HANDY BOOK
OF
CANADIAN LAW

WALTER SCOTT, LL.D.

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Handy Book of Canadian Law

being

Handy Book on Property Law

BY

EDWARD SUGDEN, LORD ST. LEONARDS
(Lord Chancellor of England and of Ireland)

Revised and adapted for Canada with additions

BY

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DEDICATED
TO
THE YOUTH OF CANADA
AND OTHERS
UNLEARNED IN THE LAW

FOREWORD.

WHATEVER the case may have been in days of yore, it must be conceded that without some knowledge of the principles underlying the vast body of law which to-day broods over the world in general, life cannot be lived either to the advantage of oneself or, what is more important, to the advantage of the social unit or body politic to which we belong.

CORRIGENDA

Page 52, line 10, should read "in the Act" instead of "on the fact".
" 54, line 22, "three thirds" should read "two thirds".
" 55, line 14, for "their" read "her".
" 55, line 15, for "them" read "her".
" 63, line 13, between "yet" and "declares" insert "it".
" 74, line 30, for "civil" read "cavil".
" 85, line 23, for "them" read "him".
" 92, line 12, substitute "5th" for "7th".

This classic work, glorious in its simplicity, I commend to you unhesitatingly. As to my own additions and corrections, I shall but say that they have been written with all humility and reverence, and with the same simplicity and an endeavour after something like the same correctness.

Just one word as the exact pretensions this book makes. It does not attempt to take the place of a lawyer. It may give you practical help when a lawyer is not available; it will help you to explain to your lawyers the difficulty in

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I cannot think that any young man or woman can be said to be educated without a certain knowledge of legal principles, and know of no professional or mercantile pursuit, wherein such knowledge will fail to lend an added effectiveness by reason of the increase of intelligent interest awakened by its possession.

In short, legal knowledge of some sort is a necessary part of preparation for the life of today, and even more for the life of to-morrow.

Lord St. Leonards, after having served as Lord Chancellor of both England and Ireland, turned aside at a time of life when he might have enjoyed a well-earned rest to write for the unlearned in the law, concisely and without many technical phrases, the book 'A Handy Book on Property Law,' which now by means of the necessary alterations and additions appears as a 'Handy Book of Canadian Law'.

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which you may be placed and to understand his advice better. It may help you to avoid the difficulty. Its prime aim is to make better citizens and better business men. Intelligently read and re-read, it will infallibly do so.

It does not claim to compete with popular legal manuals, which in their endeavours to solve dogmatically each and every legal conundrum are frequently misleading with disastrous results.

WALTER S. SCOTT,

31, Gariepy Block, Edmonton.
September, 1917.

LETTER 1.

YOU complain to me that, although utterly ignorant of law, you are constantly compelled to exercise your own judgment on legal points: that you cannot always have your lawyer at your elbow; and yet a contract for the sale, purchase, or lease of an estate or a loan, must be entered into at once; and it is not until you have gone too far to retreat that you learn what errors you have committed; that you are even at a loss in giving instructions for your will, and wholly incapable of making the most simple one for yourself; that you cannot readily comprehend your lawyer when you seek his advice: that, in a word, you have been plunged into a lawsuit, which a slight previous knowledge might happily have prevented.

It is, unquestionably, a matter of profound regret, that so large a proportion of contracts respecting estates should lead to litigation. It is equally to be regretted that, however desirous the man of property may be to understand the effect of his daily contracts, there is no source to which he can apply for the desired information. You ask me to remove the cause of your complaint, and in particular to point out the precautions to which you should attend in selling, buying, mortgaging, leasing and devising estates.

You express, besides, a desire to know something in a popular way of the nature of the different interests in property, and of the mutual rights of yourself and your wife, and your power over your children.

You further ask me to give you some general hints as to your conduct in the character of a trustee or executor, which may keep you from harm. In short, you want, in the form of familiar letters, what is now so much in vogue, a work upon an interesting subject calculated "for the million," whom I should be but too happy to assist: such a work, whilst it imparts knowledge, may, perchance, beguile a few hours

in a railway carriage. I have in my youth and in my manhood written much for the learned in the law; why should I not, at the close of my career, write somewhat for the unlearned? This I shall proceed to do concisely, and without encumbering my pages with many technical phrases. I must premise, that I shall say little which is not warranted by decided cases; but I shall not burden you with references to them, as they lie scattered in many a bulky volume to which you have not access.

LETTER 2.

IN this Letter I intend to draw your attention to the precaution to be observed on the sale and purchase of estates as between yourself and the other party; and first as to your conduct and duty as a Seller.

I will not argue with you, whether in selling an estate you are bound in conscience to disclose all its defects to the purchaser. Moralists, as you know, agree that a seller is bound to do so, although the principle has been controverted. I shall content myself with stating how the law on this subject stands.

If the person to whom you sell was aware of all the defects in the estate, of course he cannot impute bad faith to you in not repeating to him what he already knew; neither will you be liable if you were yourself ignorant of the state of the property.

And even if the purchaser was at the time of the contract ignorant of the defects, and you were acquainted with them, and did not disclose your knowledge to him, yet he will be without a remedy, if they were such as might have been discovered by a vigilant man. The disclosure of such defects is at most what the civilians term a duty of imperfect obligation; and to claim the aid of the law, you must yourself be vigilant.

If, however, you should, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered—for example, if you carefully conceal from him the necessary repairs of a wall to preserve the estate from the sea, the contract would not bind the purchaser. In one case, a seller plastered up a defect in a main wall, and papered it over, so as to conceal the defect, and the purchaser was relieved from the contract.

So if there is a latent secret defect in your estate, of which you are aware, and which the purchaser could not by any attention whatever possibly discover, you are, it seems, bound to disclose it to him, although you should sell the estate expressly subject to all its faults. Upon this point, however, the authorities are divided.

This point has several times arisen on the sale of ships sold "with all faults," yet described in an attractive manner, and kept afloat, so that the defects well known to the seller could not be discovered, and that has been held to be a fraud, which renders the sale void.

But generally speaking, a sale "with all faults" is binding, and the seller is not bound to disclose faults within his own knowledge, although he must not conceal them. Where a seller knows there is a defect, which was concealed before he acquired the property—for example, where the defective wall was plastered and papered over before his purchase, and he only acquired a knowledge of the concealment after his purchase, and he sells with all faults, still he should disclose the defect, although this is a doubtful point in law.

If you actually describe the estate in the particulars of sale or agreement, you will, of course, be bound by the description. And if you misdescribe the estate with a fraudulent intent, it is unimportant that you expressly stipulated that an error in the description of it should not annul the sale. This was decided before the Reform Act, in a case where the estate was described "to be about a mile from a borough-town"; and it was provided in the conditions of sale that an error in the description should not vitiate the sale. It turned out that the estate was between three and four miles from the place, and therefore the purchaser resisted the contract, and brought an action for recovery of the deposit which he had paid. It was left to the jury to say, whether this was merely an erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable from being in the neighbourhood of a borough-town. In the former case, the contract remained in

force; but in the latter case, the purchaser was to be relieved from it, and was entitled to recover back his deposit. The purchaser had a verdict; so that the jury must have thought the misdescription fraudulent.

Where the sale was of a "brick-built house," and the house was built partly of brick and partly of timber, and some parts of the exterior were composed of lath and plaster only, without any party-wall to the house, the purchaser was not compelled to complete the purchase. There must not be a substantial misdescription.

But although you misrepresent the nature of the property, yet the purchaser cannot be relieved if he bought with full knowledge of the actual state of it; thus, if you describe an estate to be in a ring-fence, and the buyer knew that it was intersected by other lands; or you warrant a house to be in perfect repair, and he knew that it was without a roof or windows, he cannot in either case object that the property does not agree with the description of it.

But it would not be safe to rely upon the purchaser's knowledge in opposition to your own statement. If you were to state that the house was in good repair, knowing that it had the dry rot, and were not to communicate this fact to the purchaser, and the state of the house was not perfectly visible to everybody, you could not enforce the contract, although the purchaser might take the property if he pleased, with a compensation for its defective state.

The same rule applies to encumbrances on the estate, and defects in the title to it, as to defects in the estate itself. You must either deliver to the purchaser the instrument by which the encumbrances were created, or on which the defects arise, or you must acquaint him with the facts. If you neglect this, you are guilty of a direct fraud, which the purchaser however vigilant, has no means of discovering. And if your attorney keep back any encumbrance, he as well as you will be answerable for the fraud.

Thus I have told you what truths you must disclose. I shall now tell you what falsehoods you may utter in regard

to your estate. In the first place, you may falsely praise, or, as it vulgarly termed, puff your property; for our law, following the civil law, holds that a purchaser ought not to rely upon vague expressions uttered by a vendor at random in praise of his property . And it has even been decided, that no relief lies against a vendor for having affirmed, contrarily to truth, that a person bid a particular sum for the estate, although the buyer was thereby induced to purchase it, and was deceived in the value. So you may affirm the estate to be of any value which you choose to name, for it is deemed a purchaser's own folly to credit a bare assertion like this. Besides, value consists in judgment and estimation, in which many men differ.

Again, you may, with impunity, describe your land as uncommonly rich water-meadow, although it is imperfectly watered. Such statements are cautions to purchasers to inquire. So mere puff, as that a house is fit for a respectable family, is entitled to no weight; but you must not, in answer to enquiries, assert, contrary to the fact, that your house is not damp. You are not bound to inform the purchaser, that upon the tenant's complaint, the full amount of rent has not been paid; nor are you bound to tell him what offers have previously been made to you; for a concealment, to be material, must be of something that the party concealing was bound to state. But you must disclose any right of sporting over the estate, or any right to mine upon it, or the like. And you may not refer a purchaser to an agent who is ignorant of circumstances affecting the property of which you yourself are aware. If your agent should be guilty of a fraudulent concealment, you would be liable.

If you should affirm that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, you could not enforce the contract in equity. Nor can you with impunity misstate the amount of rent paid for the estate, because that is a circumstance within your own knowledge; the purchaser may have no other source of knowledge; or your

tenants, if he were able to apply to them, might combine with you, and so misinform and cheat him. And the purchaser will have a remedy against you for the fraud, although he did not depend upon your statement, but inquired further.

What I have hitherto said applies mostly to your own conduct. I have still a few cautions to give you in regard to those things which must be performed by your agents.

Although it is not an unusual practice, yet you should never permit the particulars and conditions of sale to be prepared by an auctioneer. Auctioneers know nothing of the title, and continual disputes arise from their misstatements. When a man has an estate to sell he generally goes first to an auctioneer: I advise you to go to a lawyer.

It would be useless to state to you what provisions should be contained in the particulars and conditions of sale. They must be prepared by your lawyer. I may, however, observe, that the nature of the property should be correctly stated.

Where the deposit is directed to be paid to the auctioneer, he is entitled to retain it until the contract is completed, without paying interest for it, because he is considered as a stakeholder or depositary. To obviate this, where the sum is large, it may be provided that the deposit shall be invested. You should be cautious whom you employ as an auctioneer, for any loss by his insolvency would fall upon you; he is your agent.

I may here observe, that an agent to sell or to buy an estate may be appointed by parol, that is, without writing; but you will not act prudently if you do not specify in writing to your agent the terms upon which you propose to sell or buy. The authority to sell does not include a power to receive purchase-money, which therefore, should never be paid to an agent without an express authority from the seller. Even an auctioneer to whom, by the conditions of sale, the deposit is to be paid, has no authority to receive any further part of the purchase-money. If a purchaser is directed to

pay the purchase-money to an agent on the completion of the purchase, he cannot safely pay any part of it to him before the completion. An auctioneer or other agent is not at liberty to take a note or other security for the purchase-money. The seller can compel him to pay the money. The purchaser may safely pay the money, or remit it to a broker or any other person by the post, for example, if so directed by the seller, and he would not be answerable for any loss, if he use due precaution. If the seller accept a valid cheque on a banker for the purchase-money, and he is guilty of negligence in presenting it, any loss by the banker's insolvency will fall upon him.

An agent, after he has bought or sold according to his authority, and entered into an agreement, binding on his principal, cannot vary the terms of the contract; but if he exceed his authority, his principal may, of course, ratify his act. Either a seller or a purchaser may revoke his authority to an agent at any time before the latter has executed a binding agreement to sell or buy. An agent, of course, cannot go beyond his authority. If, for example, he were to bid more for an estate than he was authorised, he would himself be bound as the actual purchaser, but his principal would not be bound. It has been held that a seller may falsely pretend to be an agent for another, although he is selling for his own benefit, and that the purchaser will be bound unless he can show that he has suffered damage, or that the misrepresentation induced him to enter the contract. This cannot often arise upon the sale of an estate. Where a purchaser of a picture—a Claude—from an agent, with an undisclosed principal, had an impression that it came out of a particular collection, and that ownership in his view enhanced its value, and the seller's agent, knowing that the purchaser laboured under a deception as to the real owner of the picture, permitted him to remain in it, although he thought it would influence the purchaser's judgment, the contract was held void at law.

You may, without public notice, appoint a person to bid

for you at the sale, in order to prevent the estate from being sold at an undervalue. This is generally termed "puffing." Cicero, in his "Offices," declares his opinion that a vendor ought not to appoint a puffer to raise the price; nor ought the purchaser to appoint a person to depreciate the value of an estate intended to be sold. And Huber, the civilian, lays it down, that if a vendor employ a puffer, he shall be compelled to sell the estate to the highest "bona fide" bidder, because it is against the faith of the agreement by which it is stipulated that the highest bidder shall be the buyer. Great contrariety of opinion has prevailed in our courts as to the legality of appointing a puffer; but it is now settled that you may employ a person to prevent a sale at an undervalue. But if you go beyond this, and send a puffer to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud, and the sale will not be binding on the purchaser. Neither can you appoint more than one person to bid. It is proper that a man should be permitted to appoint a person to guard his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. An auction so constituted is simply a mock auction. Your case would be obnoxious to the same rule were you to appoint even one puffer, with unlimited power, to take advantage of the eagerness of bidders to increase the biddings. And if you state in the particulars, or advertisements, that the estate is to be sold "without reserve," the sale would be void against a purchaser if any person were employed as a puffer, and actually bid at the sale.

If you employ an agent to sell an estate by public auction, a sale by private contract is not within his authority; nor does it seem to be material that the estate sold for more than the price fixed, for it might have fetched a still greater sum at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, I con-

ceive that, in most cases, the sale would be binding on the principal.

You may find it best to make a contract with your auctioneer in order to avoid excessive charges.

If the estate is not sold at the auction, you should either authorize the auctioneer to sell it by private contract, and agree with him as to the commission, or you should expressly withdraw from him all further authority. It is only the other day that, after an unsuccessful attempt to sell an estate by auction, the owner sold it by private contract for £10,000, and paid commission to the agent who compelled the contract. The auctioneer then recovered from him in an action half commission, viz., 2½ per cent. on the first £5000, on the ground that, after the auction, he had,, upon the application at his office of the person who ultimately purchased the estate, furnished him with the particulars of the estate and a card to view it.

If, therefore, you employ more agents than one, you should expressly stipulate with each of them, that the commission shall be paid to the agent only of whom the purchase is made, or you may have also to pay large commissions to the other agents for what is termed finding a purchaser. You should carefully read the card or paper with which they usually supply persons applying to them ; for in some instances it expressly states " that the agent is to be paid his commission although the sale should not be conducted by him, if it is effected through any information afforded by him," and dealing with the agent after such a notice would, I fear, bind you to his terms. An intelligent and respectable house-agent has suggested to me a clause to protect the employer, to the effect that in case there should be a dispute between any of the several agents as to the right to the agency money, the dispute should be referred to arbitration, as between the agents; and the employer should pay the money to the agent in whose favour the award shall be made. Such a provision would protect the principal from paying more than

once; but it should, I think, be made the subject of an arrangement between the agents themselves. It is not prudent to answer the inquiry by an agent whom you have not employed, whether your property is to be let or sold, for an incautious answer might justify him in placing his property on his books, and making you in the result liable for some compensation to him, although you really employ and pay another man.

In some places e.q. in Alberta, a commission agreement of this sort cannot be sued upon unless it is in writing.

LETTER 3.

I SHALL now dismiss you from your character as a seller, and treat you as a buyer.

In running over, in my last Letter, the misstatements which a seller may with impunity make, I of course was looking to the situation in which I now consider you to stand; for when you know how far an unprincipled vendor may with safety go, you can guard against fraud by not trusting to misrepresentations which are made without fear of retribution.

If you should have a right to avoid a purchase on the ground of fraudulent representations by the seller, you ought at once to exercise your right, and not go on dealing with the property as the owner of it, for such conduct may amount to a waiver of your right to rescind the contract.

With the exception of a vendor, or his agent, suppressing an encumbrance, or a defect in the title, it seems clear that a purchaser cannot obtain relief against him for any encumbrance or defect to which his covenants do not extend; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he has no remedy beyond what the seller's covenant may afford. It has even been laid down, that if one sell another's estate, without covenant or warranty for the enjoyment, it is at the peril of the purchaser, because he might have looked into the title; and there is no reason he should have an action by the law, where he did not provide for himself.

If a purchaser is damnified by the gross want of skill in a lawyer, or by his neglect he may recover at law against the lawyer for any loss which he may sustain. To return: You will collect from the observations in my last Letter, that as a purchaser you are entitled to relief on account of any

latent defects in the estate, or the title to it, which were not disclosed to you, and of which the vendor, or his agent, was aware. In addition to this protection afforded by the law, you, as a provident man, ought not to trust to the description of the vendor, or his agents, but to examine and ascertain the quality and value of the estate yourself, and you should have the title to it inspected by a lawyer.

If there are rights of way over the property, you cannot object, although they are not noticed in the contract. A right of way is not a latent defect, and you ought to inquire. If you buy a mine, and it is full of faults, you will be bound, for they are incidents to a mine, as you must have known and therefore ought to have inquired. The very name of the place where the property is situated may mislead you; for example, a house "in Regency Square, Brighton." was sold by auction in London, and the buyer bought on that description, never having seen the house. But the houses running from the north-west corner of the Square into an adjoining street, although in no respect within the Square, had always been numbered, and named, and treated as part of the Square . This house was, unluckily for the purchaser, in the street and not in the Square, but he was compelled to take it, as he ought to have inquired. So the immediate neighbours may be such as to prevent the purchaser from taking his family to the house recently purchased for their habitation, yet he must complete his purchase. These instances are sufficient to show the necessity of previous inquiry.

I may here remark, that although a vendor is bound to tell the purchaser of latent defects, yet a purchaser is not bound to inform the vendor of any latent advantage in the estate. If you were to discover that there was a mine on an estate, for which you were in treaty, you would not be bound to disclose that circumstance to the vendor, although you knew that he was ignorant of it. Nor need you as a purchaser adhere closely to truth in procuring the estate at as cheap a price as you can. In a case where a false statement by a purchaser was held not to give the seller a right of

action, the Court said, that the question was, whether the purchaser was bound to disclose the highest price he chose to give, or whether he was not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase.

A purchaser may misrepresent the seller's chance of sale, or the probability of his getting a better price for his property than that which the buyer offers. But the purchaser is always in danger who makes an actual misrepresentation, which tends to mislead the seller. And he cannot justify misrepresenting the estate to any person desirous of purchasing it, or concealing the death of a person, of which the seller is ignorant, by which the estate is increased in value.

In regard to false representations to a purchaser of land or rent, I must still observe that the same remedy will lie against a person not interested in the property, for making such false representations as might be resorted to, in case such person were owner of the estate; but the statement must be made fraudulently, that is, with an intention to deceive; whether it be to favour the owner, or from an expectation of advantage to the party himself, or from ill-will toward the other, or from mere wantonness, is immaterial. And in these cases, to use the language of Sir William Grant, it will be sufficient proof of fraud to show, first, that the fact as represented is false; secondly, that the person making the representation had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact; and therefore it is no excuse in the party who made the representation to say, that though he had received information of the fact, he did not at that time recollect it.

And on the same ground, if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser will be entitled to hold it against the person who has the right, although a married woman, or under age. And the same rule has even been extended to a case where the

representation was made through a mistake, as the person making it might have had notice of his right.

If you suspect that any person has a claim on an estate which you have contracted to buy, you should, before proper witnesses, inquire the fact of him, at the same time stating that you intend to purchase the estate; and if the person of whom the enquiry is made have an encumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against you. The witnesses in this case should take a note of what passes, because a witness may refresh his memory by looking at any paper, if he can afterwards swear to the facts from his own memory.

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no misrepresentation, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the customs of the country, because whoever buys with notice of a lease is held to have knowledge of all its contents. If, therefore, you have notice of a lease, or even that the estate is in the occupation of a tenant, you should not sign a contract for the purchase of the estate until your solicitor has seen and read the leases, unless the vendor will stipulate in writing that they contain such covenants only as are justified by the custom of the country. And even such a stipulation is not quite satisfactory, for there is frequently great difference of opinion as to what is the custom of any particular place.

And in buying a leasehold estate, it is absolutely necessary to know the contents of the lease, particularly the covenants on the tenant's part. They may be onerous, and may, for example, prohibit you, as the purchaser, from assigning without the landlord's consent; yet you would be bound by them, because you would be held to have bought with implied notice of them. So it is not unusual to stipulate, in conditions of sale of a leasehold property, that the production of a receipt for the last half-year's rent shall be accepted as proof that all the lessee's covenants were performed up to that period. Never bid for an estate clogged with such a condi-

tion, for if there had been a breach, of which the lessor could take advantage, notwithstanding his receipt of rent, you might lose the property after you had paid for it. There are some acts against which no relief can be obtained; for example, the tenant's neglect to insure, or his insuring in an office, or in names not authorized by his lease; and you should not rely upon the mere fact that the insurance is correct at the time of sale: there may have been a prior breach of covenant, and the landlord may not have waived his right of entry for the forfeiture.

Where difficulties arise in making out a good title, you should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression that it gives them an advantage over the vendor, but this is a false notion; such a measure would, in some cases, be deemed an acceptance of the title. If, however, the objections to the title can be remedied, and you should be desirous to accept possession of the estate, you may in most cases venture to do so, provided the seller will sign a memorandum importing that your taking possession shall not be deemed a waiver of the objections to the title. And although it is not advisable to do so, yet you may, with the concurrence of the seller, safely take possession of the estate at the time the contract is entered into; because you cannot be held to have waived objections of which you were not aware; and if ultimately the purchase cannot be completed, on account of objections to the title, you will not be bound to pay any rent for the estate, unless it be provided for by the contract. When you sell you should keep this in view.

LETTER 4.

I HAVE not yet dismissed you from your character as a purchaser; but now that you have, according to my suggestions, viewed the property you wished to purchase, and inquired into the nature of the leases, or if it be a leasehold, into the liabilities of the lessee or assignee, and carefully considered the conditions of sale, you may venture into the auction-room. If a man is about to buy an estate by private contract, he generally takes all proper precautions, and pertinaciously objects to any unusual stipulations in the contract on the part of the seller: yet he walks confidently into an auction-room, and often bids for an estate which he has not seen, and upon conditions which he has not read, or if he have read, has not understood them. It has been gravely doubted whether one man is influenced by the biddings of another; few men who have attended auctions will entertain this doubt. Not only are we influenced by the biddings of others, as evidence that they are willing to give the price they bid, but every bidding in advance on our own removes our chance as the last bidder. The spirit of competition, besides, animates most men. An advance bidding is an opposition to our own desire openly expressed, to become the purchaser. Before, therefore you enter the auction-room, make up your mind as to price, and do not be led away by the persuasions of the auctioneer, who is the agent of the seller, or the biddings of others. Bear in mind, too, that puffers may be amongst the bidders, although you may not be able to ascertain the fact, and that the seller is at liberty to privately appoint one bidder, to prevent the property from being sold below its price. You cannot therefore obtain it for less, although you may be induced to buy it, contrary to your sober calculations, at a higher price.

The auctioneer is of course the seller's agent, pending the completion of the sale by auction, and what you would probably not conjecture, he becomes, by your bidding, also your agent at the sale; so that by putting you down, as you proceed with your biddings, your name, and the sums you bid, and connecting them with the description of the estate, etc., in the conditions, he can bind you to the sale.

If you repent of your bidding you may countermand your bidding at any time before the lot is actually knocked down; because the assent of both parties is necessary to make the contract binding: that is signified on the part of the seller by knocking down the hammer. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer was knocked down, he would be bound by his offer, and the vendor would not, which can never be allowed.

You need only look at the particulars and conditions. An auctioneer cannot contradict them at the time of sale by a verbal statement; although, perhaps, you would be bound, if he could bring home to you particular personal information of it. What is termed the babble of the auction-room goes for nothing. So the auctioneer cannot, by reading a lease at the auction, bind the purchaser to misdescriptions in the particulars. A mere general statement to the company will not affect you, either at law or in equity. I need not suggest to you how far a man may, consistently with good faith, take advantage of the omission in the particulars, if he distinctly understood the verbal statement at the sale.

When the sale is concluded, if you are the purchaser, you will be called up by the auctioneer and required to sign a short agreement already prepared. But usually the auctioneer does not offer to sign a reciprocal agreement as the agent of the seller. You should not sign unless a like contract is signed and delivered to you by the auctioneer.

I have already informed you, that if your agent bid more for the estate than you empowered him to do, he

himself would be liable, but you would not. But unless you expressly limited him as to price, it seems that you would be bound.

If after employing a man to bid, you should be so dishonest as to deny the authority (in seeking instruction you must not quarrel with your master's mode of conveying it), the agent, unless he could prove the commission, would be compelled to complete the purchase himself; but he would afterwards be able to put you to your oath as to the transaction; and if you admitted, or he could prove the authority, you would be compelled to take the estate at the sum which you authorized him to bid for it. I need not tell you, that by falsely denying the authority, you would incur the penalty attached to the commission of perjury. On the other hand, if you merely employ a man by parol, that is, by word of mouth, to buy an estate for you, although he buy it accordingly, yet if he hold himself out as the real purchaser, and no part of the purchase-money was paid by you, you cannot compel him to convey the estate to you, because that would be directly against the provisions of an Act of Parliament, called the Statute of Frauds (29 Charles 2, chap. 3), which requires a writing in such cases. And although the man should afterwards be convicted of perjury in denying the trust, yet that will not enable equity to compel him to convey the estate to you; but you would be a competent witness to prove the perjury. You would therefore have at least the satisfaction of making an example of him.

The vendor cannot object that your agent purchased in his own name, whereas he is a trustee for you; for it happens in very many cases that the contract is entered into in the name of a trustee; and the mere fact of a quarrel having taken place between the seller and you, totally unconnected with the subject of the contract, or even a bare refusal by the seller to deal with you, is not sufficient ground for his refusing to convey to you.

But if you applied to purchase the estate, and the owner expressly refused to treat with you unless the money was

paid down, which you were unable to pay, and then you procured some other person to purchase the estate on your account, it seems clear, that at least the purchase-money must be ready at the very day appointed. So if you should apply to Mr. Biggs, to sell you an estate on behalf of Tompson, for whom, as we know, he has a great affection, and Biggs should on that account be induced to take less for the estate than he otherwise would have done, or even, perhaps, without this circumstance, the agreement could not be enforced against Biggs, unless it was really made on behalf of Tompson; but if Tompson would patronize the sale, execution of the agreement would be compelled, although he might sell the estate to you the next day.

