presumed, however, that if wax were dropped on the paper or parchment while hot, and it adhered to it, such wax would be considered as a seal, if the party had adopted it as such, whether any impression had been made on it or not.

Merlin(*d*) defines a seal to be a plate of metal with a flat surface, on which are engraved the arms of a prince, or private individual, or other device, with which an impression is made on wax or other soft substance, or on parchment or paper, in order to authenticate them; the impression thus made is also called a seal.

All these definitions are imperfect in this country, because in some of the states, the impression upon wax is not always used, and a circular, oval, or square mark, opposite the name of the signer, has the same effect as

(*a*) Duncan *v.* Hodges, 4 McCord, 239; Perminter *v.* McDaniel, 1 Hill, So. Car. 267.
(*b*) Warren *v.* Lynch, 5 John. 239,
(*c*) 3 Inst. 169.
(*d*) Répert. verbo Sceau.

a seal. It is usually made with a pen, and the shape of it is altogether indifferent.(*a*)

When there are several obligors, and but one seal, it is presumed each one adopted the same seal.(*b*)

3. *Of the delivery of the deed.*

878. A delivery is necessary to a deed, but it is not requisite that the delivery should be express, it may be implied from the acts of the grantor; as where the deed was put into the recorder's office to be recorded at the request of the grantor, for the use of the grantee, and the grantor subsequently assented to it, this was considered as a delivery.(*c*) And putting a deed into the post-office by the grantor, directed to the grantee, is a sufficient delivery.(*d*) A presumption of delivery arises from the fact that the deed is in possession of the grantee.(*e*)

A deed may be delivered to a third person for the use of the grantee; it takes effect immediately, and is then *absolute;* or it may be delivered to such person *conditionally* or as an *escrow*. It has then no binding effect until the condition has been performed,(*f*) and, by relation, it refers back to the delivery.

Art. 2.—*Of the effect of a deed.*

879. A deed or specialty differs from any other agreement in writing in various particulars, the principal of which are the following:

1. It always imports a consideration, and although one is generally stated, it is not indispensably requisite.(*g*)

(*a*) 2 S. & R. 503; United States *v.* Coffin, Bee, 140; Duncan *v.* Duncan, 1 Watts, 322; Cromwell *v.* Tate, 7 Leigh, 301; Commerford *v.* Cobb, 2 Flor. 418.

(*b*) Mackay *v.* Bloodgood, 9 John. 285.

(*c*) Hedge *v.* Drew, 12 Pick. 141.

(*d*) McKenney *v.* Rhodes, 5 Watts, 343. See White *v.* Bailey, 14 Conn. 271.

(*e*) Green *v.* Yarnall, 6 Mis. 326; Dunn *v.* Games, 1 McLean, 321; Hatch *v.* Haskins, 5 Shep. 391.

(*f*) Currie *v.* Donald, 2 Wash. 68; 14 Conn. 271; Wheelwright *v.* Wheelwright, 2 Mass. 447.

(*g*) Horn's Exr. *v.* Gartman, 1 Flor. 63.

2. The rights to it cannot be transferred at common law, like a promissory note, by a bare endorsement; such endorsement may convey the equitable right, but not the legal title.

3. It is not barred by the act of limitations, and no presumption of payment arises till a period of twenty years has elapsed, nor then, if the reason for the non-payment can be explained.

4. A man who makes a specialty is estopped from denying or disproving any fact recited it it;(*a*) in a simple contract, on the contrary, although an admission in it of a fact affords evidence of its truth, it may be disproved by other proof.(*b*)

Art. 3.—*Of the kinds of deeds.*

880. We have already observed that the word deed has two meanings: one, which is the generic name for all instruments under seal, and another, which, in a more confined sense, signifies a conveyance of real estate. Of this last we shall have occasion to speak in another place. Here our observations will be confined to the first. Deeds of this description are bonds, single bills, mortgages, and covenants.

1. *Of bonds.*

881. A bond is a written obligation under seal, by which the maker, called the obligor, binds himself, his heirs, executors, and administrators, to pay to the other party, called the obligee, a certain sum of money. To this there is a condition that if another sum, usually one-half mentioned in the bond, shall be paid at a day certain, then the bond shall be void, or else remain in full force and virtue; or sometimes the condition is that the obligor shall do or refrain from doing certain acts. If the acts which he binds himself to do are unlawful, then the bond is absolute, and will

(*a*) 2 Bl. Com. 295; Com. Dig. Estoppel, A; 1 Greenl. Ev. § 24, 25, 211.

(*b*) Parish *v.* Stone, 14 Pick. 201, 202.

stand as if it were single and unconditional; and if the condition be to do something *malum in se*, the whole bond is void.(*a*) The following are the requisites of a valid bond.

1. There must be parties, one or more obligors, and one or more obligees.

2. The words must clearly declare the intention of the parties, but no particular form of words is required.

3. It must be in writing, on paper or parchment, and if made on other materials, it is void.(*b*)

4. It must be under seal.

5. It must be delivered.

6. It ought to be dated, but as the date is no substantial part of a deed, a bond that either has no date, or an impossible one, is not void on that account. It takes effect from the day of delivery.(*c*)

2. *Of a single bill.*

882. A single bill is in the form of a bond without any condition; it must be in writing, under seal, and delivered, and the object must be to promise a payment of money.

3. *Of a mortgage.*

883. Mortgages are of several kinds: as they concern the nature of property mortgaged, they are mortgages of lands, tenements and hereditaments, or of goods and chattels; as they affect the title of the thing mortgaged, they are legal and equitable.

1*st.—Of the legal mortgage of lands.*

884. A *legal mortgage* may be described to be a conveyance by deed of lands by a debtor called the *mortgagor*, to his creditor called the *mortgagee*, as a

(*a*) 2 Bl. Com. 340; Bac. Ab. Conditions, K, L; Com. Dig. Conditions, D, 1, 2, 3, 7, 8.

(*b*) Bac. Ab. Obligations, A; Co. Litt. 229; 2 Bl. Com. 297.

(*c*) 2 Bl. Com. 304.

pledge and security for the payment of money borrowed, or the performance of a covenant, with a proviso that the conveyance shall be void on the payment of the money and interest on a certain day, or the performance of the covenant by the time appointed; by which the conveyance of the land becomes absolute at law; yet the mortgagor has an *equity of redemption*, that is, a right in equity to perform the agreement in a reasonable time, and to call for a reconveyance of the land.(*a*)

885. As to the *form*, such a mortgage must be in writing and under seal, between parties capable of contracting, when it is intended to convey the legal title.(*b*) It is usually made by a single instrument which contains the whole contract, but sometimes the conveyance of the land is absolute, and the grantee, by a separate instrument, called a *deed of defeasance*, agrees to reconvey the land to the grantor, on his paying a certain sum of money.(*c*) The two instruments make but one contract, and both must be recorded in order to give them validity as a mortgage against lands.(*d*)

In general, whatever clauses or covenants are introduced in a conveyance, though they seem to impart an absolute disposition or an additional purchase, yet if, upon the whole, it appears to have been the intention of the parties that such conveyance should have been a mortgage only, or pass an estate redeemable, a court of equity will always so construe it.(*e*) And

(*a*) Cruise, Dig. t. 15, c. 1, s. 11.

(*b*) Bowers' Oysters, 3 Pennsyl. 239; Conard *v.* Ins. Co., 1 Pet. 386; Hebron *v.* Centre Harbor, 11 N. Hamp. 571.

(*c*) Peterson *v.* Clark, 15 John. 205; Dimond *v.* Enoch, Addis. 357; Manuf. & Mech. Bank *v.* Bank of Pennsylvania, 7 Watts & Serg. 335; Perkins *v.* Dibble, 10 Ohio, 433; Ogden *v.* Grant, 6 Dana, 473; Nugent *v.* Riley, 1 Metc. 117, 119; Lanfair *v.* Lanfair, 18 Pick. 299; Watkins *v.* Gregory, 6 Blackf. 113; Colwell *v.* Woods, 3 Watts, 188; Nichols *v.* Reynolds, 1 Angell, 30.

(*d*) Brown *v.* Dean, 3 Wend. 208; Jaques *v.* Weeks, 7 Watts, 261.

(*e*) Vern. 183; Rice *v.* Rice, 4 Pick. 349; Catlin *v.* Chittenden, Brayt. 163; Page *v.* Foster, 7 N. Hamp. 392.

it is a universal rule that an instrument once a mortgage is always a mortgage.(*a*)

886. As the mortgage is only a *pledge of the land* for the payment of a debt, the mortgagor is the principal debtor and the land is the surety; hence it follows that if the debt is paid, the land mortgaged, like any other pledge, is discharged.(*b*) But still, the mortgage conveys an estate to the mortgagee at law, on which a real action may be maintained.(*c*)

2d.—Of the equitable mortgage of lands.

887. An *equitable mortgage* of lands takes place when the mortgagor does not regularly convey the land, but does some act by which he manifests his determination to bind the same, for the security of a debt he owes. An agreement in writing to transfer an estate, as a security for the payment of a sum of money borrowed, or even a deposit of title deeds, and a verbal agreement, will have the effect of creating an equitable mortgage.(*d*) But in some states, owing to provisions in their recording acts, equitable mortgages are not allowed.(*e*)

3d.—Of mortgage of chattels.

888. A grant or conveyance of *chattels* in gage or mortgage, passes the whole legal title conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law, though equity will interfere to compel a redemption.(*f*)

Some mortgages of chattels have been held valid without possession, but they stand upon very peculiar

(*a*) 2 Cowen, 324; 1 Yeates, 584.

(*b*) Briggs *v.* Fish, 2 Chip. 100. But it is not indispensable that there should be any collateral or personal security for the debt, secured by the mortgage. Smith *v.* The People's Bank, 11 Shepl. 185.

(*c*) Dexter *v.* Harris, 2 Mason, 531.

(*d*) 2 Story, Eq. Jur. § 1020; 1 Bro. C. C. 269; Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

(*e*) Shitz *v.* Diffenbach, 3 P. S. R. 233; Bowers' Oysters, 3 Pennsyl. 239.

(*f*) Cutts *v.* York Man. Co., 6 Shep. 201.

grounds, and may be deemed an exception to the general rule, which requires that *possession* of chattels should accompany the mortgage.(*a*)

4th.—For what debt a mortgage may be given.

889. In general a mortgage is given merely as a collateral security for the payment of a bond or other written obligation of the mortgagor, but this is not indispensable, if there is a debt due;(*b*) and a mortgage may be given for future advances or for a contingent debt;(*c*) and if fair, it will be supported. Unless fraudulent it is not void, because it is given for a greater sum than is actually due.(*d*)

5th.—Of the difference between a mortgage and a conditional sale.

890. A *conditional sale* is one which depends for its validity upon the fulfilment of some condition. It not unfrequently happens that a debtor conveys his land to his creditor absolutely, and then the creditor agrees to convey the land to the debtor upon condition, and this has much resemblance to a mortgage; for if the debtor pays the amount stipulated for, he will be entitled to the land, as when he pays the amount due on the mortgage, he will have a right to it. But they are distinguishable, and this is the test. If any debt remains after the debtor has made his conveyance, the transaction is a mortgage, but if the debt is extinguished by mutual agreement, or the money advanced is not loaned, but the grantor has a right to refund it

(*a*) Langdon *v.* Bull, 9 Wend. 80; Brown *v.* Bement, 8 John. 96; Portland Bank *v.* Stubs, 6 Mass. 422; Clow *v.* Woods, 5 S. & R. 275; Walsh *v.* Bakey, 1 Penna. 57; Goodnow *v.* Dunn, 8 Shep. 86.

(*b*) Smith *v.* People's Bank, 11 Shepl. 185.

(*c*) Conard *v.* Atlantic Ins. Co., 1 Pet. 386; Garber *v.* Henry, 6 Watts, 57; Stewart *v.* Stocker, 1 Watts, 135; Adams *v.* Wheeler, 10 Pick. 199; Commercial Bank *v.* Cunningham, 24 Pick. 270; Leeds *v.* Cameron, 3 Sumn. 488; Ter-Hoven *v.* Kerns, 2 Penn. St. R. 96; Lyle *v.* Ducomb, 5 Binn. 585.

(*d*) Gordon *v.* Preston, 1 Watts, 385.

in a given time, and have a conveyance, this is a conditional sale.(*a*)

4. *Of a warrant of attorney.*

891. A *warrant of attorney* is an instrument in writing addressed to one or more attorneys therein named, authorizing them generally to appear in any court, or in some specified court, on behalf of the person giving it, and to confess judgment in favor of some person therein named, in an action of debt, and usually containing a stipulation not to bring any writ of error nor to file a bill in equity, so as to delay him.

This authority is generally qualified by reciting a bond, which usually accompanies it, together with the condition annexed to it, or by a written defeasance, stating the terms upon which it was given, and restraining the creditor from making use of it contrary to such conditions.

It is generally given under seal, though it is said this is not indispensable.(*b*)

In general it is not revocable, but death destroys its validity, for no judgment can be entered against a dead man.(*c*)

5. *Of covenants.*

892. In its proper technical sense, a *covenant* is an agreement between two or more persons, entered into in writing and under seal, by which either party stipulates for the truth of certain facts, or promises to perform or give something to the other, or to abstain from the performance of certain things.(*d*)

A covenant differs materially from an *assumpsit;* the

(*a*) Robinson *v.* Cropsey, 2 Edw. 138; Page *v.* Foster, 7 N. Hamp. 392; Robertson *v.* Campbell, 2 Call, 354; 2 Sumn. 487; Wheeland *v.* Swartz, 1 Yeates, 579; Hillhouse *v.* Dunning, 7 Conn. 143. See Johnson's Ex'rs. *v.* Clark, 5 Ark. R. 321; Holmes *v.* Grant, 8 Paige, 243.

(*b*) Kennersly *v.* Mussen, 5 Taunt. 264; Overton *v.* Tyler, 3 Penn. St. R. 346.

(*c*) Co. Litt. 52 b.

(*d*) 2 Bl. Com. 304; Bac. Ab. *in pr.*

former must be under seal, the latter may be verbal or in writing not under seal; in a covenant no consideration need be shown, in *assumpsit* the contract is invalid unless a consideration appears; the act of limitations bars an *assumpsit*, it does not affect a covenant; though lapse of time will be presumption of performance.

6. *Letter of attorney.*

893. A *letter of attorney* is a written instrument, under seal, by which one or more persons called *constituents*, authorize one or more other persons, called *attorneys*, to do some lawful act, by the latter, for or instead and in the place of the former.(*a*)

The authority is either general, to transact all the business of the principal; or special, to do some particular business, as to collect a debt.

It is revocable or irrevocable; the former, when no interest is conveyed to the attorney, in the matter of which it is the subject; it is irrevocable when the attorney has such an interest; as, when it is given as part security.

§ 2.—Of contracts in writing not under seal.

894. For most commercial purposes, contracts are made in writing not under seal, and these, like contracts made verbally, are called *simple contracts*, for there is no difference as to their effects except perhaps in consequence of statutory provisions, and as to the manner in which they are to be proved. This class are called *parol* contracts.

The principal contracts which must of necessity be in writing, and not under seal, are the following: 1, bills of exchange; 2, promissory notes; 3, bills of lading; 4, bills of adventure; 5, charter party; 6, articles of agreement; 7, letters.

(*a*) 1 Moody, Cr. Cas. 52, 70.

Art. 1.—*Of bills of exchange.*

895. A bill of exchange is an open letter of request from, and order by one or more persons, on one or more others, to pay to some third person or persons a sum of money therein mentioned, on demand, or at a future time therein specified. The nature and use of this instrument will be fully pointed out when we come to treat of special contracts.(*a*)

Art. 2.—*Of promissory notes.*

896. The nature of this instrument will also be considered when we treat of particular contracts. It is required here only to give the definition of a promissory note. It is a written promise, not under seal, by one or more persons, called the makers, to pay to one or more persons, denominated the payees, for a valuable consideration, a sum of money, at a future time, unconditionally.

Art. 3.—*Of bills of lading.*

897. A *bill of lading* is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver, in like good order, (the dangers of the sea excepted,) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same;(*b*) or it is the written evidence of a contract for the carriage of goods sent by water for a certain freight.(*c*)

1. *Form of the bill of lading.*

898. A bill of lading ought to contain the name of

(*a*) Post, n. 1129.

(*b*) By the French authors a bill of lading is called a *connoisement;* by Italians, *polizza do carrico;* and by Latin authorities on the continent of Europe, *apocha oneratoria.*

(*c*) 1 H. Bl. 359.

the consignor; the name of the consignee; the name of the master of the vessel; the name of the vessel; the place of departure and destination; the price of the freight; and, in the margin, the marks and numbers of the things shipped, and also an agreement to deliver them at the place of destination: it should be dated and signed by the master. It must be in writing, and not under seal.

It is usually made in three originals or parts. One of them is commonly sent to the consignee, with the goods, on board; another is sent to him by mail or other conveyance; and the third is retained by the merchant or shipper. The master should also take care to have another part for his own use.(*a*)

2. *Of the assignment of the bill of lading.*

899. The bill of lading may be assigned, and the assignee takes all the rights of the assignor, unless there has been some restriction in the assignment, or it has been assigned upon some condition. As there are several parts, there may be several assignments, and in that case a difficulty arises to ascertain who is entitled to the goods. The rule of law on the subject is, that the goods pass by the bill first endorsed; and for this there are two reasons: the first, that after a party has parted with his rights, he cannot transfer any other to another person; and, secondly, when all parties are equal in equity, he who has the advantage at law has the best right.(*b*)

This assignment is always understood as leaving the goods liable for the freight, and, in some cases, to the right of the sellers to stop them *in transitu*.(*c*)

Art. 4.—*Bill of adventure.*

900. A *bill of adventure* is a writing signed by a merchant, to testify that the goods shipped on board a

(*a*) Abbott on Shipp. 217.
(*b*) Abbott on Shipp. 387; Caldwell *v.* Ball, 1 T. R. 205.
(*c*) 2 Kent, Com. 548; Abbott on Shipp. 331; Bac. Ab. Merchant, (L); 1 Bell's Com. 542, 545, 5th ed.

certain vessel belong to another person, who is to take the hazard, the subscriber signing only to oblige himself to account to him for the produce.

Art. 5.—Of the charter party.

901. *Charter party* is a contract of affreightment in writing, by which the owner of a ship or other vessel lets the whole, or a part of her, to a merchant or other person, for the conveyance of goods on a particular voyage, in consideration of the payment of freight. This instrument ought to contain, 1, the name and tonnage of the vessel; 2, the name of the captain; 3, the names of the letter to freight and the freighter; 4, the place and time agreed upon for loading and discharge; 5, the price of the freight; 6, the demurrage or indemnity in case of delay; 7, such other conditions as the parties may agree upon. It should be dated and signed.(*a*)

Art. 6.—Of articles of agreement.

902. Articles of agreement relate either to real or personal estate, or to both. An *article* is a memorandum of an agreement, reduced to writing, to make some future disposition or modification of property; and such an instrument will create a trust or equitable estate, of which a specific performance will generally be decreed in chancery.(*b*)

903. This instrument should contain, 1, the name and character of the parties; 2, the subject matter of the contract; 3, the covenants which each of the parties binds himself to the other to perform; 4, the date; 5, the signatures of the parties.

1. The *parties* should be named, and their additions, as, of the city of Philadelphia, merchant, should be expressed, in order to identify them. It should also

(*a*) Abbott on Shipp. pt. 3, c. 1, s. 1 to 6; Poth. h. t.; Pardess. n. 708; Marsh. Ins. 407. A charter party may be made under seal or simply in writing not sealed. Lawes on Charter Parties, 2.

(*b*) Cruise on R. P. tit. 32, c. 1, s. 31; and tit. 12, c. 1.

be stated, which persons are of the first, second, or other part. A confusion in this respect may occasion difficulties.

2. The *subject matter* of the contract ought to be set out in clear and explicit language, and its consideration should be properly stated. What one party is to do, should be set out in a consecutive series of articles, and then, in another set, what the other binds himself to do. The time and place of performance ought to be mentioned: and when goods are to be delivered, it ought to be provided at whose expense they should be removed, for there is a difference in the delivery of light and bulky articles. The seller of bulky articles is not in general bound to deliver or remove them, unless he specially agrees to do so.(*a*)

3. The *promises* of each party ought to be correctly stated, as a mistake in this respect leads to difficulties which might have been obviated. Too much precision cannot be attained.

4. The instrument should be truly *dated* as to time, and though the place where it is made be not indispensable, yet it is highly proper it should be mentioned.

5. It should be *signed* by the parties or their agents. When an agent executes it, he should sign it in the name of his principal and not his own, or he may perhaps make himself unintentionally responsible personally. The proper way to sign is thus: A B (the principal's name,) by his agent or attorney, C D.

This instrument may be made under seal, and frequently it is so made.

Art. 7.—Of letters or correspondence.

904. A contract may be made by persons who are absent from each other, as well as by those who are present. This is done by *correspondence*, or by letters sent by one person to another, and the answers.

(*a*) 5 S. & R. 19; 12 Mass. 300.

The difficulty, in cases of this kind, is to know when the contract has actually been completed. If, for example, Peter writes from Philadelphia to Paul in New Orleans, offering to buy a thousand bales of cotton, at a certain price, and before he receives Paul's answer he changes his mind, and writes to him declining the contract and withdrawing his offer, there is no contract, although Paul may have assented to it before Peter wrote his letter withdrawing the offer, because in fact there was no consenting mind when Peter received the acceptance of his offer.(*a*)

When an offer is made by letter, and it is not accepted unconditionally, but the precise terms are changed, even in the slightest degree, there is no contract.(*b*)

SECTION 3.—OF CONTRACTS NOT IN WRITING.

905. Although doubtless it is more prudent to reduce the terms of every contract to writing, particularly when they are of much importance and are not to be executed immediately; yet, in the affairs of life, it is almost impossible to pursue this course, and many contracts are daily made without any such precaution. Every man, every day, makes one or more of these contracts, without feeling any inconvenience, and indeed without observing the frequency of such engagements. You go into a store and buy a book, into a hotel and eat your dinner, into a steamboat to go on a journey, into an omnibus to go from one part of the town to another; in all these cases, and a thousand similar ones, you make a contract, without scarcely observing it.

The principal difference between verbal contracts or those not in writing, and those in writing, is in the mode of proof. In written contracts, the writing is

(*a*) McCulloch *v.* Eagle Ins. Co., 1 Pick. 278; Thayer *v.* Ins. Co., 10 Pick. 326. See B. 2, part 1, t. 5, c. 4, s. 1, note.

(*b*) Eliason *v.* Henshaw, 4 Wheat. 225.

alone evidence of them, and no verbal agreement will be admitted to alter, change, or contradict what the parties have reduced to writing; they are presumed to have put all into their agreement, and all *pourparlers*, or conversations, or a previous *colloquium*, in the negotiation of the agreement, are merged in the written contract.(*a*)

But parol evidence is admissible to defeat a written instrument, on the ground of fraud or mistake, or to apply it to its proper subject-matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to operate at all, or is essential in order to give the instrument its legal effect.(*b*)

906. Contracts not in writing may be made *expressly* by the consent of the contracting parties distinctly stated. In this kind of contracts, like those which are reduced to writing, there must be, 1, competent contracting parties; 2, a subject matter of the agreement; 3, a lawful consideration, or, when that is not requisite, as in the case of a gift, a delivery of the thing; and 4, an agreement of the parties.

907. But the principal contracts not in writing, are to be classed among *implied* contracts. These are such as reason and justice dictate, and which the law presumes every man undertakes to perform; as if a man employs another to do business for him, or perform any work, the law implies that the former contracted or undertook to pay the latter as much as his labor deserved; or if one takes up goods from a tradesman, without any agreement or price, the law presumes that

(*a*) 1 Greenl. Ev. § 275; 1 Spence on Equit. Jur. of Chan. 553; Dig. 20, 1, 4; Dig. 22, 4, 4; 1 Phil. and Am. on Ev. 753.

(*b*) Lessions *v.* Gilbert, 1 Brayt. 75; Arberry *v.* Noland, 2 J. J. Marsh. 421; Gower *v.* Sterner, 2 Whart. 75; Comm. *v.* Blaine, 4 Binn. 186; 1 Binn. 610; 3 Binn. 587; 3 S. & R. 340.

he will pay their value; or even without any active act of his own, a man may make a contract; as, if a baker were to send to your house every morning, for any given time, a loaf of bread; or a publisher of a newspaper, his paper, and they were used in your family, even without your knowledge, but for your benefit, you would be bound to pay for their just value.(*a*)

(*a*) 2 Bl. Com. 443; Com. Dig. Action upon the case upon Assumpsit, A. 1; Com. Dig. Agreement. In Ogden *v.* Saunders, 12 Wheat. 341, Marshall, C. J. says, "A great mass of human transactions depend upon implied contracts, which are not written but grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made." In the Roman law, there is a species of contract somewhat resembling implied contracts, but differing from them in many particulars.

Quasi-contractus, a term used in the civil law. A quasi-contract is the act of a person, permitted by law, by which he obligates himself toward another, or by which another binds himself to him, without any agreement between them.

By article 2272 of the Civil Code of Louisiana, which is translated from article 1371 of the Code Civil, quasi-contracts are defined to be "the lawful and purely voluntary acts of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between the parties." In contracts, it is the consent of the contracting parties which produces the obligation; in quasi-contracts no consent is required, and the obligation arises from the law or natural equity, on the facts of the case. These acts are called quasi-contracts, because, without being contracts, they bind the parties as contracts do.

Quasi-contracts may be multiplied almost to infinity. They are, however, divided into five classes: such as relate to the voluntary and spontaneous management of the affairs of another, without authority; the administration of tutorship; the management of common property; the acquisition of an inheritance; and the payment of a sum of money or other thing by mistake, when nothing was due.

1. *Negotiorum gestio.* When a man undertakes, of his own accord, to manage the affairs of another, the person assuming the agency contracts the tacit engagement to continue it and complete it, until the owner shall be in a condition to attend to it himself. The obligation of such a person is, 1st, to act for the benefit of the absentee; 2dly, he is commonly answerable for the slightest neglect; 3dly, he is bound to render an account of his management. Equity obliges the proprietor, whose business has been well managed, 1st, to comply with the engagements contracted by the manager in his name; 2dly, to indemnify the manager in all the engagements he has contracted; and, 3dly, to reimburse him all useful and necessary expenses.

2. Tutorship or guardianship, is the second kind of quasi-contracts, there being no agreement between the tutor and minor.

3. When a person has the management of a common property owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum.*

But this rule would not authorize any one to do work for another without his knowledge or consent, so as to make the latter liable for the amount; as, for example, where one without the request or privity of the owner saved his property from fire;(*a*) or where one put repairs on the house of another without his privity or consent.(*b*) In these cases the party has no remedy.

908. These implied contracts may be made by any person *sui juris*, and by a corporation aggregate.(*c*)

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4. The fourth class is the *aditio hæreditatis*, by which the heir is bound to pay the legatees, who cannot be said to have any contract with him or with the deceased.

5. *Indebiti solutio*, or the payment to one of what is not due to him, if made through any mistake in fact, or even in law, entitles him who made the payment to an action against the receiver for repayment, *condictio indebiti*. This action does not lie, 1, if the sum paid was due *ex equitate*, or by a natural obligation; 2, if he who made the payment knew that nothing was due, for *qui consulto dat quod non debebat, præsumitur donare*.

Each of these quasi-contracts has an affinity with some contract; thus the management of the affairs of another without authority, and tutorship, are compared to a mandate; the community of property, to a partnership; the acquisition of an inheritance, to a stipulation; and the payment of a thing which is not due, to a loan.

All persons, even infants and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi-contract, which results from the act of another, and may also oblige others in their favor; for it is not consent which forms these obligations; they are contracted by the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms the quasi-contract, but it is not required in the person by whom or in whose favor the obligations which result from it are contracted. For instance, if a person undertakes the business of an infant or a lunatic; this is a quasi-contract, which obliges the infant or the lunatic to the person undertaking his affairs, for what he has beneficially expended, and reciprocally obliges the person to give an account of his administration or management.

There is no term in the common law which answers to that of quasi-contract; many quasi-contracts may doubtless be classed among implied contracts; there is, however, a difference between them, which an example will make manifest. In case money should be paid by mistake to a minor, it may be recovered from him by the civil law, because his consent is not necessary to a quasi-contract; but by the common law, if it can be recovered, it must be upon an agreement to which the law presumes he has consented, and it is doubtful, upon principle, whether such recovery could be had. Bouv. L. D., h. t.

(*a*) Bartholomew *v.* Jackson, 20 John. 28.

(*b*) Caldwell *v.* Eneas, 2 Rep. Const. Ct. 348; Hart *v.* Norton, 1 McCord, 22. See Pinchon *v.* Delaney, 2 Yeates, 22.

(*c*) North Whitehall *v.* South Whitehall, 3 S. & R. 117; Chestnut Hill Turnp. Co. *v.* Rutter, 4 S. & R. 16; Baptist Church *v.* Mulford, 3 Hals.

909. There are various contracts which cannot be entered into except in writing; these will be considered, when we come to examine the provisions of the statutes of frauds.

CHAPTER VII.—OF THE MEMORANDUM IN WRITING REQUIRED BY THE FOURTH SECTION OF THE STATUTE OF FRAUDS.

910. To prevent frequent frauds and perjuries of persons who pretend that certain contracts had been made, and who afterward supported them by perjured witnesses, the English statute of 29 Car. II., c. 3, was passed. Most of the principles of this statute have been reënacted, with certain alterations and modifications, in the greater number of the states of the Union. There is, however, a great difference between these enactments. It would be extremely difficult to examine all of them in detail, and they would not perhaps repay the trouble of studying them. The fourth section of the English statute, which requires that the contract should be in writing, applies to the following cases: It provides that no action shall be brought—

1. Whereby to charge any executor or administrator, upon any special promise, to answer out of his own estate; or

2. Whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; or

3. To charge any person upon any agreement made upon consideration of marriage; or

4. Upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or

5. Upon any agreement that is not to be performed within the space of one year from the making thereof; or

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182; Dunn *v.* St. Andrew's Church, 14 John. 118; Bank of Columbia *v.* Patterson, 7 Cranch, 297.

6. Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some person by him thereunto lawfully authorized.

SECTION 1.—OF PROMISES MADE BY EXECUTORS OR ADMINISTRATORS.

911. Executors and administrators are liable for the debts of the deceased persons whom they represent, only in their representative capacity, to the extent of the assets which have actually come to their hands, or for which they may be lawfully charged. If they make any promise to pay such debts, it applies only to such assets. But the executor or administrator may, if he will, undertake to pay the debt out of his own estate; in this case, to prevent perjuries, the statute requires that the promise shall be in writing, and this writing must state the consideration upon which the agreement is founded.(a)

SECTION 2.—OF PROMISES MADE FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

912. Promises of this sort are called *guarantees*. A guarantee is a promise made upon a good consideration, to answer for the payment of some debt, or the performance of some duty, in case of the the failure of another person, who is, in the first instance, liable to such payment or performance.(b)

To comply with the requisitions of the statute, the agreement must, 1, be in writing; 2, made upon a sufficient consideration; and, 3, be to fulfil the engagement of another. The nature of the writing and what is a sufficient signature will be examined in another place. Here will be considered, 1, the nature of the

(a) Addis. on Contr. 107; Saunders *v.* Wakefield, 4 B. & Ald. 601. See Patton *v.* Williams, 3 Munf. 59.

(b) Dole *v.* Young, 24 Pick. 250, 252.

engagement, or for what debt a guarantor is liable to answer; and, 2, the nature of the default or miscarriage for which he agrees to become responsible.

§ 1.—Of the nature of the debt for which the guarantor is liable.

913. The very term guarantee implies that some other is the principal debtor, but a default may arise upon an executory contract, and a promise to pay for goods to be furnished to another, is a collateral promise to pay on the other's default, provided the credit, in the first instance, was given exclusively to the other.(*a*)

It is a general rule, that when a promise is made by a third person, previous to the sale of goods, or other credit given, or other liability incurred, it comes within the statute, when it is conditional upon the default of another, who is solely liable in the first instance, otherwise not; the only inquiry to ascertain this is, to whom was it agreed that the vendor or creditor should look in the first instance? Many nice distinctions have been made on this subject:

1. When a party actually purchases goods himself, which are to be delivered to a third person for his sole use, and the latter was not responsible; this is not the case of a guarantee, because the person to whom the goods were furnished never was liable.(*b*)

2. Where a person buys goods, or incurs other liability, jointly with another, but for the use of that other, and this fact is known to the creditor, the guarantee must be in writing.

3. A person may make himself liable, by adding his credit to that of another, but conditionally only, in case of the other's default. This sort of promise comes immediately within the meaning of the statute, and, in these cases, is sometimes called a *collateral promise*.(*c*)

(*a*) As to the form of a guarantee, and the difference between an offer to guarantee and a guarantee, see Burg. on Sur. c. 2, p. 16; Addison on Contr. 107, 114.

(*b*) Berkmyr *v.* Barrell, 1 Salk. 27. See D'Wolf *v.* Raybaud, 1 Peters, 476.

(*c*) Meade *v.* McDowell, 5 Binn. 195.

§ 2.—Of the nature of the miscarriage for which the guarantor is liable.

914. The term *miscarriage,* used in this section, has not the same meaning as the words *debt* or *default.* It comprehends that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages; and therefore falls within the word *miscarriage.* This term is more properly applicable to a ground of action founded upon a tort, than to one founded upon a contract; for, in the latter case, the ground of action is, that the party has not performed what he agreed to perform, not that he has misconducted himself in some matter for which by law he is liable. But the words *miscarriage* and *default,* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract.(*a*)

SECTION 3.—OF AGREEMENTS IN CONSIDERATION OF MARRIAGE.

915. This clause does not extend to the contract of marriage *itself,* therefore *promises of marriage* are binding though not reduced to writing, and signed by the party sought to be charged thereon.(*b*) But all promises and agreements made by one person in consideration of the completion of a marriage made by another, are within the statute and must be reduced to writing, whether they are executory or executed.(*c*)

SECTION 4.—OF CONTRACTS FOR THE SALE AND PURCHASE OF LAND OR REALTY.

916. The note or memorandum of the "agreement for the sale and purchase of lands, tenements, or here-

(*a*) Kirkham *v.* Marter, 2 Barn. & Ald. 516.
(*b*) Harrison *v.* Cage, 1 Raym. 386; Bac. Ab. Agreements, C 3.
(*c*) Addis. on Cont. 96.

ditaments, or of any interest in or concerning them," must show that there was an agreement, on the part of the vendor, *to sell*, and of the vendee, *to buy;* but no technical language or words of form are requisite; both the subject matter of the sale and the price to be paid for it, must be specified.(*a*)

Numerous questions have arisen as to what shall be considered "lands, tenements, or hereditaments, or any interest in or concerning them." Every contract for the conveyance of land, whatever may be the consideration of it, is a contract for the *sale of land* within the meaning of the statute.(*b*) And an agreement for growing crops, which are not to be taken out immediately, is a contract *concerning land;*(*c*) but when the bargain is that the crop shall be removed immediately out of the ground, it will be considered a contract for the sale of personal chattels.(*d*)

SECTION 5.—OF PROMISES NOT TO BE PERFORMED WITHIN ONE YEAR.

917. The contracts to which this clause refers are those which, by the express agreement of the parties, are not to be performed within one year from the making thereof; and not to agreements depending upon a contingency either within or beyond the year. The word *performed* does not signify an inchoate performance, or part execution of the agreement; and the provisions of the statute render a contract void, if it appear to have been the understanding of the parties, at the time, that it was not to be completed within a year, although it might be, and was in fact, in part

(*a*) Saunders *v.* Wakefield, 4 B. & A. 601; Hughes *v.* Parker, 8 M. & W. 247.

(*b*) Frowman *v.* Gordon's Heirs, Litt. Sel. Cas. 193.

(*c*) Crosby *v.* Wadsworth, 6 East, 602; Emmerson *v.* Heeliss, 2 Taunt. 38.

(*d*) Parker *v.* Stanilands, 11 East, 362; Warwick *v.* Bruce, 2 M. & S. 205.

performed within that period.(*a*) But an agreement which may or may not be performed within a year is not required to be in writing: it must appear from the agreement itself that it is not to be performed within a year.(*b*)

SECTION 6.—OF THE MEMORANDUM OR NOTE OF THE AGREEMENT.

918. The agreement must be in writing, but the form is not material; and the signature must be affixed to it. This will form the subject of two divisions.

§ 1.—Of the form of the note or memorandum of the agreement.

919. This need not be *formal*, nor drawn with technical precision; any thing under the hand of the party showing that he has entered into the agreement, and upon what terms, is sufficient, although it may be a mere recognition or adoption of a prior contract. An endorsement, or memorandum on the back of a lease, acknowledging that he had agreed to take the premises; or a letter referring to another containing the contract, and agreeing to be bound by it, will be sufficient.(*c*)

But it must be remembered that there is a distinction between a promise to do a thing at a future time, as, "I have no objection to guarantee,"(*d*) and actual present agreement, "I do hereby guarantee." In the former case there is no present engagement, and, unless notice of acceptance be given, the parties are not bound, while in the latter there is a positive obligation.

§ 2.—Of the signature to the memorandum or note.

920. The statute requires that the memorandum or note shall be *signed* "by the party to be bound;" as it is not required that the signature of the other party

(*a*) Boydell *v.* Drummond, 11 East, 142; Bracegirdle *v.* Heald, 1 B. & A. 722; Birch *v.* Earl of Liverpool, 9 B. & Cr. 392; Hinckley *v.* Southgate, 11 Verm. 428.

(*b*) Russel *v.* Slade, 12 Conn. 455.

(*c*) Jackson *v.* Lowe, 1 Bing. 9; 2 B. & P. 238.