The following case shows to what extent this doctrine is carried. A purchaser of a house adjoining to another occupied by the seller, agreed with the seller verbally, that he would not let the house to any person not agreeable to him. A man of the name of Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there would be no objection to granting him a lease. The seller, however, disapproved of Langstaffe, and so far from knowing him intimately had only seen him at a tavern. Lord Chancellor Camden set aside the agreement which Langstaffe had obtained, with costs.

A somewhat similar case is mentioned in Hawkin's Life of Johnson. Peele had often said that as he knew it would be an accommodation to Garrick, he had given directions that, at his decease, he should have the refusal of his house. On Peele's death a man in the neighbourhood applied to the executors, pretending that he had a commission from a friend or relative of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him, under a secret trust for himself. Garrick filed a bill against him, and the purchase was declared fraudulent, and set aside with costs.

I must here observe, that you cannot, even at an auction, purchase any property for yourself of which you are a trustee

for another. If, however, the person for whom you are a trustee is, what we lawyers term "sui juris," that is, of legal capacity to contract for himself, not an infant or a lunatic, he may certainly sell to you, but you must first, with his assent, shake off your character as a trustee, and you must freely disclose to him all your knowledge of the property. For the rule is, not that you may not buy from the person for whom you are trustee, but that as a trustee you cannot buy from yourself. And in all cases of this nature equity looks with a very jealous eye on the transaction. The same rule forbids an assignee of an insolvent to buy the insolvent's estate himself, without at least the consent of the majority of the creditors; and it has even been thought by high authority that the consent of all the creditors is absolutely requisite. The rule applies equally to agents and auctioneers. Your solicitor may buy of you, but I should advise him not to do so; and if he do, another solicitor should be bona fide employed by you. Unless there is perfect fair-dealing, and the dealing is, as it is termed, at arm's length, it would not be allowed to stand.

If you purchase an estate, and take a conveyance of it in the name of a stranger, as the real purchaser, although you have no declaration of trust from him, yet you will be entitled to the estate if it can be proved that it was paid for with your money. If, however, you deliberately declare, although verbally, that the purchase was made for the man's benefit, he will be entitled to retain the estate as his own. And if you take a conveyance in the name of one of your children, for whom you have not made a provision, without declaring him a trustee for you, the consideration of blood between you will fix the estate in the child, although illegitimate, for his own benefit; nor can you defeat his claim by any subsequent declaration of your intention.

The same rule applies to a purchase in the name of your wife, or of a grandchild, if its parent is dead. But all purchases of this kind are open to much objection. If you intend the conveyance to be for the party's own benefit, it should be

expressly declared to be so on the face of it. If, on the contrary, you mean it to be in trust for yourself, the trust should be declared by the deed, or by a separate instrument.

I must still observe, that in all cases of joint undertaking or partnership, although the estate will belong to the survivor at law, yet in equity he will be a trustee as to the share of the deceased partner for his representatives; so that if you and another were to take a building lease jointly, and lay out money in erecting houses on the land, the survivor would be compelled to assign a moiety of it to the representatives of the deceased.

If you and another are in treaty for the purchase of an estate, and you agree to desist, and permit him to go on with the intended purchase upon his promising to let you have a part of the estate, you should acquire a written agreement from him; for it seems, that although he should get the estate, he would not be bound by a mere parol or verbal agreement to convey part of it to you.

LETTER 5.

THE present Letter concerns you both as a Buyer and Seller.

Generally speaking, a "written" agreement is essential to a valid contract for the sale or purchase of an estate. This is required by the statute of 29 Car. 2, cap. 3, usually called the Statute of Frauds; and it must be signed by the party whom you wish to be bound by it, or his agent, to whom a verbal authority for that purpose will be sufficient; and the agreement must distinctly contain all the terms, such as the names of the parties, the estate to be sold, and the consideration to be given for it; nothing can be supplied by parol, that is, verbal evidence. There are, indeed, some exceptions to this rule in equity.—If the party resisting the contract admit the agreement, and do not claim the benefit of the Statute, or if he have acted fraudulently, equity will compel the fulfilment of the agreement, although merely verbal, and not reduced to writing, and signed by the parties.

As an instance of what is deemed a sufficient fraud to enable equity to relieve, I may observe, that if you were verbally to sell me an estate, and I in performance of part of the agreement were to lay out money in repairs, you could not afterwards resist my claim to a conveyance of the estate.

Letters which have passed between parties have frequently been held to amount to an agreement where they contain the particulars necessary to form a contract. And yet, in many such cases, much has been left unprovided for, and the parties have been surprised to find that they were bound by a mere correspondence; therefore, in writing about the sale or purchase of an estate, you should always cautiously declare your offer or proposal not to be final, lest the other party should entrap you, against your intention, into a binding contract.

If upon a treaty for sale of your estate, you should write a letter to the person wishing to buy it, stating that if you part with it, it shall be upon such and such terms (specifying them), and such person, upon receipt of the letter, accept the terms mentioned in it, your letter will be deemed equivalent to an agreement. So, if you are in company, and make offers of a bargain, and then write them down and sign them, and the other party—that is, the person to whom the offer is made—take them up, the proposal will be binding on you. But if it appears that, on being submitted to any person for acceptance, he had hastily snatched it up, and refused you a copy of it, or if, from other circumstances, fraud in procuring it may be inferred, it seems, that if there were a jury, it would be left to the jury to say, whether you intended it at first to be a valid agreement on your part, or as only containing proposals in writing, subject to future revision; and if the aid of equity be sought, these circumstances would have equal weight with the Court.

In every case it must be considered whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit, and a letter must, like a regular agreement, contain all the terms. And the answer must be a simple acceptance, without introducing any new stipulation or any exception. If the answer were, for example, an offer of a less sum, the original offer would no longer be binding, and the other party could not revive it by submitting to pay the price at which the offer was made. An offer to sell may be recalled or modified at any time before it is accepted, and an offer to purchase may, of course, in like manner, be recalled or modified. Although the offer is left open for the acceptance of the other party for a period named for example, fourteen days—yet it may be retracted at any time before the fourteen days, if the other party have not already accepted it. If the acceptance is sent by letter by post, it will be binding on the writer, although the other party do not receive it till the day following. If even the writer were to die on the same day after he had

posted his letter, the acceptance would be binding, it seems, on his representatives.

A receipt for the purchase-money, if it contain the terms, will be a sufficient agreement. And even a letter to your attorney, stating the terms, and directing him to carry the agreement into execution, will have the same operation.

It is not, however, sufficient that a person present at the making of the agreement reduced it into writing, unless it was signed by the parties; nor is the delivery of particulars of the estate, abstracts of title, etc., on the treaty for sale, equivalent to an agreement; neither is it sufficient that both parties verbally direct an attorney to prepare the transfer: with the exception before alluded to, there must be an agreement signed by the "party to be charged"; that is, by the party against whom relief is sought; for if you sign an agreement to sell or buy an estate, the other party acting bona fide may proceed against you, although he himself never signed it. You should always require the party with whom you deal to sign when you do.

I may observe, that the price to be paid for the estate is not weighed in very nice scales. As the rule now stands, the consideration must, indeed, be grossly inadequate or unreasonable to enable equity to refuse its aid; and at law, unless it is merely fraudulent and nominal, the amount of the consideration would not prevent the party benefitted from recovering damages for a breach of the contract by the other party. But fraud is an exception to every rule.

A case arose, where an agreement was made for sale of land at a halfpenny per square yard. The prices was in all about £500; the real value £2000. The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The desire of concealment was considered such a fraud as would avoid the transaction, because parties to a contract are supposed, in equity, to treat for what they think a fair price.

Never leave the price to be fixed by surveyors or arbitrators; for if they refuse to value the estate, or disagree in the valuation, you cannot enforce the performance of the contract. This, however, is not the case where it is merely agreed that the estate shall be taken at a fair valuation, without specifying the mode in which it shall be made. But even this mode is objectionable.

If upon the purchase of an estate you pay a deposit, and afterward become entitled to a return of it, because the seller cannot make a title, you would not be compelled to take any stock in which he may have thought proper to invest it without your consent. And your assent will not, it seems, be implied from notice having been given to you of the investment, to which you did not reply. It would not, however, be prudent to be silent in such a case. Where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it is for the benefit of both parties to enter into an arrangement for an investment of the deposit, so as to make it productive of interest.

You cannot, as a purchaser, because delays arise, deposit your money at a bank, or convert it into stock at the risk of the seller; nothwithstanding such a deposit or conversion, the principal will remain entirely at your own risk; nor is it material that you gave the vendor notice of the deposit, unless he took the risk on himself, by agreeing to accept it as a payment. And as he would not be bound, without his express assent, by a conversion, he could not, unless he had bound himself, claim any benefit by any rise in the funds. So if you sell out stock to answer the purchase-money, and the title prove bad, without any fraud in the seller, and then you re-purchase at a loss, you are not entitled to any allowance on that account, for you had a chance of gaining as well as losing by fluctuation in the price of the stock.

Continual disputes arise as to interest. The purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; and as from that time the money

belongs to the vendor, the purchaser will be compelled to pay interest for it if it be not paid at the day. Upon this rule, no difficulty would ever arise if the purchase-money were not frequently lying dead; in which case it becomes a question upon whom the loss of interest shall fall. The loss must be borne by the party by whom the delay has been occasioned. It seems, however, that although the delay is with the seller, and the money is lying ready, and without interest being made by it, yet notice should be given to him that the money is lying dead, because otherwise there is no equality—the one knows the estate is producing interest, the other does not know that the money does not produce interest; and in all cases, where a purchaser resists the payment of interest, he must show that the money was lying dead, and bona fide appropriated to answer the purchase. But I would advise you never to let your money lie dead.

It has become usual to stipulate, upon a sale by auction, that if the purchase is not completed at the time appointed, "from whatever cause," the purchaser shall pay interest on the purchase-money. The true meaning of this condition has led to much difference of opinion on the equity bench. It may be considered to apply to delays caused by the state of the title, or other causes, although the purchaser himself is in no respect in fault, but it would not enable the seller wilfully to delay the completion of the contract, or to be grossly negligent, and yet to claim interest during the delay.

Interest is not payable until the principal is payable, and that is not payable until it is seen whether the contract can be completed. If, therefore, a long delay take place in the completion of a contract, but the lien which the law gives to the vendor, on the estate sold for the purchase-money, has been kept on foot by acknowledgment, interest will be payable on the purchase-money for the whole time it ought to be paid under the contract, nothwithstanding the Act of Parliament to which I shall by-and-by draw your attention, by which interest on such a lien could not in general be recovered for more than six years.

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase-money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state; and the augmented value of the timber by growth is deemed an equivalent for the interest from the time of the contract to the making of the valuation.

I may here observe, that as the estate belongs to the purchaser from the time of the contract, he is entitled to any benefit which may accrue, and must bear any loss which may happen to it before the conveyance. If a house is even burned down, yet the purchaser must pay for it, although the seller permit the insurance to expire without giving him notice. You should, therefore, upon entering into an agreement to buy a house, provide for the insurance of it till the completion of the contract.

You cannot safely buy a property where a nuisance upon it exists; for if there be a nuisance there, although the property is in lease, and you cannot remove the nuisance, yet by your purchase you would render yourself liable for it. If the nuisance were created by the occupier after your purchase, you would not be responsible; but if the tenancy were a short one, and you were to renew it with the existing nuisance, you would be responsible. You are not to let the property with the nuisance upon it.

A purchaser of land without any way to it, except over other land of the seller, may by implication be entitled to a way of necessity over the latter.

Without attempting here to tell you how you may exercise your rights of property generally, I may take this opportunity of observing that, as a general rule, the several owners of adjoining lands are each entitled to the lateral support of the other's land, and neither can justify excavating his soil, so that the adjoining land would be without support. But if you were to erect a house on the confines of your land your neighbour might afterwards dig his land near to your foundation,

but not so as to touch your land, and you would be remediless although your land should fall down; nor could he at any period justify excavating his ground "negligently" so as to occasion the fall of your house.

You might indeed, in certain parts of Canada, but not in others, obtain a right to support for your building through lapse of time.

As to mines: if you grant the surface of your land to another, reserving the mines, the grantee will have a prima facie right to the support of the subjacent strata; and the reservation by you of the usual powers to work the mines, with an agreement to pay for damages, will not destroy the grantee's right to the support of the minerals. So if you let or grant your minerals, but retain the surface, your right to support will in like manner remain. But in either case the grantor may expressly reserve or grant any extent of right to damage the surface, which may be found necessary in working the mines. The same principle applies where distinct floors in the same house are occupied by several owners. If you were to demise or sell to another the lower story of your house, and reserve to yourself the upper story, you would have the right to the continued support of the lower floor.

As to water, you may sink a well on your land, and divert by pumps and steam-engines, if you think proper, the underground water, which would otherwise percolate the soil, and flow into the river.

LETTER 6.

TO enable you to understand some terms which I must necessarily use in speaking of the remedy for breach of contract, I must explain the difference between law and equity. The division of our law into what is termed legal and equitable, arose partly from necessity and partly from the desire of the ecclesiastics of former times to usurp a control over the common-law courts.

Our legal judges hereofore adhered so strictly to technical rules, although frequently subversive of substantial justice, that the Chancellors interfered, and moderated the rigour of the law according, as it is termed, to equity and good conscience. The judges in equity soon found it necessary, like the common-law judges, to adhere to the decisions of their predecessors; whence it has inevitably happened, that there are settled and inviolable rules of equity, which require to be moderated by the rules of good conscience, as much as ever the most rigorous and inflexible rule of law did before the Chancellors interposed on equitable grounds.

The essential difference between law and equity, as it affects the subject upon which I am writing, consists in this, that equity will give you the thing itself for which you have contracted; whereas the law can only give you a pecuniary compensation for the dishonesty of the other party in not fulfilling his contract.

Thus, if you were to sell your estate to your neighbour Tompson, and were afterwards, disliking the bargain, to refuse to convey it to him, he would have it in his election to proceed against you either at law or in equity.

If he resolved to proceed at law, he would bring an action against you for the recovery of damages for breach of contract, and a jury would in general, decide the amount of the damages which you ought to pay; but still you would retain

the estate in the same manner as if you had never contracted to sell it. But if he wished to have the estate itself, he would proceed in equity against you, for what is termed a specific performance, or a performance "in specie," and the court would not, in effect, let you off the contract on payment of damages, but would compel you to convey the estate itself to the purchaser upon his paying the purchase-money to you. But of course, as the court compels you to perform the agreement, there are no damages to pay. This equity is founded upon the principle, that the court considers that as actually performed which is agreed to be done; so that the instant after you have entered into a contract to sell an estate, the court considers the estate as belonging to the purchaser, and the purchase-money as belonging to you, and so vice versa.

The terms specific performance, and action for breach of contract, will now, I hope, be familiar to you.

I shall frequently be compelled to use them in the course of my correspondence.

The remedy in equity, I must remark, is open to a seller as well as to a buyer, although a seller merely wants the purchase-money; so that if a vendor would prefer getting rid of the property, and receiving the whole of the purchase-money, to keeping the estate, and taking his chance of the amount of damages at law, he may apply to equity for a specific performance.

But equity will not interfere in every case. A man acting without good faith cannot require the extraordinary aid of the court, but will be left to his remedy at law, where his bad conduct may have its full operation with a jury.

And in many cases equity will not interfere,, although the applicant or plaintiff, as he is called, has acted bona fide; for instance, where the estate has by surprise or mistake been sold at an under-value. Thus, where the known agent of the seller bid for the estate at an auction on behalf of the purchaser, and other persons present, thinking that he was bidding as a puffer on the part of the seller, were deterred

from bidding, the court, on the ground of surprise, refused to interfere against the seller, who resisted the sale.

Equity also looks to the substantial intention of the parties, whereas law adheres more strictly to the letter of the contract. Thus, if an estate is described in a particular of sale to be in good repair, and it turns out to be in bad repair, the seller cannot enforce the contract at law; but equity, if the purchaser is not in want of immediate possession, so that there is time to do the repairs before possession is essential to him, will compel him to take the house upon being allowed a sufficient sum to repair it: if a man sell a leasehold estate, as having 70 years to run, and the term is only 68, the purchaser will in equity be decreed to take the estate with an abatement; at law, the contract cannot be enforced by the vendor. Again, if a time is stipulated for the performance of the contract, that stipulation is of the essence of the contract at law; whereas in equity, if the time was not material, or the party complaining was aware of the cause of the delay when he entered into the agreement, and the other party is not wilfully lying by, equity will compel a specific performance in the same manner as if the party had been ready to perform his agreement by the time stipulated; but parties may expressly stipulate that time shall be of the essence of the contract, so as to be binding even in equity.

If the seller cannot make a title to the whole estate sold, the purchaser is not at law compellable to take the part to which a title can be made; but in equity, if the part to which a title cannot be made is not necessary to the enjoyment of the rest, equity will compel him to take it, and will allow him a proper abatement out of the purchase-money.

In one case a man purchased a house on the north side of the Thames, which was supposed to be in Essex, but which turned out to be in Kent, a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder in Essex; yet he was compelled to take the house. These instances and others to

which I shall in subsequent letters draw your attention, will sufficiently show the difference, in these respects, between law and equity. The latitude which a court of equity allows itself in enforcing agreements against the letter, and, perhaps, in some cases, contrary to the spirit of the contract, may be narrowed by the express stipulation of the parties. This should always be attended to.

The ground upon which equity proceeds in the cases which I have mentioned is, that the agreement can be performed in substance. A purchaser cannot be compelled, even in equity, to take an undivided part of an estate—as where the seller and a third person are tenants in common, so that each is entitled to only an undivided half—if he contracted for the whole; nor a leasehold, however long the term in it may be. And if you were to buy at an auction a mansion-house in one lot, and farms, etc., in others, equity would relieve you from the whole contract, if no title could be made to the mansion-house.

If you sell an estate, your title to which proves bad, and you cannot cure the defect, equity of course cannot relieve the purchaser, unless he choose to take the title with all its faults; but the purchaser may recover damages against you at law.

However, where a man is without fraud incapable of making a good title, a purchaser can even at law only recover what are called nominal damages—a dollar for instance. I dare say that you think it high time this letter should end. You must, however, preserve your patience, or I shall never make a lawyer of you.

LETTER 7.

IN my last Letter I mentioned the principle upon which a specific performance is decreed—viz. that the Court considers that which is agreed to be done as actually performed, so that from the time of an agreement for sale the estate in equity belongs to the purchaser, and the purchase-money to the vendor. I hasten to unfold to you the very important consequences of this doctrine, to which a slight inattention on your part might wholly overthrow your plans in the disposal of your property amongst your family.

I shall first consider you as a seller. As the estate is no longer yours, if you have devised it, it will not pass to the devisee except as a mere trustee for the purchaser; and even if you have by your will directed it to be sold, and actually given the money to arise by the sale to a legatee, yet if you sell the estate yourself, he will not be entitled either to the purchase-money or the estate.

But the purchase-money, although not paid, will go to your personal representative in the same way as the rest of your personal property. Therefore, where you wish the money to go to the person who would have taken the estate, or that he should have the estate itself, in case you should abandon the contract, or it should prove to be such a one as equity will not enforce, you should carry your intention into effect by a codicil at the time you enter into the contract.

It is material you should be informed, that if you give a man only an option to purchase your estate, yet if he accept it, even after your death, the nature of the property is changed. I think that I can make this quite plain to you. You have now both land and money. I will suppose that you have by your will given your estate to your eldest son, and the money amongst your younger children. You then grant a lease of the land to Tompson, and give him an option to

purchase the estate for $25,000 at any time within ten years. You would think, no doubt, that you had secured the estate to your eldest son. But, on the contrary, if you die before the end of the 10 years, and Tompson, after your death, but within the 10 years, elect to purchase the estate, the money would go to your younger children, and your eldest son would be stripped of all his fortune! To obviate this, if you should enter into such a contract after making your will, you must, by a codicil, give the money to arise by sale to the person to whom you have given the estate, and then he will be secure of the property. and if you make your will after the contract, expressly declare that your devisee shall have the purchase-money, if the lessee make his option to take the estate.

I shall now consider you as a buyer. The estate is yours from the moment the contract is executed; and the purchase-money must be paid out of your personal property.

The consequence of equity thus deeming the estate to belong to you, is, that you may dispose of it by your will, or otherwise, even before the conveyance, just the same as if you had paid the purchase-money, and the estate were actually conveyed. You must, therefore, upon a purchase, always reflect that your disposable cash is decreased by the amount of the purchase-money; and that unless you otherwise dispose of it the estate will go to the person to whom you have given your lands by will.

A moment's reflection will show what serious consequences may follow from a neglect on your part; for suppose, you purchase an estate with the $10,000 in the funds, which you have given by your will to your younger children, and which constitutes the bulk of your personal property, and should neglect to devise the estate, the money must go to pay for it, at the expense of your younger children, who would be left nearly destitute, whilst your eldest son, to whom I am supposing you have given your lands, would have a large fortune. Distressing cases of this kind happen every now and then.

If your personal property undisposed of is not sufficient

to pay for the estate, it would be better, perhaps, to direct it to be sold again, and the first purchase-money to be paid out of the money produced by the re-sale.

You must remember that in devising an estate which you have purchased and not paid for, your devisee will be entitled to have the purchase-money paid out of your personal property, although you may have given it all to another person.

A most vexatious case once happened: A younger brother agreed to purchase an estate from his elder brother; the conveyance was accordingly executed, but the money was not paid. The younger brother then made his will, giving his property to his brother, subject to legacies, and made him executor. The will, however, was not executed to as to pass the estate. The younger brother died, and the elder brother took the estate as his heir, and also paid himself the purchase-money out of the personal property; by which he disappointed the legatees, who lost their legacies, whilst he got both the estate and the purchase-money for it. On the other hand, you must guard against the chance of the estate not being ultimately conveyed according to the agreement. For if equity should for any reason refuse to execute the contract, or a good title cannot be made, the person to whom you have given, or suffered the estate to descend, will not be entitled to have it paid for out of your personal property, although he may be willing to accept such a title as can be made to it; because equity will not interfere unless there is a binding contract at the death of the party. You should, therefore, provide for the purchase of another estate, of equal value for your devisee, in case the one purchased should not be conveyed to him. I must, however, remark, that if by your will you direct an estate to be bought for which you have not actually contracted, and the estate cannot be bought according to your direction, yet equity will decree the money to be laid out in the purchase of another estate for the benefit of the devisee.

Before I close this Letter, I shall give you a caution as

to your Hampshire estate, wherein you have only a long lease for years, which you have bequeathed to your second son John. You tell me that you are about to purchase the fee, or, as you express it, to buy the estate out and out. Now the effect of a conveyance of the fee to you will clearly be to put an end to the lease, and to give you the entire interest in the estate discharged from the lease, and so the bequest to John would be defeated ;and the effect may be held to be the same, immediately after the contract is executed, and even before the conveyance; to guard against which you should give the fee to John without delay by a codicil to your will. And in giving this estate to John, after you have agreed to buy the fee, but before the conveyance, you should go a step further, and expressly declare that he shall have the lease, although he cannot obtain the fee, for it may happen, as it has in a similar case, that the seller is not owner of the estate, or cannot make a good title to it.

You would bear in mind that, by the law of wills, any estate which you may buy after the making of your Will, will pass by a general devise in it of all your estates.

This I shall explain to you in a later Letter.

LETTER 8.

YOU ask me to tell you something about contracts, other than those relating to land.

Well, with respect to these, there exist two main rules, the first being that unless a contract be made by deed, i.e., under seal, you must be prepared to show that consideration, in the language of the lawyers, was given. In other words, if you are about to seek damages from someone with whom you have contracted for his breach of contract, you must be in such a position that you can show that you have done something, or omitted to do something, or suffered something or promised to do something in return for the promise, which you no waccuse another of not having kept.

If you cannot do this, then you have no legal right to complain of his refusal to keep his word. Let me illustrate; if from the goodness of my heart and from a mere desire to be bountiful, I announce my intention of giving you a hundred dollars, and thereafter the warmth of my generosity cools, and I refuse to carry out my promise, nevertheless you shall have no action against me, in that you have given no consideration for my promise.

I would have you observe also that there must exist the intention to make a legally binding promise. Otherwise if I bid you to dinner, and you assent but come not, then would I have an action against you, having spent much money in the preparation of the dinner to which you came not; but the truth is that under such circumstances I have no action against you.

The second main rule is that you should ever be on your guard to put into writing all these contracts, which require to be evidenced by writing. As to all other contracts, it is clear that you may put them into writing or not, as fancy or expedency shall dictate to you.

In putting your contract into writing, you must ever be mindful of the rule, which forbids the contradiction or varia-

tion of a written contract by verbal evidence. Further in saying that the contract should be in writing, I mean not in general that the contract is wholly void or of no effect, if it is not put into writing, but I mean that it will not be enforced by a court of law, unless there is at the time when an action is brought with respect to the contract a written note, from which the terms of the contract and the names of the contracting parties can be gathered, i.e. although the contract itself is not in writing at the time of its making, you may still bring an action upon it, if between the making of the contract and the action there has come into existence a written note signed by the person against whom you are going to bring the action or his agent. The chief of the contracts which must be evidenced by writing are (1) Promises by an executor or administrator to be liable for the debts of the deceased person whose estate he has taken.

(2) Promises to answer for the debt of another, i.e. to be a surety.

(3) Contracts for the sale of land or of an interest in land.

(4) Contracts where there is an intention that neither party is to perform the same within a year of its making.

(5) Agreements made in consideration of marriage. This does not mean an agreement or promise to marry, which need not be in writing.

(6) Agreements for the sale of goods of the value of fifty dollars and upwards, unless the buyer accepts part of the goods, or gives earnest money, or partly pays for them.

Here I would have you notice that a buyer of goods is said to accept them, when he does any act in relation to the goods which recognizes a pre-existing contract of sale; or to put it in another way, when he does an act with respect to them which a person who had not contracted to buy the goods would not have done, e.g., if he examines the goods to see if they are of the equality ordered by him, he does an act which shows that there must have been some contract for

the sale of the goods, for otherwise he would neither have desired, nor would he have had a right to inspect the goods. In that case, then, there need be no evidence in writing.

(7) Representations as to the solvency of another person.

(8) Again if a contract has been barred by the lapse of time, as it is in general after the lapse of six years from its creation or from a written acknowledgment of it, a mere verbal promise will not revive it.

I would have you notice a few other peculiarities as to contracts.

If a contract be made under seal, and there be no consideration, yet the contract may, as I have said, be sued upon and damages be recovered for its breach, yet if what you desire be not damages, but that the contract itself be carried out in deed; that you will not be entitled to, in any event, owing to the absence of considerartion.

If you enter into a contract for the purchase of merchandise, it is clear that you and the seller may enter into any arrangement you may please as to the time when what is bought by you is to become yours and to cease to be the seller's, i.e. as the lawyers say, as to the time when the property passes.

That this time is of considerable importance I think you will acknowledge from a consideration of the following not unlikely occurrences. You bargain with a man for a stack of hay or for half a stack of hay at a set price. In the night time, after your bargain, a fire arises, and the stack is consumed. On whom will the loss fall? Clearly upon the owner. Yes, but who is the owner? That depends upon the bargain. True, but suppose they made no special bargain?

A herd of cattle is sold, or half a herd is sold and while they are still on the seller's ranch, and unpaid for, a calf is born. To whom will it belong in the absence of special bargain?

Certain rules have been formulated by law to settle these

questions, and I will now try to set them down in as simple a fashion as I can.

The property in a specific thing, in an ascertained thing, a thing which you have settled on as the actual particular thing which you wish to have for your own passes at once.

The property in unascertained goods does not pass until they are ascertained, e.g. the property in half a stack of hay does not pass until it is settled which half is being sold, the top half or the bottom half, the right hand half or the left hand half, or a half by weight; in the latter case the half is clearly not ascertained until it has been weighed and set apart. So in general all goods in bulk, such as 100 lbs of sugar are only ascertained when they have been set apart to meet the contract with the consent of the buyer, which consent is usually an implied consent, and not an express one.

If anything is to be done to the article sold to put it into a fit state of delivery, then the property does not pass until that thing be done, so again, where things have to be weighed, measured, tested, counted, etc.

Where goods are sold on approval or on sale or return, the property passes to the buyer when he signifies his acceptance of them, or where he does any other thing adopting the transaction, such as holding them for an unreasonable time, or selling them to another as his own.

You must not think, however, that because the things sold may have become yours that you are therefore entitled to the delivery of them to you.

This is not so, unless you have made some other arrangement with the seller, he is entitled to retain them, until you either pay or tender the whole price agreed upon.

If you wish to accept an offer made to you, you must be careful to accept it in the very terms in which it is made to you, otherwise you may find yourself in the position of being regarded as having refused the offer and made one of your own, which cannot work as a binding contract, until it has been in turn accepted by the other party.

Again you must remember that a statement of willing-

ness to keep an offer open for a certain time is not binding, unless there be a separate consideration for the separate agreement to keep the offer open, or, to put it any other words, when you are taking an option upon anything, be sure and see that there is a separate consideration for the option, no matter how small it may be.

Will you also please remember, that if you are making a contract by post or in such circumstances that it would be proper to send your acceptance of an offer by post, then your acceptance and the contract is complete. So far does this rule go, that even if the other party to the contract should have posted a letter to you revoking the offer before you posted the letter accepting the offer, yet, if you had not received his letter before you posted yours, the resulting contract would be a good contract.

And now I come to a point in which you will have to be very wary. You may sometimes think that you are accepting an offer, whereas, in fact, all that you are doing in the eyes of the law is making an offer in response to a request to do so. Let me give you an illustration:— A Insurance Company sends you a proposal form. That is not an offer, that is only a request to make an offer. The Insurance Company is something in the position of a person inviting tenders, so again where a railway Company advertises that it intends running certain trains, it is probably not making an offer which may be acepted by any one tendering the fare and asking for a ticket; the true view more probably is that it is merely inviting offers, and that there is no contract until the offer of the intending passenger is accepted by the issue of a ticket.

Before closing this letter I should like to say something about the contracts of infants, meaning by that term persons under the age of twenty-one, lunatics and drunken persons. An infant is liable to pay for necessaries and is bound by certain contracts, which are clearly for his benefit. It would take us too far from the general idea of our correspondence, were I to enter into further details other than to point out

that what are necessaries for one person may not be considered necessaries for another; they are goods suitable to the condition in life of the infant and to his actual requirements at the time of the sale and delivery.

Any person who is suffering from mental disease, or is so drunk that he does not know what he is doing, is not capable of contracting and any contract made by him may be repudiated, provided that the state of his mind was known to the other party to the contract.

In making a contract with a company or a corporation, you will be well advised to ascertain whether it has power to make the contract in question, for such a body cannot, like an ordinary person, make what contracts it pleases, but only such contracts as are within its power, unless indeed it be created by the express or presumed charter of the King.

As a rule, when you are about to make a contract you are not bound to give information to the other party and are not bound by statements which are innocently made by you prior to a contract, but you must be careful, when you find out that you have innocently made a mistake, to correct it.

There are, however, some contracts in which you cannot satisfy the requirements of the law by merely remaining silent. In these cases a duty lies upon you to disclose all material facts, which are within your knowledge. Such contracts are insurance contracts, in which you must disclose all the circumstances which would influence a prudent insurer in fixing the premium or determining whether he will take the risks or not. In contracts of suretyship you must disclose all the facts within your knowledge, the existence of which would make the liability undertaken by the surety substantially different from that which the surety might naturally expect up. If you are an agent for another or his guardian or trustee, you must in any dealings with your principal, ward or beneficiary, or their property make the most ample disclosure.

Where you have been induced to enter into a contract by the fraudulent misrepresentation of the other party and

have suffered any damages, you may recover damages for the fraud, or you may repudiate the contract, which practically means that you may refuse to be bound by it or you may do both. By a fradulent misrepresentation I mean one that is made knowing that it is false or without belief in its truth, or recklessly, without caring whether it is true or false.

Where the misrepresentation is innocent and not fraudulent, you will be able to set it up as a defence, should the other party sue you or you can repudiate the contract, but you cannot recover damages.

You cannot in either event repudiate the contract, unless you give up all the benefits you have derived from it and restore the other party as far as possible to the same position as before and you cannot repudiate it where some third person has innocently acquired an interest in it, or you cannot restore the other party to his original position.

And now I must end this letter already too long in the hope that though I have but touched the fringe of the subject, I yet have put you in possession of information that may stand you in good stand in the conduct of your ordinary life.

LETTER 9.

YOU asked me to tell you something of the special law relating to women both in their capacity as holders of property and in their relationship towards their husbands. In this region the law has in the last half century or so, changed so considerably that the balance, which so long hung to the side of the husband, now may be thought to incline to that of the wife. Speaking generally and subject to the exceptions that I shall later point out in this letter a married woman is absolutely entitled to all her own property and as long as she is alive her husband has no rights therein, but the same thing cannot, as will later appear, be said as to the property of the husband.

It is said that a husband is always liable for the wrongful acts committed by his wife after marriage, thus if he have a wife possessed of a ready tongue, he may perchance find himself involved in an action of slander, or should she be a forceful person, a peaceful husband may be enmeshed in an action of trespass. Though indeed fortunately for the husband when the marriage is terminated by death or some other untoward cause, his liability ceases. The liability I speak of, though existing even when the husband and wife are living apart, will not continue after a judicial separation, i.e. in jurisdictions where it is possible to obtain such.

Although, as we have seen, the husband is liable for these wrongs committed by the wife during marriage, yet he is not liable for her contracts; and so it has been held that he is not liable for her wrong actions that are closely conected with the contract. Thus he is not liable for a fraud committed by his wife, such as the false representation that she is a person of independent means made in procuring a contract to be made with her.

A husband is no longer liable for wrongs committed by the wife before marriage, except to the extent of any property he may have acquired upon marriage, nor is he

responsible for breaches of trust, which are not in the eyes of the law deemed wrongs or "torts" as the lawyers would call them, unless he has himself interfered with the administration of the trust.

From the fact that a husband is not liable for the debts of the wife, it follows that he is not liable as husband for debts contracted by her with the butcher or grocer.

This freedom from liability is however rather a freedom of words than a freedom of verity, inasmuch as the law will in most cases hold that the wife in making such purchases acts as an agent for the husband and so imposes liability upon him.

If the husband should have forbidden the wife to pledge his credit and this fact should be known to the grocer or baker, he will not be liable.

If the wife has been in the habit of ordering goods of any description, e.g. expensive dresses or diamonds, from a dealer therein, and the husband has been complacent enough to pay duly for the same, then he is said to have held out the wife as his agent for the purpose of purchasing diamonds or expensive dresses, and will have the privilege of paying for them.

It should be noticed that it is always easier to show that a wife has been an agent of the husband for the purpose of purchasing the necessaries of life, than in the case of luxuries.

If the husband has given the wife a sufficient allowance for all her purchases, then it may be possible for the husband to escape liability for expenditure hidden from him.

I think I can best illustrate by showing how a warning to tradesmen can save the husband's cheque-book. If the husband puts an advertisement in the papers warning tradesmen not to supply his wife with goods, then he will avoid responsibility as to debts incurred by his wife with tradesmen with whom she has not been in the habit of dealing; but as to others, the advertisement will be of no avail and

the husband will be well advised to give personal notice to the old tradesmen.

And now I must speak somewhat of the rights of, or restrictions upon a married woman in her own dealings or those of her husband in dealing with land or other real property.

The rights of a married woman in this respect unfortunately vary considerably according to the province in which the land is situated.

In many provinces a widow has what is known as the right of dower, that is, the right to hold for her own life one third of the lands held at any time by her husband during the continuance of marriage.

This was the common law rule; but exceptions from it of the right of mining land and wild lands have been engrafted on it in different jurisdictions.

The right to dower ceases upon the wife voluntarily parting with the said right by a deed barring the right to dower.

I do not intend to burden you with all the intricacies of this law of dower. Should you have on any practical occasion call for any more detailed knowledge on the subject than is now given by me, I should advise you to have recourse to a lawyer. Begging you to remember once more what I have already endeavored to impress upon you, that an early visit to a lawyer will often save many more visits, as well as much trouble and money; a piece of advice which after all is a piece of household learning, enshrined as it is in the maxim "A stitch in time saves nine."

I may mention, however, that British Columbia and Newfoundland follow the English rule that a wife has no dower in any lands which the husband has disposed of either in his life-time or by his will, and that in those jurisdictions there is no necessity for a deed barring dower.

In Ontario, New Brunswick, Nova Scotia and Prince Edward Island, dower remains in very much the same posi-

tion as it was under the old common law rule of a life interest in a third of the estates of the husband.

In Alberta, Manitoba, Saskatchewan and the Yukon Territories there is no right to dower properly so called.

In Alberta and Saskatchewan, however, wives and widows have acquired new rights of a somewhat peculiar nature which I will explain to you now as well as can be done in a few words and within the limits of this letter.

In Alberta, no married man can transfer or mortgage or make any other disposition of what is known on the fact conferring the privilege as a "homestead," that is the land of a certain size on which his residence is situated, except with the written consent of his wife registered under the Land Titles Act, which she has acknowledged apart from her husband to have been executed by her or her own free will and accord and without any compulsion on the part of her husband.

It should be noticed that even if the husband does change his residence the law can take no notice of such change as far as the wife or widow is concerned unless the change has been consented to in writing by his wife.

In Saskatchewan the wife has similar rights, except that the court, when the wife is living apart from her husband under circumstances dissentitling her to alimony or is a lunatic or person of unsound mind, may dispense with the signature, etc., of the wife ,and it is possible for a mortgagee or transferee of the "homestead" or residence of the husband to get a legal claim to it where the husband has sworn falsely as to the fact of his being unmarried.

So again in Alberta, Saskatchewan and the Yukon Territories, a widow acquires a right after the death of her husband to the land which constituted his actual residence, also called a "homestead" within certain limits, if it is necessary for her maintenance, while in British Columbia a wife has certain rights in the husband's homestead, if it be properly registered.

There remains one other peculiar statutory provision

to which I had better call your attention, that is the provision in Alberta which provides that if a husband dies, leaving a will and the wife thinks that she is thereby placed in a worse position than she would have been if her husband had died not leaving a will, she can apply to a judge who can under these circumstances, practically make a fresh will for the dead man.

It must not be imagined that a wife or widow or rather a widow can avail herself of all these rights at the same time. There is a doctrine known to the law as the doctrine of election which may be stated in popular language as follows: Where by the same document (e.g. a will) a gift is made to a person of some part of the property of the giver and a gift of the property of the person who receives the first gift is given to another, the person, to whom the first gift is made must elect or choose whether he will take his own property or the property of the maker of the document. If he does the former, he must compensate the person to whom his property was given out of the property of the maker of the instrument given to him. Thus, if in Ontario a husband gave by his will all his lands to his son, and gave all his horses, cows, ploughs and other personal property to his wife, the wife would have to elect or choose whether she would take the horses, etc., and give up her right to dower to the son, or whether she would keep her right to dower and out of the horses, etc., make compensation to the son for his loss of the interest given to him by the will.

There are many and intricate rules, which differ in the various provinces in Canada, as to how the property of an intestate, that is of a person who dies without making a will are to be distributed. I cannot here attempt to do more than to set down the main rules, mainly those which have to do with the cases where a person dies leaving a wife or husband only or a wife or husband and a child or children. I will first take the case where a man dies leaving a wife only. In that case in Alberta, Manitoba and Saskatchewan, all his property goes to his wife. In Ontario a thousand dollars

goes to the widow and the rest is divided between the wife and the next of kin.

In Newfoundland, New Brunswick, Nova Scotia, Quebec and British Columbia, the wife takes half and the remainder goes to the heirs of the husband. In Newfoundland the wife takes one thousand dollars, and half of the excess of the estate over two thousand dollars.

If a wife dies leaving a husband only, then in Ontario, Nova Scotia, New Brunswick, Quebec, British Columbia and Newfoundland, half goes to the husband and the remainder goes to the heirs of the deceased. In Manitoba, Alberta, Saskatchewan, N. W. Territories and Prince Edward Islands, the husband takes all. It should be noticed that in Quebec, if the deceased person leave father or mother or brother or sister or nephews or nieces, the wife or husband in order to claim the benefit of these provisions must abandon rights in community of property and rights of suvivorship including dower and the husband has to make corresponding surrenders.

If the deceased person leaves a wife and child or children, speaking generally, one third goes to the surviving wife or husband and three thirds to the child or children, with the exception that in Alberta, if there be only one child, the widow will share equally with the child, and whether there be children or not, the husband takes the whole of the wife's personal property and one third of her land, the child or children taking two thirds of the land.

In the case of descendents as a rule, the children share equally, but children of a deceased child are entitled to take the share of their deceased parent, e.g. if a man died leaving a wife, one child and three grandchildren (the children of a deceased child), the wife will take a third of the estate, the child will take a third and each of the grandchildren will take a ninth.

It only remains now, I think, to describe the interest taken by a husband in the lands of a deceased wife which was known as a tenancy by curtesy, that is the right of a husband

to take a life interest in all the lands in which his wife had a fee simple, provided there had been issue of the marriage born alive and capable of inheriting the land.

Where the wife leaves a will, the husband must elect as to whether he will take his curtesy right. or will take under the will in the same manner as has been described with respect to the dower rights of the wife. It must be remembered, however, that tenancy by the curtesy has been abolished in Ontario, Manitoba, Alberta, Saskatchewan and the North West Territories.

It may be well to explain here what is meant by the term "restraint upon anticipation." This was a doctrine invented by the Lord Chancellors of olden days and it simply means that when property is given to a married woman for their separate use, a proviso could be introduced restraining them from anticipating the benefits to accrue from it, so that they could not transfer it or charge or mortgage it and in general were only allowed to take its income as it came in.

It was considered that to give property in any other way to a married woman would be practically to give it to her husband and, therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income.

This restraint clearly served most beneficial purposes as long as it was the law that all the wife's property coming to her during the marriage fell under the husband's dominion; to different degrees, it is true, but still under his dominion; and even still may serve a useful purpose when the husband's power over the wife's property is no longer a legal one, but may nevertheless be a very real one.

It is strange in what odd places the old doctrine that man and wife were but one person in the eye of the law still lingers, thus it has been decided that a wife cannot take criminal proceedings against her husband for a defamatory libel upon her concerning her profession of a vocalist, and it has been doubted whether the communication of a libel from a husband to his wife is a sufficient publication to render the husband liable in an action for libel.

LETTER 10.

I NOW write to you upon one of the most important subjects on which I have promised you any information.

Before making your will, there are many questions which you should ask yourself.—Is it probable that I shall be much in debt at my decease? Are there charges on my estate which must be provided for on my death? What is the nature of my property? Is any part of it already settled, or agreed to be settled, on my family? Have I charged portions on any part of it for my children? What advancements have I already made for them? Is my wife dowable of any part of it?

If your children are entitled to portions, you should declare whether you intend what you give them by your will to be in addition to their portions, or in satisfaction of them. I have already advised you, if you make any provision for your wife, to state whether you mean it to be in lieu of dower.

If you have given your children legacies by your will, and afterwards advance portions with them on their marriage, you should declare by a codicil whether they are still to be entitled to the legacies.

If you have advanced them in your lifetime, and then make any provision for them by your will, you should declare whether you mean it to be in addition to the advances. So if you have given a legacy by your will, and you afterwards give another to the same person by a codicil, you should declare whether or not you mean him to have both.

Never in your will say generally that your debts shall be paid, but declare out of what fund they are to be paid; nor leave it in doubt, if it should become necessary to sell your property to pay them, by whom the sale is to be made. The Legislature has saved you from the danger of "sinning in your grave," for now all your property in land, which

you shall not by your will charge with or devise subject to your debts, and of course all your personal estate, will be liable at your death to all your debts—by simple contract as well as by specialty.

I am somewhat unwilling to give you any instructions for making your will, without the assistance of your professional adviser; and I would particularly warn you against the use of printed forms, which have misled many men. It is quite shocking to reflect upon the litigation which has been occasioned by men making their own wills, or employing incompetent persons to do so. To save a few dollars in their lifetime, men leave behind them a will which it may cost thousands of dollars to have expounded by the Courts before the various claimants will desist from litigation. Looking at this as a simple money transaction, lawyers might well be in despair if every man's will were prepared by a competent person. To put off making your will, until the hand of death is upon you evinces either cowardice, or a shameful neglect of your temporal concerns. Lest, however, such a moment should arrive, I must arm you in some measure against it.

If you wish to tie up your property in your family you really must not make your own will. It were better to die without a will, than to make one which will only waste your estate in litigation to discover its meaning. The words "children," "issue," or "heirs," sometimes operate to give the parent the entire disposition of the estate, although the testator did not mean any such thing. They are seldom used by a man who makes his own will without leading to a lawsuit.

I could, without difficulty, run over the names of many judges and lawyers of note, whose wills made by themselves have been set aside, or construed so as to defeat every intention which they ever had. It is not even a profound knowledge of law which will capacitate a man to make his own will, unless he has been in the habit of making the wills of others. Besides, nowithstanding that fees are purely hon-

orary, yet it is almost proverbial that a lawyer never does anything well for which he is not fee'd. Lord Mansfield told a story of himself, that feeling this influence, he once, when about to attend to some professional business of his own, took several guineas out of his purse, and put them into his waistcoat pocket, as a fee for his labor.

Always avoid, and particularly when you make your own will, conditional gifts and devises over in particular events. It is folly of most testators to contemplate a great many events for which they too often inadequately provide. You give me a horse, "and if I die," you give it to my son. Here a question at once arises, when the death is to happen—Generally? In your lifetime, or in my son's? Pray avoid this; and if you must give a thing over, after you have given the entire interest to one, state precisely in what event, and if depending upon the death in your lifetime, or in the lifetime of the legatee over: And I must tell you, that where you have given the absolute interest, you ought not to make any gift over which will not take effect in a life, or lives, who shall be in existence at your death. The rule goes somewhat farther, but I would not advise you, without advice, to go beyond the line which I have marked out; and, indeed, without advice you will be more bold than wise to go even so far.

Where a man has a large family to provide for, it is often advisable to direct all his property to be turned into money, out of which he may order his debts and legacies to be first paid, and the residue to be laid out at interest in the names of trustees, for the benefit of his family.

Sometimes a man making his own will omits to name executors, which causes much trouble and considerable expense after his death.

As regards the will itself, the all-important point is to comply with the statute in the mode of executing it. Whatever is the nature of the property, two witnesses are required to every will or codicil. Every testamentary instrument is in this respect placed on the same footing.

Though not so in olden days, it would now be difficult for a man to place his signature so as to render his will void, for it will be valid if the signature be so placed at or after, or following or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

But although the signature is properly placed, yet any disposition or direction which is underneath, or which follows the signature, will be inoperative, nor of course will the signature render valid any disposition or direction inserted after the signature shall be made.

But not to trouble you with nice distinctions, I advise you to make your will in the following manner:—Take care that if written on several separate sheets of paper, they are all fastened together, and that the pages are numbered. Sign your name at the bottom of each sheet, and state at the end of your will of how many pages your will consists. It has been suggested by a learned writer that where the testator is "in extremis" it seems advisable that the first or only signature should be at the end, for it has sometimes happened that a testator who has begun to sign the several sheets, has expired or become insensible before he had reached the last. If there are any erasures or interlineations put your initials in the margin opposite to them, merely to identify them, "and notice them in the attestation." The attestation should be already writen at the end of the will, and may be in this form:—

"Signed by the above-named testator, in the presence of us present at the same time, who have hereunto signed our names as witneses thereto, in the presence of the said testator, and in the presence of each other (the words interlined in the 4th line of the 3rd page having been first added, and the erasures in the 7th and 8th lines in page 6 having been first made.")

The two persons intended to be the witnesses should be called in, and told that you desire them to witness your

will, and then you should sign your name in their presence, and desire them each to look at the signature. Your signature should follow your will, but should precede the signatures of the witnesses, for if you were to sign after they had signed, your will would be void. When, therefore, you have signed, they should sign their names and residences at the foot of the attestation. You will observe, that according to the attestation, neither of the witnesses, although he has signed the attestation, should leave the room until the other witness has signed also. Remember that they must both sign in your presence, and therefore you should not allow them to go into another room to sign, or even into any recess, or any other part of the same room, where it is possible that you might not be able to see them sign. If, therefore, you do not choose them to sign after you at the same table or desk, have a table placed close to you before they come into the room, so as to create no confusion, at which they can and ought to sign before leaving the room. If you were to send your servant, who happened to be one of your intended witnesses, out of the room even for a table, he would probably leave the room before you sign. If after your death a question were to arise upon the fact of your having signed in the presence of both of the witnesses present at the same time, the man would of course admit that he left the room before you did sign, and then imagine what reliance would be placed upon that fact in cross-examination, and in the address to the jury. The precaution which I recommend would prevent this difficulty from arising.

Even if you are ill and confined to your bed, you should have a table ready at your bedside at which the witnesses should sign after you, and you should not turn your back upon them whilst they are signing. These simple precautions will render it impossible to impeach your will for want of its due execution.

The actual law is, that no will shall be valid "unless it shall be in writing, and signed at the foot or end thereof by the testator, "or by some other person in his presence,

and by his direction"; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; "but no form of attestation shall be necessary." And the words, "at the foot or end," have been explained and extended by a later Act in the manner to which I have already referred, so as to render valid any common mode of signing a will.

You will observe, therefore, that if you cannot sign your name yourself, some other person may do so for you in your presence, and by your direction; but this should be noticed in the attestation . It will be no objection that the person signing for you is also one of the attesting witnesses. It has been decided, that where a person signed for the testator, but in his own name, stating it to be for the testator, and by his direction, the signature was a good one. You might, if you could not write, or did not choose to do so, sign by your **X** or mark, and so may the witnesses, if they cannot write; but to sign by a mark when you can write would be an act of folly, and if you can avoid it, do not have marksmen for witnesses. Although one of the witnesses is unable to write, yet the other cannot sign for him; but in such a case the other witness may guide the hand of the witness unable to write, so as to enable him to write his name. It would, however, be more advisable to let a marksman affix his mark.

A husband cannot sign for his wife where they are the witnesses. A witness cannot, by going over his signature with a dry pen, give effect to that signature. You should attend to this if you have occasion to re-execute your will, and should require the witnesses to re-write their names as witnesses to the re-execution. I will presently explain to you the object of a re-examination of your will. I have shown to you that there must be two witnesses to your will; but you may have more if you please, although I advise you to be content with two.

But although a witness cannot give effect to his signature by recognition, yet you will have observed that you, the maker of the will, may, if you please, sign your name in the absence of the witnesses, provided you acknowledge "your signature," not merely the will, in their presence. "But the witnesses should see that the will is signed by you." Pray attend to this: if you do not sign in their presence, point out your signature carefully to them, although you need not tell them that it is your will, but it is better to do so. If you were to fold your will so as to conceal all its contents and the attestation clause, and the witnesses were not to see your sign nor see your signature, the will would be void, although your acknowledged the paper to be your will before the witnesses.

But even gestures by a testator, intimating that he has signed the will, and wishes the witnesses to attest it, have been held sufficient where they saw the signature. A will, however, will not be set aside simply upon the infirm or confused recollection of witnesses. Their want of recollection where the will, on the face of it, is properly executed, will not have much weight. At a distance of time, persons not accustomed to witness the execution of instruments, forget nearly all that passed; therefore defective memory alone in witnesses cannot be allowed to overrun a will. The Court must first be satisfied that the will was not duly executed, and where the negative is not established, the affirmative must be held to be proved. Where a will was properly signed on the face of it, and two servants attested it, and the testatrix was writing when the first of them went into the room, although neither of them knew it was a will, or saw the testatrix sign, and she did not acknowledge her signature, yet as the paper was open, and they might have seen it, the will was established. If the witnesses disagree, and the one against the will is discredited, the evidence of the other, with corroborating circumstances, would support the will. If you follow the plain directions which I have given you, no such question could arise.

I have advised you to keep both of the witnesses present until they have both signed the attestation. This is not required by the statute, and after some doubt, it appears to be settled that it is not necessary, although I think it highly expedient, for it will impress the matter more upon their minds; but do not fall into an error on this head. You must sign or acknowledge your signature in the presence of the two witnesses present at the same time, according to the very words of the statute.

I have furnished you with a formal attestation, which will save both delay and expense in the proof of your will after your death; but although the statute requires the witnesses to attest and subscribe the will, yet declares that no form of attestation shall be necessary, so that no attestation clause whatever is required. If the witnesses sign as such, that is sufficient. The word "witnesses," for example, prefixed to their names at the end of the will, would be a compliance with the law.

The Act protects you against the incompetency of the witnesses to prove the execution of your will; so that although they may have been guilty of crimes, for example, which would formerly have excluded their evidence in common cases, yet that would not render your will invalid. You would not, of course, if you were aware of it, allow persons of bad character to witness your will. Creditors or executors may prove the execution of a will to which they are attesting witnesses; but no person to whom you give a legacy, or to whose wife or husband you give one, should be a witness to your will; for although the testimony of such a witness would be good, the legacy to him or her, or to his or her wife or husband, would be void, as a rule.

I have advised you not to lose sight of the witnesses until they have signed the attestation: on no account allow them to take the will out of the room where you sign it, or even to sign it in any part of the room where you cannot see them. The decisions on this head reflect no credit on the law of England. It is, however, sufficient if the witnesses

sign where you might see them; it is not necessary to prove that you actually did see them. Even in the case of a blind man, he is treated as if he could see, for the witnesses must sign where, if he enjoyed the organs of sight, he could see them.

In one case, where a lady went to her attorney s office to execute her will, but executed it in her carriage in the presence of witnesses, who then returned into the office to attest it, the validity of the will was established, because the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the lady might see what passed—that is, the witnesses signing the attestation. In another case of this nature, there was an unseemly contest between the Court of Chancery and the juries who had to try the validity of a will of a noble Duke, which depended upon the question whether the testator could see the witnesses who signed in an adjoining room. Two juries found in favour of the will, and yet the Court directed a third trial.

If you add a codicil to your will, you should call it a codicil, and should execute it, and have it attested, just as if it were an original will. Remember that you cannot give a single additional legacy without once more going through these ceremonies.