(*d*) Symmons *v.* Want, 2 Stark, 371; Mozley *v.* Tinckler, Cr. M. & Ros. 692; McIver *v.* Richardson, 1 M. & S. 557.

should be affixed, the contract may be enforced without it.(*a*)

As to the *form* of the signature, it may be by the party subscribing his name at the end of the memorandum, or in any other way, which clearly shows it to be his act; as, "I, James Crockford, agree," etc., which is sufficient.(*b*) It may be written in ink or with a pencil;(*c*) it may be with his name in full or with initials, or with his mark.(*d*) But the signature, wherever placed, or however written, must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon.(*e*)

But the signature may be affixed by an agent, who must, however, be a "person lawfully authorized." This authority ought to be in writing. It has been held, however, with regard to these contracts, that the name of the party sought to be charged, printed in particulars of a bill of sale, or other printed paper embodying the terms of the contract, may be a signature by "a person lawfully authorized," within the meaning of the statute, provided the printing was done by his authority, or received his subsequent sanction.(*f*)

An auctioneer or his clerk, taking down the biddings, is the agent of both the seller and the buyer.(*g*) And the delivery of a bought note or a sold note to the parties will be considered a sufficient compliance with the statute.(*h*)

(*a*) Laythoarp *v.* Bryant, 2 Bing. N. S. 735; S. C. 3 Sc. 238; Thorn *v.* Kempster, 5 Taunt. 788.

(*b*) Knight *v.* Crockford, 1 Esp. 190; Taylor *v.* Dobbins, 1 Str. 399; Saunderson *v.* Jackson, 2 B. & P. 239.

(*c*) Geary *v.* Physick, 5 B. & C. 234.

(*d*) Hubert *v.* Moreau, 12 Moore, 219; Phillimore *v.* Barry, 3 N, & P. 228; S. C. 1 Camp. 513.

(*e*) Sugd. Vend. & Purch. 159, 179.

(*f*) Schneider *v.* Norris, 2 M. & S 288; Maclean *v.* Dunn, M. & P. 766; 2 B. & P. 238.

(*g*) Hinde *v.* Whitehouse, 7 East, 568.

(*h*) Story on Agency, § 28; 1 Bell's Com. 435, 5th ed.; Bouv. L. D. verb. Bought Note; Id. Sold Note.

One contracting party cannot be the agent of the other,(a) nor can the clerk of one be agent of the other, without a special authority.(b)

TITLE V.—OF PARTICULAR CONTRACTS.

921. After having taken a general view of contracts, it seems proper to consider some of the principal contracts, each by itself, so as to form a more correct and definite idea of the mode of acquiring title to personal property. These are the contracts: 1, of sale; 2, of bailments; 3, of bills of exchange; 4, of promissory notes; 5, of marine insurance; 6, of life insurance; 7, of insurance against fire; 8, of bottomry and respondentia; 9, of games; 10, of agency; 11, of suretyship; 12, of partnership.

CHAPTER I.—OF SALE.

922. Traditions, and the observations made among civilized nations, agree with the speculations which show that barter preceded the contract of sale. It was not always convenient to have objects which would be taken in exchange for others, and this want was the cause of the invention of money. In choosing the material to make money, which should be the sign of value of all objects, it was desirable to select one which would not be easily destroyed by use, and which might be conveniently divided. Metal was found very suitable for this purpose, and by selecting a precious metal, which might be carried without inconvenience, the end was attained. Gold, silver, and some less precious metals, have been used for this purpose. In order to avoid delay and inconvenience in regulating their weight and quality when passed, the governments of

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(a) Wright *v.* Dannah, 2 Camp. 203.
(b) Graham *v.* Mason, 7 Sc. 769; Graham *v.* Fretwell, 4 Sc. N. S. 25.

the civilized world have caused them to be manufactured in certain portions, and marked with a stamp, which attests their value; this is called *money*.(*a*)

These researches on the subject of money bring us to the conclusion that the price of a thing sold should be paid in money. The invention of money, and the contract of sale, are therefore coëval.

923. A sale is an agreement by which one of the contracting parties, called the seller, gives a thing and passes a title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price.(*b*)

This contract differs from a barter or exchange in this, that in the latter the price or consideration, instead of being paid in money, is paid in goods or merchandise, susceptible of a valuation. It differs from accord and satisfaction, because in that contract, the thing is given for the purpose of quieting a claim and not for a price. An onerous gift, when it imposes as a burden the payment of a sum of money, and is accepted by the donee, is in the nature of a sale; when it requires the delivery of some other thing as a condition precedent, it is in the nature of a barter. And when partition is made between two or more joint tenants of a chattel, it would seem the contract is in the nature of a barter.

To constitute a valid sale there must be, 1, proper parties; 2, a thing which is the object of the contract; 3, a price agreed upon; 4, the consent of the contracting parties; 5, the performance of certain acts required to complete the contract. In a sixth section will be considered the different kinds of sale.

(*a*) 1 Inst. 207; 1 Hale's Hist. 188; Pardess. n. 22; Domat, liv. Prél. t. 3, c. 2, n. 6.

(*b*) Noy's Max. ch. 42; Shep. Touchs. 244; Pardes. Dr. Com. n. 6; 1 Duv. Dr. Civ. Fr. n. 7; Civ. Code of Louis. art. 2414; Poth. Vente, art. Prél.; Vail *v.* Strong, 10 Verm. 457. Mr. Chancellor Kent, 2 Com. 268, says, "A sale is a contract for the transfer of property from one person to

SECTION 1.—OF THE PARTIES TO A SALE.

924. In treating of the persons capable of entering into a contract, we considered the capacities of persons for such a purpose; little, therefore, need be said here. As a general rule, all persons *sui juris*, or those who have all the rights of freemen, without being under the control of another, may be either buyers or sellers. Corporations may also buy and sell But to this general rule there are several exceptions.

1. There is a class of persons who are incapable of purchasing, except *sub modo*, as infants and married women.

2. Another class, who, in consequence of their peculiar relation with regard to the owner of the thing sold, are totally incapable of becoming purchasers, while that relation exists; these are trustees, guardians, assignees of insolvents, and, generally, all persons who, by their connection with the owner, or by being employed concerning his affairs, have acquired a knowledge of his property, as attorneys, conveyancers, and the like.(*a*)

SECTION 2.—OF THE SUBJECT-MATTER OF THE CONTRACT OF SALE.

925. There must be a *thing* which is the *object* of the sale; for if the thing sold at the time of the sale had ceased to exist, it is clear that there can be no sale; if, for example, Paul sells his horse to Peter, and, at the time of the sale the horse was dead, unknown to both parties: or if Paul and Peter, being in Philadelphia, the former sells his house situated in Cincinnati to the latter, both parties supposing the house to exist, when, in fact, it was then burned down, it is manifest that there was no sale, because there was not a thing

another for a valuable consideration." This applies to a barter as well as to a sale; the barter of one horse for another would, according to this definition, be a double sale.

(*a*) Barker *v*. The Marine Ins. Co., 2 Mason, 369.

to be sold. Again, if Paul sell to Peter the foal, of which his mare is then pregnant, and, in consequence of an abortion, no foal is born, there is no sale.(*a*)

The thing which is the object of the sale must be a thing in commerce, for things which are not in commerce, as the air, the water of the sea, a port, and the like, cannot be sold.

Not only a thing in possession may be sold, but a *chose in action*, as a debt, and when such a debt is sold, the sale entitles the buyer to all the securities which the seller holds for its payment, they being mere accessories to it.(*b*)

There must be an agreement as to the specific goods, which form the basis of the contract of sale; in other words, to make a perfect sale, the parties must have agreed, the one to part with the title to a *specific article*, and the other to acquire such title; and when they have so agreed, the purchaser takes the thing sold, in the same state in which it was held by the vendor, subject to the same liabilities;(*c*) and accessories generally pass with the principal article sold; as, the sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list.(*d*) But it is not always easy to say what articles are principal and what accessories;(*e*) a boat, it has been held, is not an accessory or appurtenance to a vessel.(*f*)

926. When a thing is sold, which is not specified, the property in the thing is not changed until it has been fully *separated* from the mass from which it was to be taken; as a sale of one hundred bushels of wheat, to be measured out from a heap, passes no property till it has been so measured, and, if it should be destroyed

(*a*) Dig. 18, 1, 8. See McCarty *v.* Blevins, 5 Yerg. 195; Smith *v.* Atkins, 13 Verm. (3 Wash. b.) 461.

(*b*) Foster *v.* Fox, 4 Watts & Serg. 92.

(*c*) Jones *v.* Steamboat Commerce, 14 Ohio, 408.

(*d*) McFarland *v.* Stewart, 2 Watts, 111.

(*e*) Co. Litt. 152 a; Co. Litt. 121 b, note.

(*f*) Starr *v.* Goodwin, 2 Root, 71. Sed vide contra Pardes. n. 599.

or deteriorated, while in that state, the loss will fall upon the seller, *res perit domino.*(*a*)

SECTION 3.—OF THE PRICE.

927. To constitute a sale, there must be a price, which is the consideration in money given for the purchase of a thing. The price must have the three following qualities.

§ 1.—To a sale there must be an actual or serious price.

928. The price must be serious, or such a one as the seller intends to require to be paid to him; if, therefore, one should sell a thing to another, and, *by the same agreement,* he should release the buyer from its payment, the contract would not be a sale, but a gift, because, in that case, the buyer never agreed to pay any price, the same agreement by which the title to the thing passed to him, discharging him from the obligation to pay for it. As to the quantum of the price that is altogether immaterial, unless there has been fraud in the transaction.

§ 2.—Of the certainty of the price.

929. The price must be *certain* and determined, but upon the maxim, *id certum est quod reddi certum potest,* a sale may be valid, although it is agreed that the price of the thing sold, shall be determined by a third person.(*b*) But still there must be a price; if, for example, I sell my watch for the price my father gave for it, and, upon inquiry, it was found my father did not buy it, but received it as a gift from his father, there would be no contract for want of a price or consideration.

When the parties have not expressed any price in

(*a*) Blackb. on Sales, 122; Houdlette *v.* Tallman, 2 Shep. 400; Devane *v.* Fennell, 2 Iredell, 36; Woods *v.* McGee, 7 Ham. part 2, 127; Thompson *v.* Gray, 1 Wheat. 75; Dennis *v.* Alexander, 3 Penn. St. R. 50; Young *v.* Austin, 6 Pick. 280.

(*b*) Brown *v.* Bellows, 4 Pick. 179.

their contract, the presumption of law is, that the thing is sold for the price it generally brings at the time and place where the agreement was made.(*a*)

If the price cannot be reduced to a certainty, there is no contract, for there is no consent of the parties to the price.

§ 3.—The price must be paid in money.

930. The price must consist in a sum of *money* which the buyer agrees to pay to the seller, for if it be paid in any other way, the contract is not a sale, but an exchange or barter. But it is only requisite that the agreement should be for payment in money, in the sequel it may be changed, and the creditor may take goods in payment, and the contract will still be a sale.

It is not requisite that the money should be paid down, either at the time of the sale, or the delivery of the goods; it may be upon a credit, or payable at a future time.(*b*)

But unless so stipulated, the sale is understood to be for cash.(*c*)

SECTION 4.—OF THE CONSENT OF THE CONTRACTING PARTIES.

931. By *consent*, is meant an agreement to something proposed. It does not consist simply in a vague will to sell or to buy; it must bear on all the conditions which may be suggested by the circumstances of the case, or imagined by the caprice of the contracting parties; thus, the designation of the thing sold, the amount of the price, the terms of payment, and the warranty, either express or implied; unless the consent be given to all these, there is no consent at all.

(*a*) Beatty *v.* Scrivener, 3 Monr. 133; Jenkins *v.* Richardson, 6 J. J. Marsh. 441; Hill *v.* Hill, Coxe, 261. See Lyle *v.* Lyle, 6 Har. & John. 273.

(*b*) Girard *v.* Taggart, 5 S. & R. 19.

(*c*) Cammayer *v.* United German Lutheran Churches, 2 Sand. Ch. R. 186.

The consideration of the form and of the substance of such consent, will occupy the two following sections.

§ 1.—Of the form of giving consent to a sale.

932. The consent to a sale may be given, in general, as regards personal property, verbally as well as in writing, and both will be equally binding; all that is required in those cases is, that both should expressly agree to some certain thing. But the English statute of 29 Car. II., c. 3, which has been reënacted in most states of the Union, with alterations and amendments, commonly called the statute of frauds, enacts, section 17, "that no contract for the sale of any goods, wares and merchandise, for the price of £10 or upward, 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 as earnest to bind the bargain, or in part payment, or some note or memorandum in writing, of the said bargain, to be made or signed by the parties to be charged by such contract, or their agents, thereunto lawfully authorized."(a)

933. It not unfrequently happens that the consent of the parties to a contract of sale is given in the course of a correspondence. To make such contract valid, both parties must concur in it at the same time; if, therefore, Paul, in New York, write to Peter, in New Orleans, offering to purchase one hundred bales of cotton, and Paul writes to Peter that he accept his offer, still there is no contract till the latter has received the letter; for, till then, both parties may withdraw their letters, Paul his offer, and Peter his acceptance of it.(b) This will appear proper when we consider that the letter of Peter is only a mute messenger by which he announces his will, accepting

(a) Vide ante, B. 1, t. 7, n. 890.

(b) McCulloch *v.* Eagle Ins. Co., 1 Pick. 278; Thayer *v.* Ins. Co., 10 Pick. 326.

of the contract proposed, and nothing certainly prevents a man from revoking a power of attorney which he has given, before the act authorized has been performed, and this letter, having no greater authority, it may be revoked at any time before it has been received; and till then, Paul, too, might revoke his offer.(*a*)

934. There is an implied consent to a sale, when a party, *by his acts*, approves of what has been done; as, if he knowingly use the goods left at his house by another who intended to sell them, he will, by that act, confirm the sale.

§ 2.—Of the substance of the consent to a sale.

935. The consent must relate, 1, to the thing which is the object of the sale; 2, to the price; and, 3, to the sale itself.

Art. 1.—*Consent as to the thing sold.*

936. Both parties must agree upon the *same object* of the sale; if, therefore, one give his consent to buy one thing, and the other to sell another, there is no sale; nor is there any sale when one sells a bag which he believes is full of wheat, and sells it as such, and, in fact, it was full of oats, because there is no consent as to the thing which is the object of the contract. But a sale would be valid, although the purchaser might be mistaken as to the quality of the thing sold, unless there was fraud in the transaction.(*b*)

Art. 2.—*Of consent as to the price.*

937. The parties must agree upon the *same price*,

(*a*) In England, a different rule has been adopted; there, the moment the letter accepting the offer has been put into the mail, both parties are bound. Such is the decision of the case of Adams *v.* Lindsell, 1 B. & A., 681; the court give as a reason, that "the defendants must be considered, in law, as making, during every instant of time their letter was travelling, the same identical offer to the plaintiff; and then the contract is completed by the acceptance of it by the latter."

(*b*) Swett *v.* Colgate, 20 John. 196; Borrekins *v.* Bevan, 3 Rawle, 23; Jennings *v.* Gratz, 3 Rawle, 168.

for if the seller intends to sell for a greater price than the buyer intends to give, there is no mutual consent; but if the case were reversed, and the seller intended to sell for a less price than the buyer intended and offered to give, the sale would be good for the lesser sum; for he who wants to buy for a greater sum, must be presumed to want to buy for a less, and both parties agree as to this.(*a*) As, if the seller write a letter to the buyer offering to sell one hundred barrels of pork at four cents per pound, and on the same day the buyer write to the seller, offering for the same pork four and a half cents per pound, the contract will be complete on the receipt of the letters by the parties, for the buyer who offered four and a half cents per pound, will be presumed to accept the offer of the seller to sell at four.

Art. 3.—The consent must be on the sale itself.

938. The consent must be on the *sale itself;* that is, one of the parties intends to sell, and the other intends to buy. If, therefore, Peter intended to lease his house for ten years, at three hundred dollars a year rent, and Paul intended to buy the house for three thousand dollars, payable in yearly instalments of three hundred dollars each, there would not be a contract of sale nor a lease.(*b*)

SECTION 5.—WHEN PROPERTY PASSES BY THE SALE.

939. Whether the title shall pass to the purchaser at the time of the sale, or at what other time, depends upon the express or implied agreement of the parties. An agreement for the sale of goods is *primâ facie* a bargain and sale of those goods; but this arises merely from the presumed intention of the parties, and if it appear that the parties have agreed, not that there shall be a mutual credit, by which the property is to pass

(*a*) Poth. Vente, n. 36.
(*b*) Poth. Vente, n. 37.

from the seller to the buyer, and the buyer is bound to pay the price to the seller, but that the exchange of the money for the goods shall be made on the spot, *no property is transferred*, for it is not the intention of the parties to transfer any.(*a*)

But when the buyer makes a part payment, or by consent, a future day of payment is fixed, the parties clearly manifest an intention that they should have some time to complete the sale by payment and delivery, and, in the mean time, they are *trustees for each other*, the one of the property in the chattel, and the other in the price.

As a general rule, when the bargain is made for the purchase of goods, and nothing is said about payment and delivery, the property passes *immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price.(*b*)

SECTION 6.—OF THE OBLIGATIONS OF THE SELLER.

940. The seller, or he who transfers the title of a thing to another called the buyer, in consideration of money to be paid by such buyer to him, binds himself to transfer the title and the property in the thing; that is his principal or rather his only engagement. This engagement is divided into two branches, the obligation to *deliver* the thing sold, without which the buyer could not exercise the right of property, and to *warrant the title*, in certain cases, without which the right of property might be disturbed, interrupted, or even totally destroyed. But this warranty applies only when the seller sells the property as his own, and when it is in his possession.

§ 1.—Of delivery.

941. This section will be divided into four parts:

(*a*) Wilmarth *v.* Mountford, 4 Wash. C. C. 79.

(*b*) Bloxam *v.* Sanders, 4 B. & C. 941; Bloxam *v.* Morley, 4 B. & Cr. 481.

1, the different modes and effects of the delivery; 2, the time and place of the delivery; 3, how it is to be made; 4, the effect of delivery.

Art. 1.—Of the different modes and effects of a delivery.

942. A delivery is the transmission of the possession of a thing from one person into the power and possession of another; or it is an execution of a sale, without which the intent of the parties would not be attained.(a)

Originally, delivery was a clear and unequivocal act of real possession, accomplished by placing the subject to be transferred into the hands of the buyer, or his agent, or into their respective warehouses, vessels, carts, and the like. This *actual delivery* was justly considered as the true badge of transferred property, as importing full evidence, by signs apparent to the senses, of the consent to transfer; preventing the appearance of possession or ownership in the transferrer, and avoiding uncertainty and risk in the title of the buyer.

The complications of modern trade, however, render a strict adherence to this rule impossible. Not unfrequently the purchaser cannot take immediate possession, and the seller cannot make an immediate delivery. The bulk of the goods; their situation, as when they are deposited in public custody as a security for duties, or in the hands of a manufacturer for the purpose of having some operation of his art performed upon them, to fit them for the market; the distance they are from the place of sale; the frequency of bargains made by correspondents residing in distant countries; and many other obstructions, render it impracticable to receive or to make an actual delivery. In these and such like cases, something short of actual delivery is sufficient to transfer the property.

(a) Domat, Lois Civ. l. 1, t. 2, s. 2, n. 5.

943. When the thing sold is not delivered by the actual removal, it may be transferred in a variety of ways which have the effect of a delivery, and are considered as a proof of it. Acts from which a delivery may be presumed are equivalent to a delivery, at least between the parties. A *symbolical delivery* is, in many cases, equivalent to an actual delivery; as, by delivering the keys of a house in which goods are stored, will be a delivery of the goods;(*a*) so the sale of a ship by a bill of sale, properly attested, passes the title of a ship at sea.(*b*) In England a distinction has been made between a bill of sale for the transfer of a ship while in the country, and a ship at sea; the former is called simply a *bill of sale*, but when a ship at sea is to be transferred, it is called a *grand bill of sale*. In this country, no such distinction appears to exist.(*c*)

944. In some cases no delivery is requisite, as when Peter holds property belonging to Paul as a bailee, and Paul sells him the property, the sale will be complete, and it will not be necessary to make a double delivery by Peter to Paul, and then by Paul to Peter.(*d*)

945. On an entire contract, a delivery of a part of the goods sold, for the whole, will operate as a good delivery of the whole,(*e*) so as to vest the property in the purchaser.

Art. 2.—Of the time and place of delivery.

1. *Of the time.*

946. The delivery must be made at the time *agreed upon* between the parties, and if nothing has been agreed upon as to the time, then it must be made

(*a*) Jordan *v.* James, 5 Ham. 88; Pleasants *v.* Pendleton, 6 Rand. 473. See Baily *v.* Ogden, 3 John. 399.

(*b*) Howland *v.* Harris, 4 Mason, 497; Brinley *v.* Spring, 7 Greenl. 241.

(*c*) 4 Mass. 661.

(*d*) Nichols *v.* Patten, 6 Shep. 231; 1 Duverg. n. 252. See Linton *v.* Butz, 7 Penn. St. R. 89.

(*e*) Shurtleff *v.* Willard, 19 Pick. 202; Legg *v.* Willard, 17 Pick. 140.

whenever required by the buyer, on his paying the price; and even without his paying the price if the goods were sold on credit, unless indeed in cases where the seller would have a right to stop the things sold *in transitu*.

2. *Of the place.*

947. When a place of delivery has been agreed upon, the delivery must of course be there. But it frequently happens that no place has been mentioned in the agreement, and it cannot be ascertained from the acts of the parties where it ought to be made. In such case the rule is that the delivery is to be made where the thing was when it was sold,(*a*) unless indeed it was on its way, being transported from one place to another, and in this last case, it must be delivered at its place of destination. But the rule that the thing sold must be delivered at the place where it was when sold, applies only to *determinate* things, as when I sold you *my horse Napoleon;* for if the thing be an *indeterminate* thing, as *a horse*, which may be any horse, then it must be delivered at the residence of the seller.

Sometimes the place of delivery may be ascertained from the nature of the thing to be delivered, or from the custom or usage of the place, which always forms a part of every contract.(*b*)

When there are two places of delivery in the alternative, as to deliver cotton in Charleston or Savannah, it is at the option of the seller to deliver at either place, but in that case, he must give notice of his election.(*c*) According to Pothier, where the contract is to deliver at Charleston *and* Savannah, one half must be delivered at each place.(*d*)

Art. 3.—How the thing is to be delivered.

948. This head will be examined under three sub-

(*a*) Barr *v.* Myers, 3 Watts & Serg. 295.
(*b*) Boynton *v.* Veazie, 11 Shep. 286.
(*c*) Rogers *v.* Van Hoesan, 12 John. 221.
(*d*) Poth. Obl. n. 241; 1 Duverg. n. 261.

divisions: 1, at whose expense the delivery must be made; 2, in what state the thing sold must be delivered; 3, of the loss between the sale and the time of delivery.

1. *At whose expense the delivery must be made.*

949. The seller is bound to bear all the expense *attending the delivery;* for example, if the thing is pledged at the time it is sold, the seller must redeem it, and deliver it to the buyer clear of the lien or pledge. Another example may be mentioned, where goods are in the custom-house or public warehouses, liable for duties to the government, the owner must deliver the goods clear of those duties.

The expense of measuring and weighing articles, when they are sold out of a heap, or a large body from which they are to be separated, must also be borne by the seller. As soon as that is done, and the buyer has notice of it, the seller's expenses are at an end, and the buyer must remove them at his own expense, unless some contrary provision has been made in the contract.

2. *In what state the thing sold must be delivered.*

950. When a *determinate* article is sold to be delivered on a future day, it is to be delivered to the buyer on that day in the state in which it is *then,* provided the deterioration has not taken place in consequence of the seller or those in his employ; for example, I sell you my horse Napoleon, to be delivered on the first day of January next, and, in the mean time, he loses his sight without any fault of mine or of my agents or servants; the loss is yours, and you are bound to take him as he is at the time I bound myself to deliver him. When the thing is *indeterminate*, as if I sell you a horse, without specifying any horse, or one hundred bushels of wheat, without saying what wheat, the deterioration to either is my loss.

3. *Of the loss of the thing between the sale and the time of delivery.*

951. When a determinate object is sold, as the horse Bucephalus, and without any fault of the seller, and before he is in default as to the time of delivery, he dies, it is evident the seller cannot deliver him, but if there remains any part of the thing sold, he is bound to deliver that. But when the thing sold has been lost through the fault of the seller, or after he has been put in default, by not delivering it agreeably to the provisions of the contract, he is responsible in damages.(*a*) He is equally liable if it perishes in consequence of the acts of some one for whom he is responsible.

If the subject of the sale has been applied to public use, by virtue of law, as if my horse Bucephalus, which I sold to you, has been taken by the government to carry on a war, all you can ask is to be subrogated to my rights, to receive the indemnity paid by the government.

But the thing may subsist, and still I may not be bound to deliver it to you; as, if robbers, without any fault of mine, or those for whom I am responsible, should steal it.(*b*) The law will not compel a man to do that which he cannot possibly perform: *Lex non cogit ad impossibilia.*(*c*)

Art. 4.—*Of the effect of a delivery.*

952. When the contract of sale is made without fraud, a delivery will vest all the rights of the seller in the buyer, so that the creditors of the former can have no rights whatever to the chattel so sold.(*d*) So long as no delivery has taken place, if the seller should sell the chattel twice, to different persons, priority of time prevails, and *qui prior est tempore, potior est jure;* but

(*a*) Puffend. Dr. de la Nat. et des Gens, l. 5, c. 5, § 3; Bowyer's Civ. Law, 208.
(*b*) Poth. Obl. n. 656; Poth. Vente, n. 60.
(*c*) Co. Litt. 231 b.
(*d*) Dig. 50, 17, 54; Poth. Vente, n. 321.

when a *bona fide* purchaser of a chattel obtains possession, he is preferred to a purchaser prior in date, for *in pari causa possessor potior est.*(a) He is not to be deprived of the fruits of his care and vigilance in obtaining possession. *Jus civile vigilantibus scriptum est.*(b)

§ 2.—Of the warranty of a thing sold.

953. Warranties in relation to the sale of personal chattels are of two kinds, express and implied.

An *express warranty* is one by which the warrantor covenants or undertakes to insure that the thing which is the subject of the contract, is, or is not, as therein mentioned; as, that a horse is sound; that he is not five years old, and the like.

An *implied warranty* is one which, not being expressed, the law implies by the fact of the sale. This section will be confined to the consideration of the latter; these are divided into, 1, implied warranties of title; 2, implied warranties of the quality of the thing sold.

Art. 1.—*Of implied warranty of title.*

954. When a man sells a chattel as his own, when it is in his possession, he warrants *the title,* when sold, at a fair price; and a fair price is a warranty of title, under these circumstances. But if he is not in possession of the article sold, the rule of *caveat emptor* prevails, and the purchaser buys at his peril.(c) The meaning of this rule is, that the purchaser of a chattel must take all the risk of the *title* of the chattel, when not in possession of the seller, and of its *quality,*

(a) Dig. 50, 17, 128; Poth. Vente, n. 320.
(b) Co. Litt. 290 b, note 1, § 15.
(c) Paisley *v.* Freeman, 3 T. R. 57, 58; Cro. Jac. 197; 1 Story, Eq. § 212.

whether it be in his possession or not, unless he asks a special or express warranty.(*a*)

Art. 2.—Of the implied warranty of the quality of goods.

955. In general there is no implied warranty as to the quality of goods, by a mere sale or exchange. The maxim of *caveat emptor* applies in such case.(*b*)

But to this rule there are various exceptions:

1. Where the purchaser had no opportunity, before or at the time of sale, of examining the goods, there is an implied warranty that they are of a *merchantable quality*.(*c*)

2. Upon the sale of goods by sample, there is an implied warranty, by the seller, that the bulk of the commodity is equal in quality to the sample exhibited to the buyer.(*d*)

3. When provisions are sold for consumption, there is an implied warranty that they are sound.(*e*) But when they are an object of merchandise, there is no such implied warranty.(*f*)

When there is an implied warranty of quality, if the articles prove not to be sound they must be returned, or the purchaser will have no remedy.(*g*)

SECTION 7.—OF THE RIGHTS OF THE SELLER.

956. The rights of the seller are, 1, to be paid the price; 2, to be indemnified for any expenses he may have incurred for the buyer to preserve the thing sold;

(*a*) This rule has been very severely assailed, not without some appearance of justice, as being the instrument of falsehood and fraud; but although its policy has been frequently questioned, it is too well established to be disregarded. Coop. Just. 611, note. See 8 Watts, 308, 309.

(*b*) Co. Litt. 102 a; 7 S. & R. 482.

(*c*) Howard *v.* Hoey, 23 Wend. 350; 4 Camp. 144; Borekins *v.* Brown, 3 Rawle, 23; Jennings *v.* Gratz, 3 Rawle, 168.

(*d*) Magee *v.* Billingsley, 3 Ala. 679; Waring *v.* Mason, 18 Wend. 425; Willings *v.* Consequa, 1 Pet. C. C. 301; Rose *v.* Beatee, 2 N. & McC. 538; 3 Rawle, 23, 37; The Monte Allegre, 9 Wheat. 616.

(*e*) 3 Bl. Com. 166.

(*f*) Emerson *v.* Brigham, 10 Mass. 197; Moses *v.* Mead, 1 Denio, 378.

(*g*) 3 Ala. 679; 18 Wend. 425; Shaw *v.* Levy, 17 S. & R. 99; Hazard *v.* Hamlin, 5 Watts, 201.

3, to stop the thing *in transitu*, when the buyer has failed and the price has not been paid.

§ 1.—Rights of the seller to be paid or secured the price.

957. When the article which is the object of the sale has been sold for cash, the seller is, of course, entitled to be paid at the time of delivery, and when nothing is said about the time of payment, and there are no circumstances which show that a credit was to be given, the money is due as if expressly sold for cash, and the goods cannot be taken away by the purchaser until they are paid for.(*a*)

If the goods are sold on a credit, the time of payment is to be when the credit has expired; but if they are sold on a credit, and notes are to be given at the time of delivery, the notes must be delivered at that time, and should they not be then delivered, and afterward refused, an action will lie immediately.

§ 2.—Of the rights of the seller to indemnity.

958. One of the natural consequences of a sale is, that the buyer shall pay the seller for all expenses he may have sustained in keeping the thing, after the completion of the sale; as if I sell to you my horse to be delivered to you on the first day of January, and also a lot of merchandise, and you do not call for them at the time and place agreed upon, in consequence of which, I am put to expense in feeding your horse, or storing the goods, you are bound to indemnify me.

§ 3.—Of the right of stoppage *in transitu*.

959. When a person has sold goods to another, and delivered them to a common carrier or middle man, for the purpose of being carried to the purchaser, and while they are thus in their transit the buyer fails, the seller has a right to stop them, retake possession, and prevent the delivery until he has been paid.(*b*)

(*a*) Bank of Columbia *v.* Hagner, 1 Pet. 455.
(*b*) See generally Bac. Ab. Merchant, (L); Ross on Vend. h. t.; 2 Selw.

This head will be divided into six articles, relating, 1, to the person who has the right to stop goods *in transitu;* 2, the property which may be stopped; 3, the time when to be stopped; 4, the manner of stopping; 5, the failure of the buyer; and, 6, the effect of stopping.

Art. 1.—*By whom goods in transitu may be stopped.*

960. The right of stopping goods *in transitu* is confined to cases in which the consignor is substantially the seller; and does not extend to a mere surety for the price, nor to any person who does not rest his claim on a proprietor's right.(*a*)

The price for which the goods were sold must remain unpaid at the time of stopping *in transitu*, but where only a part of the purchase money is due, the right still subsists.(*b*)

Art. 2.—*What goods may be stopped in transitu.*

961. The property over which this right may be exercised must be the identical chattels sold on a credit.(*c*) When goods are sent in part by one conveyance and part by another, and one parcel arrives safely in the hands of the consignee, the right of stoppage *in transitu* exists as to that parcel which is not yet delivered, particularly if the contract can be divided.(*d*)

Art. 3.—*Of the time when goods may be stopped in transitu.*

962. The right of stoppage *in transitu* must be exercised *during the transit*, and while something remains to be done to complete the delivery; for the actual or symbolical delivery of the goods to the buyer puts an

N. P. 1206; Whitak. on Stoppage in Transitu; 3 Chit. on Comm. Law, 340; 2 Leigh's N. P. 1472.

(*a*) Siffken *v.* Wray, 6 East, 371; Ambl. 399; 3 East, 93; 4 Burr. 2047; 1 Bell's Com. 224.

(*b*) Hodgson *v.* Loy, 7 T. R. 440; Jordan *v.* James, 5 Ham. 88. See The Constantia, 6 Rob. Adm. R. 321.

(*c*) Wood *v.* Roach, 2 Dall. 180; 1 Yeates, 177.

(*d*) Wentworth *v.* Outhwaite, 10 M. & W. 451; Buckley *v.* Furniss, 17 Wend. 504.

end to the rights of the seller to stop the goods *in transitu*.(*a*) But if, before he parts with the goods, the seller annexes a condition that security shall be given before taking possession; or that the price shall be paid in ready money; or that a bill shall be delivered; the property does not pass by the mere act of the buyer's obtaining the possession.

When the seller has given the buyer documents sufficient to trasfer the property, and the buyer, upon the strength of such documents, has sold the goods to a *bona fide* purchaser without notice, the seller is divested of his rights ;(*b*) but a simple resale by the buyer does not of itself, and without other circumstances, destroy the vendor's right of stoppage *in transitu*.(*c*)

The moment the *transitus* is at an end, the right of stoppage ceases; but what shall be so considered depends upon circumstances too minute to be detailed here.(*d*)

Art. 4.—What is a sufficient stoppage of goods in transitu.

963. The manner of stopping the goods, is usually by taking corporal possession of them; but this is not the only way it may be done; the seller may put in his claim, or demand his right to the goods, either verbally, or in writing.(*e*)

Art. 5.—Of the insolvency or bankruptcy of the buyer.

964. To entitle the seller to stop the goods, the buyer must have actually failed, or be in actual and

(*a*) Covell *v.* Hitchcock, 20 Wend. 167; S. C. 23 Wend. 611; 3 T. R. 464; 8 T. R. 199. See Allen *v.* Mercier, 1 Ashm. 103.

(*b*) Walter *v.* Ross, 2 Wash. C. C. 283; 4 Bro. P. C. 57; S. C. 5 T. R. 367, 683; 6 T. R. 131.

(*c*) Craven *v.* Ryder, 6 Taunt. 433; 14 East, 308.

(*d*) See the following cases: Barrett *v.* Goddard, 3 Mason, 107; Harman *v.* Anderson, 2 Camp. 243; 20 Wend. 167; S. C. 23 Wend. 611; Stubs *v.* Lund, 7 Mass. 453; Bolin *v.* Huffnagle, 1 Rawle, 9; Bell *v.* Moss, 5 Whart. 189: Hurry *v.* Mangles, 1 Camp. 452; Ellis *v.* Hunt, 3 T. R. 464; Naylor *v.* Dennie, 8 Pick. 198.

(*e*) See the cases mentioned in last note.

immediate danger of insolvency, and the validity of the seller's right depends entirely upon this.(*a*)

Art. 6.—The effect of stoppage in transitu.

965. Stopping goods *in transitu*, does not, of itself, rescind the contract; the seller may, therefore, upon offering to deliver them, recover the price. And if the goods so stopped, are applied to the payment of the price, and a balance still remains unpaid, the seller may recover it of the buyer.(*b*)

SECTION 8.—OF THE OBLIGATIONS OF THE BUYER.

966. The obligations of the buyer of chattels, resulting from the contract of sale, are, 1, to pay the price agreed upon in the contract; 2, to take away the thing purchased, unless otherwise agreed upon; and, 3, to indemnify the seller for any expenses he may have incurred to preserve it for him. These we have examined while treating of the rights of the seller.(*c*)

SECTION 9.—OF THE RIGHTS OF THE BUYER.

967. The development of the rules which determine the obligations of the seller, necessarily explain the rights of the buyer; and reciprocally to show in what the obligations of the buyer consist, is to point out the rights of the seller; thus, when the law makes the principal obligation of the buyer to pay the price, it gives the seller the right to enforce the payment. These rights of the buyer, are correlative to the obligations of the seller, which have been considered under this chapter in a former section.(*d*)

SECTION 10.—OF THE DIFFERENT KINDS OF SALES.

968. Sales are of various kinds: 1, when consid-

(*a*) The Constantia, 6 Rob. Adm. R. 321; Wood *v.* Roach, 2 Dall. 180.
(*b*) Newhall *v.* Vargas, 3 Shep. 314. But see Bell's Com. 230, 5th ed.
(*c*) See the last section.
(*d*) Ante, n. 940.

ered as to their effect, they are absolute or conditional; 2, when as to the will of the parties, they are voluntary or forced; 3, when as to the mode of making them, they are public or private.

§ 1.—Of absolute and conditional sales.

Art. 1.—*Of absolute sales.*

969. An *absolute sale* is one made and completed, without any condition whatever, by which the property and all its incidents are conveyed by the seller to the buyer, for exactly the same rights the former had in it, and with the guarantees implied by law.

Art. 2.—*Of conditional sales.*

970. A *conditional sale* is one which depends for its validity upon the fulfilment of some condition. These conditions are resolutory or suspensive.(*a*) We will here confine our inquiries to sales made upon a suspensive condition. These are, 1, when the sale is made on condition of measuring, counting, weighing, etc.; 2, when it is made on condition of tasting or degustation; 3, when it is made on trial.

1. *Of a sale made on condition of measuring, counting, weighing, etc.*

971. Goods and merchandise which are susceptible of being counted, weighed or measured, may still be sold in gross, or in a body, without requiring any ascertainment of their number, weight or quantity; as a sale of a heap of grain, or a flock of sheep. In these cases, the sale has the same effect as if there were but one single article, as a bushel of grain, or one single sheep. There being nothing further to be done by the seller, the sale is perfect, and the goods are at the risk of the buyer. But still, as regards

(*a*) Vide ante, B. 2, part 1, tit. 4, c. 4, s. 9, art. 1, § 8.

third persons, the sale will not have all its effects until the delivery of the goods.(a)

A sale thus made of the whole of a commodity in gross, differs essentially from one made of only a part of it. In the latter case, the goods are at the risk of the seller until after the counting, weighing or measuring.(b)

2. *Of sales made under condition of tasting.*

972. When the article sold is one which may be tasted, the sale may be on the condition that it shall please the taste of the purchaser, and until he has approved of it, after tasting, the sale is incomplete, but when approved, the buyer cannot afterward decline.

3. *Of sales made on condition the thing sold shall be tried.*

973. In general, a sale of articles on trial is presumed to be made under a suspensive condition. But there are two species of trial.

Paul writes to Peter, a manufacturer, to send him a piece of cloth, and adds, if it pleases me I will pay you so much for it; the sale does not take place until Paul has approved of it. If, however, he should for a long time delay upon deciding, it will be presumed he approved of it.(c)

But if Paul buys a horse upon conditton that if, after the trial, he do not approve of him, the sale shall be null; this is a resolutory condition.