Do not make your will at intervals. If you do you must execute what you have written every time you leave off, and it must be attested just as if it were a full disposition, if you mean to give effect to it, although you should die before you finish your will. If you were to write two testamentary instruments on the same sheet of paper, and sign them both, and the witnesses were actually witnesses to the signature to both, yet if they signed an attestation at the end of the first instrument, that would not render the second operative.

If you obliterate, interline, or make any other alteration in your will after it is executed, you must sign your name, and the witnesses subscribe theirs " in the margin, or on

some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum, referring to such alteration, and written at the end or some other part of the will." If you neglect this direction, the alteration will not have any effect, except so far as the words or effect of the will before such alteration shall not be apparent; for if the obliteration is effectual, of course the disposition in the will as it originally stood cannot be made out; and where the intention is simply to revoke, and not to substitute another legacy for that given by the will, no evidence can be admitted to show what the words really were; but expert persons may be employed, and magnifying glasses may be used in order to make out the words.

The initials of the testator and of the former witnesses have been deemed sufficient to give effect to such interlineations. I recommend you to have all the names written at length; it would be still better to re-execute the will, and have it regularly re-attested, noticing the interlineations.

Generally speaking, any alteration should be made by a regular codicil, and not by obliteration or interlineation. If there are any interlineations in your will unattested, it will be presumed that they were made after the execution of your will, and they consequently will be inoperative, although parol evidence may be received to show that they were made before the will was executed.

A codicil duly executed will make the will speak as of the date of the codicil, unless a contrary intention appears. So a will or a codicil not duly executed may be rendered valid by a later codicil duly executed, and referring clearly to it, or in such a manner as to show the intention; therefore, if you were to begin your codicil, "This is a codicil to my last will," and there was only one will, those words would set up the will, although not duly executed. But if you had several wills and codicils in your possession, and some were not duly executed, and by a codicil duly executed you were expressly to confirm all your wills and codicils, this codicil would only confirm those which

were duly executed; for they by themselves would satisfy the strict meaning of the words. This was decided in a contest for large legacies under dispositions by the late Marquess of Hertford. No doubt a harsh construction; but without perplexing you with other instances of a strict construction on this head, this may serve to point out to you how careful you should be in referring distinctly to any unexecuted testamentary papers which you desire to render valid.

Although by a codicil, duly executed, you may set up a prior will, not duly executed, yet you cannot by a will, though duly executed, give validity to any future codicil you may make, not duly executed.

LETTER 11.

I MUST now inform you how you may revoke your will, or revive it after you have revoked it; and my observations will apply to codicils as well as to wills.

Your will, then, may be revoked by another will or codicil executed in the manner I have already pointed out, or by some writing declaring an intention to revoke it, and which must be executed in like manner; or by the burning, tearing, and otherwise destroying the same, by yourself, or by some person in your presence and by your direction, with the intention of revoking the same. As there must be an intention to revoke, if a testator, whilst of unsound mind, were to destroy his will, probate would be granted of the draft of the will; and destruction of the will by accident or mistake, if clearly proved, would not defeat the gifts, if the contents of the will could be shown. A man's will duly executed was found at his death with the signature of his name erased, but with another like signature just below where the original signature stood, and no explanation could be furnished, but the will was supported, as it was considered that the erasure was not made by the testator with an intention to revoke his will. You must be content with these instances.

But then you may revoke your will by burning, tearing, or otherwise destroying it, which enactment excludes the mode which was sanctioned by the former law, of cancellation, or striking the will through with a pen; therefore crossing out your name or the names of the witnesses is not a revocation.

But burning ,tearing out, or cutting out your name from the will would be a revocation, for your will could not operate without your signature. The whole will would be destroyed by the removal of your signature. A will written in pencil would be destroyed by removing the words by india-

rubber; even obliteration may amount to a revocation, as where the testator obliterates his name so that it cannot be made out, or if he erases it in like manner with an intention to revoke. If, however, you intend to revoke your will, the safer way is wholly to destroy it. And if you have executed two parts or copies of your will, take care and destroy both. If you throw your will on the fire with an intention to revoke it, you should see that no one takes it off before it is burnt, for unless it is at least partially burnt, there will be no revocation.

There is still another act which will operate as a revocation of your will—your marriage after the execution of it, with an exception which would only perplex you; and the same law applies to your wife, for marriage of either sex operates as an immediate and total revocation of a prior will. This ought to be universally known; it is no improvement of the old law. When a man marries, he should immediately make a new will to meet the obligations which he has imposed upon himself. If he really mean his old will to stand, he must at once re-execute it or declare his intention by a codicil and, I must always repeat, duly executed.

I advise you to take the above as the general rule, though in Ontario marriage does not revoke a will in which there is a declaration that it is made in contemplation of marriage.

But no presumption of an intention on the ground of alteration of circumstances is allowed to revoke a will.

The Civilians carried the doctrine of presumption so far as to hold every will void in which the heir was not noticed, on the presumption that his father must have forgotten him. From this, as Blackstone reasonably conjectures, has arisen that groundless vulgar error of the necessity of giving the heir a shilling, or some other nominal sum, to show that he was in the testator's remembrance. The practice is to be deprecated, as it wounds unnecessarily the feelings of a disinherited child. This you may say does not always happen. An assembled family, as the legacy to each

was read aloud, sobbed and wished that the father had lived to enjoy his own fortune. At last came the bequest to his heir—"I give my eldest son Tom a shilling to buy him a rope to hang himself with." "God grant," says Tom, sobbing like the rest, "that my poor father had lived to enjoy it himself!"

There are now only four modes by which a will can be revoked. 1. By another inconsistent will or writing executed in the same manner as the original will. 2. By burning, or other act of the same nature . 3. By the disposition of the property by the testator in his lifetime; for of course that leaves nothing for the will to operate upon. 4. By marriage. By the 2d and 4th modes, the revocation, as I have already intimated, will be complete. By the 1st and 3rd, consistently with the new disposition, the revocation may be partial only.

You may wish to revive you will after you have revoked it; this can only be accomplished by the re-execution of it, or by a codicil duly executed, and showing an intention to revive it. And therefore you should expressly declare that you intend to revive your will, and that it shall remain in full force in like manner as if it has not been revoked.

There is a provision as to revivals of revoked wills, which may puzzle you at first sight. "When any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, "unless an intention to the contrary shall be shown."

Let me explain this to you. Your will is made, and then by a codicil you revoke one of the legacies given by the will. You then make a second codicil, by which you wholly revoke the will; lastly, by a re-execution of the will, or by a codicil duly executed, you "revive" your will,

without noticing your first codicil revoking the legacy: the consequence would be that the legacy would stand revoked, and would not be revived, although the rest of the will would be. If, therefore, in such a case you desire the gift to the legatee to revive also, you should expressly declare such to be your intention, and then every part of your will would be revived. Bear in mind, that these observations are confined to wills which have been already revoked; for where the will has not been revoked, a codicil duly executed would operate to give effect, if necessary, to the prior will as of the date of the execution of the codicil, unless a contrary intention appeared. There is one point of importance to which the attention of every man should be drawn. A will which shall be in any manner revoked will not be revived by the re-execution of the will, or by a codicil, unless "showing an intention to revive the same." Now marriage will operate as a revocation of a will, and that, I suppose, will be held to within this clause. Well, a man marries after he has made his will, but is wholly unconscious that his marriage has revoked his will; he subsequently to his marriage makes a codicil giving a legacy; yet unless that codicil show an intention to revive the will, it will remain inoperative.

No conveyance or other act by you subsequently to the execution of your will, in reference to any property comprised in it, except such an act as will revoke your will, will prevent the operation of your will with respect to such estate or interest in the property in question, as you shall have power to dispose of by will at your death. I must explain this to you: By your will you have given your estate in Alberta to one of your sons; now if you were, after your will, to convey that estate to another of your sons for his life, the estate would still, but subject to this life-estate, go under your will to the son to whom you devised it, without its being necessary for you to re-execute your will.

Your will, I must tell you, will be construed with reference to the real and personal estate comprised in it [that is,

with reference to any gift in it of real or personal estate], to speak and take effect as if it had been executed immediately before your death, unless a contrary intention appear by your will. And, finally, every will re-executed, or republished, or revived by any act, will, for the purposes of the Act of Parliament, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived. All these are excellent provisions, and calculated to carry your testamentary intentions into effect.

LETTER 12.

THIS is my last Letter on the subject of Wills. I have already pointed out to you how your will should be executed, and how it may be revoked, and how revived after revocation. I proceed now to point out to you the operation which, by statute or law, various dispositions in your Will will have.

1. You may dispose by will of all your real and personal estate to which you may be entitled at the time of your death — property of every description. And very general descriptions will pass leaseholds, as well as freeholds. A general devise or bequest, too, will pass any real or personal estate which you have power to appoint in any manner you think proper; that is, to whom you think proper, and therefore a power to appoint to your children would not fall within this description. Both, as to Freeholds and leaseholds, and as to property over which you have a general power, the property will not pass if a contrary intention appear by your will . You will observe, that if you devise all your real property generally, any subsequently acquired real estate will pass by it without the necessity of any re-execution. If you intend to confine the operation of your gift, you should express that intention.

You may devise and bequeath any of your "expectancies," and if they drop in in your lifetime they will pass by your will. Whatever, therefore, you may expect as heir-at-law, or next of kin, or devisee, or legatee of any living person, will pass by your will, if you bequeath it, and live to be entitled to it; and as to one interest, as I will presently point out to you, although you do not survive the testator. Although you have no real estate when you make your will, yet if you give all your real estate by it, any estate which you subsequently acquire by purchase or otherwise will pass by it without the necessity of a re-execution. In trusting to your

will passing, without your re-executing it, any subsequently acquired property, be careful that the words are sufficient to pass it: for where an estate was devised by its name, "All my Quendon Hall estates in Essex," after-acquired property, although the testatrix had contracted to buy part of it before the will, and most of it consisted of small additions to the principal estate, was held not to pass, for the Court could not think that the testatrix intended to include it.

Do not, where it is not necessary, give any personal chattel specifically. This you cannot avoid, if you wish to give a particular watch, for example; but if you should sell or give it away, of course your bequest becomes inoperative, and no other watch that you may acquire can supply its place. In bequeathing your stock, give it generally, as all your funded property, or all your three per cents, or the like, and not the funds or three per cents which you have now in your name. It seems that if, having a brown horse, you were to bequeath it, and then to sell it and buy another brown horse, the latter would not pass.

If you devise an estate and afterwards sell it, the devise, as I have stated to you in another Letter, will become revoked: should you re-purchase the same estate, I recommend you not to trust to your former gift, but to re-execute your will, or rather to execute a codicil, and confirm the gift in your will. I can give you an instance which will convince you how dangerous it is to deal with the property given by your will, without ascertaining what effect the disposition will have on the previous gift. Under a settlement on a marriage, the husband, in the event which happened of a failure of issue of the marriage, had a power to appoint the property to whom he pleased; and there was the usual power of sale in the settlement with the consent of the husband and wife. The husband, by his will, appointed his interest in the estate to trustees to be sold, and gave the produce to persons named in his will. The estate itself was afterwards sold under the power in the settlement, and was conveyed to the purchaser, and then the husband died, and it was held

that the gift in the will was void, and could not affect either the purchase-money of the settled estate, or the new estate to be purchased with it.

If formerly you gave any part of your real estate by your will which lapsed, as it is termed, that is, failed, by the death of the devisee in your lifetime, or the gift was for an illegal object, the devise failed altogether, and the property would go to your heir-at-law, although there was a residuary devise in your will, or, in other words, a devise of all the residue of your real estate to a person who survived you. As to personal estate, the law was always otherwise, and lapsed legacies fell into the residue as they still do. But now, residuary devises of real estate are placed on the same footing as residuary bequests of personal estate; therefore the residuary gift of the real estate would carry to the residuary devisee an estate which lapsed by the death, in the lifetime of the testator, of the person to whom it was devised. So where a gift is to a charity of an estate, which is void, the estate will go to the residuary devisee. But this will not be so, if a contrary intention should appear by the will. It is not necessary for the residuary devisee to show that the testator intended, in the given event, that the estate should pass as part of the residue; but it is necessary for the heir-at-law, resisting the claim of the residuary devisee, to show, that by the declaration of the testator in the will, or from the frame of the devise, such was not his intention. It is seldom that any testator has any such intention. In making your will, if you do not intend your residuary devise to have this operation, state so distinctly. If you do intend it, then see that your residuary devise is open to no civil, but will pass all the residuary estate of which you can dispose at your death.

No hatred is more intense that that which arises in a man's family after his death, where, under his will, the rights of each member of it are not separate and strictly defined. None is more afflicting or degrading to our common nature.

We weep over the loss of our relative, and yet quarrel over the division of his property. Be careful not to make an unwise or ill-considered disposition ,particularly of your residue, upon which the contest generally arises. As you love your family, pity them—throw not the apple of discord amongst them. If you leave to every one separately what you desire each to have, and give nothing amongst them all which requires division, and therefore selection and choice, peace and good-will will continue to reign amongst them.

Still further: in disposing of your residue, neither overrate nor underrate its value. It is a duty which you owe to yourself, and to those who are to succeed you, carefully to ascertain the value of your property. I know an instance of a person who succeeded to a great estate, simply by declining a particular legacy, in common with the general legatees—the mere gift of the residue would satisfy him—he begged the testator would not consider him until every other claim was satisfied! The residue greatly exceeded in value the aggregate amount of all the legacies.

On the other hand, it has frequently happened that a man over-estimating the value of his property, or not allowing for its depreciation, has given large legacies to all his children but one, and has reserved his residue for that one. At his death it has turned out that every one was well provided for except the chief object of his bounty, his residuary legatee. You can easily avoid this by giving to the child whom you mean to make your residuary legatee, equally with the rest, what you wish it at all events to possess, and then you can give to this child the residue. If your funds should fail, every legacy would have to abate in proportion, which would be what you intend. If there should be enough to answer all the legacies, the child taking the legacy and the residue would yet not take more than you intended. If you really mean one child to take its chance as to the value of the residue, whether more or less, then of course my observations would not apply.

I would have you note that if you should give, by your will, any real or personal estate to any of your children or grandchildren, for any interest which will not determine at or before the death of such child or grandchild, and he or she shall die in your lifetime "leaving issue, and any such issue shall be living at your death," the gift will not lapse, but will take effect, as if the death of the child or grandchild had happened immediately after your death, and therefore will form part, according to its quality, of the real or personal estate of the deceased child or grandchild. But this will not be so, if a contrary intention appear by the will. You should therefore consider whether you mean your gift to your children, and your children's children, to take effect if they die in your lifetime; and if you do not, you must say so. The provision, you will observe, does not apply to gifts which are not to endure beyond the life of the legatee; for of course in those cases there is an end of the gift whenever the legatee dies, whether before or after you. But keep in mind that the general gift in your will to your child, for example, will belong to him if you leave it unrevoked, and will pass by his will although he die in your lifetime, and will not belong to the children whose existence at your death prevented the legacy from lapsing.

LETTER 13.

DOUBTLESS you know that in Canada, as a rule divorce can only be procured from the Senate, but I would have you notice that in Nova Scotia, New Bruswick, Prince Edward Island and British Columbia, the provincial courts will grant divorces. The laws of these provinces are chiefly based on the English law, which is here explained.

At the cost of wearying you, I will tell you that here, if anywhere, you require the services of a competent lawyer.

Judicial separation is a term introduced for the old divorce "a mensâ et thoro." Either the husband or the wife may obtain a judicial separation on the ground of adultery, or cruelty ,or desertion without cause for two years or upwards.

The Court can direct the husband to pay alimony—that is, an allowance to the wife for her support and if he do not pay it, he may be sued for necessaries supplied to her. She becomes, after the judicial separation, and whilst it continues, a " feme sole " (a single woman) with respect to property of every description which she may acquire, or which may devolve upon her; and if she die intestate, it will go as if her husband had been then dead. In case of re-cohabitation, the property will continue to be her separate estate, unless some agreement in writing be made between them whilst separate. During the separation she may, as a single woman, enter into contracts, and sue and be sued—and this is a liability which she should keep in view; and her husband will not be liable for her debts or acts.

In those jurisdictions, where divorce is not granted, alimony is generally granted, and, I think, an action for crim. con, (See later in this letter) could be sustained.

I must postpone for a moment stating the other incidents of a judicial separation, whilst I point out to you the cases in which the marriage may be dissolved; and here you will

observe that for well-considered reasons the remedies are not reciprocal. The husband may obtain a divorce dissolving the marriage upon the simple fact of his wife's adultery. The wife can obtain such a divorce only where the husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of foul crimes—for which I must refer you to the statute, and the insertion of which I endeavoured in vain to keep out of the statute—or of adultery coupled with such cruelty as would have entitled her to a divorce "a mensâ et thoro," or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. If the case is proved, and the Court shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned (or forgiven) the adultery, or that there is collusion with either of the respondents, the marriage is to be dissolved by decree. But the Court is not bound to pronounce such decree (observe, it is not said that the Court may not) if it shall find that the petitioner has, during the marriage, been guilty of adultery, or shall, in the opinion of the Court, have been guilty of unreasonable delay in seeking redress, or of cruelty towards the other party, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery. This provision, therefore, applies equally to the husband and wife. The petition will be "dismissed" if the petitioner has been accessory to or conniving at the adultery of the other party, or has condoned (or forgiven) the adultery, or there is collusion with either of the respondents.

The Court has power to make interim orders for payment of alimony for the wife, and ultimately to suspend the divorce until the husband has made a proper provision for her.

The husband must, it seems, in every case make the alleged adulterer a co-respondent to his petition, unless the Court excuse him. The wife, in applying for a "dissolution"

of the marriage, may be ordered to make the person with whom the husband is alleged to have committed adultery a respondent. Any of the parties may insist upon having the contested matters of fact tried by a jury. In every case, the petitioner must by affidavit verify the facts so far as he or she is able to do so, and deny collusion. And the Court may examine "the petitioner"—husband or wife—on oath; but they are not bound to answer any question tending to show that he or she has been guilty of adultery.

There are some important remedies applicable to all cases. As to children, the Court may make such interim or final orders as it may deem just, with respect to their custody, maintenance, and education, and may direct them to be made wards of the Court of Chancery. This is interfering with a strong hand with the parental rights of the father. Where the wife is the guilty party, the Court may order a a settlement of her property, either in possesion or reversion, for the benefit of the innocent party, and of the children of the marriage, or any of them. This is as powerful an interference with the wife's right of property.

When a decree for dissolving the marriage has become final, the respective parties may marry again as if the prior marriage had been dissolved by death.

Finally, on this head, the action of "crim. con.," that disgrace to the nation, has been abolished; but, by an unpardonable mistake in legislation, this is accomplished in words only, whilst in effect—indeed in words equally plain—a similar right of action is given to the husband, through the instrumentality of the Court, but to be tried by a jury like the old action, in the case of a petition for either a dissolution of a judicial separation, or even limited to the object of damages only; and the wife is also to be served with the petition, unless the Court order otherwise—thus really increasing the evil; for a divorce formerly could not in general be obtained without damages had been recovered, and that circumstance was always relied upon as an excuse for the husband's demand of a pecuniary compensation, whereas now

he may go for damages, although he profess an inteantion not to ask for a divorce. The damages, however, are not to belong to the husband, but the Court is to direct in what manner they are to be applied, and to direct that the whole or any part shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife; and the adulterer may be fixed with the costs of the proceedings in the Court of Divorce. All were ultimately agreed that the old action should be discontinued, and none proposed that the adulterer should not pay in the shape of damages, but many wished no part beyond the expenses to go to the husband, but rather that it should fall into the Consolidated Fund. The measure, as it stands, was not passed without a severe struggle. It is not carefully framed, and is wholly inconsistent with the general enactment abolishing the action. A man may now recover damages for his wife's infidelity without seeking for a divorce, but may continue to live with her upon the damages recovered from her paramour, which may be settled upon her or upon the children! It should be said, however, that such a claim is practically never made. Even where a divorce is obtained, the damages may be settled upon the children, whilst they are maintained and educated with the price of their mother's dishonour! It may be well doubted whether this is an improvement of the old law, and whether we have freed ourselves from the reproach of foreign nations—that we consider a money payment as the proper consolation to a husband whose wife has proved unfaithful to him.

You are aware that husband and wife may, by mutual agreement, live separate and apart under a deed with formal stipulations as to maintenance, the contracting of debt by the wife, against which some relative usually covenants to indemnity the husband, and other usual stipulations; but such a deed does not in law dissolve the marriage, and the restitution of marital rights would be enforced if sought for. The wife's adultery would not release her husband from an absolute covenant in such a deed to pay her an annuity during

her life. Subsequent cohabitation in general would avoid a deed of separation unless it contained a stipulation to the contrary, or the husband promised to continue the payment upon the wife's going back to him at his request. Our law forbids any provision to be made, either before or after the marriage, for a "future" separation between husband and wife. Even if an immediate separation be provided for, yet, where that is a mere colour, and no separation then takes place, the deed will be void.

In reading this letter you will please bear in mind the contents of its first paragraph.

LETTER 14.

A REMEDY is afforded by Statute to mothers where their husbands deny them access to their infant children, or withold from them the care of those under seven years of age. The authority is given to the Court, who, on the mother's petition, may, in the father's lifetime or after his decease as against the guardian appointed by him, make such order as may seem fit for the access of the mother to such infants at such times, and subject to such regulations as may be deemed just and convenient; and if such infants are under seven years of age, may order them to be delivered to and to remain in the custody of the mother until attaining such age, subject to such regulations as shall be deemed convenient and just; but these provisions do not extend to a mother against whom adultery has been established. As Lord Cottenham observed, the object of the Act was to protect mothers from the tyranny of husbands who ill-use them; it gives the Court the power of interfering when the maternal feelings are tortured (by the threat to take their children from them or to deny them access to them), for the purpose of obtaining anything like an unfair advantage over the mother.

Besides these statutory powers, the Court, in exercise of its own jurisdiction, will take the custody of his children from a father on the ground of his impiety and irreligion, or of his profligacy, adultery, and profaneness, it being both the right and duty of the Court to remove the children from the contamination to which they would be exposed from such examples; but there must be sufficient property to educate and maintain them, either belonging to them, or found by their friends for them, as the father cannot be compelled to pay for their maintenance or education.

Subject to these powers, the father alone has a right to the custody of his children, and he can by deed or will appoint a guardian to them; but although from the time of Charles

II. until a recent period an infant might have appointed a guardian to his children by deed or will, yet it seems that he can no longer do so by will. The adult father's will must be executed like all other wills, which has been the subject of another Letter. The mother cannot appoint a guardian, although she survives her husband. Where it is necessary after the father's death, the Court will appoint a guardian; and the Court will, if necessary, although reluctantly, interfere with the testamentary guardian appointed by the father, but the mother as such has no right to interfere with a testamentary guardian. Generally speaking, the child should be brought up in the religious faith of the father, but he cannot, strictly speaking, by his will regulate the faith in which his child is to be brought up ;the Court nevertheless will pay great attention to the expression of his wishes, and he can exercise that power indirectly by appointing a guardian of the faith which he professes. If the father make no appointment of a guardian ,the mother, after his death, is the guardian by nurture until the age of fourteen.

The Queen's Bench ordered a girl of the name of Race, under fourteen years of age, the daughter of a deceased Protestant father, to be delivered to the mother, a Roman Catholic, by the mistress of a Protestant school, where she was provided for out of the Patriotic Fund; and the Court refused, contrary to some precedents, to examine the child, who was between ten and eleven years of age, as to her religious belief, or on any other subject; and so powerful was the mother's right deemed, that it was considered to be no objection that she intended to educate her child as a Roman Catholic, although the girl had been baptised as a Protestant, and had been placed at the Protestant school, upon the mother's application, after her husband's death, and remained there for some time, and had previously been to other Protestant schools as well during her father's lifetime as since his death, which had impressed upon her mind strong religious convictons, and she refused to become a Roman Catholic. But upon a small settled income being provided for the child

by persons who took an interest in her welfare, and made her a ward of the Court of Chancery, the mother being unable to maintain her, the Court replaced her at the school. The Judges in Equity do not hesitate to see and examine the child, not with a view to consult the child's wishes, but to ascertain what religious impressions have been made upon the child's mind.

Where the father and mother of a posthumous child were Roman Catholics, and the child was baptised as a Roman Catholic, and his uncle and aunt (a Roman Catholic peer and his wife) were his godfather and godmother, and the mother, after her husband's death, became a Protestant, and brought up her son as a Protestant until he was nearly ten years of age, when the Roman Catholic relatives interfered, the Judges in Equity did not doubt that if the application had been made at once it would have been of course that the child should have been brought up in his father's religion ;but they had seen him, and were satisfied that he had received strong impressions adverse to his father's faith, and that to disturb them would expose the child to danger. The mother, therefore, was left as sole guardian, and, consequently, the boy would continue to be brought up as a Protestant.

There is, as you will have perceived, a distinction between the jurisdiction upon a "habeas corpus," where a judge looks principally to see whether the father or mother has acted towards the child cruelly or with personal ill'usage, as the ground upon which he can deny to a father, or to a mother where she is entitled, the custody of a chiid and the jurisdiction of a court of equity, for where the child is a ward of that court, many other considerations may have weight for example, the father's acquiescence in the application of a gift to the child by a third person for its maintenance and education, in which case the Court may enforce his further submission.

Before ending, I should add that in Alberta a learned judge has stated that a mother has in that jurisdiction, at any rate, as good a right as a father to appoint a guardian.

LETTER 15.

YOU tell me that you have some difficulties as to your servants and laborers and are defeated in your dealings with them by a want of knowledge of what your legal rights and liabilities are.

I may begin by reminding you that no contract of service, which must extend beyond one year from the time that it has been entered into unless it has been entered into in writing, is enforceable.

If you employ a servant you must, as you may well imagine, take him into your service and retain him therein for the time which has been agreed upon between you, you are not compelled to find any work for him to do. If you have not agree to the amount of the wages, your servant is yet entitled to an reasonable reward.

Without being accused of inhumanity I may perhaps remind you that you are not in general bound to provide a servant who falls sick either with medical attendance or medicine unless you have expressly agreed to do so.

You need not upon a servant leaving your service give him any testimonial or certificate as to character. Indeed, at times it will be much wiser not to do so, either to him or to any prospective employer inasmuch as although you may escape from liability as to what you say concerning them on the ground that such communications are privileged, yet you nevertheless by a few careless words may incur the risk of an action for libel.

If your servant should earn wages from another during the continuance of his contract with you, it would seem that in the absence of any definite agreement on the subject that you would be entitled to take such earnings although you might not be able to take an action against the employer of your servant to recover them unless the servant in truth acted as your agent.

As to the duties of the servant I can say but little more than that he must serve his master faithfully and obey his lawful command. Here I will go no further into detail than to say that if you employ a servant for skilled work and he professes himself to be possessed of the necessary skill then he is liable if he either do not posses it or do not exercise it, and that if whilst in your service he acquires either confidential information or materials he must not either during his service or after its termination make any use of such information or materials to your loss or hurt. Thus, the mere fact of a servant after leaving your employment soliciting your customers is not a legal wrong, but if in so doing, he makes use of information or materials improperly obtained whilst he was still your servant, he is liable to an action.

You must make good to your servant the losses or expenses to which he may be put in carrying out any of your orders, unless indeed, the order given by you is so clearly an order to do something illegal that the servant must have known of its illegality or unless the servant knew that in fact the act directly was illegal.

It seems to have been considered for some time that when an agricultural laborer or menial servant was hired, that in the absence of agreement the hiring must be considered to be for a year, but it is very doubtful where there is in reality any such presumption. I would here give you the warning that it does not necessarily follow that because wages are to be paid weekly or monthly or quarterly that the hiring is to be considered weekly or monthly or quarterly.

LETTER 16.

THERE are few social questions of more importance than that which is the subject of this Letter—the relation between trustees and their "cestu's que trust," as they are termed, or the persons for whom they are trustees. Property could not be enjoyed in the way in which we, husband and wife, parents and children, succeed to it, unless men could be prevailed upon to assume the office and undertake the duty of trustees. It is a true act of friendship to accept an onerous trust. In the creation of a trust, the person whose property is to be the subject of it, has to weight well how far he can confide in the integrity of the proposed trustee—more especially where stock or railway shares, for example, are to be transferred into his name; and to guard as well against dishonesty as against death, or an inability or unwillingness to continue a trustee, more than one is generally appointed, with a power, in case of necessity, of appointing a new one. On the other hand, the proposed trustee has to reflect upon the liabilities which he will incur. The harsh rules of equity in making him answerable as for a breach of trust, where he has acted with perfect good faith, and according to the best of his judgment, although not strictly according to the trust, or perhaps not in accordance with some rule of equity of which he was ignorant, and upon which his trust-deed would not enlighten him, are calculated to alarm him; he may well hesitate, for he can hardly have lived long in society without meeting with some family whose prospects in life have been destroyed by an innocent error of the head of the house in the execution of a trust. He will find, too, that unless his "cestuis que trust" are, after the creation of the trust, more reasonable than the generality of mankind, they will want to deal with the trust-property as if it belonged to them absolutely, and not merely as bound by the trust. Some men, although only tenants of life of the fund, desire

to speculate with the trust-money or stock, just as if it were not settled; and if the trustee refuse to allow this, a coolness ensues between the parties, which threatens to sever the friendship between them. On the other hand, if the trustee allows this perpetual dealing with the trust-fund, although it may be strictly legal, it places the fund, and consequently himself, in constant danger. The money must be intrusted to brokers, agents, bankers, solicitors, and may inconsiderately, or unavoidably, be left in their hands for too long a period, or may be improperly retained, or even wasted or misappropriated by them, and then would arise the question of the liability of the trustee.

Consider yourself always responsible for the receipt or payment of the trust-money. See, therefore, that the money is paid to the right hand, and in like manner, when paid off, receive it yourself. Upon advancing money upon mortgage, personally pay the money to the mortgagor, and see the documents properly executed; when it is paid off, attend and receive the money. There is danger in executing the deed and singing the receipt without at the same time receiving the money. This precaution will no doubt give you trouble, but it may preserve you and your family from litigation and heavy loss. You will be safe if, pending a transaction for the investment of the money, you pay it to regular bankers, though they should fail; but never pay trust-money into your general account, but to a separate account, as trustee; and be scrupulous in drawing upon that account for the trust only. You would expose yourself to liability to interest or profit if you used the money as your own. Even keeping the money with a banker at a separate account will not protect you if the banker should fail, and you ought by the direction of the Court, to have paid over the money before the failure. This shows how promptly an order for payment of the money should be obeyed.

Never allow the money to be received, or, if that cannot be avoided, to be retained by brokers, agents, or lawyers. If you have a co-trustee who is a lawyer, unless you repose

confidence in him, you should, upon lending the money upon any security, employ a lawyer of your own. It is only the other day that one trustee sold the trust-stock and gave the money to his co-trustee, a lawyer, to invest upon a mortgage to be obtained from a client of the co-trustee's; the latter fraudulently obtained a mortgage to both for the money from the client, and the mortgage was set aside as against both the trustees, so that the honest trustee was treated as if he had been a party to an act by which the money was lost. You may be safe in allowing your co-trustee to receive the trust-money; if you join in the receipt of it only for the sake of conformity; but it is dangerous to do so, and it is always better to have it paid into a banker's you can rely upon in your joint names. If you permit your co-trustee to receive it, you must look sharply after it, for you will not be absolved from seeing that it is in due time applied according to the trusts. Where one of the three trustees was a lawyer, and acted in the trust as lawyer for himself and the other trustees, and was allowed to receive the purchase-money for an estate which they sold, and for which they all gave a receipt, it was held that the lawyer received the money, not in that character but in the character of trustee.

In a case of real difficulty, you should be careful how you act under a lawyer's opinion, for if you are wrongly advised, and act accordingly, you will be responsible. And now, you may in a summary, and comparatively with former proceedings, an inexpensive mode, obtain the opinion of the Court on the right of the parties. Following literally the words of your trust will not always be safe: for instance, although you were empowered to lend the trust-money on real or personal security, and are declared not to be responsible for any loss, yet it would not be safe to lend the money to a trader, and of course not to any one in doubtful circumstances, to your knowledge.

If you are directed to sell an estate, take care to sell it within a reasonable time, and never, without the direction

of a court of equity, be induced to make a mortgage of an estate, which you are directed to sell.

It is desirable also that you should ascertain that the securities vested in you have had legal validity given to them as far as you can insure it. Upon a marriage, a mother assigned an "unregistered" judgment to a trustee for her daughter for life, and the judgment had remained unregistered about a year and a half before it was thus assigned, although to give it full effect it ought to have been registered. The trustee naturally left the security as he found it, and a loss having been sustained by the non-registry of it, he was compelled to make it good. This shows the necessity of requiring, when you accept a trust, that all the securities vested in you shall have every legal validity given to them of which their nature admits. Of this you cannot be a judge, but you should impress the necessity of this step on your lawyer.

The advice which I have given to you in your character of a trustee will apply equally to your conduct in the office of an executor. But in the latter character ,you must be careful in your expenditure on the funeral, for if you are not careful, and the assets run short, you may have to pay the greater portion of them yourself. You should, of course, see whether the testator has himself given directions in his will about the nature or expense of his funeral, which should be complied with as far as his property will justify a compliance with his wishes. You should be careful not to leave any money outstanding upon personal security—note of hand or bond—for although the testator himself lent it upon that security, and so let it remain, yet it will be your duty to enforce payment of it: nor can you justify neglecting to bring an action for a debt where there is a probability of its being paid. You should see that rents to which, as executor, you are entitled, are duly brought into your account: you cannot excuse yourself by allowing one of the beneficiaries to act as collector.

It is not my object to point out to you with particularity

how the assets or property of the testator are to be disposed of, for all that I could explain to you within the compass of my undertaking is sufficiently known to you, and to all men; and for anything beyond that, you must necessarily act under legal advice. But I may inform you generally, upon authority, that as between the creditors and the executor, he must take all reasonable means to collect the debts due to the testator ,and must convert all the personal estate, whether goods, terms of years, or perishable property, into money, so as to pay the testator's debts in due course of law, and after debts to discharge the legacies: he would be liable to creditors in an action for their debts for what he could have sold the terms and perishable chattels for. The law is the same as between the executor and the particular and residuary legatees, unless the will authorise a different disposal of the assets. The residuary legatee, for example, has a right to insist that the executor, before the end of the first year, ought if possible, to convert all the assets into money, and pay the funeral and testamentary expenses, debts and legacies, and hand over the clear residue to the residuary legatee, or if the residue be bequeathed to one for life, to secure the capital, for the benefit of the tenant for life, and those ultimately entitled; and if from any cause the assets cannot be sold so soon as to effect this purpose, the right of the tenant for life will commence from that date.

When the debts are all paid, as far as you can ascertain by advertisements and inquiries, the legatees or next of kin will require the residue to be paid to them. You will, of course, be entitled to an indemnity against any demand which still binds you; for example, future rent under a lease to the testator.

LETTER 17.

IT now comes in order to give you a few instructions as to Leases. What I have to say on this head will lie in a narrow compass.

Leases not exceeding three years from the time of making them, whereupon the reserved rent amounts to two-thirds of the improved value, may be granted by parol, or word of mouth; but all other leases must be in writing, according to the provisions of the Statute of Frauds which I have before mentioned, and so must an "agreement" for a lease, however short the term; although here, as in the case of purchases, equity will, in some instances, for which I refer you to my 7th Letter, enforce even a parol agreement to grant a lease. To this, however, a party should not trust.

By statute, leases required by law to be in writing are made void at law unless made by "deed." Therefore, as with the exception of leases not exceeding three years at a rent equal to two-thirds of the value, all leases must have been made in writing, now they must be made by deed; and assignments and surrenders of leases are equally required to be by deed. There are exceptions which would only puzzle you if I were to attempt to explain them. It will be sufficient for you to know that you cannot safely grant or accept a lease, or an assignment, or surrender of one, without a deed.

This alteration of the law has led to much embarrassment. The judges felt the difficulty of holding a lease in writing, but not by deed, to be altogether void, and consequently decided that, although such a lease is void under the statute, yet it so far regulates the holding, that it creates a tenancy from year to year, terminable by a year's notice; and if the tenure endure for the term attempted to be created by the void lease, the tenant may be evicted at the end of the term without any notice to quit.

If an agreement, not by deed, for a lease for a term of years, to begin at a future day, were made, and it were

to be construed to be a lease, it would of course be void under the statute, and the intended tenant could not force the landlord to give him possession at the time when the lease was to commence, for he would be entitled to possession only on a tenancy for the years agreed upon, and that tenancy never commenced, but it was said that the party might proceed upon the agreement to grant such a lease. This will show you the difficulty which may arise upon an informal agreement since the statute; for before the statute, if the writing, not under seal, was held to be a lease and not an agreement, still it was in favour of the intention, as collected from the instrument, and it did operate as a lease; but now in a like case, the intention, as collected, does not create the lease, but destroys the instrument.

An agreement for a lease, like an agreement for purchase, must contain the names of the parties, the consideration —viz. the rent, and also the property to be demised and for what term. The parties must sign the agreement by themselves or their agents, in like manner as an agreement for a purchase. And the caution which I before gave you, in regard to writing letters about the sale or purchase of an estate, applies equally to leases. I must observe, that nothing can be added to an agreement of this kind by parol or verbal evidence: you cannot, for instance, if the agreement is silent on that head, show that the tenant agreed verbally to pay taxes. The parties must stand or fall by the written agreement. Therefore, whatever the terms are upon which you agree, you must reduce them to writing.

If you should ever be under the necessity of entering into an agreement to grant a lease, without the assistance of your solicitor, insert an express declaration that it is meant to be an agreement, and not an usual lease. It has frequently happened, that what was intended by the parties as an agreement only, has been construed to be a lease, by which means the tenant has evaded the conditions which would have been imposed on him if a regular lease had been granted. (Please see also the letter on mortgages).

It is highly desirable that agreements for leases should contain a minute of the covenants to be entered into by the tenant. Disputes frequently arise as to the covenants to which the landlord is entitled. If you wish your tenant not to part with a lease without your consent, you should stipulate by the agreement that a proper clause for that purpose shall be contained in the lease, because you cannot insist upon such a restraint unless it is bargained for.

If you agree to grant a building-lease, the tenant must engage by the lease to insure the property, although the agreement was silent on that head; but the rule is otherwise as to tenants at a full rent, or, as we term it, a rack-rent. If, therefore, you mean that a tenant at rack-rent shall insure at his own costs, you must make him agree to do so by the "contract." If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But even in this case you are not bound to insure; and although the house should be burned down, yet the tenant must continue to pay the rent: so that each bears his burden; you lose your house, and the tenant loses his rent during the term. If, however, you have insured, although not bound to do so, and received the money, you cannot compel payment of the rent if you decline to lay out the money in rebuilding. It is material, however, to observe, that whatever may have been the agreement, unless the tenant is exempted by the lease from making good accidents by fire, he must, under the common covenants to repair, rebuild the house if it is burned down.

If you agree to grant a man a lease, and he afterwards says that he is merely a trustee for an insolvent who claims the lease, you are not bound to grant it.

It may be useful to state that if you grant, or even agree to grant, a lease, to hold for seven or fourteen, or any other number of years, in the alternative, the option to determine the lease at the end of the first term mentioned is in the tenant, and not in you; therefore, if this is not your intention, you should expressly provide by the agreement, or lease, that the option shall be in you as well as the tenant.

LETTER 18.

I have still some directions to give you about the mortgaging, selling and devising of your property; but I have not forgotten your request that I would first furnish you with a slight popular sketch, just a notion, of the various ordinary interests which you have acquired or may acquire in real property, and I do not hesitate to disturb the arrangements of my subjects in order to comply wtth your request. Real or landed property is either held in fee or for an estate of freehold, or for a term of years. The fee or fee-simple includes all the interest in the land. A legal anecdote has been transmitted to us from a very early period, where a judge, who indulged himself in the euphonical phrases, "I'd have you to know," and "I'd have you to see," asked a learned serjeant why he had been absent when the Court required his presence. His excuse was that he had been turning the work of "Coke upon Littleton" into verse. The judge called for a sample, which the serjeant thus gravely delivered:—

> "A tenant in fee-simple is he
> That need fear neither wind nor weather;
> For I'd have you to know and to see,
> 'Tis to him 'and his heirs for ever!'"

An estate for life, or for another man's life, is termed a freehold, less than an inheritance, but still a freehold; and of course, unless expressly empowered to do so, a tenant for life, or "pur auter vie" (for the life of another), cannot grant any lease or create any charge extending beyond his own interest.

A term of years, for example, a common lease, is called a chattel real, and forms a part of the owner's personal estate, and is not deemed real estate.

LETTER 19.

THERE is a mode in which a man may acquire real property without paying for it or receiving it as a gift, or inheriting it by descent. This, at first sight, may appear singular to you. It is by what I may call "adverse possession," which now is a possession by a person not the owner during a certain number of years without acknowledgment of the right of the real owner, and yet not necessarily in open defiance of him. In all times, great weight has been given to long-continued possession, in order to put a period to litigation. With us, the periods and nature of the possession depend altogether on acts of the Legislature, and now even charities may be bound by nonclaim. Constant claims are set up to the estates of other men by poor and ignorant,, and sometimes by crafty persons, although generally the latter support the claims of the former, where they think they can work upon the credulity of mankind. Some remarkable instances of fraudulent claims which have happened in recent times will recur to your memory. I call your recollection to them in order to guard you against such frauds; for these claims when specious ones, are made the subject of bargains and wagers in the city, and the claimants held up as persons who have been stripped of their rights by the wealthy, and are deserving of public sympathy. I have myself seen an office open for a considerable period in a great thoroughfare in the immediate vicinity of the Law Courts in London, for the sale of shares in an estate claimed by a person who, to meet the expenses of law proceedings, was willing to allow subscribers to participate largely in the profits of the estate when acquired. Great numbers of persons were cheated by this scheme, which was clearly an illegal one. And in point of fact, to my knowledge, the right to the estate in question had, long before this sale of shares in it, been the subject of litigation, and had been adjudged to belong

to persons whose right to it could not be disputed by further litigation. You will quickly see how impossible it is that any really stale claim can succeed. When the time has arrived that bars the remedy, the right of the claimant out of possession is actually extinguished by continued possession.

The common remedy is now by the action of ejectment, which simple remedy is a great relief to the subject, and the common time for asserting the right of action is 12 years. The claimant's remedy, therefore, will be barred by mere possession by another, without payment of rent or acknowledgment, if his right of entry accrued above 12 years before the ejectment.

If the right of entry first belongs to you; for example, if you are in possession of the property, or in receipt of the profits ,and discontinue such possession or receipt, the 12 years will begin to run from such discontinuance. Where there has been no possession or receipt under a conveyance of the possession, the time runs from the period when the grantee became entitled to possession under the deed.

If the right does not first accrue to you, but to some person through whom you claim, time will in like manner run from the period when the right first accrued to such person: for example, if your father had been in possession or in receipt of the property or rent, and had discontinued such possession, and then died, leaving you his heir, time would run against you from the period of such discontinuance by your father; and so in like cases.

If your father had been in possession at his death, and had left you his heir, and a stranger entered, time would run against you from your father's death. If a rent or an annuity be left to you by will, and you neglect to receive it, 12 years will bar you, counting from the period when you first had a right to distrain for it.

If you were entitled in remainder—for example, if by will property were given to one for life, and after his death to you, time will not run against you until your remainder

became an estate in possession by the death of the tenant for life. Upon this head there are very nice distinctions, with which I will not perplex you.

You should be told that the term discontinuance of possession means an abandoment of possession by one person, "followed by the actual possession of another person," otherwise there would be no person in whose favour time would run; therefore, for example, if you were to sell part of your estate, reserving the unopened mines with a right of entry ,12 years' neglect would not bar you, but you might exercise your right at any period.

Where the person in possession is a tenant, and holds without regard to his landlord, the law applies itself to various cases. 1. Upon a tenancy at will, as it is termed, time runs at the determination of the tenancy, or at the expiration of one year after the commencement of the tenancy, when it is to be deemed to have determined. The possession of a purchaser who has been let into possession before obtaining his conveyance and paying his purchase-money, affords an example of what amounts to a tenancy at will.

2. When the tenancy is from year to year, or other period, "without a lease in writing," your right of entry as landlord would accrue at the end of the first of such years, or at the last receipt of rent (which shall last happen), and from that period time might run against you, if you neglected your claim as a landlord.

3. Where the tenancy is "under a lease in writing" at a rent, and a wrongful claimant of the reversion receives it, and no payment of rent is afterwards made to you as the rightful landlord, your right would be held to accrue when the rent was first received by the third party, and no new right would vest in you on the determination of the lease so that by mere neglect to receive it, you would be barred of all relief at the end of 12 years. Mere non-payment of rent, however, will not bar you, nor will this law apply to a lease upon which no rent is reserved. So that in

such cases you would be entitled to recover at the end of the lease.

If the person in possession or receipt of the profits acknowledges to you or your agent in writing, signed by him, your title, then in law his possession is yours, and time will run against you only from the period when such acknowledgment was given, or the last, if more than one is given.

These provisions, as I have remarked elsewhere, place landed proprietors in danger of rapidly losing portions of their property, particularly where they have allowed friends or dependants to occupy parts without payment of any rent. In many cases it will be found that the statute has transferred the fee-simple to the occupier. Where 12 years have not already elapsed, written acknowledgments should be immediately obtained from all such occupiers, signed by them. And in every case in which you allow another person to occupy any part of your estate without paying rent, or to receive any part of your rents without account, not only should you obtain a written acknowledgment of title to be signed by such person, but you should require a renewal of it every year, just as you would payment of rent; for, oddly enough, the time will begin to run against you the moment after the person in possession has acknowledged your title, so that, even where an annual acknowledgment is taken, with the exception of a momentary interval, "time will always be running against you," although every renewed acknowledgment renders it necessary to begin a new computation of the 12 years. If you were to postpone calling for an acknowledgment for 5 or 10 years, it would probably escape your recollection altogether, and yet you might be in constant intercourse with the person whom you kindly let into possession, and who may yet ultimately claim the property as his own.

Part of your estates is vested in trustees, expressly in trust for you, and as between you and your trustees you are in no danger of being barred by time, unless indeed they should convey your property to a purchaser for valuable con-

sideration, from which act time would begin to run against you as regards the purchaser, and any person claiming under him. But the trustees themselves may be in danger of being barred; for 12 years' possession by a third person will bar both you and them. Your possession, however, would not be adverse to your trustees land whilst their right continues, yours is safe.

If there is a "concealed fraud," the remedy, except as against any "bonâ fide" purchaser for valuable consideration, without notice, and no party to the fraud, will not be considered to accrue until the fraud shall, or with reasonable diligence might, have been first discovered. This has been explained not to mean the case of a party entering wrongfully; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances proving that right, and by means of such concealment enables himself to enter and hold.

I may still observe, that time runs against an administrator from the testator's death. A party relying upon possession cannot avail himself of the possession of a joint-tenant or tenant in common.

LETTER ~~17~~ 20.

MY last Letter relates to adverse possession of the estate itself, but a limitation has also been put upon proceedings to recover charges on the estate. Neither action nor suit can be brought to recover any money secured by mortgage, judgment, or lien, or otherwise, charged upon any estate, or any legacy (which, however, extends to legacies although payable out of personal estate only), but within twelve years, unless in the mean time some part of the money or interest has been paid, or some acknowledgment of the right to it shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled to it, or his agent, and in such case the twelve years are to run from the last of such payments or acknowledgments, but the time will not begin to run until next after a present right to receive the money has accrued to some person capable of giving a discharge for it. This is an important condition; for instance, if you, as tenant for life of your estates, were to pay off a charge upon it, but to take no step to keep it alive, and you were to live more than twelve years after the payment, yet the right to the charge would not be barred, for there would be no assignable person liable to pay it in your lifetime, and the rent out of which the interest of the charge was to be paid belonged to you, who were entitled to the interest. You would be both the hand to pay and to receive.

That part of the statute which requires an acknowledgment in writing to save time running, has received a liberal interpretation in favour of the claimant.

These provisions apply to the principal sums charged. Arrears of dower cannot be recovered for more than six years next after the same became due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto or his agent; with an exception,

nevertheless, in favour of the creditor where a prior encumbrancer has been in possession within one year before the action or suit.

It is also provided that all action of debt for rent upon an indenture of demise, and all actions of covenant or debt upon any bond, or other specialty, shall be sued within twenty years after the cause of such actions. It contains savings in case of disabilities, with the nature of which you are already well informed, and it gives effect to acknowledgments in writing, and part payments of any principal or interest; but it so far differs from a former provision, that although it requires the acknowledgment to be made and signed by the party liable, or his agent, it does not require it to be made to the person entitled, or his agent. But there are some nice distinctions on this head.

I would have you know that the periods of twelve years and six years mentioned in this letter does not hold in all jurisdictions, e.g. in Ontario and Manitoba the periods are as a rule ten and five years. I again impress upon you if there is any real necessity to know these exact periods, the duty of consulting a lawyer.

LETTER ~~18~~. 21.

YOU may have been puzzled by the fact that well-grown persons are sometimes spoken of by lawyers as infants. I would have you know that in the eyes of the law every person is an infant until he reaches the day immediately preceding his twenty-first birthday.

For some purposes infants are treated exactly as if they were grown up persons, thus if an infant of years of discretion sells any of his personal property and the bargain has been what one might call a fair one, that sale would probably be good; and so also if he bought goods and paid for them he could not recover the money back, but it may almost be laid down as a general rule that where in order to part with the ownership of things it is necessary for him to employ writing, e.g. in the purchase of land or stocks and shares, the transfer is voidable, that is, can be avoided.

As a rule an infant cannot dispose of property by will, except, indeed, if he happens to be a soldier on active service or a seaman at sea.

As to his contracts, it may be laid down as a general rule that where the contracts create a continuing liability, (I mean such conracts as the lease of a house or the acquisition of shares in a company,) then he is bound by such contracts unless within a reasonable time he declares that he will not be bound by it. But where there is no continuing liability then the infant is not bound by it, unless indeed, upon attaining full age he proceeds to ratify the contract.

I have already spoken about an infant's contracts as to necessaries, so I need not here repeat what I then said but would refer you to the letter in which I spoke of them.

With regard to wrongs or torts as the lawyers call them, an infant is just as liable as any one else, thus if at school your boy wilfully destroys the clothing of another boy, he will be liable to pay for the damage he has occasioned,

though indeed, it is hard to see in most cases how the liability of an urchin of ten years will be much good to the father or the mother of the lad whose clothing has been damaged. Be that as it may, you need have no worry, for you at any rate will not be liable to make good the damage.

Whilst repeating that an infant may as a rule be liable for wrongs or torts, but not upon contracts, I would have you notice this peculiar fact, that if in making an infant liable for his wrongs you indirectly make him liable upon a contract, then you cannot make him liable at law at all. In a case well known to all lawyers it was held that where an infant had hired a horse and had injured it by careless riding he could not be make liable for the injuries to the horse inasmuch as that would have been the same thing as making him liable upon the implied contract between himself and the hirer to use proper care in riding the horse.

I would have you notice that you must be careful in the event of your desiring to deal with the property of any infant. You may hear that so and so is the trustee or the father or guardian of the infant, and that it is all right to deal with them. You will see the reason for care when I tell you that guardians have as a rule, no power to deal with the infants' property, a trustee may or may not have such power, he probably has not in the case of property other than land. Let me give you an example, suppose a legacy is left to your son. You might think that all the executor of the will had to do was to hand you over the money. The executor, however, would be but poorly advised if he handed over the money either to your son or you. Your son, not being of the full age of twenty-one years, could not give a valid receipt for the money, and as to yourself, you are not your son and so have no right whatsoever to the money. In such cases an application should be made to the court, if your son really requires money for his education or maintenance. You may be sure that an executor is most likely to ask to be pointed to the statute authorizing payment to you or to an order of Court authorizing the same thing. Under

the general rule, you as the father of your child are the only person who has any right to appoint a guardian for your infant children. Your wife has no such right, as long as you are alive. It is true that in at least one part of Western Canada it has been judicially said that a wife has such a right, but should this question seriously occur, I should advise you to take the law as I have stated it, until your lawyer assures you that the law in province in which you are living is otherwise than as I have stated it. So far has the rule been carried that it has been held that a father, except under an agreement to live apart entered into with his wife, cannot contract himself out of this right. It is really the court, that in the last resort will settle who is to be guardian of your child, and it can even remove the father from the position if serious reasons exist for so doing. Let me add a few words as to illegitimate children. Under the old law, an illegitimate child was said to be a filius nullius, a son of nobody, if a father died without a will, nay, if he made a will and left all his property to "my only son" without naming him, yet the the illegitimate could not take any of the property. English law was harsh in this respect. There were some alterations of the position in Scotland and other countries which followed fairly closely the old Roman Law. In those countries, children of parents who married after the birth of the child were considered legitimate per subsequens matrimonium, i.e. by virtue of the subsequent marriage.

In many of the Canadian jurisdictions, e.g. those of Alberta and Saskatchewan, these hardships have been mitigated, and illegitimate children are admitted to a share in their fathers' property, if he die without a will. In some too, children can be legitimated per subsequens matrimonium, i.e. by the subsequent marriage of their parents. Again, illegitimate children can now, in many places, share in the statutory compensation which is given for the death of their father owing to injuries.

Notwithstanding that much has been done to place illegitimate children on the same footing as others, yet it will

be still necessary to inquire of a lawyer how far an illegitimate child can either take or transmit a benefit, e.g. as to whether the father or mother of an illegitimate child can inherit from him. Here, I should add, that under the general law the mother of an illegitimate child is entitled to the custody of it, and is in the first place liable for its maintenance, though she can of course by taking the proper legal proceedings compel the father to contribute to its support, until the child reaches a certain age.

LETTER ~~19~~ 22.

IN this letter I want to write something of void, voidable and illegal contracts. In simple language a void contract is one which has no effect at all, a voidable contract is one which is just as good as any other contract till one of the parties to it has taken some steps to set it aside. As usual, illustration should make this much clearer. Supposing you contract that goods are to arrive for you from Europe by the steamship Peerless. Now, suppose there are two steamships of this name, one leaving Europe on March 1st, and you with your mind on the spring markets are thinking of this steamer, and another leaving Europe on September 1st, of which the person with whom you are contracting is thinking. Now that contract is void, it is just the same as if it never had been made.