§ 2.—Of voluntary and forced sales.

Art. 1.—*Of voluntary sales.*

974. A *voluntary sale* is one made without constraint, freely, by the owner of the thing sold. A man having an absolute right over his property may of course dispose of it as he pleases, and sell it at any price he

(a) Shumway *v.* Rutter, 7 Pick. 56; S. C. 8 Pick. 443.

(b) Davis *v.* Hill, 3 N. Hamp. 382; Andrew *v.* Deitrick, 14 Wend. 31; Young *v.* Austin, 6 Pick. 280.

(c) Humphries *v.* Carvalho, 16 East, 45.

thinks proper. To those sales thus voluntarily made, the usual rules relating to this subject apply.

Art. 2.—Of forced sales.

675. A *forced sale* is one made without the consent of the owner of the property by some officer appointed by law, as by a marshal or sheriff, in obedience to the mandate of a competent tribunal. This sale has the effect to transfer all the rights the owner had in the property, but it does not, like a voluntary sale of personal property, guarantee a title to the thing sold;(*a*) it merely transfers the rights of the person as whose property it has been sold. This kind of sale is called a *judicial sale*.

By forced sale, in another sense, is understood a sale at auction to the highest bidder, without any reserve whatever. This may in one sense be said to be voluntary, when made by order of the owner of the property.

§ 3.—Of public and private sale.

Art. 1.—Of public sale.

976. A *public sale* is one made by auction to the highest bidder, whether the same be forced or voluntary. An *auction* is a place authorized by law, where property is publicly sold to the highest bidder.

Sales of this kind are called *judicial sales*, when made by the marshals of the different districts of the United States, by sheriffs, by constables, and sometimes by other officers who are authorized by law. These sales are not in general subject to all the rules of other sales; for example, there is no warranty of title of personal property either expressed or implied.

But public sales are usually made by auctioneers appointed by law, who sell goods not under judicial

(*a*) The Monte Allegre, 9 Wheat. 616; Yates *v*. Bond, 2 McCord, 382; Bashore *v*. Whistler, 3 Watts, 490.

process, but by the authority of the owner, or of persons who have a lawful right to make such sales.

The usual way of conducting an auction sale, is to offer the property at a certain price, descending in the amount until some person present accepts it, then to ask others to give more, and to receive the bids of all proper persons, higher and higher, until no one will offer more. The auctioneer then accepts the last offer, either verbally or by a sign, such as knocking down a hammer, and the moment this is done, both parties are bound by the contract; the owner of the goods to deliver them, the buyer to pay for them. The manner of conducting a sale by auction is immaterial, whether it be by outcry as just described, or in any other way. The essential part is the selection of a buyer from a number of bidders.(*a*)

The sale is not complete until the bid has been accepted. The bid is only an offer to pay a stipulated price for the article about to be sold; and, like every other offer, which has not been accepted, it may be withdrawn until accepted;(*b*) indeed it has been holden that it may be withdrawn by implication.(*c*)

Fairness is required in all cases, both from the auctioneer and the buyer; and the former will be considered as acting for himself, unless at the time of the sale he discloses the name of his principal.(*d*) On the part of the buyer, if he has been guilty of any fraud, the sale will be vitiated; as for example, where a number of bidders associate together with a design to stifle competion.(*e*) But there is nothing unlawful in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder.(*f*) If the owner, on his part,

(*a*) Hebler *v.* Hodg. 1 W. & S. 552.
(*b*) Sugd. Vend. 29; Babb. on Auct. 30, 42.
(*c*) Donaldson *v.* Kerr, 6 Penn. St. R. 486.
(*d*) Mills *v.* Hunt, 20 Wend. 431.
(*e*) Smith *v.* Greenlee, 2 Dev. 126.
(*f*) Smull *v.* Jones, 6 W. & S. 122.

employs a person to bid for the purpose of running up the property to an unreasonable price, this will also vitiate the sale.(a) The owner, however, has a right to limit the lowest amount at which the property shall be sold.(b)

Art. 2.—Of private sales.

977. A *private sale* is one made voluntarily, and not at auction.

CHAPTER II.—OF BAILMENTS.

978. Numerous contracts, having some general resemblance to a sale, are known by the generic name of bailments. Various definitions have been given of the word bailment. The clearest is that of Merlin, adopted by Story.(c) A *bailment* is a delivery of a thing in trust for some special purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.

Bailments are divisible into three classes: 1, those in which the trust is for the benefit of both parties, as hiring and letting to hire, and pawns or pledges; 2, those in which the trust is for the benefit of the bailor, as deposits and mandates; 3, those in which the trust is for the benefit of the bailee, as gratuitous loans for use, etc.

First Class. Of bailments for the benefit of both parties.

979. This class will be divided into two sections: in the first will be examined the rules which relate to hiring and letting to hire; and in the second those which apply to pawns or pledges.

(a) Moncrief v. Goldsborough, 4 Har. & McHen. 482.
(b) Wolf v. Lingster, 1 Hall, 146; Hazull v. Dunham, 1 Hall, 655; Steele v. Ellmaker, 11 S. & R. 86.
(c) Merlin, Répert. verbo Bail; Story, Bailm. c. 1, § 2. See Jones on Bailm. 1, 117; 2 Bl. Com. 395, 451; Kent, Com. Lect. 40, p. 437.

SECTION 1.—OF CONTRACTS OF HIRING.

980. *Hire* is an agreement by which one of two contracting parties binds himself to let the other have and use a thing, or his work or labor for a time agreed upon, in consideration of a certain price which the other binds himself to pay to him. He who agrees to let the other enjoy the use of the thing is called the *letter*, locator; the other the *hirer*, conductor.

This contract arises from the principles of natural law; it is voluntary and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit.

981. In many respects it bears a strong resemblance to the contract of sale; and indeed it may be said that hiring is nothing else than the sale of the use and benefit of the thing, or of the labor, which forms the subject of the agreement; the principal difference between them is, that in cases of sales, the owner parts with the whole proprietary interest in the thing; and in cases of hire, the owner parts with it only for a temporary use and purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is the object.(*a*)

982. There is a kind of contract which, strictly speaking, is not hiring, and yet it partakes of its nature. It frequently takes place among poor people in the country: the following is an example. Two poor neighbors, each owning a horse, are desirous to plough their respective fields, to do which, two horses are required; one agrees that he will let the other have his horse for a particular time, on condition that the latter will let the former have his horse for the same length of time.(*b*) This contract is not properly a hiring, for want of a price, which, according to the

(*a*) Poth. Louage, n. 2, 3 & 4; Vinnius, lib. 3, t. 25, in pr.; Jones, Bailm. 86; Story, Bailm. § 371; Bowy. Civ. Law, 211; Inst. 3, 25, prin.; Dig. 6, 1, 9; Ersk. Inst. 3, 3, 14; 1 Bell's Com. 451.

(*b*) Poth. Louage, n. 458.

civilians, is required in this contract; nor is it a loan for use, because there is to be a recompense or consideration; it has been supposed to be a partnership, but it differs from that contract, because there is no community of profits. This contract is generally ruled by the same principles which govern the contract of hiring.(*a*)

983. The contract of hiring and letting is usually divided into two kinds: 1, *locatio*, or *locatio conductio rei*, the bailment of a thing to be used by the hirer for a compensation to be paid by him; 2, *locatio operis*, or the hire of the labor and services of the workman or undertaker, and to be paid by the employer.

§ 1.—Of the *locatio conductio rei* or hire of a thing.

984. To form this contract there must be, 1, a thing to be let; 2, a price; 3, a letter, or party to let; 4, a hirer, or a party to hire.

Art. 1.—The thing to be let.

985. The contract of hiring cannot exist unless there be a thing, the use of which is conveyed by the letter to the hirer, for a time agreed upon between them. It is then essential to the contract of hiring, 1, that there be a thing; 2, that it be susceptible of the contract of hiring; 3, that there be an enjoyment, or use of the thing which is the object of the contract; 4, that there be a time during which the enjoyment is to last.

1. *There must be a thing.*

986. If the thing agreed upon should perish, it is clear there would be no hiring; as, if I hire a certain horse from you, and the horse dies before the time when the hire commenced, there is no contract. But if the horse be indeterminate, and a horse you had selected dies, you are bound to furnish me another;

(*a*) Duverg. tom. 4, n. 247.

and, if the latter be fit for my service, I am bound to take him.

2. *What things may be hired.*

987. In general, all sorts of things may be hired. But there are things which are susceptible of sale, which cannot be hired; such as are consumed by use, as money, wheat, cider, etc. The reason is evident: by this contract the hirer is bound only to use the thing which he must return; but a man who passes money, who eats the wheat, and drinks the cider, cannot return them.(a) Things of this kind, which are consumed by use, are called *fungibles*.

3. *Of the enjoyment or use of things hired.*

988. What *enjoyment* the hirer of a thing is to have in the thing hired depends on the contracting parties; by consent it may be applied to any purpose which does not entirely destroy it; but when the parties are silent on the subject, then the question arises, how is the hirer to use it? It is not always easy to solve the difficulty. As a general rule, it is presumed to have been hired for the use for which it is destined by its nature, and sometimes also for that which the profession of the hirer, or other circumstances point out, as being the intention of the parties; for example, if a saddle horse be hired for one week, the hirer could not use him to draw heavy draughts in wagons, or to turn a mill, such evidently not being the intention of the parties; or if a riding carriage were hired for a week, it could not be used to carry manure as a dung-cart.(b)

The use to which the thing is to be put must be *lawful*, whatever may be the agreement. If an express contract were made by which the letter would hire a horse to enable the hirer to commit a larceny, or if a hire of clothes were made to a woman for

(a) Hurd *v.* West, 7 Cowen, 752.

(b) Wheelock *v.* Wheelwright, 5 Mass. 104; Schenck *v.* Strong, 1 South. 87; Homer *v.* Thwing, 3 Pick. 492; Rotch *v.* Hawes, 12 Pick. 136.

the purpose of prostitution, the contract would be void.(a)

If the unlawful use was *not mentioned* in the agreement, neither of the parties could prove that the contract was unlawful in order to avoid its performance; if the contract was in writing, it could not be changed nor altered by parol proof; and if it was merely verbal, the delinquent party could not be heard to allege his own turpitude: *Nemo auditur turpitudinem suam allegans.*

4. *Of the time for which the hiring is to take place.*

989. In general, the time during which the hiring is to continue, is made a part of the contract, but sometimes this is left uncertain; in these cases the intention of the parties may be collected from circumstances; if, for example, a pair of horses and a carriage are hired to you at a certain price per day, and the contract mentions that you hire them to make a journey from Philadelphia to Richmond, it cannot be doubted but you will be entitled to them for the whole journey.

Art. 2.—*Of the price or recompense.*

990. There can be no contract of hiring without a price or consideration, for if there be none, the contract will be a loan. It is not indispensable that the agreement as to the price should be expressed, it will be sufficient when implied, and then the customary price must be paid, or if there be no customary price, then a reasonable price. Whether the consideration be a price paid in money, or a recompense in something else, it is still a hiring, and both cases are considered as bailments for hire.(b)

(a) Shep. To. 163; Co. Litt. 206 b; 10 East, 534; 1 Esp. 13; 1 Bos. & Pull. 340, n.

(b) Mr. Justice Story is of opinion that the consideration may be paid in money or other thing. Bailm. § 377; while Mr. Chancellor Kent, who has followed the civilians, describes hiring as a pecuniary bailment. 2 Kent, Com. 385.

Art. 3.—*Of the letter.*

991. The letter must be competent to make a contract, for one not *sui juris*, or incompetent to make an agreement, cannot let a thing to hire. The obligations of the letter and the rights of the hirer are correlative terms, the obligations of the one are the rights of the other. Again, the obligations of the hirer are the rights of the letter. Under this head will be considered only the obligations of the letter.

These are not clearly defined by the common law, and to ascertain them we must have recourse to the civil law, from which so many principles have been transplanted, and which, cultivated by the nursing care of the common law, have taken such deep root. In virtue of this contract, it is then said, the letter of a thing to hire impliedly engages to secure to the hirer the full use and enjoyment of the thing hired, and to fulfil his own engagements and trusts, in respect to it, according to the original intention of the parties. This implies the obligation to deliver the thing to the hirer; to refrain from every obstruction to the use of it by the hirer during the period of the bailment; to do no act which shall deprive the hirer of the thing; to warrant the title and possession to the hirer, to enable him to use the thing or to perform the service; and finally to warrant the thing free from any fault inconsistent with the use of it. Though these obligations, which are deduced from the nature of the contract, appear perfectly reasonable, it is difficult to find any authority supporting them in the common law.

Art. 4.—*Of the hirer.*

992. In considering the obligations of the letter, we have incidentally mentioned the rights of the hirer, the principal of which are the following:

1. He acquires a *special* property in the thing hired, during the continuance of the contract, and for the purposes expressed or implied by it.(*a*)

(*a*) Jones' Bailm. 85; Bac. Ab. Bailment, C.

2. He acquires the exclusive right to the *use* of the thing during the time of the bailment,(*a*) and if he misuses it, this does not authorize the letter to take it by force,(*b*) but such act puts an end to his special property, and the thing may be recovered in trover.(*c*)

993. Among the obligations of the hirer the following are the principal:

1. He is bound to take the same care to preserve the thing, which a good and prudent father of a family would take of his own.(*d*)

2. He is not only bound to take good care of the thing, but he must use it for no other purpose than that for which it is hired; if a carriage be hired to go from Philadelphia to New York, it cannot be used to go to Baltimore.(*e*) And if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occur, although by inevitable necessity, he will be responsible for it. But these responsibilities on the part of the hirer take place, only when he has the *possession* as well as the *use* of the thing hired; for when the owner, or his agents, retains the possession, the hirer is not in general responsible for an injury done to it; for example, when the letter of a carriage and a pair of horses sent his driver with them, and an injury occurred, the hirer was held acquitted of any responsibility,(*f*) except, indeed, the obligation of taking ordinary care of the inside of the carriage

(*a*) Roberts *v.* Wyatt, 2 Taunt. 268.

(*b*) Hartford *v.* Jackson, 11 N. Hamp. 145; Lee *v.* Atkinson, Yelv. 172.

(*c*) 2 Saund. 47 f.; Clarke *v.* Poozer, 2 McMullan, 434; Morse *v.* Crawford, 17 Verm. 499; Setzar *v.* Butler, 5 Iredell, 212.

(*d*) Story, Bailm. § 398; Poth. Louage, n. 190; Domat, B. 1, t. 4, § 2, art. 4; Code, 4, 65, 28; Ayl. Pand. 463; Milon *v.* Salisbury, 13 John. 211; 17 Mass. 502; McNeils *v.* Brooks, 1 Yerg. 75.

(*e*) Jones' Bailm. 68; Angus *v.* Dickerson, 1 Meigs, R. 459; Ld. Raym. 915; 5 Mass. 104.

(*f*) Hughes *v.* Boyer, 9 Watts, 556, 562.

where he sits, the glasses, and such things as are under his immediate control.(a)

3. The hirer is bound to *restore* the thing hired, when the bailment is determined. The time, place, and the mode of its restitution, are governed by the circumstances of each case, and depend upon the rules of presumption of the intention of the parties, as in other cases of bailment, unless there has been an express agreement on the subject.(b)

4. There is also an implied obligation, when there has been no express contract, that the hirer will *pay the hire* or recompense.

§ 2.—Of the *locatio operis* or hiring of labor.

994. Hiring of *labor* is a contract by which one of the contracting parties, called the *employer*, gives to the other, called the *workman* or *undertaker*, a certain work to be performed, which the latter promises to perform, for a price or recompense which the former binds himself to pay. This head will be divided into two articles: 1, hire of labor; 2, hire of custody.

Art. 1.—*Of the hire of labor, and the nature and requisites of this contract.*

1. *Of its nature.*

995. The contract of hiring of labor differs mainly from the contract of the hire of things, in this, that the hire of a thing is given for a certain price or recompense, paid to the letter, which is the object of the letter, and the work given to be done forms the substance of the former. In the contract for the hire of a thing the hirer agrees to pay the price or hire, and in a hiring of labor or services, the employer binds himself to pay the price or hire.

There is a considerable resemblance between this contract of hiring of labor and a sale; if I order a carriage to be made and the materials are to be fur-

(a) Poth. Louage, n. 196; Jones' Bailm. 88.
(b) Story, Bailm. § 415.

nished by the coachmaker, there is a contract of sale; so if I order a tailor to make me a coat, and he is to furnish the materials, it is a sale; but if I furnish the cloth to a tailor to make me a coat, and he merely puts his work upon it, it is a contract of hiring of labor. This would be the case also, were the tailor to furnish the buttons, twist, etc., commonly called the trimmings.(a)

2. *Of the requisites to form the contract of hiring of labor.*

996. As in the contract for the hire of a thing, so in this contract there are three requisites, namely: 1, a work to be performed; 2, a price or recompense; 3, the consent of the parties.

1° *A work to be done.*

997. The work to be done must be such as *can be performed*, for if the contract were to do an impossible thing, it would be void. The thing to be done must be lawful; for example, if you employed a painter to paint a libel, or a printer to print an obscene work, the contract would be void.

2° *Of the price.*

998. It is evident that there must be a price or recompense, or the contract would no longer be a hiring for labor, but a mandate. But still it is not requisite that the parties should have expressly agreed upon a price, one may be implied. If I send cloth to a tailor with a request that he make me a coat, the law presumes that I will pay him what he justly deserves, a *quantum meruit*.

3° *Of the consent of the parties.*

999. As in all other contracts, there must be a consent between the parties.

(a) Poth. Louage, n. 394; Story, Bailm. § 423.

Art. 2.—*Of the obligations of the parties.*

1. *Of the obligations of the employer.*

1000. The obligations of the employer, which arise from the nature of the contract, are the following:

1. To pay the price agreed upon, or if no price has been fixed, to pay the workman what his work is worth, or what he deserves.

2. If there have been any deviations made in the plan, with the express or implied consent of the employer, to pay for the additions what the workman deserves. The rule in cases of deviation is to trace the work according to the original plan, and the additions are to be paid according to the usual rate of such work.(*a*)

3. The employer is bound to do all he can to enable the workman to fulfil his contract. If you employ a plumber to introduce the Croton water into your house in the city of New York, you are bound to pay whatever expense may be charged to obtain a permit from the proper authority.

4. The employer is bound to receive the thing when finished.

5. In making the contract, the employer must use no means to deceive the workman; such deceit may amount to a fraud and vitiate the contract.

2. *Of the obligations of the workman.*

1001. The workman or undertaker is bound, 1, to perform the work he has undertaken to do; 2, to do it in proper time; 3, to do it well; 4, to employ the things furnished him according to his contract.

1° *Of the performance of the work.*

1002. The undertaker is bound by his contract to do the work he has promised to perform, but, in general, he may employ workmen to assist him, or to do

(*a*) Craven *v.* Tickell, 1 Ves. jr. 60; 13 Ves. 73, 81.

the whole under his superintendence. Some undertakings must, however, be performed by the party himself; as, if I want a work of art, as a statue or a painting, and I employ a particular statuary or painter to make them, the presumption is that I want no other's work, for the value of the thing depends, in a great degree, on the name and skill of the artist.(a)

2° *When the work is to be done.*

1003. It is evident that if the work is not done in time, the undertaker will be liable in damages.

3° *Of the obligation to perform the work well.*

1004. As a general rule, he who undertakes for a reward to perform any work, is bound to use a degree of diligence, attention and skill, adequate to the performance of his undertaking, that is, to do it according to the rules of the art: *spondet peritiam artis.*(b) It is his fault to undertake to do a thing beyond his strength, or for which he has not sufficient skill, or to employ bad workmen; in this case the maxim applies, *imperitia culpæ annumeratur;*(c) ignorance is like negligence, for which one is responsible. If, for example, a farrier undertake to cure a horse, he is required to use reasonable skill; if a carpenter undertake to build a ship, he engages to use the same kind of ability. And the degree of skill rises in proportion to the value and delicacy of the operation. But he is in no case required to have more than ordinary skill, for he does not engage for more.

1005. Under this rule all professional men, who can recover for their services in an action, are included; their contract is *locatio operarum* and not mandate. An

(a) Poth. Louage, n. 421. See Rust *v.* Larue, 4 Litt. 416.

(b) Poth. Louage, n. 425; Jones, Bailm. 22, 53, 62, 97, 120; Domat, B. 1, t. 4, s. 8, n. 1; Story. Bailm. § 431; Coggs *v.* Bernard, Ld. Raym. 909; 1 Bell's Com. 459, 5th ed.

(c) Dig. 50, 17, 132.

action will, therefore, lie against an attorney,(a) or a physician,(b) for neglect; for, like artists of all kinds, wherever they engage their services for a compensation, which they could recover by action, they are responsible for the skill and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it. The public who employ them may exercise a judgment of selection, but having selected the person, they are entitled to presume that he has the ordinary skill in his art, of which he holds himself out to the world to be possessed.(c) But if the employer were to engage a common blacksmith to repair his watch, and he should spoil it, or a farrier to cure his eyes, and he should lose his sight by taking his remedies, he would have no legal ground of complaint.(d)

4° *Of the workman's obligation to employ properly the materials furnished him.*

1006. He is bound to use the materials furnished to him according to his contract, and for the advantage of his employer; as to employ the cloth I sent a tailor to make me a coat, so that I can have a coat which shall fit me, for if it be so made that I cannot wear it, this is not a proper employment of the materials. But, if the undertaker use ordinary skill and care, he will not be responsible, although the materials may be injured; as, if a gem be delivered to a jeweler, and it is broken without any unskilfulness, negligence or rashness of the artisan, he will not be liable.(e)

The workman is to use ordinary diligence in the care of the materials entrusted with him, or to exer-

(a) Dearborn v. Dearborn, 15 Mass. 316; Crooker v. Hutchinson, 2 Chipm. 117; S. C. 1 Verm. 73; Varnum v. Martin, 15 Pick. 440; Ruggles v. Ives, 6 Mass. 494; Wilson v. Russ, 7 Shepl. 421.

(b) Gallaher v. Thompson, Wright, 466; Landon v. Humphrey, 9 Conn. 209.

(c) Bell's Com. 459, 5th ed.; Moore v. Morgue, Cowp. 497.

(d) Jones, Bailm. 99, 100.

(e) Poth. Louage, n. 428.

cise that caution which a prudent man takes of his own affairs,(*a*) and he is also bound to preserve them from any unexpected danger to which they may be exposed.(*b*)

Art. 3.—Who is to bear the loss of the work and materials destroyed before they are delivered.

1007. When there is no special contract between the parties, and a thing perishes while in the possession of the workman or undertaker, without his default, either by inevitable casualty, by internal defect, by superior force, by robbery, or by any peril not guarded against by ordinary diligence, he is not responsible. This is the case only when the material belongs to the employer, and the workman only undertakes to put his work upon it. But a distinction must be observed in the case where the employer has engaged a workman to make him an article out of his own materials, for, in that case, the employer has no property in it until the work is completed, and the article has been delivered to him; if, in the meantime, the thing perishes, it is the loss of the workman, who is wholly its owner, according to the maxim, *res perit domino*.(*c*) In the former case the employer is the owner; in the latter, the workman; in the first case it is a bailment, in the second, a sale of a thing *in futuro*.(*d*)

Another distinction must be made in the case where the thing given by the employer was to become the property of the workman, and an article was to be made out of similar materials, and before its completion it perished. In this case the title to the thing having passed to the workman, the loss must be his.(*e*)

(*a*) Clarke *v.* Earnshaw, 1 Gow. R. 30.
(*b*) Leck *v.* Maestaer, 1 Camp. 138.
(*c*) Bouv. L. D. h. t.
(*d*) Domat, B. 1, t. 4, § 7, n. 3; Dom. B. 1, t. 4, § 8, n. 10.
(*e*) Ewing *v.* French, 1 Blackf. 353; Hurd *v.* West, 7 Cowen, 752, 756, note; Smith *v.* Clark, 21 Wend. 85; Buffum *v.* Merry, 3 Mason, 478; Dig. 19, 2, 31.

§ 3.—Of *locatio custodiæ*, or hire of custody.

1008. The *locatio custodiæ*, or deposit for hire, is a contract by which one of the parties, called the custodier, or *depositary*,(*a*) undertakes for hire to take care of goods belonging to the other party, called the *depositor*, for a particular time and in a way agreed upon.

These depositaries for hire are of two classes; 1, those who are responsible only for want of ordinary diligence; 2, those who, like carriers, are responsible for all losses except those caused by inevitable accident, or the act of God, and those which are the effect of the act of a public enemy.

Art. 1.—*Depositaries responsible for want of ordinary care.*

1009. These are *agistors* of cattle; warehousemen; forwarding merchants; factors, and wharfingers. The general rules applicable to bailments of *locatio operis faciendi*, which have been already considered, are also applicable to these contracts.

1010.—1. An *agistor* is one who receives horses or other animals, on his own ground, for hire, to take care of them. The agistor is not bound, like the innkeeper, to take all horses offered to him, nor is he liable for any injury done to the animals under his care, unless he has been guilty of negligence.

1011.—2. A *warehouseman* is a person who receives goods and merchandise to be stored in his warehouse for hire. He is bound to use ordinary care, and his neglect to do so will render him liable to the owner.(*b*) His liability commences as soon as the goods arrive and he applies the crane to take them into his warehouse.(*c*) It ends by delivering the goods to the true owner, and a delivery to a person not entitled will

(*a*) 1 Bell's Com. 458.
(*b*) Story, Bailm. § 444; Jones, Bailm. 49, 96, 97.
(*c*) Thomas *v.* Day, 4 Esp. 262; De Mott *v.* Laraway, 14 Wend. 225; Randleson *v.* Murray, 8 Ad. & Ell. 109.

render him liable for all losses which may result from such delivery.(a)

1012.—3. A *forwarding merchant* is one who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. He is not deemed a common carrier, but a mere warehouseman, or agent.(b) He is only required to use ordinary diligence in sending the property by responsible persons.(c)

1013.—4. A *factor* is an agent to sell goods and merchandise consigned or delivered to him by, or for his principal, for a compensation, commonly called *factorage* or *commission*. He is also called a *commission merchant* or *consignee*.(d) Factors and other bailiffs to manage for hire, are generally liable only for a reasonable exercise of skill and ordinary diligence; and are not liable for any accidents, unless they are occasioned by their negligence.(e)

1014.—5. A *wharfinger* is one who keeps a wharf, and who receives and ships merchandise to and from it, for hire. Like a warehouseman, he is responsible for ordinary neglect, and therefore required to take ordinary care of goods entrusted to him as such. His responsibility begins when he acquires, and ends when he ceases to have the custody of the goods in that capacity. When this takes place, depends upon usage. When goods are delivered on his wharf, and he assumes the custody of them, either by his express or implied agreement, his liability commences; but a mere delivery at his wharf, without his assent, does not render

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(a) Lubbock *v.* Inglis, 1 Stark. 104; Leigh *v.* Smith, 6 Car. & P. 638.

(b) Roberts *v.* Turner, 12 John. 232; Platt *v.* Hibbard, 7 Cowen, 497.

(c) Brown *v.* Dinison, 2 Cowen, 593.

(d) Paley on Ag. 13; 1 Liverm. Ag. 68; Story, Ag. § 33; Com. Dig. Merchant, B; 1 Bell's Com, 385.

(e) Coggs *v.* Bernard, 2 Ld. Raym. 909, 918; Vere *v.* Smith, 1 Vent. 121.

him liable.(*a*) The moment he loses the custody, by justly delivering them on board of a vessel, his responsibility ceases.(*b*)

Art. 2.—When the depositary is bound to exercise more than ordinary care.

1015. Innkeepers are the only bailees who will be classified under this head. An *innkeeper* is one who keeps an open house for the entertainment and lodging of all such travellers and passengers, who desire to be entertained there, with their horses and attendants, for a reasonable compensation.(*c*) To constitute him an innkeeper, a man must have a house kept for travellers generally, and not for a short season of the year, or for select persons, or for mere lodgers. A private boarding house, lodging house, or a coffee house, is not an inn.(*d*) It is not indispensable to an inn that there should be stables, or that stage coaches or wagons should stop there.(*e*) And one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper.(*f*)

1. *Obligations of an innkeeper.*

1016. He is bound to take in and receive all travellers and wayfaring persons, and to entertain them for a reasonable compensation, unless he have no room, or the applicants are drunk, or disorderly, or afflicted with contagious diseases; to supply their reasonable wants, for a just compensation.(*g*) He is liable for damages if he neglect to take proper care of the baggage or luggage of his guest which is brought within

(*a*) Buckman *v.* Levi, 3 Campb. 414; Gibson *v.* Inglis, 4 Camp. 72; Packard *v.* Getman, 6 Cowen, 757.

(*b*) Corbin *v.* Downe, 5 Esp. 41; Dig. 4, 9, 3; Abbott on Shipp. 226; Molloy, B. 2, c. 2, s. 2.

(*c*) Bac. Ab. Inns, etc., C; Thompson *v.* Lacy, 3 B. & Ald. 283.

(*d*) Cayle's case, 8 Rep. 32; Bac. Ab. Inns, etc., B.

(*e*) 3 B. & Ald. 283.

(*f*) The State *v.* Matthews, 2 Dev. & Bat. 424.

(*g*) Howell *v.* Jackson, 6 Car. & Pay. 725; Fell *v.* Knight, 8 Mees. & Wels. 269.

the inn.(*a*) A delivery of the goods into the custody of the innkeeper is not however requisite, in order to make him responsible, for although he may not know anything of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract; the money paid for the apartments extending to the care of the box or portmanteau. But in order to give this protective security to the goods, the owner of them must be a *guest* at the inn, that is, he must be a person who stays there under an express or implied agreement to be supplied with his personal wants, for a just compensation, for unless he is invested with that character, his goods will not be protected to the extent of those of a guest; one who stays at an inn as his home, under a special contract, is not a guest but a boarder.(*b*)

2. *Of the degree of liability of innkeepers.*

1017. Innkeepers are an exception to the general rule applicable to depositaries for custody. Their responsibility is nearly similar to that of common carriers, and for the same reason, the protection of the public. They are bound to exert the greatest diligence in regard to the goods and chattels of their guests, and their responsibilities extend to deeds, bonds, and other choses in action. If the goods of the guest are stolen while they are in the inn, the keeper is in general responsible, unless the guest has done some act by which he has assumed the sole custody of them, or has deprived the innkeeper of their custody.(*c*)

He is responsible for the acts of his servants and domestics, as well as for the acts of other guests, if the

(*a*) 8 Co. 32; Jones, Bailm. 91.
(*b*) Bac. Ab. Inns, C 5; Story, Balm. § 477. See Peet *v.* McGraw, 25 Wend. 653; Mason *v.* Thompson, 9 Pick. 280.
(*c*) Cayle's case, 8 Co. 32; Sneider *v.* Geiss, 1 Yeates, 34; Farnworth *v.* Packwood, 1 Starkie, 249; Burgess *v.* Clements, 4 M. & S. 306.

goods be stolen or lost; but he is not liable to an action for damages done without his consent or coöperation, by a servant to the person of a guest.(*a*)

His general liability does not extend to those cases where the guest is in fault, nor where the loss happens through the act of God or of a public enemy.(*b*)

3. *Of the rights of innkeepers.*

1018. The innkeeper is entitled to a just compensation for his care and trouble, in attending to his guest and his property, and finding him what he may require. To enable him to recover this, the law has given him various remedies; he has a lien upon all the property of his guest, in the inn and its stables, for all his claim as innkeeper. The lien does not, however, extend to the person of his guest,(*c*) though formerly a different rule obtained.(*d*)

4. *General Observation.*

1019. It must be remembered that the rules above mentioned are applicable to innkeepers by the common law. In the United States there are regulations, in each state of the Union, in relation to the licensing inns, hotels, and taverns, and, in some of them, the laws limit or change the rights and liabilities of the keepers of them.

§ 4.—Of *locatio mercium vehendarum*, or the carriage of goods.(*e*)

1020. A *common carrier of goods*, is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.

(*a*) 8 Co. 32.
(*b*) Broom's Max. 108.
(*c*) Sunbolp *v.* Alford, 1 Horn. & Hurl. 13.
(*d*) Newton *v.* Trigg, 1 Show. 269; Bac. Ab. Innkeepers, D.
(*e*) For the authorities on the law of carriers in the civil law, the reader is referred to Dig. 4, 9, 1 to 7; Poth. Pand. lib. 4, t. 9; Domat, liv. 1, t. 16, s. 1 et 2; Pardes, n. 539 to 555; Moreau & Carleton, Partidas 5, t. 8, l. 26; Ersk. Inst. book 1, t. 1, § 28; 1 Bell, Com. 465.

Steamboat companies; railway companies; masters of vessels; bargemen; ferrymen;(a) proprietors of stage coaches and stage wagons, which ply from place to place;(b) truckmen; cartmen; porters, who carry parcels in the same town from place to place; indeed all persons who make it a business to carry goods for any who may wish to employ them, for a reward or hire, are considered as common carriers. But a forwarding merchant, who has no interest in the conveyances which carry away the goods entrusted to him, is not a common carrier;(c) nor is the owner of a cart, or carriage, let for a specific length of time, to go to such places as the employer may direct, as a cab driver, or a hackney coachman, such a carrier.(d) And a distinction must be observed between one who carries goods only occasionally, although he may receive hire, and a common carrier; a man who is employed for hire *pro hæc vice* only, and does not make the carriage of goods his constant employment, is not liable as a common carrier.(e)

1021. Common carriers of goods are, 1, required to fulfil certain obligations, arising from the nature of their employment; 2, liable for certain losses which occur in the course of their agency; 3, entitled to certain rights, either under an express or implied agreement: each of these will be separately examined.

Art. 1.—Of the obligations of common carriers.

1022. A common carrier is obliged to receive and carry all goods offered to him for transportation, when he has room for such goods, upon receiving a just compensation or hire; and, unless he has a valid excuse,

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(a) Smith v. Seward, 3 Penn. St. R. 342.

(b) Beekman v. Shouse, 5 Rawl. 179; Gordon v. Hutchinson, 1 W. & S. 286.

(c) Platts v. Hibbard, 7 Cow. 497; Roberts v. Turner, 12 John. 232.

(d) Brind v. Dale, 8 Car. & Payne, 207.

(e) —— v. Jackson, 1 Hayw. 14; Satterlee v. Groat, 1 Wend. 272; Tunnel v. Pettijohn, 2 Harring. 41.

he is liable to an action for not doing so.(a) The proper time to deliver them to him, is when he is about to set out on his accustomed journey.(b)

On receiving the goods, he is bound to take the utmost care of them; to obey the directions of the owner in respect to them;(c) to carry them safely to the proper place of destination; to make a right delivery of them there in proper time, according to the usage of trade, or the course of business. He is required to provide proper conveyances; if with wagons, good horses and drivers; if by water, good vessels and a sufficient crew,(d) and to proceed, without deviation, to his place of destination, for a voluntary deviation will render him responsible for inevitable accidents.(e)

Art. 2.—Of the liability of a common carrier.

1.—*For what losses.*

1023. By the common law, a common carrier is in general liable for all losses which may occur to property entrusted to his charge in the course of business, unless the loss has happened, 1, by the act of God, or inevitable accident; 2, by the act of the enemies of the United States; 3, by the act of the owner of the property; 4, because the carrier has given notice limiting his liability; or, 5, because he is protected by some rule of law.

First Exception.—Of the act of God.

1024. By the phrase, *an act of God*, is meant those natural accidents arising from physical causes, which cannot be prevented; such as lightning, earthquakes,

(a) Bac. Ab. Carriers, B; 1 Saund. 312, C; Riley v. Horne, 5 Bing. 217, 224; Jackson v. Rogers, 2 Show. 327; Gordon v. Hutchinson, 1 W. & S. 237. See 7 W. & S. 468; McGill v. Rowand, 3 Penn. St. R. 451.

(b) Lane v. Cotton, 1 Ld. Raym. 652; Hastings v. Pepper, 11 Pick. 41.

(c) Streeter v. Hurlock, 1 Bing. 34.

(d) Bell v. Read, 4 Binn. 127; Hart v. Allen, 2 Watts, 115.

(e) Davis v. Garrett, 6 Bing. 716; Lawrence v. McGregor, Wright, 193; Hand v. Banes, 4 Whart. 204; Souter v. Baymore, 7 Penn. St. R. 415.

tempests, etc. It is something in opposition to the act of man.(a) For losses by the act of God, a carrier is not responsible, according to the maxim, *actus Dei nemini facit injuriam.* The loss in such cases must fall upon the owner; *res perit domino.*

When the carriage is by water, the bill of lading generally contains a proviso that the carrier shall not be liable for "perils of the sea." The exact import of this expression is not clearly settled. In a strict sense, it signifies the natural accidents peculiar to the sea; but in more than one instance, it has been held to extend to events not attributable to natural causes. For instance, the meaning of these words has been held to include a capture by pirates on the high seas; in another, a loss occasioned by collision of two ships, where no blame was imputable to either, or not to the injured ship.(b) A loss by jettison, when no blame is imputable to the master, is also considered a peril of the sea.(c) Numerous other accidents have also been classed as perils of this kind.(d)

The words, *perils of the sea,* on the western waters of the United States, signify *perils of the river.*(e)

Second Exception.—Of the enemies of the United States.

1025. By *enemies,* is understood public enemies, with whom the United States are at open war, and not merely robbers, thieves, or other private depredators. Losses by the latter must be borne by the common carrier, while he is excused in case the loss has been sustained from the former. It would be unreasonable to hold a carrier responsible for the acts of a

(a) Forward *v.* Pittard, 1 T. R. 33; Jones, Bailm. 103; Phill. Ins. c. 13, § 7; Story, Bailm. § 511; Neal *v.* Saunderson, 2 Sm. & M. 572.

(b) Marsh *v.* Blythe, 1 McCord, 360.

(c) Jones, Bailm. 108; 1 Caines, 43; 3 Conn. R. 9.

(d) Marsh, Ins. B. 1, c. 7, s. 4; Abbott on Shipp. part 3, c. 3, s. 9; Garrigues *v.* Coxe, 1 Binn. 592; Aymer *v.* Astor, 6 Cowen, 266; Bac. Ab. Merchant, etc., (I), Bouv. ed.