Again, suppose you are induced to buy a picture by a misrepresentation that it was painted by Titian, and it turns out be but a modern copy. That is a voidable contract and remains perfectly good until it has been avoided.

You may say, what is the difference if in the one case I am not bound to pay for the goods on the arrival in September and in the other case, I can refuse to pay for the picture?

I will show you by reversing the last illustration. Suppose you are induced to sell a picture which is really a Titian by the representation of the buyer that he knows it to be a modern copy, and suppose again that the buyer sells it to a wealthy connoisseur, who pays for it, without any knowledge of you or the means his vendor took to obtain it. Now, suppose you discover that the picture was really a Titian and endeavour to recover it from the wealthy buyer, or, in other words, to avoid the contract you made with the buyer from you. You cannot do so. Your contract was voidable only, and it had be avoided before an innocent person, i.e. a per-

son who knew nothing of the right to avoid or of the facts giving rise to it, acquired ownership of the picture. A voidable contract can be avoided, but only if it is avoided in time. A void contract remains void.

I shall now put the rules in very general language—a contract induced by certain forms of mistake is void and remains void, a contract induced by misrepresentation is only voidable, it can be avoided, but must be avoided in time.

Now, you will justly say to me: "but there was a mistake in both cases; in the one case I thought the goods were to arrive by the steamer Peerless sailing in March, in the other case, I thought the picture was a modern copy of Titian, in both cases I was mistaken.

I can but answer you that "mistake" as used in this connection by lawyers has a very special meaning. In general the only mistake that will avoid a contract, is a mistake as to the whole nature of the transaction into which you are about to enter, as for instance if a man were to sign a promisory note under the belief that he was signing a guarantee, as occurred in the case of an impecunious nobleman who managed to secure the signature of a brother officer by the old device of a slit cut in a paper laid over the one really signed; or when you are mistaken as to the identity of the person with whom you are contracting, as occurred in the case of two merchants, one called Blenkarn and the other called Blenkiron, one of good fame and the other of no substance and with no intention of paying, or where the thing with respect to which you are contracting has already ceased to exist, as for instance if you were to effect a marine insurance upon a ship which had already gone to the bottom of the sea.

In all these cases, even an innocent third party could not acquire any rights under the promissory note, or to the goods received by the merchant with no intention of paying or under the marine insurance.

Other mistakes will not affect the contract, thus if I buy grain of a certain quality, whereas it is in reality of an inferior quality, that will not affect the contract. Nor will it matter

if the seller of the grain knew that I thought it was of superior quality, provided he did nothing to lead me to believe it was of that quality (but if he knew that I thought it was of superior quality and also that I thought he was promising me that superior quality he could not hold me to the contract; just as he could not if he promised me superior quality and then did not give grain of that quality). So, if I had thought the picture was a Titian, and it was not, and the vendor had held his peace, the contract would have been good.

I must also tell you that there is one difference between an innocent misrepresentation and a fraudulent misrepresentation.

If I contract with you, say for the sale of a piece of land, it does not in the first instance make any difference whether any misrepresentation you make may be an innocent one or not. In either case, I can avoid the contract, provided I do it in time but I cannot indifferently avoid it after the land has been actually conveyed to me. Then it is too late to avoid it, unless the contract has been induced by a fraudulent misrepresentation.

In all the cases, where I have said that it is too late to avoid a contract, I would not have you think that you have no remedy. You will, of course, have an action for damages for the fraud where there has been any.

I have used the term "fraudulent misrepresentation" a good deal and have no doubt that it has conveyed to you a more or less accurate idea.

I will now endeavour to lay down with more complete accuracy the nature of a fraudulent misrepresentation. The misrepresentation may be by words or by conduct, the person who makes it must have knowledge of its falsehood or else make it with such reckless disregard as to whether it is true or not, that, in all fairness, he should be held as responsible as if he had asserted what he knew to be untrue; the misrepresentation must be intended to make the other party to act in some way and must actually induce him so to act to his damage, and lastly the misrepresentation must be of an

existing fact, though I must tell you that in a case where a man falsely stated his intention of doing something, the judge stated that a representation as to the state of a man's mind was as much a representation of fact, as a representation as to the state of his digestion.

Let me illustrate: a farmer sells a glandered horse to a merchant, the farmer knows the horse is glandered, the merchant does not. The merchant pays for the horse, brings him home and the horse dies. Can the merchant recover the price of the horse from the farmer? No, the farmer made no representations. If the merchant knew of the possible existence of glanders he should have asked for a warranty; if he did not know it, he ought not to be any better off by reason of his ignorance.

At the risk of repeating myself, I will tell you that a fraudulent representation, which has induced to contract will entitle you to have the contract cancelled, or to stick to the contract and demand its completion or damages for its non-completion, or to bring an action for damages, not on the contract at all, but for the fraud, whereas, if the representation has been made innocently, though you may be able to rescind the contract, or may be able to refuse to carry out you cannot bring an action to recover damages for the fraud or deceit.

In general, the courts will refuse to enforce contracts which are immoral in themselves or are in violation of law or are opposed to public policy. Of the last sort are contracts not to marry,, contracts to procure a marriage for reward, contracts for a " future " (but not for an immediate) separation between husband and wife, contracts to refrain from trade generally, or within an area or for a time longer than is unreasonable under the circumstance; thus a covenant not to trade within 600 miles of London has been held illegal, whereas an agreement by a manufacturer of cannon, upon selling his undertaking, not to carry on certain classes of his business in the world has been held legal, as is an agreement not to

carry on the business of a canvassing publisher in a city or within 140 miles of it. To put it shortly,, an agreement in rertraint of trade (as this last sort of contract is called) is not illegal, where some consideration has been given for the agreement and the agreement is reasonable under the circumstances.

An illustration will show how far the taint of illegality affects such contracts as these. A certain Leeman charged his clerk with embezzlement for moneys and the servant was committed to prison for trial. A certain Fivaz gave a note to Leeman for the amount embezzled and Leeman on receiving the note promised not to proceed with the prosecution. Leeman transferred the note to another person gratuitously and under an arrangement that that person should sue Leeman on the note. The suit was brought but it was held that on account of the illegal consideration for the note (i.e. the promise not to go on with the prosecution) Nicholls need not pay the note. Nicholls failed to recover the costs of the suit from the person who failed to recover the costs of the suit from the person who sued him (who was indeed a pauper and a mere puppet of Leeman's) and tried to recover them from Leeman, but it was held he could not do so, because he could not make out his case without relying on the illegal transaction, the giving of money to stifle a prosecution. So it appears to be the rule that no person need go into court expecting to succeed, not only when he sues upon an illegal contract, but also when to make out his case he has to rely upon an illegal transaction.

LETTER ~~20~~ 23.

I WISH to tell you in response to your request something of the nature of money, promissory notes and bills of exchange.

I should say that even if I did not approve of your desire to know something of everyday law in general, here, at least, I could nothing but commend you.

Why I so commend you, I can best tell you in the words of a judge for whom I have both affection and respect. "To my mind," he once wrote, " men should study this portion of our law, until they are practically masters of its rules, principles and decisions; and to men of business and bankers it is of the utmost importance that they should know these things in order that they may prove themselves exact in everything they do, and, especially if they are servants, because there is not a more delightful work than that of a servant guarding by his care and competency the interests of the master whom he serves."

In so doing, I would draw your attention to that primary rule of law which sets it out that no one can give a better title to property than he himself has. Thus, speaking generally, if a thief who has stolen a book, sells the same to you for ten dollars and you pay him the ten, the book is nevertheless not yours, and should the true owner of the book appear upon the scene, you are likely to lose both the ten dollars and the book.

Now to this rule there is one large exception and that is money and negotiable instruments. I will first deal with money . Suppose the thief, in the guise of an ordinary customer, walks into your shop and purchases a copy of the Criminal Code, paying you with ten stolen dollar bills, then the dollar bills are yours and should their original owner attempt to reclaim them from you, he will find his endeavor in vain, in other words, the thief having no title to the money

can give you a title thereto which is good as against all the world. The same thing is true of negotiable instruments.

I must now explain to you the meaning of the term of "a negotiable instrument." It means first, a document which by being delivered to another persons, transfers the property or money secured by it, but it means something more. It means a document which is capable of conferring by mere delivery of it, a better title to the money secured by it, than the person who delivers it really has.

In order to make this clear to you, I would like to explain the difference between a bill of lading and a promissory note.

The delivery of a bill of lading to you will transfer to you the title to the property comprised in it, but it will not confer upon you any better title than the person has who delivered it to you, thus, if the bill of lading had been delivered to him merely by way of pledge, then you upon taking the bill of lading merely have the same rights as he and must deliver up the property comprised in the bill of lading to the true owner, upon being paid the amount for which it is pledged.

That is to say, a bill of lading and a negotiable instrument resemble each other in that they pass title by mere delivery, but they differ in that a bill of lading cannot confer upon you a better title than that of the person who gives it to you, whereas a negotiable instrument can.

Now a promissory note is a negotiable instrument, or to be exact, can become a negotiable instrument.

A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money or to the order of a specified person or to bearer.

I would ask you to bear this definition carefully in mind, for there is not a single word in it that is not of the greatest importance.

Let me show you this: "I.O.U. $80 for value received.

To A.B., signed C.D." This is not a promissory note, there is an acknowledgment of indebtedness, but no promise to pay.

A note made payable 'when I am in good circumstances' is not a promissory note, because it is payable at a time, the occurrence of which is very uncertain.

A note made payable (or a cheque) 'provided the receipt form at foot hereof is duly signed, stamped and dated, is not a good promissory note, because it is not an unconditional promise to pay.

A note payable "6 months after my death" is good The time is certain, as I am sure to die.

A note payable "6 months after the S.S. Swallow reaches Montreal" is not a good promissory note. The steamer may never arrive.

"I promise to pay $100 out of the produce of sale of my hotel" is not a good note. The promise is not unconditional, and cannot be fulfilled if the fund contemplated does not come into existence or is insufficient to satisfy the note.

"I promise to pay to C the balance due me for building the X Theatre" is not a promissory note. The sum is not certain.

If a note on its face bears a statement that it is given as a collateral security, it is not a good promissory note, but if it contains a pledge of collateral security or a statement that security collateral to it has been given, it will be good.

The ordinary form of a promissory note is as follows:

$500. Edmonton, Aug. 30th, 1917.

Three months after date I promise to pay to T. Atkins or order, the sum of Five Hundred Dollars, value received.

W. Brown.

or in the case of two or more persons, as follows:

$500 Edmonton, Aug. 30th, 1917.

Three months after date we jointly and severally promise to pay to T. Atkins or order, the sum of Five Hundred Dollars, value received.

W. Brown.
R. Jones.

In the last form you must carefully notice the words, "jointly and severally." If neither of these words were on the note, the promise to pay would be what is known as a joint obligation, and if it were necessary to sue upon the note, it would be advisable to sue both, as judgment against one would discharge the other, since in the case of a joint liability there is but one obligation. If the word 'jointly' only were on the note, the position would be the same in this respect. As the note stands the parties might be sued either together or separately.

You will sometimes find a note which by negligence and perhaps owing to the use of a printed form, runs "I promise to pay" and then is signed by two or more persons. That note is a joint and several note.

If you will but remember that where the note is joint there is but one obligation, but where the note is joint and several there are three obligations, that of Brown, that of Jones and that of Brown and Jones jointly, you will be able to solve many of the problems connected with promissory notes. I think you may even go so far as to settle in your own mind that in the first case, there is but one note, and that in the second there are three, that of Brown, that of Jones, and that of Brown and Jones jointly. At common law the death of Brown would free his estate from any liability on a joint note. There is but one obligation, and that is still subsisting between the holder of the note and Jones. In the case of the joint and several note, Brown's liability on the joint note, or rather the liability of his estate would be gone, but his liability on the Brown note would remain, while Jones would be liable both on the Jones note and on

the joint note. I don't mean, of course, that anyone could receive three times the amount of the note. A further result of the theory of joint liability is that if the holder of the note were to release Brown, that would also release Jones. There is but one tie, if you snap it by a release, there is nothing left to tie together Jones and the payee.

I must however tell you that in some of the Canadian provinces, e.g. Ontario, Alberta and Saskatchewan, the old common law rule is gone, and upon the death of one of the persons liable, his personal representatives may be sued upon the note. This rule has always been the rule in the case of a joint note given by partners, but not where it was given by more than one person, who are not partners.

Here I am going to break away just one moment from the question of promissory notes to tell you what a partnership really is. I do so, as I fear, I may forget to do so on some more appropriate occasion, should it arise. Do not think that you know well enough what a partnership is, as, if you do so think, it may well be that on some future occasion you may find to your cost that your ideas on the subject were hopelessly wrong. I would define it as an association of two or more persons in a business carried on with a view to profit. That definition, though perhaps fault can be found with it, is sufficient for our purposes. Let me tell you then that you are not in a partnership, if you only intend to do one particular act which is not to be repeated. The business must be carried on; 'carrying on' implies a repetition of acts. An ordinary club is not a partnership, as it not carried on for the acquisition of gain, nor would a mutual insurance society be a partnership. If you own a horse together with another, you are not necessarily his partner. Co-ownership is a very different thing from partnership.

I would have you remember also that if your partnership consists of more than a certain number, you may have to incorporate it as a registered company, and, also, that it may be in the province in which you are living that there is pro-

vision for the registration of partnerships, neglect of which may bring you into sad trouble.

Let me also inform you that the law will not permit you to make an arrangement with another, whereby he shall carry on a business and share the profits with you, without also assuming the liabilities of the partnership. If, in reality, you are partners, the law will not regard the apparent positions of affairs, but will search out the truth of the matter.

A promissory note is incomplete until it has been delivered either to the person named in it as having a right to the payment of the money, who is by lawyers and others called the payee, or if there be no payee named in it to someone else, who is then called the bearer.

I said a little back, that a promissory note may become negotiable. I meant by that, that even after it has become complete, it is not necessarily negotiable,, thus, if I make a note which runs, "I promise to pay John Smith one thousand dollars," and I deliver the note to John Smith, the note is not yet negotiable. It requires endorsement on the part of John Smith, that is, he must write his name on the back of it. Then and not until he has done so, will the mere handing of it to another, confer upon that other a title to it which is good against the world. The position is the same where the note runs: "I promise to pay John Smith or order."

If on the other hand the note had run "I promise to pay the bearer one thousand dollars" and it is delivered to another, then that person by merely handing it to a third person can confer upon such person a title that is good against the world.

To put it plainly, a note payable to a payee, that is a named person, requires endorsement, where as one that is payable to bearer is negotiable without endorsement. I would however, have you notice that a note requiring endorsement is easily convertible into a note requiring endorsement and vice versa.

I have just described the first operation. In that case,

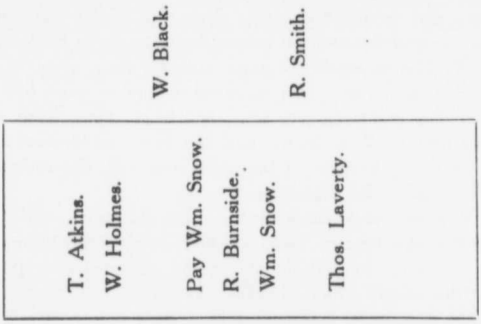
the note can pass from hand to hand without any endorsement after the first one. The second operation is as follows: Supposing I have a note which is payable to bearer and I write on the back of it: "Pay C. D.", then the note ceases to be a note payable to bearer and has become a note payable to a payee and requires further endorsement, namely endorsement by C. D., before it can be said to have become once more a negotiable instrument.

It is true, indeed, that there are many endorsements placed upon a note, which are not, strictly speaking, necessary, and generally are there because they have been asked for by the taker of the note. The reason they are asked for is that each additional endorsement constitutes an additional security to the person who holds the note at the date of its maturity, that is to say, at the date upon which it is payable or rather at that date, plus three days, which are known as the three days of grace.

The endorsement I have described above, that is "Pay C.D." is known as a special endorsement. You may endorse your note in that method or simply endorse it by writing your name on it (that is known as a general endorsement,) or you may endorse it by writing upon it "Pay C. D. only", (that is called a restrictive endorsement) and the note then ceases to be not only negotiable but even transferable, or you may endorse it "sans recours"; in this last event you will not be liable upon the note ,though indeed you may find it difficult to find anyone who will give you value for the note, as such endorsement throws great doubt on the stability of the other names that appear upon the note.

Will you kindly look at the first form of a promissory note I have given you. As it stands, it is not a negotiable instrument, i.e. the holder of it cannot get a better title to it than he had who gave it to him. It is not like money, yet. A thief steals it, and induces Smith to give $500 for it. Smith will lose his money. When T. Atkins endorses it, it becomes negotiable.

Now I want you to imagine that you are James Johnson and that this note is in your hands, its back appearing as follows:



I want you also to imagine that this is an accommodation note, i.e. that T. Atkins gave no consideration for the note. W. Holmes, however, has given T. Atkins $490 for the note. So have each of the persons whose names follow upon the note, the names appearing beside the note are persons who have also given value for the note but who have not indorsed it.

Now let us consider how many of these signatures were necessary. The signature of T. Atkins was necessary, because without his signature the document would not have been a note at all. That of W. Holmes was quite unnecessary, but the effect of his having signed it makes him liable upon the note. The signature of W. Black was also unnecessary, and he has not indorsed the note. He is not liable on the note. It would be wrong to say that he is under no liability, but I defer for the moment any explanation as to exactly how far he is liable. The signature of R. Burnside is also unnecessary, but you will observe that above his signature he has written "Pay Wm. Snow." This is, as you will remember, a special endorsement. The bill now ceases to be

negotiable. Wm. Snow cannot part with a perfect title to the bill by merely delivering it to R. Smith (see example). He must first endorse it, and so restore to the note its character of negotiability. The signature of R. Smith is unnecessary and is not endorsed. You will notice that of the seven persons into whose hands the note came between the time W. Brown made the note and the time when it came into your hands, only five endorsed it, and of these five only two of the endorsements were necessary, viz., those of T. Atkins and of Wm. Snow, and the latter endorsement was only necessary because of the order which R. Burnside chose to place above his signature.

You will also please notice, that R. Smith could have made the signature of Thos. Laverty necessary, without himself endorsing, by writing above the endorsement of Wm. Snow the words "Pay Thomas Laverty."

Do not think, however, that it does not matter to you how many endorsements there are. Each additional endorser is an additional person whom you can sue upon the note, if the note is not paid at maturity by W. Brown.

You cannot, however, sue either W. Black or R. Smith, they never endorsed the note. However, Thomas Laverty could sue R. Smith and R. Burnside could sue W. Black, if they were held liable on the note, under certain circumstances as persons in their position are supposed by law to warrant to the persons to whom they give the note, that the note is what is purports to be, that they have a right to transfer it, and that they are not aware at the time of the transfer of any fact which renders it valueless.

To put it shortly, he warrants the genuineness of the note, and if it turns out that the amount of the note has been fraudulently altered,, or that the signatures are forgeries, his transferee can recover the amount given by the latter for the note.

If there is any particular place named on the note (such as the Imperial Bank of Canada, Edmonton), for payment, then you should present it at that place upon its falling due.

It seems that even without presenting it, the maker would still be liable for the note in an action brought upon it, but if you had failed to present it at the place named in it, and it subsequently turned out that at the date of maturity there were funds lying at the bank to meet it, you would not receive the costs of any action, which you took upon the note, even if you were successful therein.

In order to make the endorser liable, you must present at the place named for payment, if any.

A bill of exchange is in the following form:

$500. Edmonton, Oct. 1, 1917.

Two months after date pay John Brown. to John Graham or order the sum of Five Hundred Dollars, value received.

Accepted

To John Brown, Toronto. William Smith.

In this case William Smith is known as the drawer, John Brown is known as the drawee, and John Graham is known as the payee. In this case the bill is not negotiable until it has been endorsed, in the same way as a promissory note; and the contract on the bill, whether it be the that of the drawers or the acceptors, or the indorsers, is incomplete and revocable until delivery of the instrument to give effect thereto. Generally speaking the acceptor of a bill (who accepts the same by writing his name across it) is in the same position as the maker of a promissory note and the rules are practically the same as those in regard to a promissory note. The acceptance, however,, may be conditional or partial.

You will remember that I told you that no contract was good unless there was consideration for the same. A statement that is just as applicable to the contract to pay contained in the promissory note as to any other contract, but there is this difference, that the law will always presume that

there has been a consideration for the note and the onus of showing that there has been no consideration lies upon the person asserting the same.

Now I would like to point out to you that it is not necessary that at every step in the life of a promissory note consideration should be given. If I borrow one hundred dollars from B and give him a note and that note passes through the hands and C, D and E, finally reaching F, F may sue any of these persons whose names appear upon the note, or myself, notwithstanding the fact that none of them gave any value for the note.

I have said that the onus of showing that there has been no consideration for the note given at any time in its career lies upon the person asserting the absence of consideration, but this is not always so because if the person who has sued upon the note can prove any fraud duress (i.e. wrongful compulsion) or force and fear or illegality connected with the note, then the holder of the note in suing up on it must show that consideration was in fact given for the note at some time subsequent to the occurrence of the fraud, etc.

I should just like to add this with respect to consideration. In the case of an ordinary contract there must, as I have explained be some consideration, but it need not be of any great value. It must however, which I omitted to say, be a consideration that is either present or future. It cannot be a past one. Thus, if you do me a service entirely unrequested by me and under such circumstances that a request for the service cannot be presumed, and I subsequently promise to pay you twenty dollars for having done me such service, such promise is not based upon any consideration, and cannot be enforced at law, but in the case of a promissory note any antecedent debt or liability will be a sufficient consideration to support the promise to pay contained in it.

Please notice also that in the case of an ordinary contract the only person who can sue upon the contract in general is the person who gives the consideration, or, as lawyers would say, from whom the consideration moves. This is not

the case with a promissory note, in that case it does not matter who gives the consideration. Let me impress this upon you, as is my wont, by means of an illustration. A once upon a time, promised B verbally that, if he would marry A's daughter, he would settle some money on him upon the marriage. The marriage took place, but there was no settlement. After the marriage A met B's father and said to him: "If you will give your son $5000, I will give him $10,000." B's father said he was agreed. Now you will remember that in a former letter I told you that an agreeement made in consideration of marriage must be in writing or evidenced by writing, so B, knowing this, was delighted when the new bargain was made. The bride's father once more was faithless, so B sued him on the new promise, but found that he could not succeed, as the other promise (which was the consideration for A's promise) was not made by him, i.e. the consideration did not move from him.

If, however, B's father had given him $5000 cash, and A had given him a promissory note for $10,000, B could have sued A upon the note, although the consideration for the note, the $4000 cash did not move from him. Perhaps I should tell you that B's father was dead at the time of the action.

LETTER 24.

IF a promissory note be signed by two or more persons, it may be shown that it was not the intention of these people that they all should be bound in the same way, that is, it may be shown that only one of them, for example was really the principal debtor, whereas the others were but sureties.

I would have you carefully remember, if you pay off a promissory note, to see that the note is either destroyed or returned to you. In this connection, I will relate to you the facts of a certain case which will show you how wary you ought to be. In that case a certain man named Balls, gave a promissory note to secure a debt to another person. Balls had also given as further security for the debt a mortgage of certain property. The mortgage had been transferred and the amount secured by the promissory note thus paid off. After this had been done, the original payee of the note endorsed the note to Glasscock, who gave value for the note, and thus became "a holder in due course" (a term the meaning of which I will shortly explain to you,) without any knowledge of the mortgage. Upon Glasscock suing Balls for the amount of the note, who was naturally reluctant to pay the note twice over, it was held by the Court that the note not having been paid or returned to Balls, he was still liable to pay the amount of it to Glasscock.

I now must explain to you what is meant by a "holder in due course." The Act which regulates negotiable instruments lays it down that "a holder in due course" is a person who has taken a note which is complete and regular on the face of it, provided he has become the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact, and that he took the note in good faith and for value and that at the time the

note was negotiated to him, he had no notice of any defect in title of the person who negotiated it to him.

If you can show that you are the holder in due course of a note then ordinarily speaking, you have a title to the money secured by the note, which can not be attacked by any person. Your title to it will be none the less good, because, for instance, it was subsequently discovered that the note had been stolen from the original owner, or that the maker of the note had been induced to make it by some fraudulent representation on the part of the person who obtained it, or, that as a matter of fact, the person who passed it to you owed more money to the maker of the note, than the maker of the note did to him.

This seems to be a perfectly clear statement, but, at the same time, if careful attention is not paid to every word in this definition, you will run the risk of imagining that either you or someone else in whom you are interested is the holder in due course of a note when he in fact is not so.

I would have you notice first of all that the note must be complete and regular on the face of it. Let me give you some instances: If a man takes a note which is wanting in any material particular, such as the date, he takes it at his peril and cannot be considered as a holder in due course. If there is any vice in the note, any thing wrong in the way it was obtained, he will probably find it is not much use to him. He is in the same position if he takes a bill which has been torn into many pieces and then pasted together, for in that case an intention to destroy the note would be evident.

Again you will remember that the holder in due course must have taken it without notice of any defect in title. Now notice, here, means actual notice though not necessarily formal notice, that is to say either knowledge of the facts or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge. Perhaps I can make this clearer by an example. If a person brings you a bill for one hundred dollars, and asks you to give him sixty dollars for it, and you suspect that he stole the bill and then refraining from

inquiry and with a vision of easily made money to the extent of forty dollars floating before your eyes, you pay him sixty dollars for it, then you are not a holder in due course and have no title to the bill as against the true owner.

Let me give you an example of a holder in due course: When a person pays a cheque into his bank in order that the amount of it may be placed to his credit, and the amount is so placed, the bank is a holder for value and under ordinary circumstances would be a holder in due course.

This leads me to another important point. You will notice that in order to make you a holder in due course, you must first of all be a holder within the meaning of the law. A person who claims under a forgery has no title to the note, and can pass none to any one else. He is not the holder of the instrument and consequently can never be a holder in due course. He is in quite a different position from a person who claims under a defective title.

I think I had better explain the position of forgery by a few examples. Supposing that a note is payable to the order of Thomas Brown and that another Thomas Brown in some way gets hold of the note and, writing his endorsement on it, passes it for value to you. You may well think that you have a perfect title to the note, and may go so far as to think that the maker of the note is bound to pay you and not the original Thomas Brown. You may say to yourself, "I am a holder in due course. I have taken a note complete and regular on the face of it for value and without notice of there being anything wrong with the title of the person who gave it to me." Nevertheless this is not so. It is not a case of your having a defective title. It is a case of your having no title at all. You are not a holder in due course, because, in the first place, you are not a holder. You cannot make the maker of the note pay you and, should you manage to persuade him to do so, he would have to pay Thomas Brown over again.

This was so decided in an old case and the judges in

giving their decision pointed out that it was really for the convenience of the public that this should be the law, their reasons being that if you cannot recover on the bill, you will be induced to prosecute the forger, whereas if you succeed in an action on the bill, you will have no inducement to prosecute for forgery and the maker of the note might have no means of discovering the person who committed the forgery and thus he would probably escape prosecution.