(e) Jones *v.* Pitcher, 3 Stew. & Port. 176; Whitesides *v.* Russell, 8 Watts & Serg. 44. See Atwood *v.* The Reliance Company, 9 Watts, 87.

public enemy, which the government, which is bound to protect the common carrier, could not resist; but the same reason does not apply to the case of common robbers and thieves, because the carrier could easily defraud his employers by colluding with them, and, to prevent this, common carriers are made responsible for the acts of such malefactors.

Third Exception.—Loss occasioned by the owner.

1026. If, in consequence of the negligence of the owner in not putting his goods in a fit condition for the journey, any loss arise, it will fall on him, unless the carrier has by implication or expressly assumed the care of them in such condition.(*a*)

Fraud in this, like every other case, will render the contract a mere nullity. If, therefore, the owner of the goods use fraud or artifice to deceive him, and in consequence of it his risk is increased or his vigilance is lessened, the loss which may follow must be borne by the owner.(*b*) Whether a bare concealment would be such a fraud seems doubtful, but if the carrier make an inquiry, and a false answer is given, he will not be liable for the loss.(*c*)

Fourth Exception.—Of notices.

1027. Attempts have been made by carriers, to limit their responsibility, by giving notices that they will not be responsible for the carriage of certain goods without loss, or that those goods are carried at the risk of the owner. Though the validity of these notices has been established to a certain extent in England, under the controlling influence of certain statutes,(*d*) in the United States they have generally been declared void as being contrary to the policy of the law, for the undertaking of a common carrier is to

(*a*) Beck *v.* Evans, 16 East, 245; Stuart *v.* Crawley, 2 Stark. 324; Laing *v.* Calder, 8 Penn. St. R. 479; Relf *v.* Rapp, 3 Watts & Serg. 21.
(*b*) Edwards *v.* Sherrath, 1 East, 604; Relf *v.* Rapp, 3 W. & Serg. 21.
(*c*) Riley *v.* Horne, 5 Bing. 217; Batson *v.* Donovan, 4 B. & Ald. 21.
(*d*) Story, Contr. § 760.

carry safely, and the notice is to exempt him from this obligation.(*a*)

In Pennsylvania a carrier may *limit* his common law responsibility by a particular agreement, but the exception will be strictly interpreted; he cannot exempt himself from *all* responsibility.(*b*)

Fifth Exception.—Exemption of the carrier by a rule of law.

1028. The reason why a common carrier is responsible for the loss of goods is, that they are completely under his control, and the policy of the law renders him liable for their loss on this account. But when the reason of a rule ceases, the rule itself should have no force. Accordingly, when a carrier has no longer the control of property, he cannot be made responsible. This is the case when intelligent beings, as slaves, are the property which he has engaged to transport. The rule in cases of this kind is, that the carrier is responsible only for want of care and skill.(*c*)

2. *Of the beginning and end of the risk of the carrier.*

1029. The carrier's liability commences the moment the goods are delivered to him, or to his authorized agent, for carriage, and accepted either expressly or by implication.(*d*) But the goods must be completely under his sole control, for if an agent be sent with them, to take special care of them, his liability does not attach. If, however, a servant happens to go with them, but there is no intention to let him meddle with the care of the goods, the carrier will be answerable for the loss.(*e*)

(*a*) Hollister *v.* Newlen, 19 Wend. 234; Cole *v.* Goodwin, 19 Wend. 251; Clark *v.* Faxton, 21 Wend. 153; Atwood *v.* Reliance Transportation Co., 9 Watts, 87; Beckman *v.* Shouse, 5 Rawle, 179; Bingham *v.* Rogers, 6 Watts & Serg. 500. Jones *v.* Voorhees, 10 Ohio, 145; Gould *v.* Hill, 2 Hill, N. Y. 623.

(*b*) Atwood *v.* The Reliance Company, 9 Watts, 88. See Bingham *v.* Rogers, 6 W. & S. 500; Laing *v.* Calder, 8 Penn. St. R. 479.

(*c*) Boyce *v.* Anderson, 2 Pet. 150; Clark *v.* M'Donald, 4 M'Cord, 223; Williams *v.* Taylor, 4 Port. 238.

(*d*) Selway *v.* Holloway, Ld. Raym. 46; Leigh *v.* Smith, 1 C. & P. 640.

(*e*) Marsh. Ins. B. 1, c. 7, s. 5; Abbott on Ship. part 3, c. 2, s. 3; Story, Bailm. § 533.

The liability of the carrier ends the moment the goods are deposited at their place of destination, and when no express agreement has been made, such place may be determined by usage, for usage enters into every contract, unless there is an express agreement to the contrary.(*a*) A delivery on the usual wharf will, in such case, be sufficient, provided notice be given to the consignee;(*b*) in such case the delivery must be made at some reasonable time, for an offer to deliver goods at an unreasonable time will not discharge the carrier from his responsibility.(*c*) But when there is neither agreement nor usage, the goods must be delivered to the consignee in person,(*d*) and the moment the latter has possession, the carrier's risk is ended.

3. *Of the rights of a common carrier.*

1030. A common carrier of goods is entitled, in all cases, to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them; if, however, he receives them without the hire being paid, he may afterward recover it by action, and he has a lien on the goods till he is paid, unless he waives it, and if once the right is waived, the lien is gone, and cannot be resumed.

The consignor or shipper is commonly bound to the carrier for the hire or freight of goods.(*e*) The consignee also becomes bound for it, whenever he expressly promises or receives the goods with a bill of lading containing the usual clause that the carrier will deliver the goods to the consignee, "he or they paying freight."(*f*)

(*a*) Chickering *v.* Fowler, 4 Pick. 371; Cope *v.* Cordova, 1 Rawle, 203.
(*b*) 1 Rawle, 203; 4 Pick. 371; Kohn *v.* Packard, 3 Miller, Lo. R. 225.
(*c*) Hill *v.* Humphreys, 5 W. & S. 123. See Hemphill *v.* Chenie, 6 W. & S. 62; Graff *v.* Bloomer, 9 Penn. St. R. 114; Eagle *v.* White, 6 Whart. 505.
(*d*) Story, Bailm. §§ 508, 539, 553.
(*e*) Moore *v.* Wilson, 1 T. R. 659.
(*f*) Abbott on Shipp. part 3, c. 7, § 4.

1031. The price or consideration for carrying goods on land is called the *hire;* for carrying them on water, *freight.*

§ 5.—Of carriers of passengers.

1032. Carriers of passengers may be distinguished into, 1, carriers by land; and, 2, carriers by water.

Art. 1.—*Of carriers by land.*

1033. These must be considered with regard to, 1, their obligations; 2, their liability; and 3, their rights.

1. *Of their obligations.*

1034. They are bound to carry all passengers who offer themselves, against whose personal character and conduct there are no just objections, provided they have sufficient accommodations,(*a*) and the passage money has been offered. They have no more right to refuse a passenger than an innkeeper has to turn away a guest.(*b*)

They are also required to provide sufficient carriages, with suitable horses and harness; careful drivers of reasonable skill and good habits; not to overload the carriage, either with passengers or baggage; to take care of the baggage, which each passenger is allowed to have; to stop at the usual places and allow such time as is commonly employed for taking refreshments; to use all ordinary precautions for the safety of passengers on the road; to carry passengers to the end of their journey; to put them down at the usual places of stopping, unless there has been a special contract to the contrary, and then to put them down at the place agreed upon.(*c*)

(*a*) Pickford *v.* Grand Junction Railway Co., 8 Mees. & Wels. 372; Jencks *v.* Coleman, 2 Sumn. 221.

(*b*) Bretherton *v.* Wood, 3 Brod. & Bing. 54.

(*c*) Story, Bailm. §§ 591 to 598; McKinney *v.* Neil, 1 McLean, 540.

2. Of the liabilities of carriers of passengers.

1035. Their liabilities toward passengers arise from a neglect to use extraordinary care and diligence, to carry safely those whom they take in their coaches; but they are not responsible for accidents, when they use all reasonable skill and diligence.(*a*)

For the baggage of the passengers they are liable as common carriers.(*b*)

3. Of the rights of carriers of passengers.

1036. The rights of such carriers are, 1, to demand and receive their fare at the time the passenger takes his seat, and if the fare be but partially paid, and the passenger does not attend at the time of departure, his seat may be given to another; but if the whole fare be paid, he has a right to come in at any place on the journey for which he has paid.(*c*) The carrier has a lien on the baggage of his passenger for his fare or passage money, but not on the person of the passenger, nor the clothes he has on.(*d*)

Art. 2.—Of carriers of passengers by water.

1037. Carriers of passengers by water are in general bound by the same rules as carriers by land; and liable for the same faults both as to the person and to the baggage of the passenger.

1038. Salutary regulations have been made by congress, as to the amount of provisions or sea-stores which must be taken on board of vessels bound to or from the United States, intended for the carriage of passengers; and also as to the number of passengers which vessels may take.(*e*)

(*a*) Ware *v.* Gary, 11 Pick. 106.

(*b*) Hollister *v.* Newlen, 19 Wend. 234; Cole *v.* Goodwin, 19 Wend. 251; Jones *v.* Voorhees, 10 Ohio, 145; Hawkins *v.* Hoffman, 6 Hill, 586.

(*c*) Ker *v.* Mountain, 1 Esp. 26.

(*d*) Abbott on Shipp. part 3, c. 3, s. 11.

(*e*) Act of 2d March, 1819; Act of 22d of February, 1847; Act of 2d March, 1847, s. 2.

§ 6.—Of postmasters.

1039. The post office is a public institution, established for the general good, and the officers appointed to fulfil the duties incident to it are, first, the postmaster-general, who has the superintendence of the whole department; and, secondly, deputy postmasters, officers who are located over the whole country. It is their duty to receive and send, according to direction, all letters and other mailable matters, which are delivered to them. The delivery is usually made by being dropped into a box, at the place where they hold their office.

Deputy postmasters are not responsible as common carriers,(*a*) nor are they liable for the secret delinquencies of their sworn assistants,(*b*) because there has been no default of their own; but when a postmaster is guilty of allowing a person, who is not permitted by law, to act as his assistant; for example, where he allowed one to have the custody of the mail, without being sworn according to law, he is responsible for any loss that may happen in consequence,(*c*) as he is when guilty of negligence or fraud.(*d*)

SECTION 2.—OF PAWNS OR PLEDGES.

1040. In this section will be examined the contract of *pawn* or *pledge*, which is the second kind of bailment for the mutual benefit of both parties. Various definitions have been given of this contract, differing but little from each other. A pawn or pledge, (for the term is used as synonymous,) is a contract by which the debtor, or some other person for him, delivers to his creditor, as a surety for his claim, personal property to be detained by him, which the creditor obligates himself to return to the debtor after his claim shall have

(*a*) Rowning *v.* Goodchild. 3 Wils. 443; Bolan *v.* Williamson, 2 Bay, 551.
(*b*) Schroyer *v.* Lynch, 8 Watts, 453.
(*c*) Bishop *v.* Williamson, 2 Fairf. 495.
(*d*) Dunlap *v.* Monroe, 7 Cranch, 242, 269; 8 Watts, 453.

been satisfied.(a) The thing delivered by this contract to the creditor is also called a pawn or pledge, in Latin, *pignus*.

The party who is in debt, and delivers the thing as a security, is called the *pawnor*, and he who receives it, the *pawnee*.

1041. A pawn or pledge somewhat resembles many other contracts, but still it is not exactly like them. It is like a *mortgage*, because in both cases the property is given as a security; but it is unlike a mortgage in this, that in a mortgage the title to the property passes to the mortgagee, subject to an equity of redemption; while only a special property passes to the pawnee, and the title remains in the pawnor.(b) It differs from a *lien*, which is a mere right in a creditor to be paid out of certain property, it is only a privilege; although the property is delivered in both cases, it differs from a *loan*, because the thing pledged is not to be used, except under special circumstances, when it is for the

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(a) Pothier Du Contr. de Nantissement, art. Prél. n. 1. Mr. Justice Story, in his learned treatise on the Law of Bailments, has rejected the definition of Pothier, and adopted that of Domat, because Pothier says that the pawn is to be given "pour la sureté de sa créance," which the learned judge has translated "as security *for his debt*," taking the meaning of the word in a narrow sense. The word *créance* is not used by Pothier for *debt*, but for *claim*, or for the obligation of the person who owes either money or any other thing; and in the same treatise, "Du Contrat de Nantissement," n. 11, he uses it in the sense of *claim*, where he says, "Il n'importe quelle soit la créance pour sureté de laquelle la chose soit donnée en nantissement." In his Pandects, liv, 12, t. 1, s. 1, Pothier says, "Le préteur ayant donc renfermé dans ce titre beaucoup de choses relatives à differens contrats, il a dû faire précéder les créances en général, puisque la matière des créances renferme *tous les contrats d'après lesquels nous nous en rapportons à la promesse d'autrui*, car, comme le dit Celse, le mot *créance est une denomination générale*." See, as to the true meaning of pawn, 2 Bell's Com. 20, 5th ed.; Jones on Bailm. 36. 117; Dane's Ab. c. 17, art. 4; Dig. 50, 16, 2, 38; Hein. Pand. lib. 20, t. 1, §§ 2, 3, 4, 5; Ayl. Pand. 524; Story, Bailm. § 286; Coggs *v*. Bernard, Ld. Raym. 909, 913; Domat, partie 1, l. 3, t. 1, s. 1, n. 1; Bowy. Mod. Civ. Law, c. 29, p. 176; Ersk. Inst. B. 3, t. 1, n. 33.

(b) Cortelyou *v*. Lansing, 2 Caines' Cas. Er. 200; Conrad *v*. Atlantic Ins. Co., 1 Pet. 449; Haven *v*. Low, 2 N. Hamp. 13; Brown *v*. Bement, 8 John. 97; Fletcher *v*. Howard, 2 Aik. 115; Lewis *v*. Stevenson, 2 Hall, 63; Gleason *v*. Drew, 9 Greenl. 82; Ward *v*. Sumner, 5 Pick. 60.

benefit of the pawnor.(a) It differs from a *deposit*, because in this contract the property is delivered to the depositary to be kept for the benefit of the depositor, and in a pledge it is to be kept as a security for the payment of a claim. The difference between hypothecation and pledge is this: *hypothecation* does not require possession to accompany it. The case of bottomry bonds, and the claims for seamen's wages, are nearly similar to the hypothecation of the civil law; these, however, are rather liens than pledges. Another instance may be mentioned: where a chattel is not in existence, it cannot properly be pledged, because it cannot be delivered, but the creditor has a lien by way of hypothecation, so that his right will attach the moment the chattel is produced.(b)

To make the contract of pawn there must be, 1, property given in pledge; 2, a claim to be secured; 3, the delivery of the thing pledged; 4, the pawnor must enter into obligations; 5, the pawnee must be liable to the obligations; and, 6, after it has been made, it may be extinguished.

§ 1.—What property may be pawned.

1042. The term pawn, *ex vi termini*, excludes the idea of real estate. When lands are given as security for a debt or other obligation, the title of them is conveyed to the creditor by a mortgage. Things which may be the subject of a pledge or pawn are ordinarily goods and chattels, but money, negotiable instruments and choses in action, and, indeed, any other valuable thing of a personal nature, such as manuscripts and patent rights, may, by the common law, be delivered in pledge. From principles of public policy the pay of soldiers and mariners in the service of the government cannot be pledged.

(a) Thompson *v.* Patrick, 4 Watts, 414.
(b) Macomber *v.* Parker, 14 Pick. 497.

§ 2.—What claim may be secured by a pledge.

1043. The pawn must be given for a claim, whether it be a debt for money or for the fulfilment of any other engagement. It may be for that of the pawnor or any one else; the claim or engagement may be due, or the pawn may be as a security for a future debt or lawful engagement.

When the pledge is given to secure a particular debt or contract, it will not authorize the pawnee to retain it for another, unless, from the circumstances, such seems to have been the intention of the parties.(*a*) But the pawn is liable for all incidental charges and expenses, as, for example, interest on a debt, or any expenses about the pledge.(*b*)

§ 3.—Of the delivery of the thing pledged.

1044. One of the essential requisites of this contract is, that the thing pledged shall be delivered to the pawnee, for, till then, he acquires no right or property in it. The delivery may be actual or constructive.(*c*)

§ 4.—Of the obligations and rights of the pawnor.

1045. By the act of pawning, the pawnor enters into an implied agreement or warranty that he is the owner of the property pawned, and that he has a right to pass the title.(*d*)

The pawnor has the right to redeem the pledge, notwithstanding he has not strictly complied with the contract, until the pawnee has taken such steps as to divest him of that right.(*e*) But the pawnee may deprive him of this right by selling the pawn;(*f*) and

(*a*) Jarvis *v.* Rogers, 15 Mass. 389, 397; Gallist *v.* Lynch, 2 Leigh, 493.

(*b*) Ayl. Pand. B. 4, t. 18; Domat, partie 1, liv. 3, t. 1, § 3, n. 4, 19, 20.

(*c*) Jewett *v.* Warren, 12 Mass. 300; Poth. du Contrat de Nantissement, n. 8.

(*d*) Story, Bailm. § 354.

(*e*) Cortelyou *v.* Lansing, 2 Caines' Cas. Err. 200.

(*f*) 1 Reeves' Hist. 161; 2 Caines' Cas. Err. 200; Yelv. 178.

the pawnor will be presumed to have abandoned it, after a great length of time.(*a*)

The pawnor has no right to redeem the pledge partially, by paying a part of the debt, and, if several things be pledged for the same engagement, the debtor is not entitled to either until he has entirely fulfilled it.(*b*)

§ 5.—Of the obligations and rights of the pawnee.

Art. 1.—*Of the pawnee's right to use the pledge.*

1046. In virtue of the pawn, the pawnee acquires a qualified property in the thing, and is entitled to the exclusive possession, during the time and for the object during which it is pledged.(*c*)

While the pawn is in his possession, the pawnee may use it, when such use is for the benefit of the pawnor, and, if its preservation depends upon its use, it is the duty of the pawnee to use it.(*d*) If it may be used without injury, and it is used by the pawnee, he does so at his peril. If its use will be injurious to the pawnor, the pawnee is not allowed to use it,(*e*) in the absence of any contract.

The rule of the civil law is, that where the pawnee uses the pledge, and it produces a profit, he shall account for it to the pawnor, he being allowed his expenses. This is but equity, and, accordingly, it has been holden that where a slave was pledged to secure the payment of a sum of money, which had been borrowed, the pawnee was liable in assumpsit for the clear profits of the slave beyond the interest of the debt, the principal having been paid.(*f*)

(*a*) Matth. Pre. Ev. 20, 331.
(*b*) Union Bank *v.* Laird, 2 Wheat. 390; Elder *v.* Rouse, 15 Wend, 218.
(*c*) 2 Bl. Com. 396; Bac. Ab. Bailment, (B).
(*d*) Jones' Bailm. 81; Story, Bailm. § 329; Thompson *v.* Patrick, 4 Watts, 414.
(*e*) Story, Bailm. § 330. See Thompson *v.* Patrick, 4 Watts, 414.
(*f*) Houton *v.* Holliday, 1 Car. Law Rep. 87; S. C. 2 Murph. 111. See Ross *v.* Newell, 1 Wash. 14; Davenport *v.* Tarlton, 1 Marsh. 244.

Art. 2.—What care the pawnee shall take of the pledge.

1047. The principal obligation which arises from the contract of pawn on the part of the pawnee is to return the thing pledged to the pawnor, when the obligation of the latter shall have been acquitted. This obligation, like all those made to deliver a certain thing, is extinguished, when the thing is lost without the fault of the pawnee; or if it be lost by the fault of the pawnor.

From this principal obligation of returning the pledge, another is a necessary consequence, which is that of taking care of it, during the time it has been pawned, in order to return it afterward. The pawnee is bound to take ordinary care of the pledge by using ordinary diligence. If he does this he will not be responsible for the loss.(*a*)

Art. 3.—Of the remedy of the pawnee.

1048. The pawnee has a double remedy. The pledge has been given to him as a security for his claim, upon the express or implied condition that if such claim be not satisfied within the time agreed upon, he shall have the right to apply the thing pledged, or its proceeds, to the satisfaction of his claim; this is one of his remedies. As the debt is due, and it is a personal obligation of the debtor, independent of the pledge, it is evident he may bring an action for its recovery, just as if he had no such security; this is his other remedy.

1. *Of the pawnee's right to sell the pledge.*

1049. When the pawnor becomes in default by not paying the debt he owes, or fulfilling his engagement, the pawnee acquires a right to sell the pledge and pay himself out of the proceeds; but, until the sale, the pawnor may redeem it, by paying what he owes. In

(*a*) Jones, Bailm. 75; 1 Dane's Ab. c. 17, art. 12; Domat, liv. 1, t. 1, § 4, n. 1; Poth. du Contrat de Nantissement, n. 34.

some cases notice of the intended sale is required, and in all cases it is prudent to give it. Care must be taken not to sell the pledge before the pawnee has acquired the right to do so; when there has been an agreement as to time when the pledge might be sold, that time must have expired, and then the goods pledged may be sold without further notice, but still a notice is advisable when it can be given. On the contrary, when the goods are pledged for an indefinite period of time, the pawnee cannot sell them without notice to the person by whom they were pledged;(*a*) and if the latter be absent, or cannot be found, judicial proceedings should be had to bar his right to redeem.(*b*) When several things have been pawned for the same claim, they may be sold *seriatim* until the whole debt shall be discharged. The moment the pawnee has made a sufficient sum to pay himself, his right to sell the remainder is at an end. He is bound to return the surplus, if any, and if the proceeds of the sale should not be sufficient to pay the debt, the pawnor will still be liable for the difference.(*c*)

2. *Of the pawnee's right of action.*

1050. The debt or engagement for which a pawn is given is the principal obligation, and the obligor is personally bound to fulfil it, as if no pledge had been given. The creditor may, therefore, bring an action for the recovery of the debt at any time after it becomes due, without any surrender of the pledge. And if the pawn be lost, or surrendered to the pawnor, or surreptitiously obtained by the latter, or if the pawnee convert it to his own use, and the pawnor recover damages from him, on that account, for its value, the original obligation survives.(*d*)

(*a*) De Lisle *v.* Priestman, 1 P. A. Browne, 176.
(*b*) Garlick *v.* James, 12 John. 146; Hart *v.* Ten Eyck, 2 John. Ch. 62.
(*c*) Bac. Ab. Bailment, B.
(*d*) Landon *v.* Buel, 9 Wend. 80; Elder *v.* Rouse, 15 Wend. 218; Case *v.* Boughton, 11 Wend. 106.

§ 6.—Of the extinction of the contract of pawn.

1051. Whatever extinguishes the claim which the pawn was given to secure, discharges the pawn, and entitles the pawnor to regain the possession. This may be done in several ways.

1. By payment of the debt, or the discharge of the engagement for which the pawn was given.

2. By accord and satisfaction.

3. By taking a new security instead of the old one, with an intention of liquidating the one which was first given, and relying upon the latter, without making any new provision as to the pledge. The effect of this, which the civilians call a novation, has been already explained. But unless there be a clear intention to extinguish the original security, a mere renewal of a claim will not have that effect.

4. When on a trial between the pawnee and the pawnor on the original claim, a final judgment is rendered in favor of the pawnor, the pledge is discharged.

5. The destruction of the pledge destroys all right to it.

6. The release of the thing pledged or a waiver of it, destroys the right which the pawnee had.

Second Class.—Of bailments for the benefit of the bailor.

1052. Having disposed of the first class of bailments where the contract is beneficial to both parties, let us next consider the second class, or those in which the trust is for the benefit of the bailor; these are, 1, deposits; and 2, mandates.

SECTION 1.—OF DEPOSITS.(a)

1053. *Deposit* is usually defined to be a naked bailment of goods by one of the contracting parties to another, to be kept by the latter for the former, without reward, and to be returned when the depositor

(a) See Bac. Ab. Bailment; Inst. 3, 15, 3; Nov. 73 and 78; Poth. Du Dépôt; Domat, partie 1, liv. 3, t. 1, s. 5, n. 26; Code 4, 34.

shall require it. The term deposit signifies not only the contract above described, it means also the thing deposited.(*a*)

The 'party who makes the deposit is called the *depositor*, and he with whom it is made is denominated the *depositary*. This section will be divided into three heads: 1, of the kind of deposits; 2, of the nature of deposits; 3, of the rights and obligations of the parties.

§ 1.—Of the kind of deposits.

1054. In the civil law deposits are of two kinds, necessary and voluntary. A *necessary* deposit is one which arises from pressing necessity, as, for instance, in case of fire, a shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*.(*b*) A *voluntary* deposit is such as arises without any such calamity, from the mere consent or agreement of the parties.(*c*) Although this distinction may be material in the civil law in respect to the remedy, yet in the common law there is no such difference.(*d*)

Deposits are again divided in the civil law into *simple* deposits and *sequestrations;* the former are where there is but one party depositor, of whatever number of persons composed, having a common interest; the latter contract is where there are two or more depositors, having each a different and adverse interest. These distinctions give rise to very different cosiderations in point of responsibilities and rights. Hitherto they do not seem to have been incorporated into the commercial law; though, if cases should arise, the principles applicable to them would scarcely fail of receiving general application, at least, so far as they affect the rights and responsibilities of the parties.

(*a*) Jones, Bailm. 36, 117; Story, Bailm. § 41; Poth. Du Dépôt, art. prél. n. 1; Code of Louis. art. 2897.

(*b*) Code of Louis. art. 2935.

(*c*) Dig, 16, 3, 2.

(*d*) Jones, Bailm. 48.

Cases of judicial sequestration and deposit, especially in courts of chancery and admiralty, may hereafter require the subject to be fully investigated. But few cases have yet occurred where the goods have been lost while in the custody of the law, where it has been requisite to inquire on whom the loss should fall.(*a*)

By the definition of deposit above given, it is required that the thing deposited should be returned. There is a kind of deposit where that need not be done, and this has been called an *irregular deposit*. This takes place when a person having a sum of money, which he does not think safe in his own hands, confides it to another, who is to return to him, not the same money, but a like sum, when he shall demand it.(*b*) The usual deposit made by a person dealing with a bank is of this nature; the title to the money so deposited vests in the depositary, and the depositor becomes a mere creditor of the latter. If the money deposited should be lost, the loss will fall on the depositary.(*c*)

There is still another kind of deposit, which for distinction's sake may be called a *quasi deposit*, because it does not arise *ex contractu*. It is generally governed by the same rules which regulate a common deposit. As the finder of an article is not bound to take possession of it, he assumes a responsibility if he takes the possession. From that moment, he is obliged to use ordinary care of the thing. The owner, on the other hand, is bound to pay him back such money as he may have laid out in necessary expenses; and if no owner reclaim the goods they belong to the fortunate finder.(*d*)

§ 2.—Of the nature of a regular deposit.

1055. This head will be divided into three others: 1, what property may be deposited; 2, between what

(*a*) Story, Bailm. § 41—46.
(*b*) Poth. Du Dépôt.
(*c*) See 1 Bell, Com. 557, 558.
(*d*) 1 Bl. Com. 296; 2 Kent, 290; Story, Bailm. § 35; Domat, l. 2, t. 9, s. 2, n. 2; Doct. & St. Dial. 2, c. 38; Bac. Ab. Bailment, D.

persons the contract may be formed; 3, of the requisites to form the contract.

Art. 1.—*What property may be deposited.*

1056. The property which is the subject of a deposit must be *personal;* real property cannot be given in deposit; when it is given as a security, it is mortgaged. Debts, choses in action, and securities given for them, as bonds, notes, and the like, may be deposited.(*a*)

The depositor may be the owner of the thing deposited, or he may have only a qualified right in it; indeed, when he has only a possession, he may deposit it, and he is entitled to recover it back against every one but the rightful owner.(*b*) But if the real owner receive his own property in deposit by mistake, he is not compelled to return it.(*c*)

Art. 2.—*Between what persons the contract may be formed.*

1057. The parties must be capable of entering into contracts. An infant and a married woman are each incompetent; the former without the consent of his guardian, the latter without that of her husband.(*d*)

Art. 3.—*Of the requisites to form the contract of deposit.*

1058. There must be, 1, a delivery of the thing deposited; 2, the intent of the delivery must be to keep the thing; 3, that the depositary take care of it gratuitously; 4, consent of the parties.

1. *There must be a delivery.*

1059. There must be a *delivery* from the depositor to the depositary of the thing deposited, which he is to keep. This delivery may be made by the agent of the depositor to the agent of the depositary, or by the

(*a*) 1 Bell, Com. 258; Story, Bailm. § 51.
(*b*) Ayl. Pand. 522; Dig. 16, 3, 1, 30.
(*c*) Poth. Du Contrat de Dépôt, n. 4; Dig. 16, 3, 15.
(*d*) Poth. Du Contrat de Dépôt, n. 4 et 5.

parties themselves. But when the thing is already in the possession of the depositary, it is not requisite that there should be two deliveries by the depositary to the depositor, and then again from the depositor to the depositary; as if you had my History of the United States, as a pawn, and I pay you the debt I owed you, and we then agree that you shall hold the History on deposit.(a)

2. *Of the intent of the delivery.*

1060. This intent must be that the depositary shall keep the thing *to be returned to the depositor*, for if it be for another purpose it will no longer be a deposit. If the delivery be to convey to the depositary the title of the thing, it is a gift, a sale, or a barter, or some other such contract; if to grant him the use for his benefit, it is a loan or a hiring; if it is to do something to it for the depositor, it is a loan or a mandate; it is a loan if the depositor receives a compensation, or a mandate if it be done gratuitously.(b)

3. *The custody must be gratuitous.*

1061. The consent must be gratuitous, for, if a reward be required, it is no longer a deposit, but a hire of custody, *locatio custodiæ.*

4. *Of the consent of the parties.*

1062. The consent of the parties to a deposit may be *expressly* given, or it may be *implied* from circumstances; for example, Peter is in the habit of leaving certain goods with Paul as he passes daily, while he goes to another place; on one occasion he leaves a bundle of merchandise in the store of Paul, in sight of the latter, without saying any thing, and Paul makes no objection; this is a deposit.

In general, no one is forced to become a depositary, but there are certain cases of necessary deposits, where

(a) Poth. Du Contrat de Louage, n. 8.
(b) Poth. Du Contrat de Dépôt, n. 9.

no such consent is required; as when goods are forced on a party in case of fire, or when the bailment arises from accident.

§ 3.—Of the rights and obligations of the parties.

Art. 1.—*Of the rights of the depositor.*

1063. The depositor has a right to the restoration to him of the thing deposited, whenever he shall demand it, and also of all the increase which belongs to it; if it be a female animal, and it has had a young one, while it was in deposit, that must be restored with the dam; and if a part be lost the remainder must be returned.

When the deposit is made by several co-depositors, they must join in making the demand.(*a*) When there are several depositaries, they are jointly and severally liable for the deposit.

The thing must be delivered at the place agreed upon, but if no place be specified, then at the place where it is, or where it ought to be kept.(*b*)

Art. 2.—*Of the obligations of the depositary.*

1064. The obligation which the depositary contracts toward the depositor, is the principal one in this contract. It consists, 1, to keep the deposit with care; 2, to deliver it to the depositor when required.

1. *Of the care to be exercised by the depositary.*

1065. When a special contract is made as to the custody of the goods, the depositary will not be responsible if they are kept according to the agreement, although they may be lost by being kept in an unsafe place.

But if no agreement is made as to the manner of keeping them, the depositary will be responsible only for gross neglect, which is not taking slight care of the

(*a*) Story, Bailm. § 114, 116.
(*b*) 2 Kent, Com. 508, 4th ed.; Story, Bailm. § 117.

thing; this may be the case where a careless man takes the same care of the deposit as he does of his own property; as where the depositary put the money deposited in a box with his own, in a common tap-room, and it was stolen, he was held liable.(*a*)

The degree of diligence to be exercised is always in proportion to the value of the deposit, and the ease with which it may be lost. But if the nature of the deposit is concealed from the depositary, he will be liable only for gross negligence.(*b*)

With regard to the mode of keeping the deposit, it may be inquired whether the depositary can use it? In general, he doubtless has no right to use it, but in certain cases it may be presumed to be the intention of the parties that he should use it. His right to do so, in the absence of any special contract, will depend upon this intention, which may be collected from circumstances.(*c*)

2. *Of the return of the deposit.*

1066. In treating of the rights of the depositor, the duties of the depositary as to the return of the deposit, to whom it is to be returned, and the place where it is to be made, were considered, so as not to require any further examination here.

Art. 3.—Of rights of the depositary.

1067. When the depositary has necessarily incurred any expense in the preservation of the deposit, he is entitled to be reimbursed, whether the deposit be a voluntary one, or whether it arise from necessity, as in case of shipwreck, or fire, or from any casual cause, as by finding.(*d*)

(*a*) Doorman *v.* Jenkins, 2 Ad. & Ell. 256; S. C. 4 Nev. & Man. 470. See Tomkins *v.* Saltmarsh, 14 S. & R. 275.

(*b*) Jones, Bailm. 38, 39; Story, Bailm. § 79.

(*c*) Jones, Bailm. 81; Moses *v.* Conham, Owen, 123. See ante, n. 1046.

(*d*) Nicholson *v.* Chapman, 2 H. Bl. 254.

SECTION 2.—OF MANDATES.(a)

1068. The second kind of bailment, which is for the benefit of the bailor, is the contract of mandate. A *mandate* is a contract by which one of the parties entrusts the other with the transaction of one or more affairs, to manage them in his place and at his risk; while the other engages to perform the trust gratuitously, and to be accountable to the former for the performance.(b)

The contracting party who confides the management of the affair to the other, is called the *mandator*, and he who accepts the charge, *mandatary*.

This section will be considered under six heads, which will relate to, 1, the subject matter of the contract; 2, the gratuity of the contract; 3, the consent of the parties and form of the contract; 4, the obligations and rights of the mandatary; 5, the obligations of the mandator; 6, the dissolution of the contract of mandate.

§ 1.—What may be the subject matter of the contract.

1069. The mandate must be in relation to some lawful and definite act to be done *in futuro;* it must be about some business to be done, *negotium gerendum;* not a thing already done, *negotium gestum*, for this cannot be the object of the contract. The mandatary must be able to perform the mandate, for otherwise it would be nugatory, as if you engaged a dumb man to deliver a verbal message, or to teach your son to read.(c) The business to be done must not concern the mandatary, as, if I request you to do a certain thing, in which you alone have an interest, it is not a mandate, but merely advice I give you. But it is not requisite that the business which I request you to perform should concern

(a) See Story, Bailm. § 137; Poth. Pand. lib. 17, t. 1; Wood's Civ. Law, B. 3, c. 5; Hal. An. Civ. Law, 70; Bowy. Mod. Civ. Law, c. 39, p. 224; Poth. Mandat; Inst. 3, 27, in pr.; 1 Brown's Civ. Law, 382.

(b) Poth. Mandat, n. 1.

(c) Poth. Mandat, n. 12.

me alone, in whole or in part, provided I have an interest in its performance.

In the common law the mandate is confined to *personal* property; contracts relating to real estate of the same nature, would not be classed among mandates, but would be treated merely as special undertakings.(*a*)

§ 2.—The contract must be gratuitous.

1070. Like the contract of deposit, a mandate must be *gratuitous*, for if any consideration is paid, it will change its nature, and make it a hiring: *mandatum nisi gratuitum nullum est.*(*b*) The employment of counsel in England, and perhaps in some of the United States, is considered as a mandate, and he cannot, therefore, recover fees; whatever is given is considered as a voluntary gift, an *honorarium.* But if a client who should employ an advocate, and at the time of giving such mandate, he should promise to give him a copy of the Pandects, which he observed he wanted in his library, this would not be considered a payment, but a token of gratitude; for his talents in defending his cause are not appreciable.(*c*) Such at least is the doctrine of the civil law.(*d*) But when an attorney who is entitled to compensation, performs such business confided to him, the contract is that of hiring.(*e*)

§ 3.—Of the consent of the parties, and form of the contract.

1071. It is of the essence of the contract, that the mandator should intend to *require* the mandatary to take charge of the mandate, and to agree that it should be at his risk, and that he would indemnify the mandatary; the latter, on his part, should *agree* to attend to the business. A mandate differs from a mere recommendation. Fraud, imposition or mistake, would

(*a*) Story, Bailm. § 141.
(*b*) Dig. 17, 1, 4; Inst. 3, 27.
(*c*) Pothier, Mandat, n. 23.
(*d*) Dig. 50, 13, 12.
(*e*) Vide ante, n. 1005.

have the effect of destroying an apparent consent, and where there was no consent, express or implied, there would be no contract.(*a*)

1072. No particular form is requisite in making this contract, in order to give it validity. It may be verbal or in writing, express or implied, under seal or otherwise. The contract may be varied at pleasure, it may be absolute or conditional, general or special, temporary or permanent.(*b*)

§ 4.—Of the obligations and rights of the mandatary.

1073. As the mandatary has no special property in the mandate, his duties toward the mandator, as to the care he is to take of the mandate, are similar to those of a depositary, he will be liable only for *gross negligence*.(*c*) But a mandatary who is known to possess certain skill, and agrees, either expressly or by implication, to exert it in the particular case, is required to exercise competent skill.(*d*) He is not bound for non-feasance, because he is not bound to perform a work without consideration, but if he once undertake it he is obliged to perform it as the law requires.(*e*)

After the work has been performed, the mandatary is bound to return the property with all its increase.

Upon principles of justice, the mandatary is bound to render an account of the trust reposed in him, and to show how it has been performed. In this account the mandatary is entitled to a credit for all necessary expenses and charges, to which he has been subjected by the trust.

(*a*) Pothier, Mandat, n. 18, 19, 20; Lethbridge *v.* Phillips, 2 Stark. 544.

(*b*) Wood's Civ. Law, 242; Bowy. Mod. Civ. Law, 226; 1 Domat, B. 1, t. 15, § 1, 6, 7, 8; Poth. Mandat, n. 34, 35, 36.

(*c*) Coggs *v.* Barnard, Ld. Raym. 909; Tompkins *v.* Saltmarsh, 14 S. & R. 275; Tracy *v.* Wood, 3 Mason, 132; Stanton *v.* Bell, 2 Hawks, 145; Sodowsky *v.* McFarland, 3 Dana, 205; Bland *v.* Warmack, 2 Murph. 373; Beardslee *v.* Richardson, 1 Wend.; Whitney *v.* Lee, 8 Metc. 91.

(*d*) Shells *v.* Blackburne, 1 H. Bl. 158.

(*e*) Inst. 3, 27, 11; Thorne *v.* Deas, 4 John. 84; Magee *v.* Bast, 6 J. J. Marsh. 455; Stephens *v.* White, 2 Wash. 203.

§ 5.—Of the obligations of the mandator.

1074. Although the mandate is to be without reward, yet, upon the plainest principles of justice, the mandator must be liable to the mandatary in certain cases, though perhaps no authorities can be found to support them, except what flow from sound reason and equity.

1. When the mandatary must incur expenses, it must be presumed, in the absence of any agreement, that the mandator will reimburse the mandatary who expended his money for him.

2. When the mandatary has been obliged to enter into collateral contracts in order to accomplish the principal, the mandator will, on the principles of justice, and the presumed intention of the parties, be considered to have agreed to indemnify him.

§ 6.—Of the dissolution of the contract of mandate.

1075. It has already been observed, that when the mandatary refuses to accept of the mandate, he cannot be sued for non-feasance. In that case in truth no contract was ever made, because there was no consent of one of the parties. But in such case the property bailed is to be restored to the mandator. And the mandatary, or person to whom goods may have been sent, in order to make him such, is bound to act with some care in protecting the property from injury, until it is returned, and not with gross negligence.

1076. After it has been formed, the contract may be dissolved in various ways.

1. By the *death of the mandatary*, where the mandate remains wholly unexecuted. If it be in part executed, there may be in some cases a personal obligation on the part of his representatives to complete it.(a) When there are several mandataries, and the trust requires

(a) Poth. Mandat, n. 101.

the consent of the whole, the death of one dissolves the contract.(*a*)

2. By *death of the mandator;* but this applies where the mandate is not executed; for if it be executed in part at the time, it is binding to that extent, and his representatives must indemnify the mandatary.(*b*)

3. By the *express revocation* of the mandator.

4. By the *operation of law,* as where the mandator sells the property which is the subject of the mandate.(*c*)

5. By the *change of condition* of the mandator, as if either party become insane, or, being a woman, marries before the execution of the mandate.(*d*)

6. When the power of the mandator *ceases* over the subject matter of the mandate; as if he be a guardian, and the ward attain his full age.(*e*)

Third Class.—Of bailments for the benefit of the bailee.

1077. In the third class of bailments are to be placed loans for use and loans for consumption. By *loan* is meant the act by which a person lets another have a thing to be used by him gratuitously, and which is to be returned, either in specie or in kind, agreeably to the terms of the contract. The thing which is thus transferred is also called a loan. But although in general a loan implies that the thing is lent without reward, yet in some cases a consideration is given for the use of the thing, as interest for the loan of money.(*f*) When a consideration is given, the nature of the contract is changed, and it becomes a hiring.

The bailments of this class will be divided into three kinds: 1, loan for use, or *commodatum;* 2, loan for consumption, or *mutuum;* and 3, *promutuum.*

(*a*) Bac. Ab. Authority, (C); Com. Dig. Attorney, (C. 8.); Co. Litt. 112 b.
(*b*) Story, Bailm. § 204.
(*c*) 7 Ves. 276.
(*d*) Bac. Ab. Baron, etc. (E); Roper on H. & W. 69, 73.
(*e*) Pothier, Mandat, n. 112.
(*f*) Nichols *v.* Fearron, 7 Pet. 109.

SECTION 1.—OF GRATUITOUS LOAN FOR USE, OR *commodatum*.

1078. A *loan for use* is the grant of a thing, by one of the parties to the other, to be used by the grantee gratuitously for a limited time, and then to be specifically returned.(*a*) This contract is called *loan for use*, after the French jurists, who give it the name of *Prêt à Usage*. It is called, in the civil law, *commodatum*, because the thing is to be restored in specie.(*b*)

He who delivers the thing to be used, is called the *lender;* the other contracting party who receives the thing to be used is called the *borrower*.

1079. This contract of loan for use much resembles a gift, but it differs from it in this, that by the loan for use the title to the property does not pass to the borrower, as it does in the case of a gift, but only the right to use the thing; it is a gift of the use. The loan for use somewhat resembles a loan for consumption, which is called *mutuum*. They both include an act of kindness on the part of the lender, and an obligation on that of the borrower, which is to return the thing or its equivalent; but there is this difference, in the loan for use the lender retains the title to the thing lent, and it is to be returned itself *in individuo*. On the contrary, in the loan for consumption, or *mutuum*, the things loaned being of such a nature that they must be destroyed by use, as grain, cider, money, and the like, the title to the things lent vest in the borrower, and he becomes the debtor to return others of the same kind to the lender.

§ 1.—Of the things lent and the use to be made of them.

1080. There must be a *thing loaned* and to be used

(*a*) Jones, Bailm. 118; Story, Bailm. § 219; Poth. h. t. in pr.; Ayl. Pand. 516; Inst. 3, 15, 2; Dig. liv. 13, t. 6, l. 1, 17; Domat, liv. 1, t. 5, s. 1, n. 1.

(*b*) Coggs *v.* Bernard, Ld. Raym. 909, 913.

for a certain purpose. The thing loaned may be used in the way it has been accustomed to be, according to its nature, or in any other way; a horse which has been used under the saddle may be used in a carriage, if such is the contract.(*a*) But unless the intention of the parties can be ascertained, the borrower would be presumed to borrow an article for what it was made; if one borrowed a bed, and there was neither an express contract as to its use, nor any circumstances to show the intention of the parties, it would doubtless be the duty of the borrower to use it in no other way than as it was destined to be.

The things which are loaned must be *personal property*, a loan for use cannot be made of real estate.(*b*) It must be lawful to lend the thing loaned; if Peter were to lend to Paul a gun to enable him to commit a robbery, the contract would be void.(*c*)

§ 2.—The loan must be gratuitous.

1081. If the lender receive any *compensation* for the loan, the contract becomes a *hire* of a thing; and the rights and obligations of the parties are changed.

§ 3.—Of the rights of the borrower.

1082. In general, the borrower has the right to use the thing borrowed, *during the time* and for the *purposes* intended between the parties; the right to use the thing bailed, is strictly confined to the use, expressed or implied, in the particular transaction, and, by any excess, the borrower will make himself responsible.(*d*) The loan is considered strictly personal, unless from circumstances a different intention may be presumed.(*e*)

(*a*) Pothier, Prêt à Usage, n. 2.
(*b*) Coggs *v.* Bernard, Ld. Raym. 913.
(*c*) 6 Duverg. n. 32.
(*d*) Jones, Bailm. 58; Poth. Prêt à Usage, n. 22; Ersk. Princ. Laws of Scotl. B. 3, t. 1, s. 9.
(*e*) 1 Mod. 210; S. C. 3 Salk. 271.

§ 4.—Of the obligations of the borrower.

1083. Being the only person benefited by the contract, the borrower is bound to take extraordinary care of the thing borrowed; to use it according to the intentions of the lender; to restore it in proper time; and to restore it in a proper condition.

Art. 1.—*Of the degree of care to be taken of the thing.*

1084. The borrower is bound to use *extraordinary* diligence, and is responsible for slight neglect, in relation to the thing loaned. If he has used the utmost diligence, he is not answerable for the loss which may have happened from inevitable accident.(*a*) The usual expenses incurred in the use of the thing must be borne by the borrower. If a horse be lent, the borrower must pay for his keep during the time of the bailment.

Art. 2.—*Of the use of the thing.*

1085. The borrower is bound to use the thing according to *the condition of the loan;* for any excess in the nature, time, manner or quantity of the use, beyond what may be inferred to be within the intention of the parties, the borrower will be responsible, not only for any damages occasioned by the excess, but also for losses or accidents, which could not be foreseen nor guarded against; the law in this respect making him a general insurer to punish him for his breach of the contract.(*b*)

Art. 3.—*The borrower bound to return the thing loaned.*

1086. One of the principal obligations of the borrower is to *return to the lender the thing loaned,* at the time, in the place, and in the manner contemplated by the contract.(*c*) A failure in any of these respects,

(*a*) Jones, Bailm. 65; 1 Dane's Ab. c. 17, a. 12; Dig. 44, 7, 1, 4; Poth. Prêt. à Usage, n. 48.
(*b*) Jones, Bailm. 68, 69.
(*c*) Domat, 1, 5, 1, 11; Dig. 13, 6, 5, 17.

puts the borrower in default, and renders him liable for future accidents, even without his fault;(*a*) unless, indeed, he be justified by some cause which, in law, will be looked upon as a sufficient excuse; as, to prevent the commission of a crime.(*b*)

Art. 4.—In what condition the thing loaned is to be returned.

1087. When the thing bailed has been deteriorated without any default of the borrower, it may be returned at the proper time and place by him, as it happens then to be. And, on the other hand, if it has increased in value while in the borrower's hands, the lender is entitled to it, in its improved condition, and he is also entitled to all the accessions.

Art. 5.—How the contract of loan for use is dissolved.

1088. This contract is dissolved by the death of either party, except under special circumstances, or by the change of the state of one of them; as in the case of a woman, by marriage.

SECTION 2.—OF GRATUITOUS LOAN FOR CONSUMPTION, OR *mutuum.*

1089. *Mutuum,* or *loan for consumption,* is a contract by which the owner of a personal chattel, of the kind called fungibles,(*c*) delivers it to another by which it is agreed that the latter shall consume the chattel, and return at the time agreed upon, another chattel of the same kind, number, measure or weight, to the former, either gratuitously or for a consideration; as if Peter lends to Paul one bushel of wheat, to be used by the latter, so that it shall not be returned to Peter, but instead of which Paul will return to Peter another bushel of wheat of the same quality, at a time agreed upon.

(*a*) Jones, Bailm. 70; Poth. Prét. à Usage, n. 60; Civil Code of Louis. art. 2870; Ersk. Prin. of Laws of Scot. 3, 1, 9.

(*b*) Story on Bailm. § 256, 273.

(*c*) See Bouv. L. D. h. t.

By *fungible*, in this definition, is meant any personal chattel whatever, which consists in quantity, and is regulated by number, weight and measure, such as corn, wheat, oil, wine and money.(*a*)

The person who delivers the article to be used is called the *lender*, the other is called the *borrower*.

1090. This contract differs essentially from a *loan for use*, or *commodatum*. In the latter the title to the property in the thing lent remains with the lender, and, if it be destroyed without the fault or negligence of the borrower, the loss will fall on the lender, the rule *res perit domino*, applying in such case. On the contrary, by the loan for consumption, or *mutuum*, the title to the thing lent passes to the borrower, and in case of loss, he must bear it. *Mutuum* bears a strong resemblance to barter or exchange; in a loan for consumption the borrower agrees to exchange with the lender a bushel of wheat, which he has not, but expects to obtain, for another bushel of wheat which the lender now has and is ready to part with.

§ 1.—Of the nature of the contract of loan for consumption.

Art. 1.—What constitutes the essence of this contract.

1091. There must be, 1, something lent which is consumed by use; 2, that it be delivered to the borrower; 3, that the property in the thing be transferred; 4, that the borrower agree to return as much in kind; and, 5, and lastly, the parties agree on all these things.

1092.—1. There cannot be a loan for consumption unless there be a *thing loaned*, which is to be consumed, and it must be lent for that purpose.

1093.—2. It is also of the essence of this contract that the lender *deliver* to the borrower the thing lent. But there are some exceptions to this rule; if Peter agrees to lend to Paul one thousand dollars, which money has been already delivered by Peter to Paul on

(*a*) Ersk. Pr. Scotch Law, B. 3, t. 1, § 7; Poth. Prêt de Cons. n. 25; 1 Bell's Com. 225, n. 2; Story, Bailm. § 284.

a special deposit, the agreement will of itself change the property; while it was on deposit it was at the risk of the depositor, but the moment the contract is turned to a loan, the money is at the risk of the borrower, the title to it being then in him.

1094.—3. The *title* to the thing loaned must be transferred to the borrower; a transfer of the possession without an intention of transferring the property, would not oblige the borrower to return other property of the same kind. It is sometimes difficult to say when the transfer has been made so as to convey the title.(*a*)

1095.—4. The borrower who receives the things loaned must agree to *return* the same quantity, weight or number, of the same kind of goods. If Peter were to borrow of Paul one hundred bushels of corn, and agree at a future time to pay him in money, for the corn, one hundred dollars, the contract would not be a loan for consumption, but a sale; and if, instead of money, he agreed to return to him seventy-five bushels of wheat, the contract would be a barter or an exchange.

1096.—5. As in all other contracts, the parties to this must agree upon all the essential matters which belong to it.

Art. 2.—Of the persons who may enter into this contract, and of the things which must be lent.

1097.—1. Like all other contracts, the parties to this must have *capacity* to contract.

1098.—2. The things which must form the object of the contract must be such as are *to be consumed by use,* which we have described to be *fungible;* such are those which serve for food to man or to animals, as wheat, corn, oil, cider, wine, and the same may be said of fire-wood. Again, there are others of which

(*a*) Ewing *v.* French, 1 Blackf. 353; Hurd *v.* West, 752, 756, note; Smith *v.* Clark, 21 Wend. 85; Seymour *v.* Brown, 19 John. 44; Slaughter *v.* Green, 1 Rand. 3.

there is no natural consumption, but one which is purely civil, as the loan of a sum of money. All those things which are consumed by the use made of them, are known under the name of things *quæ pondere, numero, et mensurâ constant;* that is, things which are considered rather as to a certain quantity of weight, number or measure, than of individuals of which they are composed.

§ 2.—Of the obligations of the borrower.

1099. The contract of loan for consumption produces obligations only on one side, that of the borrower to return to the lender goods of the same kind he has borrowed, equal in number, weight or measure to those borrowed.

SECTION 3.—OF LOAN ON INTEREST AND OF USURY.

1100. When money is lent on interest, which is a loan for consumption, the sum lent is called the *principal*, and that which is to be paid for the use of it is *interest;* when such interest exceeds the rate allowed by law, it is called *usury*.

§ 1.—Of interest of money.

1101. In the examination of the subject, it is proposed to ascertain, 1, who is bound to pay interest; 2, who is entitled to receive it; 3, on what claim it is allowed; 4, what interest is allowed.

Art. 1.—Who are bound to pay interest.

1102.—1. The contractor himself, who has agreed, expressly or by implication, to pay interest, is of course bound to do so.

1103.—2. In many instances where there has been no express loan, yet the party using the money is required to pay interest. For example, executors, administrators, assignees of bankrupts or insolvents, or trustees, who have kept money an unreasonable length

of time, and who have made it productive, or might have done so, are chargeable with interest.(*a*) Again, a tenant for life must pay interest on encumbrances on the estate.(*b*) And revenue officers of the United States are liable for interest from the time of receiving the money.(*c*) A factor or agent, who does not, with due diligence, remit money to his principal, is also chargeable with interest.(*d*)

Art. 2.—To whom interest is allowed.

1104.—1. The lender, either upon an express or implied contract, is entitled to interest.

1105.—2. Executors, administrators, and other trustees, are entitled to interest when *bona fide*, and for some beneficial purpose of the estates they represent, they advance their own money.(*e*)

Art. 3.—On what claims interest is allowed.

1106.—1. Interest is allowed on *express contracts;* when the debtor expressly undertakes to pay interest, both he and his representatives are liable for it.

1107.—2. It is chargeable on *implied contracts,* as for money lent or lawfully laid out to another's use; for goods sold and delivered, after the customary or stipulated term of credit has expired;(*f*) on bills and notes, if payable at a future day, certain, after they become due; if payable on demand, after the demand

(*a*) Cox *v.* Wilcocks, 1 Binn. 194; Say's Ex'rs *v.* Barnes, 4 S. & R. 116; Dietrich *v.* Haft, 5 Penn. St. R. 87.

(*b*) 4 Ves. 33; 1 Vern. 404, note by Raithby.

(*c*) Commonwealth *v.* Lewis, 6 Binn. 266.

(*d*) Crawford *v.* Willing, 4 Dall. 286. See Nesbit *v.* Lawson, 1 Kelly, 275.

(*e*) Dilworth *v.* Sinderling, 1 Binn. 488.

(*f*) Knox *v.* Jones, 2 Dall. 193; Breyfogle *v.* Beckley, 16 S. & R. 264. Considerable difference exists in the several states of the Union as to the right of charging interest on open accounts. In some of them, no interest is allowed on such accounts, unless there has been a special agreement, or the charge of interest is allowed by the course of trade. Nagle *v.* Chisolm, Harper, 274; Skirving *v.* Stobo, 2 Bay, 233; Listard *v.* Graves, 3 Caines, 225; Temple *v.* Belding, 1 Root, 314; Van Beuren *v.* Van Gaasbeck, 4 Cowen, 496.

has been made, for until then, the debtor is presumed to have been ready at all times to discharge his obligation;(*a*) on an account stated, or other liquidated sum, whenever the debtor knows precisely what he is to pay, and when he ought to pay it: on money obtained by fraud, or where it was wrongfully detained;(*b*) on money paid by mistake, or recovered on a *void* execution.(*c*)

1108. When the claim is for *unliquidated damages* and contested claims, sounding in damages, no interest will be allowed.(*d*)

Art. 4.—Of the quantum or amount of interest allowed.

1. *During what time.*

1109. In general, interest is allowed on all claims and demands for money loaned, *from the time it becomes due*, for then it is the duty of the debtor to pay it, and the law imposes on him the obligation of paying the interest to the creditor, because he is presumed to have made a profit out of the principal.

1110. But if the debtor is prevented from paying it, by an express law, the interest is *suspended*, and he is no longer chargeable with interest; as, where the debtor and creditor are citizens of two nations, at war with each other, a law forbidding all intercourse with the enemy, would furnish a strong ground for exonerating the debtor from the payment of the interest during the war.(*e*) But the mere circumstance of war existing between the two countries, without such prohibition, will not stop the interest.(*f*)

Interest may also be suspended during the time

(*a*) Jacobs *v*. Adams, 1 Dall. 52. But see Collier *v*. Gray, 1 Overt. 110; Cannon *v*. Biggs, 1 McCord, 170; Patrick *v*. Clay, 4 Bibb, 246.

(*b*) 3 Cowen, 426; Keener *v*. Bank U. S., 2 Penn. St. R. 237.

(*c*) Winslow *v*. Hathaway, 1 Pick. 212; King *v*. Diehl, 9 S. & R. 409.

(*d*) Gilpins *v*. Consequa, 1 Pet. C. C. 85, 95; Willing *v*. Consequa, 1 Pet. C. C. 179; Spier *v*. Van Orden, 2 Penn. 652.

(*e*) Conn *v*. Penn, 1 Pet. C. C. 496, 524; Hoare *v*. Allen, 2 Dall. 102; Foxcraft *v*. Galloway, 2 Dall. 132; Sims *v*. Willing, 8 S. & R. 103.

(*f*) 1 Pet. C. C. 524.

when a party's accounts are before the court for examination; as, where a guardian or trustee's accounts are before the court for confirmation.(*a*)

2. *Of simple interest.*

1111. By *simple* interest is meant the interest on the principal of the sum lent only; and no interest is allowed on the interest which is due and unpaid. In general, the courts will set their faces against adding interest to the interest, as being hard, oppressive, and tending to usury.(*b*)

3. *Of compound interest.*

1112. *Compound* interest is that which arises not only from the principal, but also from the interest which is due and unpaid. This is allowed in special cases, in general where the debtor has been guilty of some wrong or neglect. For example, when executors, administrators, or other trustees, convert trust money to their own use, or employ it in business or trade, they are chargeable with compound interest.(*c*) Another example; where a partner has overdrawn the partnership funds, and refuses, when called upon, to account or to disclose the profits, recourse will be had to compound interest, as a substitute for the profits he might be reasonably supposed to have made.(*d*)

When, after the interest has accrued, the parties agree to turn it into principal, compound interest will be allowed according to their agreement.(*e*)

4. *Of foreign interest.*

1113. It is a general rule, that the law of the place

(*a*) Dietrich *v.* Heft, 5 Penn. St. R. 87.

(*b*) 1 John. Ch. 14; Cam. & Norw. 361; Toll *v.* Hiller, 11 Paige, 228; Von Homert *v.* Porter, 11 Met. 210.

(*c*) Schieffelin *v.* Stewart, 1 John. Ch. 620; Dunscomb *v.* Dunscomb, 1 John. Ch. 508.

(*d*) Stoughton *v.* Lynch, 1 John. Ch. 467; 2 John. Ch. 209.

(*e*) Connecticut *v.* Jackson, 1 John. Ch. 13; Barrow *v.* Rhinelander, 1 John. Ch. 550. See Bainbridge *v.* Wilcocks, Baldw. 536.

where a contract is made, must govern; if valid there, it is good everywhere, and if illegal there, it is illegal everywhere else.(a) Loans made in a place, accordingly, bear the interest of that place, unless payable elsewhere. Thus, in a contract made in China, where a note was given, payable eighteen months after date, without any stipulation respecting interest, the court allowed the Chinese interest of one per centum per month from the expiration of the eighteen months.(b) But when the contract is made at one place, and it is to be performed at another, the interest is to be paid according to the laws of the latter.(c)

5. *Interest, how computed.*

1114. In casting interest on debts which pay it, upon which partial payments have been made, every payment is to be applied first to pay the interest then due.

When a partial payment exceeds the amount of the interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, and then subtract the payment; when a second payment is made, add interest on the remainder of the principal from the time of the first to that of the second payment, then deduct the amount of the second payment, and so from payment to payment, until the whole shall be paid. But it must be remembered that interest is not, in any case, to be turned into principal.(d)

(a) Pearson *v.* Dwight, 2 Mass. 88, 89; Ersk. Inst. B. 3, t. 2, § 39—41; Story, Confl. of Laws, § 242.

(b) Archer *v.* Dunn, 2 Watts & Serg. 227, 264; Bodily *v.* Bellamy, 2 Burr. 1094; Foden *v.* Sharp, 4 John. 183; Mullen *v.* Morris, 2 Penn. St. R. 85; Jaffray *v.* Dennis, 2 Wash. C. C. 253; Conqua *v.* Lauderbrun, 1 Wash. C. C. 521.

(c) Scofield *v.* Day, 20 John. 102. See Montgomery *v.* Budge, 2 Dow & Cl. 297; De Wolf *v.* Johnson, 10 Wheat. 367; Bushby *v.* Camac, 4 Wash. C. C. 296; Davis *v.* Coleman, 7 Iredell, 424.

(d) Dean *v.* Williams, 17 Mass. 417; Penrose *v.* Hart, 1 Dall. 378; Spires *v.* Hamot, 8 Watts & S. 18. In the case of Tracy *v.* Wickoff, 1 Dall. 124, McKean, C. J., laid down the rule, that interest of money paid in before the

Where the law regulating interest, between the time a note was given, and the day it becomes due, is changed, and the note is payable with lawful interest, it is evident the parties intended that interest should be charged at the rate which was known when the contract was entered into, and not at any other rate.(*a*)

6. *When interest shall be barred.*

1115. When a debtor makes a tender of money to a creditor for what is due to him, he is bound in case the creditor shall refuse to receive the money to keep it by him, and to pay the creditor when he shall change his mind and offer to accept it. Under these circumstances it would be hard to make the debtor pay

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time when due, must be deducted from the whole sum due at the time appointed by the instrument; as, on a bond of one hundred dollars, payable in one year with interest; if, at the end of six months, fifty dollars be paid, then the payment should not be apportioned, part to the principal and part to the interest, but, at the end of the year, interest should be charged on the whole sum, and the obligor should receive credit for the fifty dollars, and interest upon this sum for six months. This mode of computation was, however, declared to be illegal, both on principle and authority, and Tracy *v.* Wikoff, was overruled. In Spires *v.* Hamet, 8 Watts & Serg. 18, the court say, "Tracy *v.* Wikoff has long since ceased to be authority. It has been directly overruled in Primrose *v.* Hart, (1 Dall. 378); The Commonwealth *v.* Miller, (8 Serg. & Rawle, 458); and Smith *v.* Shaw, (2 Wash. C. C. R. 167), in accordance with all the English decisions since Chase *v.* Box, (2 Freem. 261), which was the first of them, and decided in 1702.

"The truth is, Tracy *v.* Wikoff is as unfounded in principle as it is in authority; for, calculating interest on payments, the debt would, in course of time, be discharged, both principal and interest, by payment of interest only. The rule established by all other decisions is, that a partial payment is to be applied to the interest in the first place, and in the second to the principal. The reason is, that though interest may be reserved to be paid yearly, half-yearly or quarterly, it accrues from day to day, and not like rent from year to year. A creditor may refuse to receive the principal before it is due, or a part of it when due, except on his own terms; and were he to receive it as a payment bearing interest, it would, in effect, be a loan. But if he receive it unconditionally, the residue applied to the principal, after payment of the interest, stops interest on the principal *pro tanto*. The last of the indorsements on this bond purports that the payment was received 'on account of principal and interest,' which is no more than the law would imply. The jury, therefore, were directed to adopt an erroneous rule of computation." See Com. *v.* Miller, 8 S. & R. 458; Smith *v.* Shaw, 2 Wash. C. C. 167; Fay *v.* Bradley, 1 Pick. 194; Kissam *v.* Burrall, Kirby, 326.

(*a*) Lee *v.* Davis, 1 A. K. Marsh, 397.

interest for money which he could not use. The law does not allow such injustice. When all the money due is tendered by the debtor to the creditor, and it is refused, the interest ceases. But in this case, the debtor must at all times be ready to pay the creditor on demand.(*a*)

Whenever the law prohibits the payment of the principal, interest is not recoverable during the prohibition; for where the debtor may have the money ready to pay his debt, as every one is presumed to be able to fulfil his contract, he cannot be said to be in default.(*b*)

§ 2.—Of usury.

1116. Usury, as already observed, is the illegal profit which is required and received by the lender of a sum of money from the borrower, for its use. In a more general sense it is the receipt of any profit whatever for the use of money. *Usura est quidquid ultrà sortem mutuatam exigitur.* It will be used in this section in the first of these senses.

The laws of the several states on the subject of usury vary not only as to the amount of interest which may be lawfully received, but also as to the provisions which operate on the validity of the contract; in some of them the usurious contract is void, in others it may be enforced, but not more than legal interest can be recovered; in some, after the payment of the usury, an action *qui tam* is given for the recovery of a penalty; in others another remedy is given.(*c*)

In general to make a usurious contract there must be, 1, a loan, express or implied; 2, an agreement that the principal shall be returned at all events; 3, not only that the principal shall be returned, but that

(*a*) Dent *v.* Dunn, 3 Campb. 296; Rose *v.* Brown, Kirby, 293.
(*b*) Hoare *v.* Allen, 2 Dall. 102; Conn *v.* Penn, 1 Peters, C. C. 524.
(*c*) See Bouv. L. D. Interest, for the rates of interest charged in the several states of the Union.

for such loan a greater interest than that fixed by law shall be paid;(a) and, 4, there must be an intention to violate the law. These will be examined separately, and in a 5th article will be considered the effect of making and completing a usurious contract.

Art. 1.—*Of the loan or forbearance.*

1117. There must be a loan in contemplation of the parties. It is not, however, necessary that there be a formal and explicit contract; it is sufficient if the secret intention of the parties has been to make a usurious bargain, however it may have been disguised under the false appearance of another contract. These contracts, which have been adopted in such cases, for the purpose of covering and disguising a loan, which the parties intended to make, are, in law, considered as loans, and the profit or benefit which the lender derives from them, as usury.

1118. The illegal contract of sale called *mohatra* is an example: in this contract, Peter having a sum of money which he wishes to lend upon usury, sells an article of property, for example, a horse, to Paul for two hundred dollars, upon a credit of one year, and takes the purchaser's note for the amount; immediately after the sale, he buys the horse back for one hundred and fifty dollars, which he pays down in cash; in this case, it is clear, that Paul will at the end of one year be bound by the contract to pay fifty dollars for the use of one hundred and fifty dollars, which is clearly usurious. In this case the law considers the sale as a simulated contract, and that the transaction was a usurious loan.(b)

(a) Lloyd *v.* Scott, 4 Pet. 205.

(b) Poth. Vente, n. 30; Poth. De l'Usure, n. 88; 1 Duverg. n. 44; Story on Sales, § 517. See Lloyd *v.* Scott, 4 Pet. 205; Moore *v.* Battie, Ambl. 371; Astor *v.* Price, 7 Mart. N. S. 409; Bac. Ab. Usury, (C), Bouv. ed.; Lowe *v.* Waller, Dougl. 736; Phillips *v.* Kirkpatrick, Add. 126; Huling *v.* Drexell, 7 Watts, 126, 129; Shanks *v.* Kennedy, A. K. Marsh. 65; Douglass *v.* McChesney, 2 Rand. 109; Evans *v.* Negley, 13 S. & R. 218; McGill *v.* Ware, 4 Scam. 21; Bouv. L. D. Mohatra.

1119. It may be stated as a general rule, that whatever be the form of the contract, if the intention of the parties were to make a usurious agreement, the contract will be tainted by such illegal intention.(*a*) But if in appearance the contract appear to be usurious, when in fact it was not intended to make it so, and such appearance was occasioned by a mistake as to a fact, it will not be usurious; as where a greater amount than that allowed by law, was charged by a mere miscalculation.(*b*) An error as to a matter of law, however, will not excuse.(*c*)

1120. When a bond or note, not made for the purpose of being discounted at a greater rate than legal interest, is offered for sale, it may be purchased at any price the parties to it may agree upon, when sold by a third party; for, in that case, the maker will not be required to pay more than he would have been bound to have paid, if it had remained in the hands of the indorser who sold it; and, again, the contract was valid when it was made, and it will not be tainted by any future usurious bargain.(*d*)

But when the original contract is usurious, it will remain so, although there may have been a substitution of a new contract clear of the taint.(*e*)

An agreement to forbear to sue, where a debt is due, upon condition that the debtor will pay usurious interest, is sufficient, and it will have the same effect as if a loan had been made.(*f*)

Art. 2.—Of the agreement to return the principal at all events.

1121. There must be a contract for the return of

(*a*) Childers *v.* Deane, 4 Rand. 406; Smith *v.* Beach, 3 Day, 268.

(*b*) Maine Bank *v.* Butts, 9 Mass. 49; Bank of Utica *v.* Smalley, 2 Cowen, 770; N. Y. Fire Ins. Co. *v.* Ely, 2 Cowen, 678.

(*c*) 9 Mass. 49.

(*d*) Wycoff *v.* Longhead, 2 Dall. 92; Musgrove *v.* Gibbs, 1 Dall. 216; Loyd *v.* Keach, 2 Conn. 175; King *v.* Johnson, 3 McCord, 365; Churchill *v.* Sutor, 4 Mass. 156; Knights *v* Putnam, 3 Pick. 184; 9 Pet. 103.

(*e*) Chamberlain *v.* McClurg, 8 W. & S. 31; Bridge *v.* Hubbard, 15 Mass. 96. But see Kilbourn *v.* Bradley, 3 Day, 356.

(*f*) Carter *v.* Brand, Cam. & Nor. 28.

the money *at all events;* for if the return of the principal with interest, or of the principal only, depend upon a contingency, there will be no usury; but if the contingency extend only to interest, and the principal be beyond the reach of hazard, the lender will be guilty of usury, if he receive interest beyond the amount allowed by law. In the contracts of insurance and of bottomry, the principal is put to hazard, and the parties are not therefore amenable to the laws of usury.

Art. 3.—Of the agreement to pay usury.

1122. To constitute usury there must be an agreement, express or implied, *to pay unlawful interest,* for when one of the parties intends and agrees to pay it, and the other does not agree to receive it, and in this respect there is a misunderstanding, the contract is not usurious.(*a*)

Whenever a certain gain is reserved to the lender by the agreement, besides the interest, the contract is usurious.(*b*) But this gain must be such as arises solely from the loan, for there are numerous instances where additional compensation has been allowed besides the lawful interest, and yet the contract has been holden not to be usurious; for example, a reasonable commission beyond legal interest, for extra incidental charges, as for agency in remitting bills for acceptance and payment.(*c*) But it must clearly appear that the additional compensation is not taken for interest.(*d*)

In order to constitute the offence of usury, there must be a loan of money or forbearance to demand the payment of money, and an agreement that for such loan or forbearance, the borrower in the one instance, and the debtor in the other, will pay usurious interest.

(*a*) Marsh *v.* Martindale, 3 Bos. & Pull. 154.

(*b*) Philip *v.* Kirkpatrick, Add. 126; Delano *v.* Rood, 1 Gilman, 690.

(*c*) Huling *v.* Drexell, 7 Watts, 126, 129; Gray *v.* Brackenridge, 2 Penns. 75; Hutchinson *v.* Hosmar, 2 Conn. 341; De Forest *v.* Strong, 8 Conn. 513.

(*d*) Large *v.* Passmore, 5 S. & R. 135; Steele *v.* Whipple, 21 Wend. 103.

When a man is indebted to another in a sum of money, payable at a future time, and he is desirous to pay his debt by anticipation, it has been questioned whether he could *in foro conscientiæ,* deduct a greater sum from his debt than the legal interest for the time the term has to run,(*a*) but there can be no question that he may, both at law and in equity, take a greater discount than simple interest.(*b*)

The agreement to pay the usurious interest must be positive, for if it be merely conditional and relievable in equity, it will not make the contract usurious, as an agreement to pay a larger sum at a future day, upon the non-payment of the sum agreed upon at a prior day.(*c*)

Art. 4.—Of the intention to violate the law.

1123. The whole of the three constituent principles of usury must concur in the contract, that is, there must be a loan of money, or forbearance to demand money due; an agreement that the principal shall be secured at all events, and an agreement to pay usury, or the payment of it. But although these may all concur, yet the usury is not complete when there was no *intention* to commit it, and unless they intended to violate the usury laws, the contract will not be usurious.(*d*)

Art. 5.—Of the effect of a usurious contract.

1124. In some states the simple making of a usurious contract renders it void, and subjects the offending parties to the penalty imposed by the statute; in some others the contract is not void, but it cannot be enforced beyond the recovery of the principal sum lent, and the lawful interest on it; and until the money

(*a*) Poth. De l'Usure, n. 128, 129.
(*b*) Barclay *v.* Walmsley, 4 East, 55: S. C. 5 Esp. 11.
(*c*) Groves *v.* Graves, 1 Wash. 1; Winslow *v.* Dawson, 1 Wash. 119.
(*d*) Chiders *v.* Dean, 4 Rand. 406; Smith *v.* Roach, 3 Day, 268; Duvall *v.* Farmers' Bank, 7 Gill & John. 44.

has been paid back, with the unlawful interest, the borrower has no remedy against the lender. In some states the remedy is by an action *qui tam* to recover the penalty, and in others the proceedings may be by indictment.

SECTION 4.—OF THE QUASI CONTRACT CALLED PROMUTUUM.

1125. Before closing the examination of that class of bailments which are wholly for the benefit of the bailee, it will be proper to take a short view of the contract, which in the civil law is called *promutuum*, so called because it has much resemblance to a *mutuum*.

Promutuum is a quasi contract, by which he who receives a certain sum of money, or a certain quantity of things fungible, which have been paid to him by mistake, contracts toward him who so paid by mistake, the obligation to return him as much.

1126. The principal resemblance between *promutuum* and *mutuum* are the following:

1. In both there must be a delivery of a certain sum of money, or of a certain quantity of things fungible.

2. The property in the thing must be transferred to the bailee, or the bailee must have consumed it, in order to make the contract like *mutuum*.

3. There is a perfect resemblance in the obligations which arise from both contracts, the bailee must return as much as he has received.

It is in general by a wrongful payment that the quasi contract of *promutuum* arises. And, in this, the contracts differ essentially from each other. *Mutuum* is a contract to which both parties must have assented and intended to fulfil, when the engagement was formed; a *promutuum*, on the contrary, was not intended by either of the parties to form any contract whatever, for when Peter pays Paul the amount of a debt, they both intend, one to pay and the other to

receive, only what is justly due; and do not intend to enter into any obligations.

1127. In the common law a rule has been adopted which, although it seems to be at variance with the facts, appears to answer an excellent purpose. It is true, that though generally speaking, there is no contract between the parties when one pays a debt to another by mistake, that the latter will return to the former any part of what is so paid, yet the common law presumes that no one desires to enrich himself at the expense of another, and therefore raises an implied assumpsit by which the receiver is presumed to have assumed to return such surplus, and in an action of assumpsit for money had and received, such money, paid by mistake, may be recovered.(*a*)

1128. Here terminate our labors on the law of bailment. It must have been perceived that the common law has drawn from that inexhaustible source of sound legal learning, the civil law, all the principal rules which govern the subject, and some may have been introduced which are not to be supported by American or English decisions, and yet, if the common law deserves to be called a science, it could scarcely repudiate them.

CHAPTER III.—OF BILLS OF EXCHANGE.

1129. This is one of the most important instruments used in commerce, both on account of the amount of property which passes by it, and with regard to its general convenience in transferring property from one place to another. A bill of exchange is defined to be an open letter of request from, and order by one or more persons on one or more others, to pay to some third person or persons, a sum of money

(*a*) Bogart *v.* Nevins, 6 S. & R. 369; Irvine *v.* Hanlon, 10 S. & R. 219; Morris *v.* Tarin, 1 Dall. 148; Wright *v.* Butler, 6 Wend. 290; Eddy *v.* Smith, 13 Wend. 488; Ogden *v.* Saunders, 12 Wheat. 341. Vide ante, n. 907, note.

therein mentioned, on demand, or at a future time therein specified.

The subject will be considered with reference, 1, to the parties to the bill; and 2, to its form.

SECTION 1.—OF THE PARTIES TO A BILL OF EXCHANGE.

1130. The parties are, 1, the drawer, or he who makes the order; 2, the drawee, or the person to whom it is addressed; 3, the acceptor, or he who undertakes to pay it; 4, the payee, or the party to whom, or in whose favor the bill is made; 5, the indorser, or he who writes his name on the back of the bill, for the purpose of becoming a surety to pay it, on condition that the parties before him shall not do so, and also on condition that notice of such non-payment or non-acceptance, shall be given to him according to law; 6, the indorsee, or he to whom the bill is transferred by the indorsement; and, 7, the holder, who is, in general, one of the parties who is in possession of the bill, and entitled to receive the money therein mentioned.

Some of the parties are sometimes fictitious persons. When a bill is made to a fictitious person, and indorsed in the name of a fictitious payee, it is in effect a bill to bearer, and a *bona fide* holder, ignorant of the fact, when he took the bill, may recover on it, against all prior parties, who were privy to the transaction.(*a*) When the drawer and payee are both fictitious persons, the acceptor is held liable to a *bona fide* holder.