You must not confuse this case with the principle as to stolen notes. That principle depends on an old case which in a very well known text-book is related as follows: "One December night about a century ago, the mail from London to the West was attacked by highway men. Amongst other things taken was a bank note for £21 10s. which a Mr. Finney of London was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney who rushed off immediately to the bank and stopped payment of the note.

A few days afterwards the plaintiff who had come by the note quite honestly and had given value for it presented it at the bank, but Mr. Race, one of the bank clerks not only refused to cash it, but even to hand it back. Miller therefore sued him and succeeded in making him cash it."

I would like you to notice that when, as is sometimes done, a simple signature on a blank paper is delivered by the signer to be converted into a note, that is a prima facie authority to fill up the note for any amount; and when a bill is wanting in any material particular the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

I had better explain the working of this provision to you by means of examples. Supposing you, wishing to get an advance from a bank of a thousand dollars, go to a friend of yours and ask him to lend you his name upon a promissory note. Supposing he agrees and signs his name upon a blank

form and you fill it up for two thousand dollars, without your friend's knowledge and without any knowledge on the part of the bank that you are acting fraudulently, then the bank will be entitled to recover the full two thousand dollars from your friend. You had authority to fill the form up, though you had not authority to fill it up for two thousand dollars.

But I would also have you notice another case. Supposing you sign your name on a blank form and hand it to your agent with instructions to keep it until he receives further instructions from you. Suppose then the agent fills it up for a thousand dollars and procures a loan for that amount. You will not in this case be liable, because you delivered the document to be kept, and not to be filled up and used. You will notice that in the former case the note though not given to be used to the extent to which it was used, was nevertheless given to be used.

I would have you notice too, what effect an alteration made in a note after it has been delivered will have. Now it is laid down that, where there is a material alteration without the assent of all parties on the note, the result is that no person can be held liable upon the note except someone who has made, authorized or assented to the alteration, and any person who endorses the note after the alteration has been made.

If, however, the note should get into the hands of a holder in due course he may sue upon it as if it were still in the same form as it was before the alteration, if and only if, the alteration is not apparent.

I must here tell you what alterations are considered to be material. The following, amongst others, are held to be material: alteration in the date, in the sum, in the time, in the place, in the specified rate of interest or alteration, by converting a joint note into a joint and several note. A learned judge has laid down in plain and explicit language what a material alteration is. "Any alteration," says he,

"is material which would alter the business effect of the instrument, if used for any business purpose."

You will please notice that it does not follow that, because the note is avoided by a material alteration, the maker of the note cannot be made liable to pay the amount secured by it. Thus, supposing you buy a motor car and you give a note in payment for it, and the note is subsequently altered while in the possession of the vendor of the motor car. You could yet scarcely expect to have your motor car for nothing. Should you consult a lawyer on the subject, he will probably tell you that though the note was avoided, that is, though you could bring no action on the note, you could yet be sued upon the consideration, that is, you could be sued for the price of the motor car just as if no note had been given.

Let me give you another example to show how an alteration works. Suppose again, the sale of a motor car to you, and that, in order to pay for the same, you hand to the vendor after indorsement a bill which you have drawn on and which has been accepted by John Brown, (you will notice here that John Brown is in the same position as if he had signed a promissory note) payable to you according to the rules I have laid down previously in this letter. Now suppose in this case again, that the bill is materially altered whilst it is in possession of the vendor of the motor car. In this case the vendor cannot sue you, either on the bill or on the consideration, because the alteration made in the bill, whilst in the possession of the vendor of the motor car, has deprived you of your right on the bill against John Brown.

I may sum up the cases in which the holder of a bill which has been avoided by material alteration may yet sue on the consideration in respect of which it was negotiated to him. First, if the bill was negotiated to him after the alteration had been made and he was not privy to the alteration, he may yet sue on the consideration, and, secondly, if it was altered, whilst it

was still in his custody or under his control, he may recover on the consideration, provided that he did not intend to commit a fraud by the alteration, and provided that the person sued (that is, John Brown in my last case,) would not have had any remedy upon the bill, if it had not been altered.

While I am on the subject of alterations, I would like you to notice the following cases that actually happened. A drew a cheque on his bankers for £50 and negligently left blank spaces both before the words and the figures. The holder of the cheque filled it up as a cheque for one hundred and fifty pounds and obtained payment from the bank. It was held that the bank was entitled to charge A with one hundred and fifty pounds.

I do not think that this case is now good law. The decision was based, of course, on the principle that the man who gives opportunity for forgery or who so acts that a forgery is a possible result, should have to pay for it. At any rate, it is now wrong to contend, that it is negligence to sign a negotiable instrument, so that somebody else can tamper with it. The facts of the case were that the customer of the bank signed several blank cheques and gave them to his wife to be filled up and negotiated by her as she required them. In one of these the sum of fifty pounds was inserted in her presence and at her request by a clerk to whom she then gave the cheque in order that he might get the money for her. In writing the sum the clerk had left spaces with fraudulent intent so as to enable him to increase the amount to three hundred and fifty pounds which was paid to him by the bank clerk.

In a very much later case a cheque for ten pounds was drawn on a joint account by three trustees, a space being left before the words and figures. One of the trustees fraudulently filled up the cheque for one hundred and ten pounds and received the money. The courts held that the bank could not charge the joint account of the trustees for one hundred and ten pounds.

The situation may be summed up in the words of the

Privy Council. Whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that a cheque is drawn with spaces such that a forger can utilize them for purposes of forgery is not by itself any violation of the obligation.

Having introduced the subjects of cheques, I ought perhaps to say something of the duties that exist between a banker and his customer.

In the first place when you pay money into a bank that money ceases to be yours, just in the same way as if you lend it to a friend on the street. "The relationship between a banker and his customer," say the lawyers, "is simply that of a debtor and creditor." The banker is, however, not only bound to repay to you the money committed to his care, but he is also bound to honor your cheque to the extent of the sum for which he is a creditor and should he dishonour your cheque he will be liable to you in damages, unless indeed, the funds sufficient to meet the cheque were paid in such a short time before the dishonour of the cheque that the banker could not with the exercise of reasonable diligence ascertain the state of accounts between you.

Let me say one word as to the practice of marking cheques. It has been held that the effect of such practice was to give the cheque additional currency by showing on its face that it was drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer the credit of the bank on which it was drawn. In the case in which this was decided, a customer of the Bank of Hamilton drew a cheque which the bank certified with its stamp. The customer fraudulently altered the cheque into one for a larger amount and therewith opened an account with the Imperial Bank. The altered cheque passed through the clearing house and was honored by the Bank of Hamilton. That bank, discovering the fraud on the following day at once gave notice to the Imperial Bank of Canada and recovered by action from that bank the difference between the original and the altered cheque.

The marking does not make the bank liable upon the cheque, but it may constitute a representation by the banker that the cheque will be paid as drawn if presented within a reasonable time, and the banker may be held liable upon this representation, though not upon the note.

Let me add that if in a cheque or note there is a variation between the figures and the written words denoting the amount payable, the written words in law control the figures, though it is thought that it is the practice of bankers only to pay the lower amount.

LETTER 25.

YOU tell me that you would gladly hear something further as to negotiable instruments and more particularly as to cheques, bills of exchange and the signing of promissory notes, by persons who are really sureties. I will try and do what you ask of me, premising that the information that I now give you will be rather scrappy, filling up the gaps as it were.

First, I will tell you the facts of a case which will show how unbending the law is in its application of the rule that delivery is sufficient to pass the property in money or negotiable instruments.

A man took a cheque of another to the bank and the teller paid it. As the man was counting the money, the teller noticed that the account of the customer was overdrawn, and endeavoured to reclaim the money. The man refused to return it, but on making off was stopped and the money was taken from him. The man took an action for the money as his, and it was held that he was entitled to recover it. You will notice that the delivery of the bills and coin (in which payment was made) passed the property in them, and that the fact that the man had not finished counting them or had not expressed satisfaction with them did not prevent the property passing. The property had passed, though he was still entitled to object to the payment as insufficient or to any of the individual notes or coins.

Of course, this rule would work both ways so that if you had paid money over the counter in a bank for lodgment, you could not take it back, if, say, you were seized with sudden doubts as to the solvency of the bank.

The obligation of a banker to honour a customer's cheque rests upon a promise to do so, if the customer has deposited sufficient funds. The promise seldom is an express promise, it is generally an implied promise arising by impli-

cation from the course of business and the nature of the transaction.

If a cheque of yours has been wrongly dishonoured by a bank, you can recover damages from the bank without showing special damage, i.e. speaking roughly, without showing that your credit has been injured in any particular instance. Of course, no respectable man would make a claim unless he really has suffered injury, which in the case of a business, he might well do to a considerable extent.

Of course, the man to whom you give the cheque will have, under such circumstances no right of action against the bank.

A post-dated cheque is not invalid but the banker should not pay such cheque if presented before its ostensible date.

If your banker has not sufficient funds to pay completely a cheque drawn by you, he need not pay any of the cheque.

If you accept a bill or draft payable at your bankers, that amounts to an authority to the banker to pay it, when it is due, and further, if you have insufficient funds there, to a request for an overdraft sufficient to satisfy the bill; your banker, however, is under no obligation to pay the amount, even though your funds are sufficient, that is, if he has made no previous arrangement with you to pay the bill.

A cheque which is made payable conditionally on a specific attached receipt being signed, is not a negotiable instrument and, so the result is, that the banker is not protected in case the signature of the receipt is a forgery, and the banker will then have paid away his customer's money without authority and cannot debit him. The same rule applies to any conditional order, e.g. "if presented within ten days," or to any other condition, unless it can be said that the condition is not addressed to the bank.

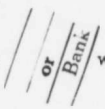
As to your bank book or pass-book, entries in this by the banker are prima facie evidence against him, and, when the book is returned by you, against you. So where a credit appears by mistake in the pass book for money not really

received, and you alter your position in bona-fide reliance upon the bank's entries, the bank cannot afterwards debit your account with the amount.

You will notice that your bank generally asks for an acknowledgment of the correctness of the balance as appearing in the bank book. This is asked for, I presume, owing to the doubt as to how far the return of a pass book without comment amounts to an acknowledgment of its correctness which you cannot dispute, by afterwards saying that some of the cheques have been forged or the amount fraudulently raised. That depends, of course, on whether a duty lies on you to examine your cheques and book and to communicate within a reasonable time with the bank, if any thing is wrong. This last seems to be a doubtful point.

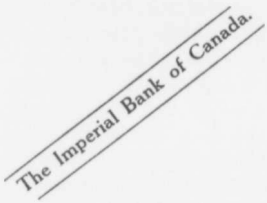
A banker may charge to the account of his customer a cheque which bears a forged indorsement, but not one which bears a forged signature. You will please notice that in the case of a forged indorsement, it is only the bank upon which the cheque is drawn, that is thus protected. Any other bank which pays a cheque bearing a forged indorsement and obtains the money for which the cheque is drawn must return the money so obtained to the person from whose account it is taken.

And now let me tell you something of crossed cheques. Very little use of the crossed cheque is made in Canada, why I cannot tell you, though doubtless there are satisfactory reasons.

You may cross a cheque either generally or specially. A general crossing consists of two parallel lines drawn across the cheque, thus. 

whilst a special crossing bears

crossing bears the name of a bank, thus —



A holder may cross an uncrossed cheque or turn a general crossing into a special crossing, such changes are not material alterations of the cheque, so as to avoid it.

Where a cheque is crossed specially to a bank, the bank to which it is crossed may again cross it specially to a bank for collection.

The first result of crossing a cheque is that the bank on which it is drawn must not pay it to any person except a bank. If it does, it will not be able to charge its customer's account with the payment. If the cheque be crossed specially, the payment can only be made to the bank, whose name is contained within the crossing lines.

Of course, the customer of a bank can waive the mistake of a bank in paying a crossed cheque.

An example will show you how this works:— a certain Bobbett drew a cheque, payable to Pennack or order, on Whitfield & Co., and crossed it specially "London and County Bank" and gave it to Pennack for goods. It was stolen from Pennack the indorsement of Pennack forged and the cheque cashed with an hotel-keeper Pinkett, who before cashing it, wired to Whitfield & Co. to enquire if the cheque was good and received a satisfactory answer. The hotel-keeper paid the cheque into his own account at the Worcester Bank, who crossed it specially to themselves, and received the money from Whitfield & Co., who disregarded the crossing to the London and County Bank. Bobbett could have said to his bank:

"You disregarded my crossing, and you cannot debit my account," but he did not do so, and instead waived the benefit of the act and approved the payment.

Bobbett then sued Pinkett to recover the moneys paid by Whitfield & Co., as Pinkett had received payment under a forged indorsement.

The jury held that Pennack had been negligent in losing the cheque, Bobbett in not stopping the cheque and Whitfield & Co. in disregarding the crossing to the London and County Bank, and Pinkett not guilty of any negligence. Judgment was however finally given for Bobbett.

I would like you to notice that if Bobbett had refused to allow Whitfield & Co. to debit his account, Whitfield & Co. could have recovered from Pinkett.

Not only may you cross cheques as I have described, but you may also write the words "not negotiable" upon the cheque; the effect of so doing will be that no one who takes the cheque can have a better title to it, than the person who gives to him. In other words the cheque ceases to be a negotiable instrument.

Let me conclude my remarks upon cheques by pointing out that you must present a cheque for payment within a reasonable time from its receipt. Just what is a reasonable time is not quite settled. It is probable that if the Bank is in the same town as you are, you should present the cheque for payment upon the same day; otherwise, you should forward it by the first post.

Please notice that if you don't present the cheque within a reasonable time, and the drawer of the cheque has sufficient assets at the time of drawing the cheque, and does not withdraw them and the bank continues to do business during the reasonable time for presenting the cheque, but subsequently stops payment, there will be no claim against the drawer of the cheque, though, of course, if the drawer of the cheque himself withdraws his assets he will still remain liable.

Banks are in the habit of refusing payment of stale cheques, i.e. cheques which have been outstanding for a long

period, but the practice has never received judicial sanction. So, again, it seems doubtful whether a bank is justified in refusing to pay an undated cheque.

Please notice, also, that most of the rules that I have laid down with regard to promissory notes are equally applicable to cheques.

A bill of exchange (draft) might be in the following form:—

$500. Edmonton, August 1st, 1917

Three months after date pay to John Smith the sum of Five hundred dollars. Value received.
To Hugh Black, Toronto. William Smith.

In this case William Smith would be the drawer, John Smith would be the payee and Hugh Black, the drawee. Of course, the bill might drawn "pay to my order"; in that case William Smith would be both drawer and payee, or it might be payable to bearer, so again it might be payable "at sight" or "on demand". Hugh Black, if he accepts the bill, i.e. if he engages to pay as directed by William Smith will do so by writing his name on the bill.

No doubt the bill may pass from hand to hand before it is accepted, and if you take it without the acceptance, you will be able to sue the drawer and all the persons who have indorsed it before coming into your hands, but you will not have any right of recourse against the drawee.

Now you will remember that the making of a promissory note cannot be conditional, so also the drawing of a bill of exchange cannot be conditional, but, (mark this well) the acceptance can be conditional. It could run thus, "payable when the S.S. Sparta arrives." So, again, the acceptance of the bill I have placed above, could be "for $400 only," though anyone taking a qualified acceptance without the consent of the prior parties will discharge them from liability to him.

Please notice that this bill of exchange will not be a negotiable instrument until it has been endorsed.

A bill must be presented for acceptance when the bill is payable at sight, otherwise the time for payment could not be fixed, it must be presented for acceptance if it contains a stipulation that it shall be so presented or if it is payable somewhere else than at the residence or place of business of the drawee.

If the drawee refuses to accept the bill, the holder of the bill should give notice to all prior parties on the bill, except the drawee and may then sue them on the bill as being dishonoured by non-acceptance.

If the bill has been accepted, it must be again presented for payment, in order to make the drawer or prior endorsers liable, on the day it falls due, allowing for the three days of grace. The presentment must be made on a business day at a reasonable hour.

The acceptor will be liable without presentment for payment, except where he has given an acceptance qualified as to place, e.g. Accepted, Payable at The Imperial Bank, Edmonton.

Please remember that even if you know perfectly well that the acceptor will not pay the bill, yet you must present it to him, to make the drawer or prior endorsers liable too. Now if the bill be presented for payment, but is not paid, you must give notice of dishonour to all prior parties on the bill (except the acceptor) in order to charge them. This notice of dishonour need not be in any particular form of words, nor need it be in writing. Give your notice of dishonour at the earliest possible moment.

This letter promises to be of such a length, that I will spare you further directions as to protest, etc., all the more readily, because these matters are but matters of detail, and not of principle and are much better left in the hands of others.

You will please notice, that when a promissory note,

bill or cheque is made payable to a fictitious or non-existing person, it may be treated as being payable to bearer.

This provision has been put into very simple language "where there is bill, no real payee, the bill may be treated as payable to bearer."

The name of an actual person may be "fictitious," just as much as a name you make up.

In Scott's Ivanhoe, Richard I is just as much a fictitious person as Rebecca the Jewess.

It can make no difference whether you invent a name to place on a note or pick out with a pin a name from a directory; in both cases, the person is 'fictitious.'

Again, it does not matter whether the person accepting a bill or making a note knew whether the payee was fictitious or not . His knowledge has nothing to do with it.

This is a difficult part of the law concerning notes and I must try to make it clearer by the use of examples, which I shall borrow from actual life.

A clerk told the head of his firm that money was due to A.B. for work done for the firm. A.B. was purely an invention of the clerk's. The head of the firm duly signed the cheque and the clerk wrote the name A.B. on its back and cashed it with a person who subsequently was paid by the bank. The drawer of the cheque endeavoured to recover the money from the person who cashed it on the ground that the cheque was not a negotiable instrument, not having been properly indorsed, but the Courts held that the casher of the cheque was entitled to treat the cheque as a bearer cheque, which could pass a perfect title without any indorsement, as you have already learned.

A clerk, according to custom, drew cheques payable to customers of a firm and had them signed by one of the firm, but instead of posting the cheques to the customers, he indorsed them and cashed them from time to time at a shop, where he was in the habit of dealing. The amount of the cheques were collected by the shop-keeper's bank. In this case it was held that the shopkeeper had no better title to

the cheques than the clerk had, as he took them not being properly endorsed, i.e. he could not treat them as payable to bearer, and so not requiring endorsement, as the payees in this case were real persons and not fictitious.

Just one more case, the trusted clerk of a firm drew a bill, putting in as drawer and payee, other firms with which his firm was accustomed to do business. His firm thinking the bill was all right, accepted it. The clerk forged the indorsement of the payee (so making the bill apparently a negotiable instrument) and obtained cash himself from bankers. It was held in this case that the payees though real in a sense, were yet fictitious within the meaning of the rule, which I have endeavoured to explain, and that therefore the bankers could debit the accounts of the accepting firm with the sum paid by them. You will please notice that this was not the case of a cheque, nor was the bill drawn on the bank, and that therefore the bank was not protected in any event against forged endorsement, as it would be in the case of a bill payable to order on demand drawn on a banker, which term includes a cheque.

There used to be a rule that where a person's name appeared on a bill or note as a principal, he could not be shown to be merely a surety. This rule depended on the well known rule of law that a written instrument cannot be contradicted by oral evidence, but it has been modified in this case and it is permissible to show that a person who appears to be primarily liable on a bill is merely a surety. Of course showing that such person is a surety does not prevent him being sued upon the bill, but it does introduce the rule that if the holder knowing the fact that one of the parties to a bill is a mere surety for another, who is the principal debtor, enters into a binding (and therefore founded on consideration) agreement with the principal debtor to give him time, that fact discharges the person who is really merely a surety unless the holder of the bill in entering into the binding agreement, I have spoken of, expressly reserves his rights against the surety.

Please notice, too, that renewing is really giving time to the principal, and therefore if persons liable as sureties do not assent to the renewal, they are in the same way discharged. Let me illustrate further, suppose that a note is made by a limited company and is endorsed by three directors in succession. Ordinarily the limited company would be primarily liable and the three directors would be liable in the order of their endorsements. Evidence however may be given that all the directors had agreed to indorse the note to guarantee the company's debt, and, upon evidence being so given, the directors will be equally liable between themselves as co-sureties.

I would have you notice that there has been much difference of opinion as to whether a person who writes his name on or endorses a note payable to order, before it has been endorsed by the payee (i.e., before the note has become negotiable, as you will remember) will be liable on the note. I think it is now clearly settled in Canada, that such person will be liable on the note just as much as any other indorser to a holder in due course of the note. The meaning of this last term I have already explained to you.

LETTER 26

IT may be well for you to know something of mechanics' liens, either because you are likely to suffer from the same or because you may at some time profit by their existence. In plain language a mechanic's lien is a security on some structure which is given to a person who has done labor upon or furnished materials for the construction, repair or improvement of the structure. I would have you notice that wage-earners have higher rights in this respect than others, that is, where some one has contracted for the erection, etc. of a building, but the contractor has failed to carry out his contract. Ordinarily mechanics can only have a lien to the extent of the money which is due to the contractor by the owner but in the case of wage earners it is possible to make the owner liable for more than is due to the contractor.

In order to be effective, a mechanic's lien must be filed.

It is not always easy to say what property may be made subject to a mechanic's lien, but I may tell you, that speaking generally, property held by a municipal corporation for public purposes is not subject to a mechanic's lien, but I must add that at any rate in Saskatchewan a school-house may be made the subject of a lien and in Manitoba a school-house may be made the subject of a lien and in Manitoba the general rule is that if property is liable to sale under execution, it may also be made subject to a mechanic's lien. So again, it may interest you to know that a mechanic's lien cannot be filed against a railway company which has been incorporated under an Act of the Dominion of Canada and declared to be a company incorporated for the general advantage of Canada.

A contractor is not generally entitled to a lien simply because he has performed work or service. If there is no contract which binds him to perform such work or service, he has no lien, so if an owner of a building in course of erec-

tion refuses to permit the contractor to carry out his contract, and so the contractor naturally suffers damages, yet he has no right to a lien for such damages, though he would have a lien for the work what he had actually done. I do not wish you to think that he has no remedy. He has, of course, an action for damages, but no right to a lien.

Sub-contractors and laborers may claim a lien against land even although they have not been employed at all by the owner and the owner is as a rule required to retain a certain percentage of the money which is due or to become due to the chief contractor, and he is bound to do this whether he has in fact any knowledge of the existence of the subcontract or not.

You never can hold any one liable upon a mechanic's lien, unless he is an owner of the property. Now this word owner has a very wide meaning. It will mean in general, a person having any interest in the lands on which work is done or material are placed at whose request or with whose consent or for whose direct benefit the work has been done or the materials have been placed. This definition results in making persons owners as far as Mechanic's Liens Acts are concerned, who are not properly speaking owners. Thus the purchaser of land under an agreement of sale might be an owner, and apparently a person who holds property in trust for another might be an owner or a tenant under a lease.

Again it would appear that the consent of the owner which is necessary to render him liable or rather to render his interest in the land liable need not be an express consent for the Court will be quite ready to presume a consent when there is apparent willingness on the part of the owner to have improvements made on the property. As for instance where he has left the property to a tenant and the tenant has expressly covenanted in his lease to make repairs.

You will please notice that where a structure is placed upon or improvements are made to a building already upon mortgaged premises, that in general the right of the mortgagee will be superior to that of the right to the holder of a

mechanics' lien, except as to the extent to which the mortgaged premises have been actually increased in value by the work done by the person who claims the mechanics' lien. You must notice that it is quite possible that the value of the work done by a person is by no means the same as the value which it adds to the premises on which it is done. It is by no means difficult to imagine cases in which a little work would add considerable value to the premises and also cases in which a great deal of work would add but little value. It is difficult to say indeed, that any premises are being increased in value until the actual value of the property has been ascertained by putting the premises up for sale.

Mechanics liens must always be filed within a certain time which varies in the different jurisdictons. This time dates from the completion of the work. It would seem to be a very easy matter to decide when work has been completed, but a little reflection will show you that it is not really so. It is quite easy to imagine a case in which a builder has contracted to build a house and the specifications have included a requirement that the ceiling should be finished in a certain fashion. The contractor may have imagined that he has completed the ceiling, and accordingly, have removed all his men and materials from the premises, and an unobservant owner may well have taken up his abode in the premises without noticing the contractor's omission. It is clear, however, that the work is not completed and that the time for registering the lien would not begin to run until the omission has been rectified. Again suppose the work to consist of different jobs all in one line of business but ordered at different times. In such a case it is not necessary for the mechanic to file a lien after completing each piece of work. It will be quite sufficient if he files his lien after he has completed the whole work. Again, take this case: Suppose it is a case of the installation of machinery and it is quite necessary to test the machinery before the job can be pronounced complete. Then the time for filing the lien does

not run until the machinery has been pronounced satisfactory.

On the other hand, it is quite easy to imagine cases in which a little tinkering afterwards put in by subterfuge and expressly for the purpose of extending the time for filing the lien and I do not think under such circumstances any Court would hold that the time had really been extended.

The whole question is really a question of honest intention. If the after work is done honestly in order to comply with the contract, then the time for filing the lien would apparently run from the doing of such after work.

I cannot possibly within the limits of a letter explain to you all the ins and outs of the law relating to mechanics' liens in the different jurisdictions. All I can here do is point out to you a few of the peculiarities. As a rule not more than six weeks' wages can be recovered.

In some jurisdictions an owner of land is deemed to have authorized the work unless a short time, generally, three days after he learns about it, he posts a notice in some conspicuous place upon the land to the effect that he will not be responsible for the work, and no contractor or subcontractor where the contract price exceeds $500 is entitled to receive any payment unless he posts receipted payrolls in some place upon the works and if the owner pays him without the delivery of such payroll the payment will not be considered as a payment at all as against the claim of a laborer.

There may be a provision that laborers cannot contract themselves out of the benefit of the lien where their wages are not more than five dollars a day.

The usual period allowed for the filing of a lien is thirty or thirty-one days. In some of the jurisdictions, for instance in Manitoba, there is a limit to the amount for which a lien can be filed. There no lien can exist for any claim under the sum of twenty dollars.

Were I to attempt to tell you any more as to these liens, the only result would be that I would muddle your head,

that even what I have been able to say, would lose its point for you. So I beg that you will hold me excused from giving a detailed account of the differences in Mechanics' Lien Laws in the various provinces of Canada. That would not at all aid you in your endeavour to learn the principles of law. Here again, let me remind you of my usual advice. I need not here repeat what that is.

LETTER 27.

I MUST no longer postpone calling your attention to Mortgages.

A mortgage is a security for money lent. The borrower is styled the Mortgagor, the lender the Mortgagee.

If you lend money on mortgage, you should take care to have a good title, and property in pledge of sufficient value, and a borrower of character, for, however good the security, if he be a bad paymaster you will find it difficult to obtain your interest regularly. In several instances, solicitors have had to indemnify their clients for having lent their money on insufficient security. But this can hardly happen except in small loans on houses, or so-called ground-rents, or the like. A lawyer is, of course, not answerable for the value of the estate pledged, unless he render himself liable by his conduct, for it does not fall within his province to value estates. You are not likely to advance money on mortgage to speculative builders, or the holders of house property. It is not usual, I must inform you, to lend more than two-thirds of the value of the property. . Never advance money upon a second mortgage, that is, subject to a prior mortgage in another person. It is not a satisfactory security; inasmuch as you may be compelled to redeem or pay off the first mortgage, or actually lose your own security. If you do advance money on mortgage of buildings, take care to have them insured in your name. If, however, they are leasehold, you should ascertain that such an assurance, if the only one, would not be a forfeiture of the lease under which they are held.