SECTION 2.—OF THE FORM OF A BILL OF EXCHANGE.

1131. In considering the form, we will take a view, 1, of the general requisites of such a bill; and, 2, of the particular requisites.

§ 1.—Of the general requisites.

1132. The general requisites of a bill are the following:

(*a*) 2 H. Bl. 178, 288; 3 T. R. 174, 182, 481; 19 Ves. 311.

1. That it be in writing.

2. That it be for the payment of money, and not for the payment of merchandise, or of other things than such as are considered as money. An order payable in funds "current in the city of New York," was held to be payable in gold and silver or their equivalent, and therefore good as a bill of exchange.(*a*) But in Missouri, a bill payable in "currency," was held not to be a good bill of exchange.(*b*)

3. That the money be payable at all events, not depending on any contingency, either with regard to the fund out of which payment is to be made, or the parties by or to whom payment is to be made.(*c*)

§ 2.—Of the particular requisites of a bill.

1133. No particular form or set of words need be adopted. An order "to deliver money," or a promise that "A B shall receive money," or a promise "to be accountable" or "responsible" for it, have been severally held to be sufficient for a bill or promissory note. The several parts of a bill of exchange are the following:

1. That it be properly dated as to place.

2. That it be properly dated as to time of making. The time when the bill becomes due is generally regulated by the time when it was made, as "sixty days after date;" the date of the instrument ought therefore to be clearly expressed.

3. The amount of the sum of money which is to be paid; the superscription of the sum for which the bill is payable is not indispensable, but if the sum be not expressed in the body of the bill, the superscription will aid the omission.(*d*)

(*a*) Lacy *v.* Holbrook, 4 Ala. 88; Carter *v.* Penn, 4 Ala. 140.
(*b*) Farwell *v.* Kennett, 7 Mis. 595; Williams *v.* Mosely, 2 Flor. R. 304, 331.
(*c*) Knox *v.* Reeside, 1 Miles, 294; Jolliffe *v.* Higgins, 6 Munf. 3.
(*d*) 2 East, P. C. 951.

4. The time of payment ought to be expressed in the bill; if no time be mentioned, it is payable on demand.(*a*)

5. The bill ought to mention a place of payment, either in the body or superscription, but it is not essential, and it is the common practice for the drawer merely to write the address of the drawee, without pointing out the place of payment: in such case the bill is considered as payable, and to be presented at the residence of the drawee, or to him personally any where. It is at the option of the drawer whether or not to prescribe a particular place of payment, and make the payment there a part of the contract. The drawee, unless restricted by the drawer, may also fix a place of payment by his acceptance.

6. The bill should contain an order or request to pay, and that it must be a matter of right, but still the drawer may use a polite term, as please pay. The word *pay* is not indispensable, *deliver* is its equivalent.(*b*)

7. It ought to specify to whom it is to be paid.(*c*) When the name of the payee is in blank, and the bill has been negotiated by indorsement, the holder may fill the blank with his own name. Sometimes it is made payable to bearer, and then it is assignable by delivery.

8. It must be payable to order, so as to give it negotiability, or there must be other operative and equivalent words of transfer. When it is intended not to make it negotiable, these words need not be used, and the instrument will nevertheless be valid as a bill of exchange.

9. The sum for which the bill is drawn, must be clearly expressed in the body of the instrument, in writing at length. The sum must be certain and

(*a*) Field *v.* Nickerson, 3 Mass. 131; Connor *v.* Harrison, 2 McCord, 246; Hoxton *v.* Bishop, 3 Wend. 13.

(*b*) Ld. Raym. 1397.

(*c*) 2 Pardes. N. 338; 1 H. Bl. 608.

not contingent. It may be in the money of any country.

10. It is usual to insert the words *value received*, but it is implied that every bill and indorsement has been made for value received, as much as if it had been expressed *in totidem verbis*.(*a*)

11. When the drawer of the bill is debtor to the drawee, it is usual to insert in the bill these words, "and put it to *my* account;" but when the drawee is debtor to the drawer, then he inserts these words, "and put it to *your* account;" and, sometimes, when a third person is debtor to the drawee, it may be expressed thus, "and put it to the account of A B." But these words are altogether unnecessary.

12. When the drawer is desirous to inform the drawee that he has drawn the bill, he inserts the words "*as per advice;*" but when he wishes the bill paid without any advice from him, he writes "*without further advice.*" In the former case the drawee is not authorized to pay the bill till he has received advice; in the latter he may.

13. The drawer should subscribe the bill.

14. It should be addressed to the drawee by his Christian name and surname, as, Benjamin Franklin, or in the name of the firm, as, Smith, Franklin & Co.

15. The place of payment should be stated in the bill.

16. The drawer of a foreign bill may, as a matter of precaution, and to save expenses, require the holder to apply to a third person, named in the bill for that purpose, when the drawee refuses to accept the bill. This requisition is usually in these words, in a corner, under the drawee's address, "*Au besoin chez* Messieurs —— at ——," or in other words, "In case of need, apply to Messrs. —— at ——."

17. A clause is sometimes introduced in the bill, that in case it should be dishonored, it may be returned

(*a*) Benjamin *v.* Fillman, 2 McLean, 213.

without expense or protest, by putting the words, subscribed by himself, "*sans frais*," or "*retour sans protêt*."

18. The drawer may limit the amount of damages by making a memorandum in the bill, that they shall be a definite sum, as for example, "In case of non-acceptance or non-payment, reëxchange and expenses not to exceed —— dollars."

19. Foreign bills of exchange consist generally of several parts; a party who has engaged to deliver a foreign bill, is bound to deliver as many parts as may be reasonably requested; the common practice is to deliver three parts. The several parts of a bill are called *a set;* each part should contain the condition that it should be paid, if the others remain unpaid. The whole set make but one bill.(*a*)

§ 3.—Of the different kinds of bills of exchange.

1134. Bills of exchange are either foreign or inland.

Art. 1.—*Of foreign bills of exchange.*

1135. A bill is foreign when it is drawn by a person out of, on another in the United States, or *vice versâ;* or by a person in a foreign country, on another in another foreign country; or by a person in one state, on another person in another of the United States.(*b*)

Art. 2.—*Of inland bills of exchange.*

1136. An inland bill is one drawn by a person in one state, on another person in the same state.

The principal difference between a foreign and an inland bill, is, that the former must be protested in order to hold the drawer and indorsers bound, both

(*a*) Ingraham *v.* Gibbs, 2 Dall. 134; Durkin *v.* Cranston, 7 John. 442; Miller *v.* Hackley, Anthon, 68.

(*b*) Buckner *v.* Finley, 2 Pet. 586; Halliday *v.* McDougal, 20 Wend. 81; S. C. 22 Wend. 264; Warren *v.* Coombs, 2 App. 139; Phœnix Bank *v.* Hussey, 12 Pick. 483. But see Miller *v.* Hoekley, 5 John. 375.

for non-acceptance and non-payment, and in the latter they need not; a notice of dishonor being sufficient in such case. Whether protest of a foreign bill for non-acceptance is indispensable, according to the English rule, or whether a protest for non-payment will be sufficient, seems not to be a settled question.(*a*)

§ 4.—Of the indorsement.

1137. By *indorsement* is understood, in its most extensive sense, what is written on the back of an instrument of writing, and having relation to it; as, a receipt or acquittance on a bond; an assignment on a promissory note. But in the sense this word is used in relation to a bill of exchange or promissory note, payable to order, it is the writing of one's name on the back of such bill or note, with an intent to become a party to it, and to be responsible for it, on certain conditions. It will be proper to consider, 1, the form; and, 2, the effect of an indorsement.

Art. 1.—Of the form of an indorsement.

1138. An indorsement may be in full, in blank, restrictive, conditional, or qualified.

1. It is *in full*, when mention is made of the name of the indorsee; as, "pay to A B, (the indorsee,) C D," (the indorser.)

2. An indorsement is *in blank*, when the name of the indorsee is not mentioned, and the indorser simply writes his name, "C D."(*b*) But a writing or assignment on the *face* of the note or bill, would, however, be considered to have the force and effect of an indorsement.(*c*) When the indorsement is once made in blank, the negotiability of the bill cannot be restrained by any special indorsement of a subsequent holder,(*d*) be-

(*a*) 3 Kent, Com. 95.
(*b*) Chit. on Bills, 170; 13 S. & R. 315; Dugan *v.* U. S., 3 Wheat. 183.
(*c*) 18 East, 12.
(*d*) Smith *v.* Clarke, Peake, 225; S. C. 1 Esp. 180; Peacock *v.* Rohdes, 2 Dougl. 611; Anon. 12 Mod. 345.

cause when once a bill has been so indorsed, the holder may strike out all the subsequent indorsements, whether special or not, and he may then recover as the indorsee of the payee.

3. A *restrictive* indorsement is one which confines the negotiability of the bill, by using express words to that effect, as by indorsing it "payable to A B only," or by using other words clearly demonstrating his intention so to do.(*a*)

4. A *conditional* assignment is one which depends for its validity upon the performance of a condition.

5. A *qualified* indorsement, which indeed wants one of the qualities of a regular indorsement, namely, the conditional responsibility of the indorser, is a transfer of the bill or note to the indorsee,(*b*) but without any liability to the indorser; the words usually employed for this purpose are, *sans recours*, without recourse.(*c*)

But although these words will exempt the indorser from all responsibility on the contract, they do not relieve him from the responsibility which he incurs, if the instrument he passes has been forged,(*d*) or stolen.(*e*)

Art. 2.—Of the effect of the indorsement.

1139. The effect of a regular indorsement is different as it affects, 1, the indorser and indorsee; 2, the indorser and the acceptor; 3, the indorser and future parties to the instrument.

1140.—1. An indorsement is sometimes an *original engagement*, as, when a man draws a bill payable to his own order, and indorses it. In general, however, it operates only as an assignment, as, when the bill is perfect and the payee indorses it over to a third

(*a*) Brown *v.* Jackson, 1 Wash. C. C. 512; Drew *v.* Jacock, 2 Murph. 138.

(*b*) Epler *v.* Funk, 8 Penn. St. R. 468.

(*c*) Chit. on Bills, 179.

(*d*) Charnley *v.* Dulles, 8 W. & S. 353; Frazer *v.* D'Invilliers, 2 Penn. St. R. 200.

(*e*) 2 Penn. St. R. 200.

person. Considered as an assigment, it carries with it all the rights which the indorsee had, and, unless qualified, a guarantee of the solvency of the previous parties.(*a*) This guarantee is, however, upon the implied condition that the holder will use due diligence in making a demand of payment from the acceptor, and give to the indorser notice of non-acceptance or non-payment.

1141.—2. As between the indorsee and the acceptor, the indorsement has the effect of giving to the former all the rights which the indorser had against the acceptor, and all other parties liable on the bill, and it is not required that the acceptor, or other party, should signify his consent or knowledge of the indorsement, and if made before the bill or note becomes due, it conveys all these rights without any set off, as between the antecedent parties.(*b*) Being thus fully invested with all the rights in the bill, the indorsee may himself indorse it to another, when he becomes himself responsible to all future parties as an indorser, as the others were to him.

1142.—3. Unless his indorsement is qualified, the indorser becomes responsible to all future parties to the bill.(*c*)

But it must be remembered that an indorsement will not convey the legal title to recover on the bill, unless the instrument is made negotiable, that is, payable to order or to bearer. A bill or note payable to an individual, without mentioning to his order or to bearer, cannot be transferred so as to entitle the assignee to sue in his own name.(*d*) It is immaterial whether the bill be payable "to the order of A B," or "to A B, or order."(*e*)

(*a*) Wilkinson *v.* Nicklin, 2 Dall. 398; Perry *v.* Cramond, 1 Wash. C. C. R. 100; Humphries *v.* Bright, 4 Dall. 370.

(*b*) Norton *v.* Wait, 2 App. 175.

(*c*) Van Staphorst *v.* Pearce, 4 Mass. 258; Bank of U. States *v.* Beirne, 1 Grattan, 234; Hubbard *v.* Williamson, 5 Iredell, 397.

(*d*) Girard *v.* La Coste, 1 Dall. 194; Smurr *v.* Forman, 1 Ham. 272.

(*e*) Huling *v.* Hugg, 1 Watts & Serg. 418.

§ 5.—Of the acceptance of a bill of exchange.

1143. The acceptance of a bill of exchange is an act by which the drawee, or other person, evinces his assent or intention to comply with, or be bound by, the request contained in a bill of exchange to pay the same; or in other words, it is *an engagement to pay the bill when due.* It will be proper to consider, 1, by whom the acceptance ought to be made; 2, the time when it ought to be made; 3, the form of the acceptance; 4, its extent and effect.

Art. 1.—*By whom the acceptance ought to be made.*

1144. The acceptance must be made by the drawee himself, or by one authorized by him. On the presentment of a bill, the holder has a right to insist upon such an acceptance by the drawee as will subject him, at all events, to the payment of the bill, according to its tenor; consequently, such acceptor or drawee must have capacity to contract, and to pay the amount of the bill, or it may be treated as dishonored.(*a*) Once having accepted the bill, the drawee is not bound to reiterate his acceptance, he cannot be asked therefore to accept all parts of a set of a bill.(*b*)

A treasurer of a corporation accepting a bill without authority, does not bind the corporation,(*c*) and one accepting a bill and adding to his name "administrator," is responsible in his individual capacity.(*d*)

Art. 2.—*Of the time when the acceptance ought to be made.*

1145. The acceptance may be made *before* the bill is drawn or *afterward.* When it is made before the bill is drawn, it is only a promise to accept the bill

(*a*) Marius, 22.
(*b*) Pardess. n. 365.
(*c*) Atkinson *v.* St. Croix Man. Co., 11 Shep. 171.
(*d*) Tassey *v.* Church, 4 W. & S. 346.

drawn; such promise binds the promisor.(*a*) will not be binding if the bill be payable after sight.(*b*) When made after the bill is drawn, it must be made within twenty-four hours after presentment, or it may be treated as dishonored.(*c*) The acceptance may be before or after the bill becomes due, and, even after refusal to accept, the drawee may make a binding acceptance.

The bill may be accepted even after it has been protested for non-acceptance, and this is called *an acceptance supra protest*. It may be accepted by any one for the honor of one party to the bill, and it may be so accepted by another, for the honor of another party.(*d*)

Art. 3.—*Of the form of the acceptance.*

1146. The acceptance may be in writing on the bill itself, or on another paper, or it may be verbal; or it may be express or implied.

1147.—1. An express acceptance is an agreement in direct and express terms, to pay a bill of exchange by the party on whom it is drawn, or some other person, for the honor of some of the parties. It is usually in the words *accepted* or *accepts*, but other words showing an engagement to pay the bill will be equally binding.(*e*)

1148.—2. An implied acceptance is an agreement to pay the bill, not by direct and express terms, but from such acts of the parties as would infer an acceptance; for example, if the drawee writes on the bill "seen," "presented," or any other thing, as the day

(*a*) Russell *v.* Wiggin, 2 Story, 213; Bayard *v.* Lathy, 2 McLean, 462; Read *v.* Marsh, 5 B. Munr. 8; Kennedy *v.* Geddes, 8 Port. 263; Wildes *v.* Savage, 1 Story, 22.

(*b*) 1 Story, 22; 2 Story, 213.

(*c*) Chit. Bills, 212, 217.

(*d*) Beawes, tit. Bills of Exchange, pl. 52.

(*e*) Spear *v.* Pratt, 2 Hill, 582.

on which it becomes due; this, unless explained by circumstances, will be considered an acceptance.(*a*)

Art. 4.—Of the extent and effect of an acceptance.

1149. The acceptance is *primâ facie* evidence that the drawer has made *provision* for the bill, that is, that he has funds in the hands of the drawee.(*b*) As between the holder and acceptor, it is of no consequence whether the drawee has any funds of the drawer in his hands or not; but to entitle the holder to recover from an accommodation acceptor, he must be an innocent holder, for value and without notice.(*c*) The effect of an acceptance is either absolute, conditional or partial.

1150.—1. An *absolute* acceptance is an engagement to pay the bill according to its tenor, and usually by writing on the bill "accepted," and writing the acceptor's name, or by merely writing his name at the bottom or across the bill.(*d*) But in order to bind another than the drawee, it is requisite his name should appear.(*e*)

1151.—2. A *conditional* acceptance is one which will subject the acceptor to the payment of money on a contingency.(*f*) The holder is not bound to receive such an acceptance, but if he do receive it, he must observe its terms.

1152.—3. A *partial* acceptance varies from the tenor of the bill; as, where it is made to pay a part of the sum for which the bill is drawn, or to pay at a different time, or upon other terms.

SECTION 3.—OF THE PRESENTMENT OF A BILL OF EXCHANGE.

1153. Presentment is the production of a bill of exchange, or promissory note, to the person on whom the

(*a*) Spear *v.* Pratt, 2 Hill, 582; Ward *v.* Allen, 2 Metc. 53.
(*b*) Kendall *v.* Galvin, 3 Shep. 131.
(*c*) Boggs *v.* Lancaster Bank, 7 Watts & Serg. 331.
(*d*) Vin. Ab. Bills of Exchange, L. 4; 2 Hill, R. 582.
(*e*) Bayl. on Bills, 78.
(*f*) Bayl. 83; Walker *v.* Little, 1 Richardson, 249.

former is drawn for his acceptance, or to the person bound to pay either, for payment. The holder of a bill is bound, in order to hold the parties to it responsible to him, to present it in due time for acceptance, and to give notice, if it be dishonored, to all parties he intends to hold liable. And when the bill or note becomes payable, it must be presented for payment. The principal circumstances attending presentment, are, 1, the person to whom; 2, the place where; and 3, the time when it is to be made.

§ 1.—The person to whom the presentment must be made.

1154. The presentment for acceptance of a bill should be made on the drawee of a bill, on the acceptor for payment, and on the maker of a note for payment; but a presentment, when the instrument is payable at a particular place, is sufficient if made there. A personal demand on the drawee or the acceptor, is not requisite; a demand at his usual place of residence, of his wife, or other agent, is sufficient.

§ 2.—The place where a presentment ought to be made.

1155. When the bill is payable at a particular place, the presentment may be made there, but when the acceptance is general, the presentment must be at the house or place of business of the party. By *place of business*, is meant the place where a man transacts his affairs. When a man keeps a store, shop, counting-house, or office, independently and distinctly from all other persons, this is deemed his place of business; and when he usually transacts his business at the counting-house, office, or the like, occupied and used by another, that will be considered his place of business, if he has no independent place of his own. But when he has no particular right to use a place for his private purposes, as in an exchange room or banking house, an insurance office, and the like, this will not be

considered his place of business, although he may transact business there.(a)

§ 3.—Of the time of presentment.

1156. The time of presentment must be considered with reference, 1, to a presentment for acceptance; 2, to one for payment.

1. When a bill is payable at sight, or after sight, the presentment must be made in a reasonable time, and what this reasonable time is, depends on the circumstances of each case.(b) When it is payable on a certain day, it need not be presented for acceptance before the day of payment, but if it be, notice must be given, if not accepted.(c)

2. The presentment of a note or bill must be made on the day it becomes due, and notice of non-payment given, as explained below; and in case the instrument be payable at a particular place, and money is lodged there for payment, the holder would probably have no recourse against the maker or acceptor, if he did not present it there on that day, and the money should be lost.

§ 4.—Of the excuses for not making a presentment.

1157. These excuses are applicable to all indorsers generally, or to special indorsers only.

Art. 1.—Of excuses applicable to all indorsers.

1158. Among these excuses may be classed the following:

1. Inevitable accident, or overwhelming calamity,

(a) Story on Bills, § 236; Story on Pr. N. § 312; Chit. Bills, ch. 10, p. 502, 8th ed.; Williams *v.* Bank of U. S., 2 Pet. 100; Bank of U. S. *v.* Hatch, 1 McLean, 92; Franklin *v.* Verbois, 6 Miller, Lo. R. 730.

(b) Robinson *v.* Ames, 20 John. 146; Aymar *v.* Beers, 7 Cowen, 705; Depau *v.* Browne, Harper, 259.

(c) Carmichael *v.* Pennsylvania Bank, 4 How. Mis. 567; Glasgow *v.* Copeland, 8 Mis. 268; Bank of Washington *v.* Tripplett, 1 Pet. 25; Townley *v.* Sumrall, 2 Pet. 170.

as floods and snows, which prevent all travelling; or the sudden illness of the holder.

2. The prevalence of a malignant disease, by which the ordinary operations of business are suspended.(*a*)

3. The breaking out of war between the country of the maker or acceptor, and of the holder.

4. The occupation of the country where the note is payable, or where the parties live, by a public enemy, which suspends commercial operations and intercourse.

5. The obstruction of the ordinary negotiations of trade by the *vis major*.

6. Positive interdictions and public regulations of the state, which suspend commerce and intercourse.

7. The utter impracticability of finding the maker, or ascertaining his place of residence.(*b*)

Art. 2.—Excuses applicable to particular persons.

Among the special excuses for not making a presentment, may be enumerated the following:

1. By the holder receiving the note from the payee, or other antecedent party, too late to make a due presentment; this will be an excuse to such party.

2. The note being an accommodation note of the maker, for the benefit of the indorser.

3. A special agreement by which the indorser waives the presentment.

4. By an indorser receiving security or money to secure himself from loss, or to pay the note at maturity. When the amount received is sufficient to pay the note or bill, no presentment is required.

5. By the holder receiving the note from an indorser, as a collateral security for another debt due by him.

SECTION 4.—OF THE NOTICE OF DISHONOR.

1159. When a bill of exchange is not accepted

(*a*) Roosevelt *v.* Woodhull, Anthon, 35.

(*b*) Ellis *v.* Com. Bank, 7 How. Mis. 294; Reid *v.* Morrison, 2 W. & S. 401.

when presented to the drawee for acceptance, or if accepted, and it is not paid when presented for payment, it is said to be *dishonored*, and notice of this fact must be given by the holder to all the parties he intends to hold responsible to him. This notice should be, 1, in proper form; 2, given by a proper person; 3, to another; 4, at a proper time; 5, in a proper place; 6, it has then certain effects; 7, it may be excused; and, 8, it may be waived.

§ 1.—Of the form of notice of dishonor.

1160. No precise form of words is requisite for such a notice; but it must substantially convey—

1. A true *description of the bill or note* so as to ascertain its identity; if, however, it cannot mislead the party to whom it is sent, and it conveys the real fact without any doubt, although there may be a small variance, it cannot be material, either to regard his rights or to avoid his responsibility.(*a*)

2. The notice must contain an *assertion* that the bill has been *duly presented* to the drawee for acceptance, when acceptance has been refused, or to the acceptor of the bill, or maker of a note, for payment at its maturity, and dishonored.(*b*)

3. The notice must state that the holder, or other person giving it, *looks to the person* to whom it is given, for reimbursement and indemnity.(*c*) But although this strictness is required, yet in general it will be presumed, where, in other respects, the notice is sufficient.(*d*)

§ 2.—By whom notice of dishonor should be given.

1161. In general notice must be given by the holder or some one authorized by him, or by some one

(*a*) Story, Bills, § 390; 11 Wheat. 431, 436.
(*b*) See Cowles *v.* Harts, 3 Conn. 517; Shrieve *v.* Duckham, 1 Litt. 194.
(*c*) Story on Bills, § 301, 390; Chit. on Bills, 460.
(*d*) Furze *v.* Sharwood, 2 A. & E. N. R. 388, 416; Story on P. N. § 353; Cowles *v.* Harts, 3 Conn. 517; Shrieve *v.* Duckham, 1 Litt. 194.

who is a party and liable on the instrument. A notice given by a stranger is insufficient.(*a*) On the death of the holder, his executor or administrator must give the notice; when several have a joint interest as holders, and one dies, notice must be given by the survivor; a bankrupt holder may give the notice, but it is the duty of his assignee to do so. An infant may give notice, but if he has a guardian, the latter should do it.(*b*)

§ 3.—To whom notice of dishonor should be given.

1162. The holder is required to give notice to all the parties to whom he means *to resort for payment*, and, unless excused in point of law, as will be mentioned below, such parties will be exonerated and absolved from all liability on such instrument, unless perhaps under special circumstances.(*c*) Notice to one partner is sufficient,(*d*) but notice should be given to each of several joint indorsers, who are not partners.(*e*) Notice may be given to the agent of an absent indorser.(*f*)

§ 4.—When notice of dishonor should be given.

1163. The notice of dishonor must be given to the parties within a reasonable time after the dishonor of the bill, when it is dishonored for non-acceptance, and the holder must not delay giving notice until the bill has been presented for non-payment.(g) Though formerly it was doubted whether the court or jury were to judge as to the reasonableness of the notice in

(*a*) Walker *v.* State Bank, 8 Mis. 704.
(*b*) Chit. Bills, 368, 8th ed.; Story, Bills, § 303; Story, P. N. § 304, 305.
(*c*) Van Wart *v.* Smith, 1 Wend. 219; 4 Wash. C. C. 1.
(*d*) Story, Bills, § 299; Story, Prom. N. § 308; 2 How. U. S. 457.
(*e*) Id.
(*f*) Crosse *v.* Smith, M. & S. 545; 16 Mart. Lo. R. 87.
(*g*) Lenox *v.* Leverett, 10 Mass. 5; Martin *v.* Ingersoll, 8 Pick. 1; Duncan *v.* Course, 1 Rep. Cons. Ct. 103. But see Brown *v.* Barry, 3 Dall. 308; Read *v.* Adams, 6 S. & R. 356.

respect of time, yet it seems now to be settled that when the facts are ascertained, it is a question for the court and not for the jury.(*a*)

§ 5.—Where notice of dishonor should be given.

1164. A distinction is made as to the place where notice is to be given between parties who reside in the same town or place, and those who do not.

1. When both parties reside in the same town or city, the notice should be given either personally or at the domicil or place of business of the party notified, so that it may reach him on the very day he is entitled to notice.(*b*) If the notice be put in the post office, the holder must prove it reached the indorser.(*c*) But in those towns where they have letter carriers, if the notice be put in the office to be delivered in time that day it is sufficient.(*d*)

2. When the parties reside in different towns or cities, the notice may be sent by the post, or a special messenger, or a private person, or by any other suitable or ordinary conveyance.(*e*) When the post is resorted to, the holder has the whole day on which the bill becomes due to prepare his notice, and if it be put in the post office on the next day, in time to go by either mails, when there is more than one, it will in general be sufficient.(*f*)

§ 6.—Of the effect of notice of dishonor.

1165. When properly given and followed by a protest, when a protest is requisite, the notice of dishonor

(*a*) United States *v.* Barker, Paine, 156; Mallory *v.* Kirwan, 2 Dall. 192; Denniston *v.* Imbrie, 3 Wash. C. C. 396.

(*b*) Williams *v.* Bank of the United States, 2 Pet. 100; 1 M. & S. 545; Story, on Bills, § 284—290.

(*c*) Bank of U. S. *v.* Corcoran, 2 Pet. 121.

(*d*) Chit. Bills, 504, 508, 513, 8th ed.

(*e*) Chit. Bills, 518, 8th ed.; Story, P. N. § 324; Bussard *v.* Levering, 6 Wheat. 102; Munn *v.* Baldwin, 6 Mass. 316; Stanton *v.* Blossom, 14 Mass. 116.

(*f*) Whitwell *v.* Johnson, 17 Mass. 449; Howard *v.* Ives, 1 Hill, (N. Y.) 263; Contra, Bank of U. S. *v.* Merle, 2 Rob. Lo. R. 117.

will render the drawer and indorsers of a bill, or indorsers of a note, liable to the holder.

§ 7.—What will excuse the want of notice of dishonor.

1166. The same reasons which will excuse a presentment, will be sufficient to excuse a want of notice.

§ 8.—Of the waiver of the notice of dishonor.

1167. The party to be affected may waive the notice, but this must be done with full knowledge of his rights, and the waiver must not be obtained by surprise.(a)

SECTION 5.—OF THE PROTEST OF A BILL OR NOTE.

1168. When a bill or note is not paid upon presentment, notice is given to the parties, and the next thing to be done is to protest it. A *protest* is a notarial act made for want of a payment of a promissory note, or for want of acceptance or payment of a bill of exchange, by a notary public, in which it is declared that all the parties to such instruments will be held responsible to the holder for all damages, exchanges, reëxchanges, etc. It is dated and signed by the notary and sealed with his official seal.

1169. There are two kinds of protests of a bill, one for non-acceptance, which is made before the bill becomes due, on the drawee refusing to accept on presentment of the bill to him by the notary for acceptance; and the other after the bill becomes due, when presented to the acceptor for payment and a refusal or neglect of making it. The protest of a note is always for non-payment.

1170. In making the protest three things are requisite to be done:

1. The *noting*, which is a minute made by the notary on the bill or note after it has been presented for acceptance or payment, consisting of the initials of

(a) Story, P. N. § 358.

his name, the date when it was made, and the reasons assigned, if any, why it was not accepted or paid, together with his charge. This is however only a part of the protest, it will not supply the protest.(*a*)

2. The *demand*, which must be made by a person having authority to receive the money.(*b*)

3. The *drawing up* of the protest, which is a mere matter of form.

1171. The *effect* of the protest when properly made, after presentment and notice, is to hold all the parties to the bill or note responsible to the holder.

SECTION 6.—HOW THE PARTIES TO A BILL OR NOTE ARE DISCHARGED.

1172. The parties to a bill or note will be discharged from it in a variety of ways, as parties are discharged from other contracts; the most common are payment, satisfaction, bankruptcy, merger, novation, accord and satisfaction, release, covenant not to sue, set off, confusion, all of which have been considered in a former chapter.

In addition to these, the act of the holder giving time to the makers of a note, or acceptors of a bill, by which he deprives himself of a right to sue them, however short the time may be, discharges all the other parties from responsibility to him, because then the contract has been changed, and, if that has been done without the indorsers' consent, they are not parties to such last contract.(*c*) But mere delay in sueing, without fraud, or any agreement with the maker or acceptor, will not discharge the indorsers.(*d*)

(*a*) Chit. Bills, 280, 398; 4 T. R. 175. The hour of presentment and protest need not be stated by the notary. Cayuga Bank *v.* Hunt, 2 Hill, 635.

(*b*) Carmichael *v.* Pennsylvania Bank, 4 How. Mis. 567.

(*c*) Bac. Ab. Obligations, D; Story, P. N. § 414.

(*d*) Story, P. N. § 414.

CHAPTER IV.——OF PROMISSORY NOTES.

1173. A promissory note is a written promise, not under seal, by one or more persons, called the *makers*, to pay to one or more other persons, called the *payees*, for a valuable consideration, a certain sum of money, at a future time, unconditionally.(*a*) A promissory note differs from an agreement to deliver or pay goods, which is not negotiable; and from a mere acknowledgment of debt, without any promise to pay, as when the debtor gives to his creditor a memorandum in these words: I O U (I owe you) one hundred dollars. But if, to this acknowledgment, there be a promise to pay, the instrument will be a promissory note.(*b*)

In its form a promissory note usually contains a promise to pay, at a time therein expressed, a sum of money, to a person therein named, or to his order, for value received. It is dated and signed by the maker.(*c*) It is never under seal. Although in its original shape a promissory note bears no resemblance to a bill of exchange, yet when indorsed it is exactly similar to one, for then it is an order by the indorser of the note, upon the maker, to pay the indorsee; the indorser is, as it were, the drawer; the maker, the acceptor; and the indorsee, the payee.(*d*)

No peculiar form is requisite to these instruments; a promise to pay or deliver money, or to be accountable for it, or that the payee shall have it, is suffi-

(*a*) Curtis *v.* Rickarts, 1 Man. & Gr. 46; Read *v.* Wheeler, 2 Yerg. 50, n

(*b*) Kimball *v.* Huntington, 10 Wend. 675; Brooks *v.* Elkins, 2 Mees. & Wels. 74.

(*c*) An instrument in the usual words of a note, payable to bearer and with an authority to an attorney to enter judgment in favor of the holder for the amount of the note with costs, coupled with a release of errors, and a waiver of stay of execution, and of the right to an inquisition and appraisement, is not a negotiable note, and the maker is not entitled to the days of grace; where a judgment was entered on this instrument and an execution issued before the expiration of the days of grace, the proceedings were held to be regular. Overton *v.* Tyler, 3 Penn. St. Rep. 346.

(*d*) Burr. 669, 1224; 4 T. R. 148.

cient.(a) The principal qualities essential to its validity are, 1, that it be payable at all events, and do not depend upon a particular fund, nor upon any contingency. And, secondly, that it be for money only.(b)

Most of the rules applicable to a bill of exchange, equally affect promissory notes; these having been considered under another head, will not be here repeated.

CHAPTER V.—OF MARINE INSURANCE.

1174. Insurance is a contract by which one of the parties, called the *insurer*, binds himself to the other, called the *insured*, to pay him a sum of money, or otherwise indemnify him, in case of the happening of a fortuitous event provided for in a general or special manner in the contract, in consideration of a premium which the latter pays or binds himself to pay to him.

The instrument by which the contract is made is denominated a *policy;* the events or causes to be insured against, *risks* or *perils;* and the thing to be insured, the *subject*, or *insurable interest*. There are three kinds of insurance: marine insurance, life insurance, and fire insurance.

1175. *Marine insurance* is a contract by which one party, for a stipulated premium, undertakes to indemnify the other, against all perils or sea-risks, to which his ship, freight or cargo, or some of them, may be exposed, during a certain voyage, or fixed period of time.

The most perfect good faith is required in this contract; if the insured make false representations to the insurer, in order to procure his insurance upon better terms, it will avoid the contract, though the loss may arise from a cause unconnected with the misrepresentation; or if the concealment happen through mistake,

(a) Chit. Bills, 53, 54.

(b) McCormick *v.* Trotter, 10 S. & R. 94; Gray *v.* Donahoe, 4 Watts, 400. In New York, it has been held that a note payable in bank notes is good. 9 John. 120; 29 John. 144.

neglect or accident, without any fraudulent intention, for this reason, that the insurer was not the less deceived.

SECTION 1.—PARTIES TO THE POLICY.

1176. All persons may be insured, whether they be natives, citizens, or aliens, with the exception of alien enemies. A policy may be made to an individual, or "for whom it may concern," and it may be made by an agent, without any warranty or representation of national character, and it will cover any interest of any person whether American or foreigner, who has authorized the insurance.(*a*)

SECTION 2.—OF THE THINGS INSURED.

1177. The contract of marine insurance naturally supposes objects which one of the contracting parties fears to lose, in whole or in part, in consequence of accidents which may occur to them on the sea; they must, therefore, be *actually exposed* to the risks, and that the assurer should receive an equivalent for the chances which he is obliged to run.

Every thing susceptible of becoming the object of a commercial transaction, which is in danger of perishing or being deteriorated, in whole or in part, in consequence of maritime accidents, may be the object of this contract. The intent of the insurance, strictly speaking, is not to make a positive gain, but to avert a possible loss. A man cannot properly be said to be indemnified against a loss which can never happen to him. There cannot therefore be an indemnity without a loss, nor a loss without an interest.

§ 1.—Of the interest of the insured.

1178. It is not easy to define an *insurable interest*. The policy of commerce and the various complicated

(*a*) Seamens *v.* Loring, 1 Mason, 127; Hulbert *v.* Ins. Co., 2 Sumner, 471; Flemming *v.* Mar. Ins. Co., 4 Whart. 59; De Bolle *v.* Penn. Ins. Co., 4 Whart. 68.

rights which different persons may have in the same thing, require that not only those who have an *absolute* property in ships and goods, but those also who have a *qualified* property in them may be at liberty to insure them; for example, when a ship is mortgaged, after the mortgage becomes absolute, the owner of the *legal* estate has an insurable interest, and the mortgagor, on account of his *equity*, has also an insurable interest.(*a*)

1179. *Wager policies*, or those made on a pretended subject, which in fact does not exist, are generally void, though formerly, at common law, they were considered valid.(*b*) Such policies are usually conceived in the terms, "interest or no interest," or "without further proof of interest than the policy," or "free from average and without benefit of salvage."(*c*)

1180. When an insurer is desirous of lessening his liability, he may procure some other insurer to insure him from loss, for the insurance by him made; this is called *reassurance*.

1181. Sometimes an insured may be doubtful of the solvency of his insurer, he is then allowed to make a second or *double insurance*, on the same risk and the same interest, but he is not permitted to receive a double satisfaction in case of loss, though he may sue on both policies. The underwriters on the different policies are bound to contribute rateably toward the loss.(*d*)

§ 2.—Of the ship.

1182. Whether the insurance be on the goods or the ship, it is an object of great interest to both parties that the latter should be *sound and in good order*.

(*a*) Godin *v.* Lond. Ass. 1 Burr. 489; Smith *v.* Lascelles, 2 T. R. 188. See Rider *v.* Ocean Ins. Co., 20 Pick. 259; Buck *v.* Chesapeake Ins. Co., 1 Pet. 163; Oliver *v.* Green, 3 Mass. 133; Higgins *v.* Dall, 13 Mass. 96.

(*b*) 3 Kent, Com. 275, 4th ed.

(*c*) Marsh. on Ins. 121.

(*d*) Park on Ins. 374, 375; Lucan *v.* Jefferson Ins. Co., 6 Cowan, 635.

There is an implied agreement in every contract of marine insurance, which the insured is required to fulfil. The principal stipulations in this implied agreement are, that the ship is sea-worthy; that she shall not be changed without the consent of the insurers; and that she shall be employed, conducted, and navigated with reasonable skill and according to law.

Art. 1.—*Of the sea-worthiness of the ship.*

1183. By *sea-worthiness* is meant the ability of a ship or other vessel to make a sea voyage, with probable success and safety. No man, it is presumed, would venture out to sea, with a ship known not to be sea-worthy, and no one would insure such a ship; there is, therefore, an implied agreement and promise, on the part of the insured, that the ship is sea-worthy when she sails for the voyage insured; that is, that she shall be "tight, staunch, and strong, properly manned, provided with stores, and in all respects fit for the intended voyage."(*a*) But the implied warranty of sea-worthiness relates only to the commencement of the voyage.(*b*)

To be sea-worthy, the ship must not only be tight, staunch and strong, and provided with necessary stores for the voyage proposed, but, as already intimated, she must be properly *manned* by persons of competent skill and ability to navigate her. If, therefore, she sail without a sufficient number of competent hands to navigate her, for her voyage; or if she be suffered to sail in a river or other place of difficult navigation, without a pilot properly qualified, the underwriters will be discharged, for this is a breach of the condition.(*c*)

(*a*) Am. Ins. Co. *v.* Ogden, 15 Wend. 532; Talcot *v.* Com. Ins. Co., 2 John. 124; Talcot *v.* Marine Ins. Co., 2 John. 130; Garrigues *v.* Coxe, 1 Binn. 592; Ingraham *v.* S. Car. Ins. Co., Const. Rep. 707.

(*b*) Peters *v.* Phœnix Ins. Co., 3 S. & R. 25; Hughes on Ins. 205; Marsh. on Ins. 165.

(*c*) Marsh. on Ins. 165, *b.* But see Keeler *v.* Firemen's Ins. Co., 3 Hill. 250; Silva *v.* Law, 1 John. Cas. 184.

Whether a vessel was sea-worthy when she sailed, is a question *of fact* for the jury ;(*a*) but in some cases it will be presumed that she was not sea-worthy.(*b*)

Art. 2.—*Of the employment of the ship.*

1184. Not only must the ship be sea-worthy, well manned, and have the proper documents to prove her nationality; she must also be employed in a *lawful voyage*, not only according to the municipal law, and the law of nations, but also according to particular treaties between the country to which she belongs and other states.(*c*)

Art. 3.—*Of the voyage.*

1185. Another subject of insurance is the voyage. By *voyage* is meant the passage of the ship upon the seas, from one port to another. She may, when allowed, touch at several ports in her voyage; but the voyage is from the port of departure to the port of her final destination. It is a general rule that none but a lawful voyage can be insured.

This article will be divided into two parts: 1, when the illegality of the voyage shall avoid the contract; 2, when the underwriters will be discharged on account of a deviation from the voyage.

1. *When the illegality of the voyage shall avoid the contract.*

1186. An insurance made on a voyage undertaken in violation of the laws of the United States, or of the laws of nations, or of the country where the contract has been made, is void, whether the insurer were or were not informed of the illegality of the voyage.(*d*)

(*a*) Union Ins. Co. *v.* Caldwell, Dudley, S. C. 263; Chase *v.* Eagle Ins. Co. 5 Pick. 51.

(*b*) Talcot *v.* Com. Ins. Co. 2 John. 124; Talcot *v.* Mar. Ins. Co. 2 John. 130.

(*c*) Marsh. on Ins. 177.

(*d*) Craig *v.* Ins. Co. Pet. C. C. 410; Richardson *v.* Maine Ins. Co. 6 Mass. 102; Breed *v.* Eaton, 10 Mass. 21; Gray *v.* Sims, 3 Wash. C. C. 276.

2. *What deviation from the voyage will discharge the underwriters.*

1187. A deviation of a ship from her voyage is a *voluntary departure, without necessity or reasonable cause,* from the regular and usual course of the voyage insured. What amounts to a deviation is not easily defined, but a voluntary departure from the usual course of the voyage, or remaining at places where the ship is allowed to touch longer than necessary, or doing there what the insured is not authorized to do, as if the ship have liberty to touch at a port, and the insured stay there to trade or to break bulk, it is a deviation;(*a*) or if captured, carried into port, and released, and the vessel remains in port to trade, it will be a deviation.(*b*) But a mere intention to deviate, will not avoid the policy.(*c*) A departure from the usual course, when occasioned by necessity, will not have any effect of avoiding the contract, when it can be justified; and its effects, when it is not justifiable, will be separately considered.

1° *When a deviation can be justified.*

1188. To make a deviation, there must be a voluntary departure from the usual course of the voyage insured. But by the *course of the voyage* is not meant the shortest course the ship can make from her port of departure to her port of destination, but the regular and customary track, if such there be, which long usage has proved to be the safest and the best.(*d*)

1189. A deviation may be *justified* from numerous causes, always grounded on a physical or moral necessity, the principal of which are the following:

1. A deviation may be justified by *stress of weather;* if, therefore, a ship be driven out of her course by a

(*a*) Coffin *v.* Newburyport Ins. Co. 9 Mass. 436; Coles *v.* Marine Ins. Co. 3 Wash. C. C. 159; Snowden *v.* Phœnix Ins. Co. 3 Binn. 466.

(*b*) Kingston *v.* Girard, 4 Dall. 274.

(*c*) 3 Binn. 466; 9 Mass. 436; Hobart *v.* Norton, 8 Pick. 159; Marine Ins. Co. *v.* Tucker, 3 Cranch, 357.

(*d*) Marsh. on Ins. 185.

storm, this shall not avoid the contract, for it is a rule that what is occasioned by the act of God, cannot be imputed to any man as his fault.(*a*)

2. Another excuse for a deviation is the *want of necessary repairs*. If a ship be reduced to a state that she cannot proceed safely on her voyage without repairs, the captain will be justified in taking her to some port, the least out of his course, where such repairs can be had, and procure the necessary repairs to be made as soon as possible. But if part of her cargo must necessarily be taken out, in order to repair the vessel, and such part of the cargo, being damaged, is sold without occasioning any delay to the vessel, it will not avoid the policy.(*b*)

3. A departure from the usual course for the purpose of rendering *succor* to a ship in distress, is justified on the ground of necessity. It is a duty which policy as well as humanity imposes on every man who has the means of performing it. But a distinction has been made between a delay to save lives which are in jeopardy, and such a delay to save property. The former is justifiable, the latter is a deviation.(*c*)

4. Such a departure *to avoid capture or detention* is an excusable deviation. It is the interest of both parties to the contract, that the vessel should not be taken, and that she should shun danger where it is apparent; but a mere apprehension of danger, without reasonable evidence of it, will not authorize a deviation.(*d*)

5. The *inability of the captain or crew* to navigate the ship in safety, whether such inability arise from sickness, death, or other cause, so as to render it highly

(*a*) Campbell *v.* Williamson, 2 Bay, 237; Delany *v.* Stoddard, 1 T. R. 22.

(*b*) Kane *v.* Columbian Ins. Co. 2 Johns. 264.

(*c*) The Boston, 1 Sumn. 328; The Henry Ewbank, 1 Sumn. 400; Lettle *v.* St. Louis Perpetual Marine, Fire, and Life Ins. Co. 7 Mis. 379.

(*d*) Riggin *v.* Petapsco Ins. Co. 7 Har. & John. 279. See Whitney *v.* Haven, 13 Mass. 172; Suydam *v.* Marine Ins. Co. 2 John. 138; Goyon *v.* Pleasants, 3 Wash. C. C. 241.

perilous or impossible to proceed on the voyage, will justify a deviation, for the purpose of obtaining medical assistance or other hands. In this case, however, it must appear that this inability did not arise from the neglect or mismanagement of the owners or the master.(a)

The *mutiny of the crew*, when the captain departs from his course by *compulsion*, will be a justification for his deviation. A departure in this case is as much a matter of necessity, as if the vessel had been forced by the wind and the waves.

2° *Of the effect of a deviation.*

1190. When an underwriter undertakes to insure against certain losses, his contract is definite and distinct; he engages to insure *no other than the voyage described* in the policy; if the insured, or his agent, without necessity, depart from the voyage which is the object of the contract, it is no longer the same voyage, and if a loss occur, the insurer cannot be made responsible for it, because he never insured the voyage in which it happened.

1191. The effect of the deviation is not to vitiate or avoid the policy; it simply determines or puts an end to the liability of the underwriters *from the time of the deviation*. When, therefore, a loss occurs before any deviation has taken place, although the insurer will be discharged from all responsibility for loss which may take place after the deviation, yet he will be liable for the loss sustained before.

1192. Though the insurer will be discharged from all liability when there has been an unnecessary deviation, he will be entitled to retain the whole premium. The insurer is discharged from his liability, when there has been a deviation, not warranted by necessity, not because the risk is increased, but because the insured has, without necessity, substituted another voyage for

(a) See Williams *v.* Smith, 2 Caines, 1.

that which was insured, and thereby varied the risk. The extent of the change is altogether unimportant, the slightest unauthorized deviation changes the voyage.(*a*)

1193. When there has been a deviation, and, before any sinister accident has occurred, the vessel returns to her track, and pursues her course, and then she encounters perils and is lost, the insurer is not responsible; and this is so for several reasons: first, because by the unnecessary deviation, the implied condition on the part of the insured, that the vessel should pursue her course, there has been a violation of the contract, and, being once broken by him, it cannot be renewed without the consent of the insurer; secondly, it cannot be known to a certainty that the risk has not been increased; if the vessel had not deviated from her course, she would not have been where she was when the loss occurred, and she might have escaped the danger altogether.

SECTION 3.—OF THE RISK.

1194. Maritime *risks* are perils which are incident to a sea voyage,(*b*) or those fortuitous events which may happen in the course of the voyage.(*c*) It will be proper to inquire into, 1, the nature of the risk usually insured against: 2, its duration.

§ 1.—Of the nature of the risk.

1195. The risks usually insured against are those occasioned by storms, shipwreck, jettison, prize, pillage, fire, war, reprisals, detention by foreign governments, collision by two ships at sea, whether it result from accident or negligence; contribution to losses experienced for the common benefit, or for expenses which would not have taken place, if it had not been for such

(*a*) Natchez Ins. Co. *v.* Stanton, 2 Smedes & Marsh. 340; Martin *v.* Delaware Ins. Co. 2 Wash. C. C. 254.
(*b*) Marsh. Ins. 215.
(*c*) Poth. Contr. d'Assur. n. 49; Pard. Dr. Com. n. 770.

events. These are called *perils of the sea.* But the insurer may by his special contract limit his responsibility for these risks, or insure only against enumerated risks; for the benefit of *particular persons,* or *for whom it may concern.*

1196. The law, founded on reason and public policy, has made some exceptions which require that, in certain cases, men shall not be permitted to protect themselves against some particular perils by insurance; among these are,

1. That no man can insure any loss or damage proceeding directly from his own fault.(*a*)

2. That he cannot insure risks or perils of the sea upon a trade forbidden by the laws.

3. That he cannot insure the risks excluded by the usual memorandum contained in the policy.(*b*)

1197. As the insurance is upon maritime risks, the accidents must have happened on the sea, unless the policy include other risks. The loss by accident which might happen on land in the course of the voyage, even when the unloading may have been authorized by the policy, or is required by local regulations, as where they are necessary for sanitary measures, is not borne by the insurer.

§ 2.—Of the duration of the risk.

1198. The commencement and the end of the risk depend upon the words of the policy. The insurer may take and modify what risks he pleases. The policy may be on a voyage *out,* or a voyage *in,* or it may be on part of the route, or for a *limited time,* or from *port to port.*

When a vessel has quit her moorings, in complete readiness for sea, and the master has an actual intention to proceed, she is *at sea,* or *on a passage,* within the meaning of the policy.(*c*) But a vessel moving

(*a*) Marsh. Ins. 215; Poth. h. t. n. 65; Pardes. h. t. n. 771.
(*b*) Marsh. Ins. 221.
(*c*) Bowen *v.* Hope Ins. Co. 20 Pick. 275.

down a river, has not necessarily sailed on her voyage; the *quo animo* decides the point.(*a*)

The voyage has not ended until the vessel has arrived, that is, till she drops her anchor or is moored.(*b*)

SECTION 4.—OF THE PREMIUM.

1199. We have seen that to make a valid insurance there must be a consideration or premium paid by the insurer. The *premium* is so called because it is to be paid *primo* or before the contract shall take effect.(*c*) But the premium is not always paid when the policy is underwritten; for insurances are frequently effected by brokers, and open accounts are kept between them and the underwriters, in which they make themselves debtors for all premiums; and sometimes notes or bills are given for the amount of the premium.

It is a rule that if the policy has never attached, the insurer has no claim for the premium; but if once it attaches and he runs any risk, he is entitled to it.(*d*)

SECTION 5.—OF THE FORM OF THE CONTRACT OF INSURANCE.

1200. The contract of insurance is in general made in the same form, which has been established by the wisdom and experience of ages, no deviation from it ought to be allowed under any pretext, as all the terms therein adopted have received the deliberate sanction of the courts.(*e*) Let us inquire, 1, into the general requisites of a policy; and, 2, into its several parts; 3, their different kinds.

§ 1.—General requisites of a policy.

1201. The agreement for an insurance must be in writing.(*f*)

(*a*) Dennis *v.* Ludlow, 2 Caines, 111.
(*b*) Gray *v.* Gardner, 17 Mass. 188; Pardes. Dr. Com. n. 778. See Bill *v.* Mason, 6 Mass. 313.
(*c*) Poth. h. t. n. 81; Marsh. Ins. 234.
(*d*) Cleveland *v.* Fettyplace, 3 Mass. 392; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56.
(*e*) Marsh. Ins. 304, 5.
(*f* Cockerill *v.* Cincinnati Mutual Ins. Co., 16 Ohio, 148.

§ 2.—Of the formal parts of a policy.

1202. The particular requisites of a policy are numerous. They will be here considered in their order.

1203.—1. *The parties.* The policy should state the name of the insurer, and the name of the insured; but it may be taken in the name of a party, and "for whom it may concern;"(*a*) or in the name of A and ——, when it will be considered as if taken for whom it may concern.(*b*)

1204.—2. *The name of the ship.* When an insurance is made on the *ship* it must necessarily identify the vessel which it is meant to insure; this is done by naming the vessel. When the insurance is on *goods*, it is usual and requisite to specify in the policy the ship in which they are to be transported, together with the name of the captain. This is necessary, because all ships are not equally good, and the insurer by this means can alone form a correct judgment. It is evident that if one ship be named in the policy, and the goods be sent in another, the policy will not cover them.(*c*) To prevent loss by any such mistake, it is usual to insert in every policy these words: "or by whatever other name or names the same ship, or the master thereof is, or shall be, named or called;" so that if the identity of the ship can be proved, and no fraud be meant, a mistake in the name of the ship will not vitiate the contract.

1205.—3. *The description of the voyage.* The voyage insured must be accurately described in the policy; namely, the time and place at which the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end, whether on the goods or on the ship.(*d*)

(*a*) Flemming *v.* Marine Ins. Co., 4 Whart. 59; De Bolle *v.* Penn. Ins. Co., 4 Whart. 68.

(*b*) Burrows *v.* Turner, 24 Wend. 276.

(*c*) Marsh. Ins. 313.

(*d*) Marsh. Ins. 321.

The policy should state the place where the merchandise has been or should be loaded; but this rule is modified when the policy is on a voyage from abroad, for it may be good though it omit the name of the ship, or master, or port of discharge, or consignee, or to specify, or designate, the nature or species of the cargo, for all these may be unknown to the insured when he applies for the insurance.(*a*) But the cargo must be of the same species as that described in the policy.

In general, the port of destination ought to be mentioned, but sometimes the voyage is described merely as to time, as for three months; in that case the place of destination, if required at all, is only to identify the vessel, and to give to the insurer a clearer notion of the risks he has to run.

The policy should mention all the ports, harbors and havens where the ship may enter and load or unload.

1206.—4. *The subject matter of the insurance.* The policy must specify the subject matter of the insurance, whether it be goods, ship, freight, respondentia or bottomry, securities, or whatever it may be.

When a ship is the object of the insurance, and not merely the place where the risks occur, as where goods on a certain ship are insured, the name must be correctly mentioned in the policy, for the purpose of indicating the vessel, and to prevent fraud. What we have before mentioned, with regard to a mistake in the name of the ship, when it is merely designated as a place where the things at risk are to be placed, does not apply when the policy is on the ship itself.(*b*)

When goods are the subject matter of the insurance, it is not necessary to designate the different sorts. It

(*a*) 3 Boulay Paty, 412; Pard. Dr. Com. n. 805, 809; 3 Kent, Com. 259.

(*b*) Pardes. n. 811.

is usually expressed to be "upon any kind of goods or merchandise."

1207.—5. *The perils insured against.* The perils against which the insured means to be protected must be distinctly enumerated in the policy; by the usual form these extend nearly over all that can happen which are insurable, but there are some, as we have seen, against which there can be no insurance.

The policies contain the words "lost or not lost;" the insurer not only undertakes by this to insure against future loss but against those which have already accrued.

1208.—6. *The clause giving powers to the insured in case of misfortunes.* To remove a doubt which formerly existed, a clause is introduced into the policy to authorize the insured to take all necessary care of property in case of misfortunes, without prejudice to the insurance.

1209.—7. *Promise of the insurers and receipt of the premium.* The next clause in the policy is that in which the insurers bind themselves to the insured for the performance of their contract, and confess themselves paid the consideration or premium by the insured, at the rate specified.

1210.—8. *The common memorandum.* This is introduced for the purpose of relieving the insurer from any liability whatever as to some specified articles; and, of others, not making him responsible, unless the loss exceeds three, and others five per centum, and then only for the excess.

1211.—9. *The date and subscription.* The sum insured is, in general, placed in the subscription after the signature, in the underwriter's hand-writing and in words at length, and not in figures.

The policy should be dated; it is usual for each underwriter to date it immediately after his name, so that a policy may have several dates.

SECTION 6.—OF THE WARRANTIES.

1212. A *warranty* is a stipulation or agreement on the part of the insured, in the nature of a condition precedent. It may be *affirmative;* for example, where the insured undertakes for the truth of some positive allegation, as that the thing insured is neutral property, that the ship is of such a force, that she has sailed and the like; or it may be *promissory*, for example, where the insured undertakes to perform some executory stipulation, as, that the ship shall sail by a given day, that she shall depart with convoy, etc.

Warranties are either *express* or *implied.* The former are introduced in the written contract of the parties; as, that the ship is neutral property. An implied warranty is that which necessarily results from the nature of the contract; as, that the ship is seaworthy, that she shall be navigated with reasonable skill and care, that the voyage is lawful and shall be performed according to law, in the usual course, without any deviation, etc.

SECTION 7.—OF REPRESENTATIONS.

1213. A *representation*, in insurance, is a *collateral statement*, either in writing, not inserted in the policy, or by parol, of such facts or circumstances relative to the purposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risk. Representations must be exactly true, for, as we have already observed, the contract of insurance requires the most perfect fairness.(*a*)

(*a*) When the insured, in a case of fire insurance, made an offer for insurance in these words, " What premium will you ask to insure the following property *belonging* to L. & P. for one year against loss or damage by fire? On their stone mill four stories high, covered with wood, on an island about one mile from Fredericksburg, in the county of Stafford; the mill called Elba Mill. Seven thousand are wanted. Not within thirty yards of any other building, except a corn house, which is about twenty yards off." The policy which was made in consequence of this offer, states that the

A representation, like a warranty, may be either *affirmative*, as where the insurer avers the existence of some fact, which may affect the risk; or *promissory*, as when he engages for the performance of something executory.

There is a material difference between a representation and a warranty. A warranty being a condition upon which the contract is to take effect, is always a part of the written policy, and must appear on its face;(*a*) whereas a representation is only a matter of collateral information or intelligence on the subject of the voyage insured, and makes no part of the policy. Again, a warranty, being in the nature of a condition precedent, must be strictly and literally complied with; but it is sufficient if the representation be true in substance. Whether a warranty be material to the risk or not, the insured stakes his claim to indemnity upon its precise truth, if it be affirmative, or upon the exact performance of it, if executory. But if it be made without fraud, and be not false in any material point, or if it be substantially, though not literally fulfilled, it is sufficient. A false warranty avoids the policy, as being a breach of the condition upon which the contract is to take effect, and the insurer is not liable for any loss, though it do not happen in consequence of the breach of the warranty; a false representation is no breach of the contract, but if material, avoids the policy on the ground of fraud, or at least because the insurer has been misled by it.

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underwriters insure L. & P. against loss or damage by fire, to the amount of seven thousand dollars on their mill, etc. On a suit on this policy, it appeared that instead of such an estate in the property as the representation justified the insurers in expecting, the plaintiffs held only one half of one-third, under a lease for three lives, renewable forever, and one half of the other two-thirds as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with; and which, if complied with, would give them a title to two-thirds as mortgagees. It was held, that the representation did not truly state the interest the insured had in the property. Columbian Insurance Company *v.* Lawrence, 2 Pet. 25, 47, 49.

(*a*) Marsh. Ins. c. 9, § 2.

SECTION 8.—OF CONCEALMENT.

1214. A *concealment* in insurance, is the *unlawful suppression* of any fact or circumstances which the insured is bound to disclose to the insurer. This, like any other fraud, avoids the contract *ab initio*, upon principles of natural justice.

It does not matter whether the concealment be intentional or the mere effect of negligence, accident, inadvertence, or mistake; if material, is is equally fatal to the contract, as if it were intentional and fraudulent.

The insured is required to disclose all the circumstances which are within his own knowledge only, and which increase the risk. A neglect to do this will avoid the policy; as, where the concealment was that the assured had heard that a vessel like his was taken.(*a*) And in a case where the assured had information of "a violent storm," about eleven hours after his vessel had sailed, and represented there "had been blowing weather and severe storms on the coast after the vessel had sailed," but without any reference to the particular storm, it was held that this was such a concealment as violated the policy.(*b*)

But although the insured is thus bound to disclose all he knows, he is not required to state general circumstances which apply to all policies of a particular description, notwithstanding they may greatly increase the risk.

SECTION 9.—OF THE LOSS.

1215. A *loss* in insurance, is the injury or damage sustained by the insured, in consequence of the happening of one or more of the accidents or misfortunes against which the insurer, in consideration of the premium, has undertaken to indemnify the insured.

(*a*) 1 Bl. R. 594; 3 Burr. 1909.
(*b*) Ely *v.* Hallett, 2 Caines, R. 57.

These accidents or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in the policy; these are—"Touching the adventures and perils which we the assurers are contented to bear and take upon us in this voyage, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, taking at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners; and of all other perils, losses and misfortunes, that have or shall come, to the hurt, detriment or damage of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance." No loss, however great or unforeseen, can be a loss within the policy, unless it be the direct and immediate consequence of one or more of these perils.(*a*)

No evidence can be given of any loss unless it be the *immediate* consequence of some perils insured against; that which is only a remote consequence of such peril, is not within the policy. If, therefore, the plaintiff upon a policy on slaves, declares for a total loss by perils of the sea, he cannot give in evidence a loss occasioned by throwing slaves overboard on account of a scarcity of water, occasioned by the captain's mistaking his course, nor a loss by the death of slaves who perish for want of proper food, occasioned by extraordinary delay in the voyage, arising from bad and tempestuous weather.(*b*)

1216. Every loss is either total or partial. The term *total loss* is understood in two different senses, the natural and legal. In its natural sense it signifies the complete and absolute destruction of the thing insured. In its legal sense, it means not merely the

(*a*) Marsh. Ins. B. 1, c. 12.

(*b*) Marsh. on Ins. 717. See Magoun *v.* New Eng. Mar. Ins. Co., 1 Story, 157; Potter *v.* Ocean Ins. Co., 3 Sumner, 27.

entire destruction or deprivation of the thing insured, but also such damage to it, though it specifically remain, as renders it of little or no value to the owner.(*a*) A loss is deemed total, if, by the happening of any of the misfortunes insured against, the voyage be lost, or be not worth pursuing, and the projected adventure frustrated; or if the value of what be saved, be less than the freight.(*b*)

1217. A *partial loss*, is any damage short of, or not amounting to a total loss; for if it be not the latter, it must be the former. Partial losses are sometimes denominated *average* losses, because they are often in the nature of those losses, which are the subject of average contributions; and they are distinguished into general and particular averages.

1218. Losses are occasioned by a variety of ways, but most usually by the following:

1. By *perils of the sea.* This is the generic name for all those losses which arise from natural accidents peculiar to the sea; but in more than one instance they have been held to extend to events not attributable to natural causes.(*c*)

2. By *collision*, which takes place when two ships or other vessels run foul of each other, or when one runs foul of the other. In all cases, collision, when there is no fault on either side, is deemed a peril of the sea, within the meaning of the policy of insurance.(*d*)

3. By *fire*. The insurer is liable for the loss of a vessel by fire, though it may have been occasioned by the negligence of the master and crew.(*e*)

4. By *capture*, which is the taking of property by one belligerent from another, according to the laws and usages of war.

(*a*) Wood *v.* Lincoln and Kennebeck Ins. Co., 6 Mass. 479; Peel *v.* Suffolk Ins. Co., 7 Pick. 254; Fuller *v.* McCall, 2 Dall. 219.

(*b*) See Wood *v.* Lincoln and Kennebeck Ins. Co., 6 Mass. 479; Peale *v.* Suffolk Ins. Co., 7 Pick. 254; Hall *v.* Franklin Ins. Co., 9 Pick. 466.

(*c*) Garrigues *v.* Coxe, 1 Binn. 592; 3 Kent, Com. 300, 4th ed.

(*d*) Hale *v.* Wash. Ins. Co., 2 Story, R. 176; Peters *v.* The Warren Ins. Co., 3 Sumner, 389; S. C. 14 Pet. 99.

(*e*) Waters *v.* Merchants' Ins. Co., 11 Pet. 213.

5. By *detention of princes.* By the terms of the policy, the insurer is liable for all loss occasioned by "arrest or detainments of all kings, princes and people, of what nation, condition or quality soever."(*a*)

6. By *barratry,* which is the act of the master or mariners, committed with fraudulent intent, contrary to their duty as such, to the prejudice of the owners of the ship.(*b*)

7. By *average and contribution.* Average is a term used in commerce to signify a contribution made by the owners of the ship, freight or goods on board, in proportion to their respective interests, toward any particular loss or expense sustained for the general safety of the ship and cargo, to the end that the particular loser may not be a greater sufferer than the owner of the ship and the other owners of the goods on board.(*c*)

8. By *salvage.* Salvage loss is understood to be the difference between the amount of salvage, after deducting the charges, and the original value of the property.(*d*)

9. By the *death of animals.* If animals, such as horses, cattle, or beasts or birds of curiosity, be insured in their passage by sea, their death, occasioned by tempests, by the shot of an enemy, by jettison in a storm, or by any extraordinary accident, occasioned by the perils enumerated in the policy, is a loss for which the underwriters are liable. Not so, if it be occasioned by mere disease or natural death.

10. By *piracy.* By this term is understood a robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi,* in the spirit and

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(*a*) Marsh. Ins. B. 1, c. 12, s. 5.

(*b*) Emerig. tom. i. p. 366; Merlin. Rép. h. t.; Roccus, h. t.; Abbott on Shipp. 167, n. 1; Crousillat *v.* Ball, 4 Dall. 294.

(*c*) Marsh. Ins. B. 1, c. 12, s. 7.

(*d*) Stev. on Av. c. 2, s. 1.

intention of universal hostility.(a) A capture by pirates is a loss within the policy.

SECTION 10.—OF ABANDONMENT.

1219. When the property insured has been lost, or so deteriorated that it cannot be used by the owner to advantage, he may in many cases abandon the property to the insurer, and look to him as for a total loss. An *abandonment*, in insurance, is the act by which the insured relinquishes to the insurer all the property to the thing insured. No particular form is required to make such an abandonment, nor need it be in writing; all that is necessary is, that it be explicit and absolute, and it must state the reasons upon which it is founded.(b) It must be made in reasonable time after the loss,(c) unless prevented by a fortuitous event.(d)

1220. Every case of loss will not authorize an abandonment. In the following cases it may be made: when there is a total loss; when the voyage is lost or not worth pursuing, by reason of the perils insured against;(e) or if the cargo be so damaged as to be of little value; or where the salvage is very high, and further expense is required, and the insurer will not engage to bear it; or if what is saved is of less value than the freight; or where the damage exceeds one half of the value of the goods insured;(f) or when the property is captured, or even detained by an indefinite embargo; and in cases of a like nature.(g)

1221. When legally made, the abandonment transfers from the insured to the insurer the property in the

(a) United States *v.* Smith, 5 Wheat. 153; United States *v.* Pirates, 5 Wheat. 184; United States *v.* Tully, 1 Gallis. 247; United States *v.* Jones, 3 Wash. C. C. 209.

(b) Suydam *v.* Mar. Ins. Co., 1 John. 181; Petapsco Ins. Co. *v.* Southgate, 5 Pet. 604; King *v.* Del. Ins. Co., 2 Wash. C. C. 300.

(c) Livermore *v.* Newburyport Ins. Co., 1 Mass. 264; Smith *v.* Newburyport Ins. Co., 4 Mass. 668; Bell *v.* Beveridge, 4 Dall. 272.

(d) McCalmont *v.* Margatroyd, 3 Yeates, 27.

(e) Fuller *v.* McCall, 1 Yeates, 464; S. C. 2 Dall. 219.

(f) Wood *v.* Lincoln and Kennebeck Ins. Co., 6 Mass. 479.

(g) Levering *v.* Mercantile Ins. Co., 12 Pick. 348.

thing insured, and obliges him to pay to the insured what he promised him by the contract of insurance.(*a*)

SECTION 11.—OF ADJUSTMENT.

1222. When a loss has occurred, the amount must be ascertained so that a settlement may be made; this is done by an adjustment. The adjustment of a loss is the settling and ascertaining the amount of the indemnity which the insured, after making all proper allowances, is entitled to receive, and the proportion of this which each underwriter is liable to pay, under the policy; or it is the amounts of the loss as settled between the parties to a policy of insurance.

1223. The first thing to be considered, is the quantity of damages for which the underwriters are liable. When the loss is total, and the policy is a valued one, the insured is entitled to receive the whole sum insured, subject to such deductions as may have been agreed upon by the policy, to be made in case of loss.(*b*)

1224. The quantity of damages being known, the next point to be settled is, by what rule this shall be appreciated. The price of a thing does not afford a just criterion to ascertain its true value. It may have been bought very dear or very cheap. The circumstances of time and place cause a continual variation in the price of things. For this reason, in cases of general average, the things saved contribute, not according to prime cost, but according to the price for which they may be sold at the time of settling the average.(*c*)

1225. The effect of an adjustment is to fix *primâ facie*, what is due by the insurer to the insured.(*d*)

(*a*) Marsh. Ins. 559; Boulay Paty, Dr. Com. Maritime, tit. 11, tom. 4, p. 215; Pardes. Dr. Com. n. 836, et seq.

(*b*) Kane *v.* Com. Ins. Co., 8 John. 229.

(*c*) Snell *v.* Ins. Co., 4 Dall. 430. See Suydam *v.* Marine Ins. Co., 2 John. 138; Lawrence *v.* New York Ins. Co., 3 John. Cas. 217.

(*d*) Facier *v.* Hallett, 2 John. Cas. 233.

SECTION 12.—OF THE DIFFERENT KINDS OF POLICIES.

1226. When considered with regard to the *interest* insured, policies are distinguished into interest and wager policies; when with the *amount* of interest, into open and valued.

1227. An *interest policy*, is where the insured has a real, substantial, assignable interest in the thing insured, in which case only it is a contract of indemnity. This interest may consist in the ship, goods, freight, and such like valuable things.

1228. A *wager policy*, is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. These policies are unlawful.

1229. An *open policy*, is where the amount of the interest of the insured is not fixed by the policy, but is left to be ascertained in case of loss.

1230. A *valued policy*, is where a value has been set on the ship or goods insured, and this value has been inserted in the policy in the nature of liquidated damages, to save the necessity of proving it in case of loss.

CHAPTER VI.—OF LIFE INSURANCE.

1231. The insurance of the life of a person is a hazardous contract by which the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

The principal points deserving examination, are, 1, the interest; 2, the warranty; 3, the risk; and, 4, the settling of the loss.

SECTION 1.—THE INTEREST.

1232. A man may insure not only his own life, for the benefit of his heirs and creditors, and assign the benefit of his insurance to others having thus or otherwise an interest in his life; but he may insure the life of another in which he may be interested.(a)

SECTION 2.—OF THE REPRESENTATION.

1233. The insured is required to make a representation or declaration, previous to the policy being issued, of the age and state of health of the person whose life is insured; and the party making it is bound to the truth of it.(b)

SECTION 3.—OF THE RISK.

1234. In almost every life policy there are several exceptions, some of them applicable to all cases; others to the case of the insurance of one's own life. The principal of these exceptions are,

1. Death abroad or at sea. In general the policy provides that the person whose life is insured shall not go within certain districts during certain seasons of the year.

2. Entering into the naval or military service, without the previous consent of the insurer.

3. Death by suicide, or the act of malicious self-murder. In England it has been holden that when a man's life was insured, and the policy contained a proviso that "every policy effected by a person on his or her own life should be void, if such person should *commit suicide*, or die by duelling or the hands of justice;" the terms of the condition included all acts of voluntary self-destruction, whether the insured, at the time the act was committed, was or was not a moral

(a) Goodsall v. Boldero, 9 East, 72; Lord v. Dall, 12 Mass. 115.
(b) See Ross v. Bradshaw, 1 W. Bl. 312; Watson v. Mainwaring, 4 Taunt. 763.

responsible agent.(*a*) In New York, on the contrary, it has been decided that a clause in a life policy, avoiding the insurance, if the assured "die by his own hands," imports a criminal self-destruction, and does not include death by drowning one's self, the insured being insane at the time.(*b*)

4. Death by duelling.

5. Death by the hands of justice.

When the insurance is on another's life, the last three exceptions do not, in general, apply.

SECTION 4.—OF THE ADJUSTMENT.

1235. Inasmuch as the loss must always be total, the full sum insured must be paid. It is to be observed that unless the death occurs during the time for which the insurance was effected, the insurer will not be responsible, although the death wound may have been received during that period.

CHAPTER VII.—OF INSURANCE AGAINST FIRE.

1236. The next kind of hazardous contracts is insurance against loss occasioned by fire. This is a contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his house or other buildings, stock, goods or merchandise mentioned in the policy, by fire, during the time agreed upon.

The principal points deserving examination, are, 1, the interest; 2, the nature of the loss insured against, or the risk; 3, the warranties and representations; and 4, the adjustment of the loss.

SECTION 1.—THE INTEREST.

1237. It is obvious that the insured must have an

(*a*) Clift *v.* Schwabe, 3 Man. Gr. & Scott, 437.
(*b*) Breastead *v.* Farmers' Loan Co., 4 Hill, 73.

interest in the thing insured; if it were otherwise, he would be tempted to set fire to the thing insured, and thereby not only cheat the insurer, but endanger the whole community. It is not, however, requisite that the insured should be the absolute owner of the thing insured; one who has a qualified property in it, as a bailee, or has an interest, as a creditor, may lawfully make an insurance, provided that the nature of the property be distinctly specified, and that all the insurances taken together upon the same property, shall not exceed its full value.(*a*)

SECTION 2.—OF THE RISKS AND LOSSES INSURED AGAINST.

1238. These are, all losses or damage by fire, during the term of the policy, to the things insured. To recover for a loss by fire, there must be an actual fire or ignition. It is not sufficient that there has been an injurious increase of heat, while nothing has taken fire which ought not to be on fire.(*b*)

1239. Generally there is an exception in the policy, as to fire occasioned "by invasion, foreign enemy, or any military or usurped power whatsoever," and in some there is a further exception of riot, tumult or civil commotion. In England, Lord C. J. Wilmot, Mr. Justice Clive, and Mr. Justice Bathurst, against the opinion of Mr. Justice Gould, determined that the true import of the words *usurped power* in the proviso, was an invasion from abroad, or an internal rebellion, when armies are drawn up against each other, when the laws are silent, and when the firing of towns becomes unavoidable; but that those words could not mean the power of a common mob.(*c*) It has been holden that by *civil commotion* is meant "an insurrection of the people for general purposes," though it

(*a*) See Illinois Mutual Fire Ins. Co. *v.* Marseilles Man. Co., 1 Gilm. 236; Gilbert *v.* North Amer. Ins. Co., 23 Wend. 43; Catron *v.* Tennessee Ins. Co., 6 Humph. 176; Col. Ins. Co. of Alexandria *v.* Lawrence, 2 Pet. 25, 48.

(*b*) Austin *v.* Drewe, 4 Camp. 360.

(*c*) Marsh. Ins. 390.

may not amount to a rebellion, where there is an usurped power.(*a*)

1240. The loss must be a loss within the policy, that is, within the time covered by the policy. It would seem, 1, that the insurance commences from the moment of paying the premium, although the policy be not delivered till some time afterward;(*b*) 2, that until the premium has been paid, there is no insurance, unless specially agreed upon.

1241. The insurers are liable, not only for loss by burning, but for all damages and injury, and reasonable charges attending the removal of articles, though never touched by the fire. And they will be equally responsible, if the building insured has been blown up by order of the public authorities, to prevent the spread of a conflagration, if it would have been destroyed by fire.(*c*)

Insurers against fire are not liable for remote losses, but only for those which are immediate and direct.(*d*)

SECTION 3.—OF WARRANTY AND REPRESENTATION.

1242. In speaking of warranties and representations in cases of marine insurances, we have pointed out the difference between them. A warranty is a part of the contract, and whether material or not, renders it void, if false. Warranties are not only express, but implied. The description of different classes of property, according to the risk, as contained in the proposals attached to the policy, form the subject of an implied warranty on the part of the insured; for when the property is given up as corresponding with the description of a particular class of property, and it truly does not so correspond, the policy is void.(*e*)

(*a*) Marsh. Ins. 793.

(*b*) Lightbody *v.* North Amer. Ins. Co., 23 Wend. 18; Hamilton *v.* Lycoming Ins. Co., 5 Penn. St. R. 339.

(*c*) City Fire Ins. Co. *v.* Corlies, 21 Wend. 367.

(*d*) Hillier *v.* Alleghany Mutual Ins. Co., 3 Penn. St. R. 470.

(*e*) Newcastle Fire Ins. Co. *v.* McMorran, 3 Dow, 255; Burritt *v.* Saratoga Mutual Ins. Co., 5 Hill, 188; Col. Ins. Co. of Alexandria *v.* Lawrence, 2 Pet. 25, 48.

1243. The representation of facts must be true; a policy will be avoided either by *allegatio falsi*, or *suppressio veri*.(*a*) There must be the most perfect fairness in disclosing every circumstance material to the risk; but the concealment of a fact which could, in no event, increase the risk, will not avoid a policy.(*b*) The insured should frankly disclose every reasonable grounds of apprehension which he may entertain.(*c*)

SECTION 4.—OF SETTLING AND ADJUSTING THE LOSS.

1244. The loss by fire is seldom a total loss, and the valuation in the policy is rather the fixing of a maximum, beyond which the underwriters are not to be liable, than the conclusive ascertainment of the value to be replaced. When a fire happens, there is an inquiry into the amount of the loss, the insured being bound to give the most satisfactory proof he can be expected to possess, of the true amount of the injury.

We have seen that in marine policies, where there is a total loss, there is an abandonment of what may chance to be saved. A settlement of a loss by fire, is made on the principles of a particular average, and the insurer is not entitled to the property which may happen to be saved.(*d*)

CHAPTER VIII.—OF BOTTOMRY AND RESPONDENTIA.

1245. These two contracts, sometimes denominated *maritime loans*, form another class of hazardous contracts.

SECTION 1.—OF BOTTOMRY.

1246. *Bottomry* is a contract in the nature of a mortgage, by which the ship owner, or the master on his behalf, pledges the keel or bottom of the ship, *pars*

(*a*) Ingraham *v.* South Car. Ins. Co., 3 Brev. 522.
(*b*) Lexington Fire, etc. Co. *v.* Paver, 16 Ohio, 324.
(*c*) Bufe *v.* Turner, 6 Taunt. 338.
(*d*) Liscom *v.* Boston Mutual Fire Ins. Co., 9 Metc. 205.

pro toto, as security for money which he borrows for the use of the ship, in contemplation of a particular voyage, or for a particular and fixed period of time; and it is stipulated that if the ship should be lost in the course of the voyage or during that time, by any of the perils enumerated in the contract, the lender shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called *marine interest*, however this may exceed the usual interest for the use of money.(*a*)

1247. There is much resemblance between bottomry and insurance. In one, the lender takes the risks, in the other the insurer. In one, the profit, in the other the premium, are the considerations for the maritime risks, which are supported upon the same principle, and may be modified in the same manner. The amount of these profits and of this premium is lower or higher, according to the duration and the nature of the risks and of the agreement. Neither have any effect, unless the objects which are bound for the loan, or which have been insured, have been exposed to maritime risks, which the same circumstances and the same events cause to begin and end.

If these contracts resemble each other, there are also many differences between them. In bottomry the lender actually furnishes a certain sum of money; in insurance, the insurer furnishes nothing; on the contrary, he receives a premium, which is frequently paid to him at the time of the agreement, but which when it is not paid in cash is a claim which he may assign, or for which he may procure a guarantee. In bottomry there must be things which may be given in pledge; in insurance all that is required is the possibility of a loss.

Bottomry differs from a simple loan. In a loan, the money is at the risk of the borrower, and must be

(*a*) The Draco, 2 Sumner, 157.

paid at all events; in bottomry the money is at the risk of the lender during the voyage. Upon a loan only lawful interest can be charged; upon bottomry any interest may be legally reserved which the parties agree upon.

The definition of bottomry sufficiently shows that this contract cannot subsist if there is not, 1, a thing loaned; 2, a ship on which the loan is made; 3, if the ship be not exposed to maritime risks; 4, if the lender has not the right to a profit equivalent to the interest of his capital and the risks he runs.

§ 1.—Of the things to be loaned.

1248. Though usually a sum of money is the thing loaned, yet other things may be loaned; but in all cases the borrower must acquire a title to them, for otherwise the contract would change its nature, as for example, if only the use of a thing were loaned, for then the borrower would never have owned the property.

§ 2.—Of the thing pledged in bottomry.

1249. In the contract of bottomry the ship, her tackle and apparel, are the objects on which the loan is made. When the loan is made on other property, exposed to maritime risks, the contract is called *respondentia.*

§ 3.—Of the risks.

1250. By *risk* is understood the danger to which a thing is exposed. Maritime risks are perils which are incident to a sea voyage,(*a*) or those fortuitous events which may happen in the course of the voyage.(*b*)

It is essential that the lender should run the risks of the things on which the loan is made: if a contract were made by which he should be relieved from them, it would be no longer bottomry, but a simple loan.

(*a*) 1 Marsh. on Ins. 215.
(*b*) Poth. Contr. d'Assur. n. 49; Pardes. Dr. Com. n. 770.

The risks the lender runs are generally the same for which the insurer is liable. But the parties may extend them beyond these limits.

§ 4.—Of maritime profits.

1251. There can be no contract of bottomry, if the borrower is not bound to pay to the lender, besides the thing loaned, *maritime profits* for the risks he has taken upon himself. If the contract did not contain such a clause it would be a kind of gift in case of a sinister event, and a simple loan in case of a successful result.(*a*)

This profit is usually fixed in a certain sum of money, but it may be of any thing else, even a part of the profits arising from the transaction; but this would rather be a partnership than the contract of bottomry.

§ 5.—Of the form of the contract of bottomry.

1252. The form of the contract is either by bond, or bill of bottomry. The contract should state, 1, the sum loaned, and at what interest or maritime profit; 2, the subject upon which the loan is made; 3, the name of the vessel and of the captain; 4, those of the lender and borrower; 5, the description of the voyage, its commencement and termination.

Art. 1.—*The sum loaned and at what interest.*

1253. To prevent uncertainty, the sum loaned and the maritime interest to be paid, must be specially stated; besides, when the loan is not money, it is required to know its value in order to return it.

Art. 2.—*Of the pledge.*

1254. The simplest way of ascertaining this is to describe the thing, so that no mistake can be made in relation to it. In *respondentia* this is still more necessary, for the pledge may be of any kind of personal property in possession.

(*a*) See the Mary, Paine, 671.

Art. 3.—Of the names of the ship and of the captain.

1255. When the ship is the thing pledged, as in bottomry, it is indispensable that its *name* should be properly stated; when it is merely the place in which the pledge is to be found, as in *respondentia,* it should also be stated, but a mistake in this case would not be fatal. The name of the captain should always be mentioned.

Art. 4.—The names of the lender and borrower.

1256. No contract can have any effect, if the parties are unknown. In the contracts of bottomry and respondentia, it is the more necessary they should be stated, because not only the owner of the property, but the master of the vessel may enter into the contract. But with regard to the rights of the latter there are many exceptions.

1. The master who hypothecates the ship must have been appointed by the owner; if, for example, before the loan was made the captain had resigned his command, and another had succeeded him, an hypothecation by the latter does not bind the owner.(*a*)

2. The master cannot borrow in the port where the owner resides.(*b*)

3. Nor in any other place, in any case, except one of great necessity, and when he has no other means of relief;(*c*) nor when he has goods or money of his own.(*d*) And the lender is required to show that advances were required to effect the object of the voyage, or to insure the safety of the ship.(*e*)

4. The master cannot hypothecate the ship for prior advances, not made on the faith of such security.(*f*)

(*a*) Walden *v.* Chamberlain, 3 Wash. C. C. 290.

(*b*) Sloan *v.* Ship A. E. I., Bee, 250; Turnbull *v.* The Enterpise, Bee, 345.

(*c*) Tunno *v.* The Mary, Bee, 120; Patton *v.* The Randolph, Gilpin, 457.

(*d*) Cupicino *v.* Perez, 2 Dall. 195; The Packet, 3 Mason, 255.

(*e*) Putnam *v.* The Polly, 157; The Golden Rose, Bee, 131; The Aurora, 1 Wheat. 96.

(*f*) 3 Mason, 255; 3 Wash. C. C. 290; 1 Wash. C. C. 293; 1 Wheat. 96.

Art. 5.—Of the description of the voyage, or the term for which the loan is made.

1257. A loan may be made either for a particular voyage, or for a definite time, or until the happening of an event; the parties may agree as to this, and their contract ought to be so expressed.

SECTION 2.—OF RESPONDENTIA.

1258. *Respondentia* is a loan of money on goods laden on board of a ship, which in the course of the voyage must, from their nature, be sold or exchanged, on maritime interest, upon this condition, that if the goods should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender shall lose his money; if not, that the borrower shall pay him the sum borrowed, with the interest agreed upon.

1259. The contract is called *respondentia,* because the money is lent on the personal security of the borrower. It differs from bottomry, principally in the following circumstances. Bottomry is a loan on the *ship,* respondentia on the *goods.* The money is to be repaid to the lender, with maritime interest, in the one case, upon the arrival of the ship, and of the goods, in the other. In all other respects the contracts are nearly the same, and they are governed by the same principles. In the former the ship and tackle being hypothecated, are liable as well as the person of the borrower; in the latter the lender has, in general, only the personal security of the borrower.(a)

CHAPTER IX.—OF GAMES AND WAGERS.

1260. The next class of hazardous contracts is composed of those of gaming and laying wagers.

SECTION 1.—GAMING.

1261. *Gaming* is a contract between two or more

(a) Marsh. on Ins. 784; 1 Bell's Com. 535.

persons, by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other shall be the winner.

When considered in itself and without any end proposed by the players, there is nothing contrary to natural equity, and the contract may be viewed as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

The practice of gaming, however, has been justly considered as perverting the activity of the mind, tainting the heart, and depraving the affections; and by the frequent and great reverses of fortunes which it occasions becoming the source of great misery, suggesting constant temptations to fraud and the perpetration of the most atrocious crimes. In most governments, therefore, games have been laid under certain restrictions, and money lost at play may be recovered back, if paid, or if it be not paid, no action lies to compel the payment.

Some games depend altogether upon skill, others upon chance, and some others are of a mixed nature. Billiards and chess are examples of the first; lottery, of the second; and backgammon, of the last.

1262. At common law all games are lawful, unless some fraud has been practiced, or such games are against public policy. Each of the parties to the contract must, 1, have a right to the money or thing played for; 2, he must have given his full and free consent, and not be entrapped by fraud; 3, there must have been equality in the play; 4, the play must have been conducted fairly.

But even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play. Indeed, it must be confessed that the law greatly descends from its dignity, when it lends its aid to give effect to any game, however innocent.(*a*)

(*a*) Bac. Ab. h. t. (A).

1263. When fraud has been practiced, as in all other cases, the contract is void; and in some cases when a party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law, and fined and imprisoned.(*a*)

SECTION 2.—OF WAGERS.

1264. A wager is a bet; a contract by which two parties, or more, agree that a certain sum of money, or other thing, shall be paid or delivered to one of them, by the other, on the happening or not happening of a certain event. Sometimes the thing bet is put into the hands of a third party, called a stakeholder, to be delivered to the winner.

1265. The common law does not prohibit all wagers,(*b*) but to restrain them within the bounds of justice the following conditions must be observed: 1, each of the parties must have a right to dispose of the thing which is the object of the wager; 2, each must give a perfect and full consent to the contract; 3, there must be equality among the parties; 4, there must be good faith between them; 5, the wager must not be forbidden by law.(*c*)

1266. A wager may be enforced by an action, if it be not, 1, contrary to public policy or immoral; or if it do not, in some respects, tend to the detriment of the public; 2, if it do not affect the interest, feelings or character of third persons.

1267.—1. Wagers on the event of a public election, laid before the poll is open,(*d*) or after it is closed,(*e*) are unlawful. Wagers are against public

(*a*) 1 Russ. on Cr. 106.

(*b*) Morgan *v.* Richards, 1 Browne's R. 171; 11 Co. 876; 1 Lev. 33; 5 Burr, 2802.

(*c*) Poth. sa. Jeu. n. 8.

(*d*) Smith *v.* McMasters, 2 Browne's R. 182; 4 John. 426; Allen *v.* Hearn, 1 T. R. 56.

(*e*) 2 Browne's R. 182; 8 John. 454; McAllister *v.* Hoffman, 16 S. & R. 147; Laval *v.* Myers, 1 Bailey, 486.

policy, if they are made in restraint of marriage,(*a*) or as to the mode of playing an illegal game,(*b*) or on an abstract, speculative question of law, not arising out of circumstances in which the parties have a real interest.(*c*)

1268.—2. Wagers as to the sex of an individual,(*d*) or whether an unmarried woman had ever borne or would have a child,(*e*) or whether Napoleon Bonaparte would be removed or escape from St. Helena, within a certain time,(*f*) have been severally holden to be illegal. The supreme court of Pennsylvania have laid down the rule, through one of the judges, that every bet about the age, or height, or weight, or health, or circumstances or situation of any person, is illegal; and this, whether the subject of the bet be a man, woman or child, married or single, a native or foreigner, in this country or abroad.(*g*)

(*a*) 10 East, 22.
(*b*) 2 H. Bl. 43.
(*c*) Henkin *v.* Guerss, 12 East, 247. And see Day's note; S. C. 2 Camp. 408.
(*d*) 12 East, 247; 1 B. & A. 683.
(*e*) Ditchburn *v.* Goldsmith, 4 Campb. 152.
(*f*) Phillips *v.* Ives, 1 Rawle, 36; Gilbert *v.* Sykes, 16 East, 150.
(*g*) Per Huston, J., 1 Rawle, 42.

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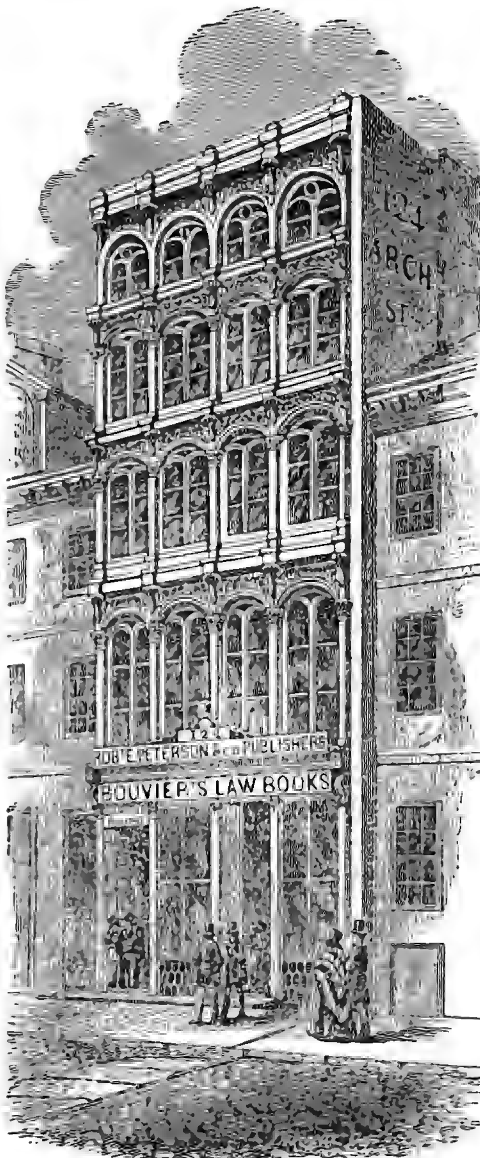

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From Chief Justice Taney.

Baltimore, May 31, 1851.

Dear Sir—Accept my thanks for the proof sheets of the "Institutes of American Law," which you have been good enough to send me, and also for the letter which accompanied them. So far as I can judge of the work from the portions before me, it is one of very great value, and will undoubtedly attract public attention. The general plan, and the order and arrangements of the subjects of which it treats, could not, I think, be improved. And I may say the same thing of the manner in which the plan is carried into execution. For every principle and rule is stated with brevity and perspicuity, and supported by the proper reference. After thus expressing my opinion of the work, I need not add that I shall feel much honored by having my name associated with it. And thanking you for the kind terms in which you are pleased to speak of me in your proposed dedication, I am, dear sir, with great respect, your obedient servant, R. B. TANEY.

Hon J. Bouvier, Philadelphia.

Baltimore, July 17, 1851.

Dear Sir—Accept my thanks for the volumes of the Institutes of American Law. My impressions in its favor, which I expressed in my former letter to you, have been strengthened by looking further into it, and I hope the work will meet with the attention and encouragement which it so well deserves. With great respect, I am your obedient servant, R. B. TANEY.

Hon. J. Bouvier, Philadelphia.

From the Hon. John McLean, one of the Associate Judges of the Supreme Court of the U. States.

Cincinnati, October 3, 1851.

Dear Sir—I am under very great obligations to you for Mr. Bouvier's "Institutes of American Law." The classification of the topics explained, appears to me to be lucid and natural; and I was struck with the excellent method of the work. The plan seems not to have been copied from any one, but it has more of the simplicity and manner of the civil law writers, than is found in the elementary treatises of the common law. The principles of law are succinctly and clearly stated,

and illustrated, and the notes appended are judiciously selected, without being crowded, as they are in many of our modern publications.

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ROBERT E. PETERSON, ESQ.

From the Hon. SIMON GREENLEAF, Author of "Greenleaf on Evidence," etc.

Boston, 1851.

DEAR SIR—I have received the volumes of the "Institutes" of Judge Bouvier, which he had the kindness to send me, through you.

In this work the learned author has taken the middle course, not occupied, that I know of, by any preceding American writer; treating his subjects with a degree of learning, compactness, precision of statement, and accuracy of definition, that cannot fail, I think, of rendering it highly acceptable to the profession.

Judge Bouvier is so well known to the profession, that any commendation of his Institutes from me would be superfluous; but it will give me great pleasure to be instrumental in making them known, whenever opportunity may occur. With sincere thanks for your kind attention, I beg to remain your much obliged and obedient servant, S. GREENLEAF.

MR. ROBERT E. PETERSON.

The following extract is from a letter received by the late Judge Bouvier from the Hon. SIMON GREENLEAF.

"I beg you to receive my hearty thanks for the volumes of your 'Institutes,' which I yesterday received. I have rapidly looked them over, plunging into one or two titles in which my present studies are most occupied; and am quite delighted with the work. *It will prove a very valuable and acceptable addition to our legal literature.*

From Hon. John CATRON, one of the Associate Judges of the Supreme Court of the United States.

Nashville, Nov. 12, 1852.

DEAR SIR—On reaching home in August, I found a copy of "Bouvier's Institutes of American Law," forwarded to me by you last November. I have examined the work according to your request, and feel prepared to recommend it as one of *high merit*. The author has succeeded in presenting the laws of England generally in force throughout the United States, as they stand modified by strictly American law, in a manner more lucid, brief and simple, than will be found in any other general treatise on our law. The usual error of overloading the work with words and useless discussions has been avoided with rare success; this in itself is a great merit. I THINK JUDGE BOUVIER'S WORK SHOULD BE READ BY EVERY LAW STUDENT NEXT AFTER BLACKSTONE'S COMMENTARIES. Very respectfully your obedient servant,

To ROBERT E. PETERSON, ESQ., Phila. JNO. CATRON.

From the Hon. JOEL JONES, late President Judge of the District Court of the City and County of Philadelphia.

Philadelphia, October 11, 1851.

ROBERT E. PETERSON, ESQ.—DEAR SIR—I have examined with much care the Institutes of American Law, by the Hon. John Bouvier.

I regard the work as a very valuable contribution to American Jurisprudence. The author's distribution and arrangement of subjects is unusually methodical and exact, and his manner of treating them elementary and concise. The work is enriched with copious references to the sources from which it has been derived, rendering it thereby useful to the experienced practitioner as well as to the student. The want of a work of this kind has long been felt; and for myself, I feel free to acknowledge the obligation I am under to the learned author for the ability and industry with which he has supplied it. With much respect, I am your obedient servant,

JOEL JONES.

I have carefully examined Judge Bouvier's Institutes of American Law, and am satisfied that there are few elementary works of greater utility to the bench, the bar, and particularly to the student. I was forcibly struck with the excellence of the plan adopted, which gives a peculiar value to the work. The principles of law it embraces, are explained with simplicity and clearness, and supported as they are by the highest authorities, the work must be esteemed a valuable contribution to the science of law. THOMAS IRWIN,

District Judge of the United States, Western District of Pennsylvania.

Pittsburgh, June 22, 1852.

From Hon. J. K. KANE, Judge of the United States District Court for the Eastern District of Pennsylvania.

Rensselaer, near Philadelphia, October 10, 1851.

I have devoted some time to an examination of Judge Bouvier's Institutes. I have traced his analysis of the law through its several subdivisions, and have also read several titles of the text; and I am satisfied that the work is worthy of its author's well established reputation, and that it *must occupy a place in every well stocked professional library*.

Very respectfully, your obedient servant, J. K. KANE.

From SIR THOMAS NOON (late Sergeant) TALFOURD, one of the Justices of Her Majesty's Court of Common Pleas.

67 Russel Square, London, December 25, 1852.

DEAR SIR—On my return from York yesterday, where I have been sitting on a Winter Gaol Delivery, I found your magnificent present of your late father-in-law's works, his "Dictionary of American Law," and his "Institutes of American Law," for which I beg to return you my hearty and respectful thanks. I feel greatly honored by the information that a writer so laborious and so

eminent as Mr. Bouvier should have thought me worthy of such a boon; and doubly indebted to you for accomplishing his purpose. *I shall always regard the works as among the chief ornaments of my library, and often recur to them as expounding those principles of laws which are common to the great Anglo-Saxon race on both sides of the Atlantic.*

Regretting that my prolonged absence from home should have so long deferred the acknowledgment of your favor, and repeating my thanks, I remain, dear sir,

Your obliged and faithful servant, T. N. TALFOURD.

ROBERT E. PETERSON, ESQ.

From the Hon. GEO. M. DALLAS, the eminent Jurist and Statesman.

June 3, 1853.

MY DEAR SIR—I have examined, with some care, the five books (contained in four volumes) of the "*Institutes of American Law, by John Bouvier.*" They exhibit the results of great research, and cannot fail to be acceptable and permanently useful to all interested in the science or engaged in the practice of the legal profession. The author has divided and analyzed his subject with unusual pains; his arrangement is lucid and natural; his references to adjudicated cases are copious, accurate and discriminating; and the index affixed to each volume, is full and reliable. His fifth book on Equity will be peculiarly welcome to the Bar of this State. The work is one of solid learning, does honor to the memory of Judge Bouvier, and should be found in every lawyer's library. Always, most truly and respectfully, your friend and servant,

GEO. W. CHILDS, Arch st., Phila. G. M. DALLAS.

From the Hon. J. M. READ, formerly Attorney General of Pennsylvania, and late District Attorney of the United States.

Philadelphia, September 20, 1851.

DEAR SIR—I perused a portion of the first volume of Judge Bouvier's Institutes of American Law, in sheets, and made some extracts from it, for use, upon a subject I was then engaged upon. Since then I have examined the whole four volumes, and can freely say, that it forms a valuable addition to legal science; and is well calculated to become a text book for students. The discussions of remedies, both in law and equity, is particularly full, and supplies what was either wholly or partially omitted by former commentators, and forms an admirable introduction to the larger treatises of Chitty, Greenleaf, Story, and Spence. Very respectfully yours, JOHN M. READ.

ROBERT E. PETERSON, ESQ.

From Hon ROBERT C. GRIER, one of the Associate Judges of the Supreme Court of the U. States.

Philadelphia, April 8, 1853.

I have examined "Bouvier's Institutes of American Law" with some attention, and am much pleased with its contents. It requires but a glance at the volumes to see the very superior character of its typographical execution. It does honor to the press of Philadelphia.

The principles and definitions of the law, are stated with great accuracy and precision. The order and classification of the subjects, (a very important characteristic in such a work,) seem to me of the very best. The learned author appears to have fulfilled the promise of his preface, in giving a valuable "preliminary work to serve the young American student as a guide in the labyrinth of the law;" and "a general view to the several parts of judicial science in a method which should be adopted in the study of law."

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TO ROBERT E. PETERSON & CO. R. C. GRIER.

From Hon. JAMES M. WAYNE, one of the Associate Judges of the Supreme Court of the U. States.

Savannah, November 4, 1851.

DEAR SIR—I am obliged to you for Mr. Bouvier's Institutes of American Law. Present my respects to him if you please, with my congratulations upon his having given to the profession a work of so much merit and real ability.

I have given the last two days to the examination of it.

It has revived my recollection of several points with which I am not as familiar as I used to be, instructed me in others about which I was not as well informed before. I shall often have occasion to use it officially; and as a preliminary work for the teacher and student of jurisprudence, I do not doubt that it will supply the want in every particular, indicated in the preface of the author.

I am, dear sir, very respectfully your obedient servant, JAMES M. WAYNE.

ROBERT E. PETERSON, ESQ.

From the Hon. H. W. GREEN, Chief Justice of New Jersey.

Trenton, N. J., October 23, 1851.

DEAR SIR—I have devoted the first leisure moments at my command, since my return home, after an absence of several weeks, to an examination of the "Institutes of American Law." The volumes contain an admirable compend of legal principles. They will prove an acquisition to the student, and a valuable addition to the library of every lawyer.

Most respectfully, your obedient servant, HENRY W. GREEN.

MR. ROBERT E. PETERSON.

From the Hon. J. NELSON, one of the Associate Judges of the Supreme Court of the United States.

MR. ROBERT E. PETERSON. Cooperstown, Aug. 24, 1853.

DEAR SIR—I have delayed thanking you for a copy of Judge Bouvier's "Institutes of American Law," till I had an opportunity to look into the work and express an opinion upon its merits. My examination of it is yet limited; but, I am free to say, that as far as it has gone I am very favorably impressed with the plan, and with the great industry and accuracy evinced in the execution. The four volumes embody a vast amount of American law, so condensed and arranged as to be studied not only with pleasure and profit by the student, but to be referred to readily and most usefully by the practitioner. Very respectfully yours, J. NELSON.

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From Joseph Story, LL. D.

Cambridge, Sept. 28, 1839.

Dear Sir—I have the pleasure to acknowledge the receipt of your letter of the 19th instant. The sheets of your Law Dictionary, which you had the goodness to send me, I received at the same time. I have examined them with considerable care, and do not hesitate to say that the work will be a very important and most useful addition to our Judicial Literature. It supplies a defect in our libraries, where the small Dictionaries are so brief as to convey little information of an accurate nature to students, and the large ones are rather compendiums of the law, than explanatory statements of terms—yours has the great advantage of an intermediate character. It defines terms, and occasionally explains subjects so as to furnish students at once the means and the outlines of knowledge. I will feel myself greatly honored by the dedication of the work to me, although I am fully sensible there are many other gentlemen who have far better claims to such a distinction than myself. Believe me, dear sir, with the highest respect, truly your obliged friend,

The Honorable Judge Bouvier. JOSEPH STORY.

Cambridge, January 7, 1840.

My Dear Sir—I had the pleasure a few days ago to receive the second volume of your Law Dictionary, for which I return you my very sincere thanks. The opinion which I formed of its great merit in examining the sheets which I formerly received of the first volume, is fully confirmed by an examination of the second. It is, indeed, a most truly valuable work. I am gratified in having my name connected with your enterprise, and I trust you will receive from a liberal profession that full approbation and compensation which are so justly due to such useful labors. Professor Greenleaf and myself shall recommend it to the attention of all our Law Students. With the highest respect, truly your obliged friend, JOSEPH STORY.

The Honorable Judge Bouvier

From the Hon. Simon Greenleaf.

Cambridge, December 17, 1839.

Dear Sir—Your letter of October 30th, with the accompanying first volume of your Law Dictionary, did not reach me till this day. The second volume, from a source till now unknown, was received a few days ago. I had previously looked over those belonging to Mr. Justice Story. I pray you, dear sir, to accept my unfeigned thanks, not only for the books, which will be highly prized, but for having made so valuable an addition to our professional apparatus. For extent of research, clearness of definitions and illustration, variety of matter, and exactness of learning, it is not surpassed by any in use, and, on every account, I think, is preferable to them all.

I am, dear sir, with sincere respect, your obedient servant, SIMON GREENLEAF.

Hon. J. Bouvier.

From Chancellor Kent.

New York, November 20, 1839.

Dear Sir—I have the pleasure to acknowledge the receipt of your letter, of the 30th ult., accompanied with your "Law Dictionary," and for which I sincerely thank you.

I have not been insensible to the value of the gift, for I have run over almost every article in it, and beg leave to add, that I have been deeply impressed with the evidences throughout the volumes of the industry, skill, learning and judgment with which the work has been compiled. I have found it very instructive; and shall not fail to recommend its utility to the student, whenever a due opportunity occurs.

With my best wishes for you health, and for perseverance in your labors for the honor of the profession, I am, respectfully and truly yours, JAMES KENT.

Hon. John Bouvier.

From the Hon. SIMON GREENLEAF, Author of "Greenleaf on Evidence," etc., etc.

Cambridge, April 6, 1853.

Messrs. R. E. PETERSON & Co.—DEAR SIRS—I return my grateful acknowledgments for the copy of the fourth edition of Judge Bouvier's Law Dictionary, which you have done me the honor to present. I was not aware that the work had passed through so many editions, though the reputation of the author as a learned and accurate lawyer would well have justified such an expectation. *I regard it as a reliable work of great merit*, and am happy to observe that the present edition is so much enlarged and improved, particularly in the article of law maxims, in which it is greatly enriched. I remain, dear sir, your much obliged and obedient servant,

SIMON GREENLEAF.

From the Hon. ROGER B. TANEY, Chief Justice of the United States.

Baltimore, May 11, 1853.

DEAR SIR—Unavoidable circumstances have prevented me from acknowledging sooner the receipt of the copy of the late Judge Bouvier's Law Dictionary.

I have looked into the work with attention, and think it SUPERIOR, *as a Law Dictionary, to any other work of that character which I have had an opportunity of examining.* The number of heads in which it is arranged, and the cases cited to support and illustrate the principles stated, add much to its value. It is a very convenient book to refer to, especially when one is pressed for time.

I am glad to hear that his Institutes of American Law have been so successful. *They certainly deserve it.* With great respect, I am, dear sir, your obedient servant,

ROBERT E. PETERSON, ESQ., Phila. R. B. TANEY.

From the Hon. JOHN McLEAN, one of the Associate Judges of the Supreme Court of the U. States.

Bouvier's Law Dictionary is a work so well known to the profession and so highly appreciated that no commendation of it is necessary. IT IS AN ELABORATE PRODUCTION UNEQUALLED BY ANY OTHER OF THE KIND IN THIS COUNTRY OR IN ENGLAND. I have before me the fourth edition revised, improved, and greatly enlarged, published in 1852. This edition is nearly one third larger than the preceding one. The greater part of the matter for this edition was prepared by the distinguished author before his lamented decease in 1851. Some additions have since been made and several errors corrected on a careful revision of the former editions, by two members of the bar, so that the present edition is not only the largest but the most valuable.

NO LAWYER'S LIBRARY IS COMPLETE WITHOUT THIS VALUABLE WORK; ITS PLACE CANNOT BE SUPPLIED BY ANY OTHER PUBLICATION WITH WHICH I AM ACQUAINTED. JOHN McLEAN.

Cincinnati, May 2, 1853.

From tho Hon. BENJ. ROBBINS CURTIS, one of the Associate Judges of the Supreme Court of the United States.

Messrs. R. E. PETERSON, & Co. Boston, April 14, 1853.

GENTLEMEN—I received the copy of Bouvier's Law Dictionary, which you did me the honor t send to me. I have examined it with some care, and have pleasure in expressing my opinion the it is a work of much importance to students and very useful to practitioners of the law. *Compare with any other similar work which has fallen under my notice, I should not hesitate to give a* DECIDED PREFERENCE, *as being far more full and comprehensive than any other, and have seen no reason to question its accuracy.*

With much respect, I am your obedient servant, B. R. CURTIS.

From the late Hon. HENRY BALDWIN, one of the Justices of the Supreme Court of the United States, to the Author.

Dear Sir—I thank you for the copy of your Law Dictionary, which you were kind enough tc present to me, and shall preserve it as a pleasing proof of your friendship. I have too little time tc examine the work throughout, but have read many parts of it attentively, and with much pleasure You have bestowed upon it much labor in the collection of the matter, and shown great judgment in its arrangement and condensation, in which respects it is what such a work ought to be, a digest as well as a book of definitions. Such an one has long been wanting by the profession, and in my opinion, yours is not only the best which has been published, but is in itself a valuable acquisition to the bar and bench, by which both will profit.

"Bouvier's Law Dictionary, is an American work of the most elaborate character, as compar with English works of a similar nature."—*Joy's Letters on Legal Education in England a Ireland.*

SIR—The high reputation of your "Law Dictionary" must be my excuse for asking the favor of your acceptance of the accompanying "Letters on Legal Education," the object of which is rouse the mind of the profession in these countries to follow in the course which has been pursu so successfully of late years in America, and which was, in olden times, the course adopted at the English Inns of Court. I have the honor to remain, sir, your ob't servant, HENRY H. JOY.

Mountjoy Square, Dublin, June 24, 1847.

To Hon. J. BOUVIER.

From the late Hon. ARCHIBALD RANDALL, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

DEAR SIR—I have delayed noticing the second edition of your Law Dictionary, until I could hav an opportunity carefully to examine its contents. After such an examination I have no hesitatio in recommending it to the profession generally, and specially to those of limited libraries, as one of the most useful works of the kind in print.

From the Hon. J. NELSON, one of the Associate Judges of the Supreme Court of the United States.

ROBT. E. PETERSON, ESQ. Cooperstown, Aug. 24, 1853.

DEAR SIR—I wish to thank you for a copy of Judge Bouvier's "Law Dictionary," which has been very much enlarged and improved, and the words and phrases in law language explained, and illustrated by copious references not only to standard elementary works, but to adjudged cases. The work affords a valuable acquisition to the law library in addition to the "Institutes."

Very respectfully yours, J. NELSON.

From the Western Law Journal, Cincinnati, March, 1853.

BOUVIER'S INSTITUTES OF AMERICAN LAW.—To a student entering upon any new pursuit, the first and indispensable requisite to a cheerful and intelligent progress is to obtain clear and definite outlines of the whole subject. A celebrated American scholar advised students of history to begin with children's books, and he showed great wisdom in that advice. In the science of the law, which extends over the whole field of human affairs, which is diffused through thousands of volumes, and to master any prominent branch of which is the labor of a lifetime, this want is peculiarly felt. To no pursuit, probably, do men ever come with such indefinite and confused ideas of its nature, as do students to the law. Their preparatory studies have not trained them to any practical regard for the actual difficulties which attend the administration of justice. The wisdon which would administer as much of human justice as is consistent with human nature, finds no place in their philosophy. Forgetting entirely that there is any wisdom in the experiences of the past, they too often evince a spirit which in practice would require the whole fabric of the law to be torn in pieces, and reconstructed solely with a view to this present time, and to their ideas of abstract right.

This is not the spirit of actual life. To adhere to old and known forms, as exponents of old and settled principles, is characteristic not of lawyers merely, but of human kind. Even in dress, which is everywhere the favorite subject upon which men exercise their whims and caprices, the same general outline is preserved from age to age.

The disposition alluded to is one of the greatest obstacles in learning our profession. He who is always quarreling with a rule, is sure to misconceive its true bearings. In matters of science as well as of religion, it was remarked by Lord Bacon, it is only the meek, the candid, the serious inquirer that obtains true knowledge. This disposition is fostered by a clear view of the whole subject. One-sided views are almost always erroneous views. Whoever, therefore, shall concisely state the elementary principles of any science, does mankind great service. This, Judge Bouvier has done for students of the legal profession, in his Institutes of American Law. "His chief aim has been," as is stated in his preface to the first volume, "to point out the rules and maxims of the law, as principal landmarks to the student, and to enable him, by keeping a constant eye upon these summits of the law, to pursue his onward course, without ever losing himself; for these rules, after having inspired the law, still remain with it and in its midst, in some sort, as the lamp in the sanctuary, enlightening the parts where the law applies, and pointing out those which it cannot reach."

The work is divided into five books. The first treats of natural and artificial persons, and of the enjoyment and loss of civil rights. Under these heads, the author states the law of the personal status, of husband and wife, parent and child, citizens and aliens, freemen and slaves; the nature, rights, powers and privileges of corporations and the mode of their dissolution; political, absolute, and relative rights; expatriation, domicil, absentees, marriage, paternity and filiation, infancy and guardianship, sanity and insanity, the relation of master and servant, and apprentices.

The second book treats of the general nature of things; of personal property, of the different modes of acquiring person chattels, by original acquisition, and by intellectual labor; of the title to things acquired by war, of the manner of acquiring property by contract, of the effect of contracts, of the different kinds of agreements, of the extinction of obligations, of the forms of agreements, of the statute of frauds, of sales, bailments, bills of exchange, notes, marine insurance, insurances on life and against fire, of bottomry and respondentia bonds, of wagers, of agency, of suretyship, of partnership; of title to personal property by operation of law; of real property, hereditaments, easements, profits à prendre, rents, and the whole law of real estate, including the mode of its acquisition and transfer, and the instruments of conveyance.

The third book treats of injuries and wrongs, the fourth of remedies, and the fifth of equity jurisprudence and pleadings.

The plan and arrangement of the work are admirable, its statements clear and condensed into brief and simple language, and all "details, which would confuse the reader without enlightening him," are avoided. The student will find in these volumes a clear and intelligible outline of the law, in which the substance of voluminous works is stated within the compass of a few pages; and the practitioner, who is at a loss for a condensed statement of a rule, or for authorities to sustain it, will, by the aid of an index unusually full and complete, readily find what he desires.

In the vast multiplication of law books in late years, gentlemen, whose means compel them to select the few good ones, are frequently at a loss how to make the selection. Some prefer the reports and purchase them exclusively, while others rely wholly on text writers. There is an error in both extremes. He who reads reports only is very apt to lose sight of the principle, to acquire partial and distorted views of the subject, and a habit of mind that puts him at fault when he is unable to find a case precisely parallel with the one under investigation. On the other hand, the reader of text writers exclusively, from the habit of surrendering his judgment constantly to the opinion of the author, unfits himself for independent investigation. His power of analyzing is not called forth; and the process of applying the rules of law to a complicated state of facts is novel and difficult, if not, in the end, impossible. The true use of a book is to aid, not to dispense with thought; and the text of an author upon legal topics should be, to the lawyer, simply a formula, from which to work out the rule of law. Regarded in any other light, the citation of authorities would be quite useless. Such a work as Judge Bouvier's, constructed, as he intimates in his preface, upon the theory that the student will combine an accurate knowledge of the text with a constant reference to the authorities, will afford a great aid in legal education. He states the principle, cites the case in the note at the foot of the page, and leaves the rest to the reader's own diligence and meditation. He seldom enlarges on a rule, or seeks to attack or vindicate it. This is a great merit in a text writer. Students must take rules as laid down in the books, at the commencement of their studies, as axioms. Their notions are necessarily crude and imperfect. If there are substantial objections to the rule, they will find it out as soon as it is material that they should know it, without relying wholly on the opinion of the author, and being prejudiced, it may be, by that opinion. From a very attentive examination of this work, we are able to recommend it to law students and practitioners as a material aid to their studies and investigations. It is of course elementary, and does not propose to supersede such works as Kent's Commentaries, Greenleaf on Evidence, or Story's Equity Jurisprudence; but to prepare the beginner, by furnishing him with a methodical view of the whole law, and a concise statement of the principal rules under each branch of it, and a reference to the authorities where fuller details may be learned, for the study of works constructed with a more immediate reference to the wants of practitioners.

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