Pay the money yourself to the mortgagor, and see the deed executed. Do not pay the money to the person bringing the deed, although executed and the receipt signed, unless by the written authority of the borrower; for the mere possession of the deed by the solicitor or agent, will give him no authority to receive the money. It is not safe in all

cases to rely on mortgages apparently duly executed, and brought to you by the regular man of business of the borrower ,to whom it has been delivered by your lawyer to get it executed by his client the borrower. Unhappily, I have known more instances than one of forged mortgages having been delivered to an unsuspecting lender. In one case, the lender and his solicitors were assembled, waiting for the mortgage deed, which was to be brought duly executed by the solicitor of the supposed borrower, who was confined to his bed by illness; and at length tired with waiting, a messenger was just being despatched to the supposed borrower's house, when the solicitor, who had evidently been delayed in concocting the forged deed and its attestations, arrived with the deed executed and attested, and received the money. He escaped detection at the moment, but ultimately left the country. The lender, of course, lost his money. These instances will make you cautious, but will not lead you to suspect men of character and reputation. It is advisable to keep your own securities in your own deed-box at home, for the same persons, who forged mortgages, forged also transfers of mortgages, and delivered up the deeds to the new lender; an act which was facilitated by the possession of the mortgage deed. The forger, of course, continued to pay interest regularly to the first lender. In one remarkable case the agent acted for two persons, and he actually mortgaged the property of one to the other by a forged instrument, and although he and these two persons frequently dined together, the forgery was not discovered till the guilty party was wholly ruined. The lender did not like to talk about the mortgage, and was not called upon to do so, as the interest was regularly paid by the agent, and the supposed borrower was, of course, silent on the subject.

It has been well said ,that high interest means bad security. Many persons—generally women—have been induced to sell their stock, and to give the produce to an agent or attorney who has promised to place it on mortgage at a higher rate of interest: the interest has been accordingly paid,

but painful instances have occurred in which the agents have spent the money, and the confiding parties have been left destitute. If a holder of stock cannot attend to sell and receive the money, he should not give a power of attorney to sell his stock with a view to another investment, until the money can be actually paid to the proposed borrower. It should, in effect, be one transaction. In giving a power to receive dividends, it should be seen that the power does not extend to a sale of the stock . The Bank has thrown around the holders of stock all the protection in their power against fraud. In some instances a holder of stock has been induced to attend at the Bank and sign what has turned out to be a transfer upon a sale, without being aware of the nature of the act. It would seem to be an unnecessary caution never to sign your name to any paper without first ascertaining the real nature of the document; but experience shows that many persons, women especially, require to have this caution impressed upon their minds.

Upon a mortgage the title is, of course, investigated by the lender's lawyer, and the mortgage is prepared by his lawyer, but all the expenses are paid by the borrower.

In case you do not pay the interest regularly, the mortgagee may compel payment of the principal and interest. You will always be in danger of the mortgagee calling in the money, and thus putting you to the expense of obtaining money elsewhere to pay him off, and of making a transfer of the mortgage to the new lender. You should inquire whether the lender is likely to want his money, or is in the habit of changing his securities. To avoid this danger, it is sometimes stipulated that the lender shall not call in the money for a given number of years, provided the interest is regularly paid; but in that case the lender will probably require an obligation from the borrower not to pay the mortgage off within that period.

A day is always named for payment of the principal, and in the mean time for payment of the interest. If either the interest or the principal be not paid at the day, the mort-

gagee (the lender) may at any time recover it; but the mortgagor (the borrower) cannot compel the mortgagee to receive it without first giving him six calendar months' notice of his intention to pay it off. If he make a regular tender of the money on the day on which the notice expires, although the lender refuse to accept it, yet interest will no longer run: but to stop the interest, a regular tender must be made on the precise day.

So the mortgagor may sell the estate, and pay off the mortgage out of the purchase-money; or he may sell it subject to the mortgage; but a purchaser in the latter case should either require the mortgagee's concurrence, or should be satisfied that the account stated by the mortgagor alone is correct, and should give notice to the mortgagee of the sale immediately after it is completed. A man buying an estate subject to a mortgage is without any express stipulation bound to indemnify the seller against the debt.

A mortgagor cannot, except under statutory authority, after a mortgage make a lease binding on the mortgagee. The mortgagee may at any time evict a tenant holding under such a lease; but he may absolutely confirm it in regular form, or he may bind himself partially by his acts; for example, receiving the rent from the lessee, in which case the latter would be considered tenant from year to year under the mortgagee, and could not be evicted without a regular notice to quit, but the lease would not be confirmed. The remedy of the tenant on eviction would be against the mortgagor.

It is always stipulated in mortgages, that until default shall be made in payment of the money the mortgagor shall quietly enjoy the estate. After default has been made the mortgagee may obtain possession of the estate, but although he becomes owner of the estate at law, yet he cannot without an absolute necessity make a lease of the lands which will bind the mortgagor.

A mortgagor, even after default in payment of the money is not liable to account to the mortgagee for the rents

during the time which he has been suffered to remain in possession.

A mortgagee can take possession, but he should either leave the mortgagor in possession or take himself; for if he give notice to the tenants not to pay their rents to the mortgagor, and do not himself receive them, and any loss is sustained in consequence of the notice, he will be liable to make it good.

A mortgagee in possession should keep regular accounts, for he is liable to account to the mortgagor for the profits which he has, or might have, received, without fraud or wilful neglect: he is answerable for wilful neglect, although not guilty of actual fraud; for instance, if the mortgagee turns out a sufficient tenant, and having notice that the estate was under-let, takes a new tenant, another substantial person offering more . But in general, if the mortgagor knows that the estate is under-let, he ought to give notice of that circumstance to the mortgagee, and to afford his advice and aid for the purpose of making the estate as productive as possible. A mortgagee in possession may, if necessary, appoint a bailiff and receiver, and charge the estate with their salaries; but if he choose to take the trouble on himself he cannot charge for it, not even formerly, if the mortgagor agreed to make him any allowance, for that would have been to give him something beyond his principal and interest; but now such an agreement would probably be held to be binding. A mortgagee may always stipulate for a receiver on his original loan to be paid by the mortgagor.

The mortgagee cannot justify committing waste on the estate unless the security is defective, and in that case the waste must in its nature be productive of money, which must be applied in relief of the estate; nor can he enter upon any speculation at the risk of the mortgagor; therefore, if he open a mine or quarry, he must do it at his own risk,, and yet the profit from it would be brought into the account against him. He need only keep the estate in necessary repair, and of course he can repay himself out of the rents; and if he in-

crease the interest in the estate, as by renewing the lives, where the estate is held upon lives, he will be entitled to be repaid the sum advanced, with interest, which will be considered as an additional charge on the estate, but he cannot by extensive and extravagant improvements so increase his claim, as to improve the mortgagor out of the estate.

It has always been laid down that neither the mortgagor nor the mortgagee can, by any adverse act, bar the right of the other. But it was decided in the great case of Lord Cholmondeley v. Lord Clinton, that twenty (now twelve) years adverse possession, by a person claiming the equity of redemption, will bar the rightful owner. If a man with a bad title make a mortgage, and afterwards, by any means, acquire a good title, he must confirm the mortgage. So if he obtain an increased interest in the estate, as a renewal of a lease, it will be considered as a graft upon the original stock, and be liable to the mortgage. And, by a parity of reason, if the mortgagee acquire a renewed interest in the mortgaged estate, it will, subject to the mortgage, be in trust for the mortgagor.

Now, by statute law, if a mortgagee is allowed to remain twelve (in some places ten) years in possession, or in receipt of the rents, without account, the mortgagor is barred of all his right in the estate, for after that period equity cannot assist him in redeeming the estate, and there is no saving for disabilities.

But if in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to his agent, signed by the mortgagee or the person claiming through him, or there has been a payment of any part of the money or interest, then the time will not run on, but still the suit must be brought within twelve or ten years next after the last of such acknowledgements, or the last of such payments (as the case may be). There are special provisions where there are several mortgagors or mortgagees in regard to acknowledgments. The statute law has made this difference, that that which before the statute was a sufficient

declaration by word of mouth, must now be in writing, and signed by the mortgagee, or the person claiming under him. The acknowledgment may be made out by letters or deeds, but a mere transfer of a mortgage, subject to the equity of redemption, as it is termed, or right in equity to redeem, will not amount to an acknowledgment.

On the other hand, if the mortgagor is allowed to remain twelve (in some places ten) years in possession without any acknowledgment or payment of any part of the principal or interest, the mortgagee will lose his security. No action or suit can be brought to recover any money secured by mortgage but within twelve or ten years next after a present right to receive it has accrued to some person capable of giving a discharge for it, unless in the mean time some part of the money or interest has been paid, or some acknowledgment of the right to it shall be given in writing, signed by the mortgagor or his agent, to the mortgagee or his agent; the time will run from the last of the payments or acknowledgments, if more than one. And there is, it seems, the same restriction upon an action or suit for the recovery of the money. Whether, therefore, you are a mortgagor or a mortgagee, you must be vigilant, or you may lose your property.

As you are tenant for life under your settlement, and happen also to have vested in you a mortgage binding the inheritance, I must inform you that your right to the money secured by the mortgage will not be affected by time running against you during your life, for yours is the hand both to receive and pay.

If a mortgagee will not re-convey upon payment of the principal and interest, and costs, and the right to redeem is still open, the mortgagor may compel a redemption. On the other hand, if the mortgagee is desirous either to obtain back his money, or to have the estate discharged of any right of redemption, he may proceed against the mortgagor for what is termed a "foreclosure," and the mortgagor will be decreed to pay the money and

interest at a day named, or to stand foreclosed of all right to redeem the estate. After such a decree is perfected, if default is made in payment of the money, the mortgagee becomes absolute owner of the estate. But equity will be anxious not to hastily foreclose the mortgagor; and therefore, under proper circumstances, the time limited for payment of the money will be enlarged more than once, if there is a fair prospect of the mortgagor being able to repay the money. This is sometimes a great hardship on the mortgagee, but the rule is not extended to a claim by the mortgagor for redemption; the time there will not readily be enlarged.

A mortgage is assignable, and the concurrence of the mortgagor in the transfer is not actually necessary. But I advise you never to accept such a transfer without the mortgagor's concurrence, for independently of the danger of forgery, an assignee will take subject to the real state of the account between the mortgagor and mortgagee, and therefore he should be well satisfied that the account is correct, if he dispense with the mortgagor's concurrence; and in no instance should you take an assignment of a second mortgage without the concurrence of the mortgagor.

The mortgagee alone cannot charge more money, he cannot increase the principal, he cannot make the interest principal. An assignee of a mortgage is entitled to the whole sum due, although he buy it at a less price. If a mortgagee "is in possession," he should be careful to whom he assigns his mortgage without the concurrence of the mortgagor, for it has been considered that, if the assignee of the mortgage were insolvent, the original mortgagee would be answerable for the rents received, as well after as before he assigned his mortgage.

Lastly, I must inform you, that the law has been altered as to the right of your heir or devisee to have a mortgage on your estate paid off out of your personal estate; for if you do not by your will or other document signify a contrary or other intention, your heir or devisee will not be entitled to have the mortgage paid off out of your personal

estate, or any other real estate of yours. This, however, does not affect the mortgagee.

If you have contracted for the purchase of an estate, but not paid for it, your heir or devisee will still be entitled to require the purchase-money to be paid out of your personal estate.

You will, please, remember that in some parts of Canada, e.g. in Alberta, Manitoba, Saskatchewan and parts of Ontario, there is in force what is known as the Torrens System. Under this system the law relating to mortgages differs in important particulars from the general law. I cannot set out in detail all the differences, but I would have you bear in mind carefully the following more important points:—

A Torrens System Mortgage does not give the legal interest in the land to the mortgagee, it only operates as a charge.

It seems probable that the mortgagee cannot demand the six months' notice prior to the paying of the mortgage, which can be demanded by the mortgagee under the general law. This is certainly true in some jurisdictons, e.g. Alberta.

Powers of sale, leasing, taking possession and foreclosure are given by statute to the mortgagee. There is considerable question as to whether these powers can be exercised otherwise than in accordance with the statutory provisions, say by special agreement in the mortgage with the mortgagor. You will please be very careful not to rely on any agreement as to these powers you may make with any mortgagor, without consulting your lawyer. In general, however, I might say you will still be entitled to possession and to make leases of the mortgaged property after the mortgagor has made default in payment. It is not clear for what term you can lease. I think, I may say that it is at any rate questionable as to whether you could make a lease for a period longer than the mortgage, or for any very unreasonable period such as 999 years.

It is clear that in the case of a Torrens System mortgage there is no necessity for the stipulation I have previously spoken of viz. that until default shall be made in payment of the money, the mortgagor shall quietly enjoy the estate.

A mortgagee under the Torrens System will be subject to the same liabilities when he takes possession, as a mortgagee under the general law would be.

In general ,the rights as to redemption are much the same in both systems.

LETTER 28

YOU asked me how far you were bound by the acts of the manager of your farm and shop respectively. This introduces the whole question of agency. It is a very intricate portion of law, but I think I can manage to give you sufficient information as to the liabilities under which an agent may place you without the use of any legal technical terms.

First of all I would tell you that if you want your agent to execute documents under seal then you must appoint that agent by a power of attorney also under seal, so that as a practical precaution it is always better to make a power of attorney under seal.

I may tell you that an agent can bind you and that even against your express instructions, as long as he is acting "within the scope of his employment"; so also you will be liable for the wrongful acts committed by your agent provided he acts within the scope of his employment.

These words "within the scope of his employment" are the magic words used by lawyers to decide whether the agent has received your authority or not.

The authority I here speak of is not necessarily the authority that you have actually given to the agent. It may be an authority that is implied from the nature of the employment of the agent, thus if you employ an auctioneer, he has authority to do all things which are necessary for you and all things which are customary amonst auctioneers, or it may be an authority, that as a matter of fact the agent never had, but which by your adoption of what is done for you, you are prevented from denying that he had or it may be an authority which he really had not, but which you by silence or otherwise permitted people to think he had.

Perhaps I can best explain this by an illustration. Certain brewers who owned a bar appointed a manager of the

business and put up his name over the door. He was forbidden to buy any goods at all for the business except certain liquors. He did however buy cigars from a tobacco manufacturer. The brewers however, refused to pay for these cigars, but on being brought into court they soon discovered that that was not the view of the law taken by the judge. He held the brewers liable to pay for the cigars, inasmuch as the purchase of such things was within the authority usually conferred upon an agent of this sort, or as lawyers would says, "within the ostensible authority of the agent."

The same principle applies to wrongs committed by an agent in the course of his employment. Not many years ago, it used to be said that where a wrong of the servant or agent was committed on his own account and not for the benefit of his master, that the master was not answerable for such wrongs, but that is no longer the law.

In the case that settled this matter, a certain widow who owned a cottage consulted the clerk of a solicitor as to making an investment, and he advised her to sell the property. He produced two documents to her which he asked her to sign and she did so without reading them. One of these documents was a conveyance of the cottage to himself. He then mortgaged the cottage and used the proceeds to pay a debt of his own. After decision of the court once in favor of the widow and once in favor of the lawyer, it was finally decided that the lawyer was responsible for the wrong of his servant.

I would just add that at any rate, as regards more serious crimes you will not be responsible for the crimes of your agent unless, indeed you have actually instigated him to commit the crime, but yet there are certain crimes or, as I would prefer to call them, offences, for which a person may be punished even though he has given no authority for their commission. I might illustrate this class of offense by the sale of intoxicating liquor to a drunken person, that is, in such provinces where the sale of intoxicating liquor is permitted at all.

I will finish this letter by pointing out to you the difference between a servant or agent and an independent contractor. As I have said the agent can make you liable even when he is acting in direct disobedience to your order, as the owner of a certain omnibus which was upset whilst racing against a rival omnibus discovered to his cost. He thought that he could be under no liability, inasmuch as he had strictly forbidden the driver of the omnibus to race against any other omnibus. But as regards an independent contractor, that is to say, one who has agreed to do a piece of work for you, but who is to be left free as to the manner of doing it, if such independent contractor improperly carries out the work you will not in general, be liable for his default, or unlawful acts, unless you have expressly authorized them. In this case there is no question of ostensible authority.

LETTER 29.

PECULIAR but very practical questions sometimes crop up with respect to the right to property which has been found.

I think I may lay it down as a general rule that he who finds property may refuse to give it up to anyone except the true owner and has a right to recover it, if it be taken from his possession by anyone else other than the true owner. This can be best illustrated by a very old case. In that case a chimney sweeper's boy found a jewel and he carried it to a goldsmith's shop to know what it was, and delivered it into the hands of the apprentice of the goldsmith who under a pretence of weighing it took out the stone and calling to the master to let him know it came to three half-pence. The master offered the boy the money, who refused to take it and insisted to have the thing again, whereupon the apprentice delivered him back the socket without the stone. Upon the chimney-sweeper's boy taking action against the goldsmith, he was held entitled to have the jewel back and what is more the judge directed the jury that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels, the measure of their damages, "which they accordingly did," as the old report runs.

It is easy enough to say that the finder or possessor of goods has a right to them as against anybody else, but the true owner, but when it comes to applying the doctrine questions of very great difficulty occur, thus where a bundle of bank notes was picked up in a shop by a customer it was by no means an easy matter to settle who had the right to the bank notes; apart of course from the right of the true owner who was unknown. The learned judge who tried the case finally held the finder to be entitled to recover the notes from the shopkeeper, with whom he had deposited them for safe keeping.

I would here also give you further warning. You must remember that if you find a very valuable article and you take no steps to find out who its true owner is you may perchance fall under suspicion of having had the guilty intention of keeping it even as against the true owner and so be guilty of a crime. From this you will see that in the case of very valuable articles, it is as well to hand them over to the police who will return them to you if the true owner be not found, or at least to acquaint the police with the fact that you have found such articles.

In another case a labourer who had been employed to clean out a reservoir found two rings imbedded in the mud and claimed to keep them; the courts held that he could not do so, as the owner of the reservoir had control over the place and its contents. These two cases are somewhat contradictory.

On the whole it is difficult to lay down any very definite rule as to the right to articles which are found. I think you cannot go far wrong if you take it that if you find an article in a public place a place to which it is open to everybody to go, either with or without payment, you are entitled to it. If you find it in a place which is not public then you must hand it over to the owner of the place.

LETTER 30.

YOU tell me that your neighbour is extremely apprehensive as to a small bear, which has been presented to you, and that you likewise are in doubts how far you will be justified in keeping him, after he has grown to years of discretion, or, should I not rather say of indiscretion?

I may tell you that with regard to animals wild by nature, such as your bear, you are under much greater liability, than you are with regard to tame or domestic animals, such for instance as a dog or a cow. You keep your bear at your peril, and no matter how careful you are, yet if he escapes and does harm, it will be in vain for you to plead the extreme care with which you guarded him.

The same rule of law that imposes liability on you with respect to the bear, also applies to such things as bonfires, factory fires and sparks from a traction engine or indeed anything in its nature likely to do mischief that you may bring upon your land, such as a water reservoir. It will be difficult to escape from paying the piper, if harm comes from your possesion of Bruin, though you might perchance be able to do so, if you could show that the damage resulted from the act of God, which, when lawyers use the phrase means not a mere misfortune, but something overwhelming, such as storms, lightnings and tempests, which could not happen by the intervention of man, and loss from which could not have been prevented, or avoided by any reasonable amount of foresight, pains and care. So, also, you might escape if you could show that the escape of the bear was due to the act of the person who complains of Bruin's hug, or to the wrongful act of some person, over whom you had no control.

I think I could illustrate the limits of this rule by telling you the facts of a case, that happened not so long ago. An apartment block was supplied with water from the top of the block. One of the supply pipes burst and the tenant in

the basement had his apartment flooded and his belongings injured. In his wrath he attempted to hold his landlord liable on the ground that he had brought something on his premises which from its nature was liable to cause mischief, if it escaped, namely water, and it had escaped and caused mischief. But you will be glad to hear he failed on the ground that the water had been brought upon the premises partly for his own benefit.

So again, if a person plants poisonous trees on his land and they project into his neighbours land and the latter's cattle feed on them and are injured, the neighbour has an action, but if thistle seed escape from one man's land to that of another and causes a plenteous crop of thistles thereon, the latter has no action, for the first man did not sow or plant the thistles.

This mention of apartment blocks, reminds me that you are the fortunate owner of many houses and apartments, so I will take this opportunity of writing to you something as to your liabilities for nuisances, your liabilities to persons visiting the blocks and your duty with regard to the common staircase and the elevator. As to nuisances you will be liable (a) if you yourself have created them prior to letting your houses, or (b) where you let your premises knowing that the tenant intends to create a nuisance, or (c) where the nuisance is due to want of repair and you have agreed to repair, or (d) where you let the premises with the nuisance already on them and you have failed to take a covenant from the tenant to prevent or discontinue it.

Now, if you have made no special stipulations with the persons who occupy your suites, you are under no liability to repair.

Here I may as well mention a case in which, even though the landlord had contracted with the tenant to keep the house in repair, yet his wife who was injured owing to the want of repair, was nevertheless unable to recover damages as against

the landlord, because the landlord had only contracted with the husband as to repair and not at all with the wife.

But as regards such parts of the buildings, as the elevator and the common staircase, which are necessary for the convenience of all the tenants and which in the eyes of the law you are presumed to retain in your own possession, these you are bound to keep in a proper condition, or to express it more accurately you are bound to take reasonable care that they should be in a proper condition.

The cases on this subject are not very consistent and I can only tell you that where the facts of the case point to a contract express or implied on the part of the landlord to do something and he fails to do that thing, then he becomes liable not only to the tenants, but also to persons who come upon the premises by the express or implied permission of the tenant, such as the milkman. The question, said a judge, is not a question of general law, but the existence of a particular implied contract, and each case must depend on its circumstances, thus it has been held that the landlord of the block is liable to a visitor to one of the tenants for injuries sustained by him through a defective staircase, and in another case it was held that where the injuries were received through defective lighting of the staircase, the landlord was not liable. One of the judges drew the difference between the cases thus: "A person going up or down a staircase may well assume that it is free from structural defects. But where the staircase is in a state of darkness, it is reasonable that he should refrain from going until he can provide himself with a light;" and another in these words: "If it is dark, the person using the premises knows it is dark; but if the premises are out of repair, he may very well not know they are out of repair."

In another case where the floor of a building was let to a tenant by a landlord, but the landlord retained possession of the roof and the gutters, a gutter became so stopped up that it overflowed and flooded the premises of the tenant. The landlord, though he had notice of the condition of the gutter

failed to clear it out. Owing to this failure the landlord had to make good the loss of the tenant. You will notice that here the landlord was negligent in that he had notice of the state of the gutter and failed to fix it. The case would probably have gone otherwise, if he had had no notice.

I would have you notice however, that you will not be liable for any injuries caused by defects in any part of the premises which is not necessary for the use of the tenants, such as a roof which is used as a drying ground by the tenants for their own convenience. So you have done your duty to your tenants with regard to an elevator when you supply them with one suitably constructed in the first instance so far as not to be liable for accidents due to the nature of the elevator. I presume that you generally retain the control of the elevator in your own hands, but, all the same, I might add that if you do not retain the control of it, you will not be liable for any accidents due to its management.

Before ending this letter I would like to give you a general bit of advice. Don't agree to repair. If you don't agree to repair ,you will not be liable to your tenants, nor to their families, visitors, customers or servants. As to your suites, you may be liable, but only if the circumstances point to the fact that you contracted or must be held to have contracted to repair.

Even if you do undertake to repair, you will not be liable to anyone else except your tenant. The contract is only between you and him. This is always true of a private house but you must remember that where you retain control of parts of your apartment block you may be held liable to the visitor, etc., of a tenant.

I think I shall end this letter by pointing out to you a distinction that is drawn by the law between two classes of persons who may come to your house. The first class I am referring are "invitees". In this class are placed customers, men delivering parcels, and persons who come to your premises upon business which concerns you by your invitation

express or implied, e.g. children at school, passengers on a train.

Towards invitees you owe a duty of keeping your premises reasonably safe for the use that is to be made of them. You are not bound to adopt the most recent inventions or devices to insure their safety, you will be quite free in the eyes of the law when you have done what is ordinarily and reasonably done to ensure safety.

The second class I am referring to are "licensees." In this class are included ordinary vistors. With respect to such persons you will not be liable for any injuries caused to them by defects in the construction of any of your premises, nor for any injury arising to them from any defect of which you are not aware, but if you know of some hidden danger on your premises, which is not readily observable, your duty is to warn them of it. In the case of children, whom you have allowed to play, for example, upon your premises, your duty is probably somewhat higher and you may be involved deeply if you have left about something which is attractive to children, but dangerous as a plaything.

And now I must end this letter with the hope that it may prove useful to you, but, also with the warning that though, as you may think, I have written at length, yet I have left much unsaid.

LETTER 31.

YOU tell me that you would like me to tell you shortly what are the most prominent legal points with respect to the carriage of the goods shipped to or by you. I will reply to you by telling you something of the liabilities and duties of the person who is known to lawyer as a common carrier. A common carrier is a person who undertakes for hire to transport from place to place either by land or water as his regular business the goods of such persons as think fit to employ him. A person who merely undertakes chance jobs is not a common carrier. He is bound to carry all goods provided that he has room for them, and that they are goods of a class which he undertakes to carry. A common carrier is entitled to be paid his charges beforehand, but not before he has received the goods.

A taxi-cab driver is not a common carrier, because he conveys passengers only, but if he carries luggage, it is only as incidental to carrying a passenger, but railway companies, and steamship companies are common carriers. The common carrier cannot charge any more than a reasonable remuneration. He is under much more severe liability than are other persons to whom the goods of others are entrusted. He is bound to take the utmost care of the goods whilst in his custody and is responsible for every injury sustained by them occasioned by any means whatever except only by the act of God or the King's enemies. I have already in the letter relating to your liabilities for bringing dangerous animals or things upon your premises, told you what is meant by an act of God and I need not here repeat it. He is not liable however, for damage which arises from what is known as the inherent vice of the articles carried, meaning by inherent vice a quality which is natural to the thing carried and results in damage to them, such as the rotteness of fruit shipped when over-ripe or the liability of grain to over-heat, or the

propensity of some horses to injure themselves owing to fright and consequent struggling or for injury through bad packing.

Common carriers are protected from paying more than a certain amount for damage in respect of certain articles which may be generally described as articles of great value in small compass unless at the time of the delivery to the carrier the value of nature is declared and an extra charge paid for them.

Where goods are delivered to be carried partly on one railway line and partly on another, the original company is liable for any injury to the goods, unless in the contract made with them they have expressly limited their liability.

If anything goes wrong with the goods, the proper person to sue is the consignee or person to whom the goods are sent, as the consignor or sender of the goods is in law considered to be the agent of the consignee in selecting a carrier, so that the contract is really made with the latter. If the property in the goods has not passed to the consignee, e.g. if the consignor is a vendor of goods who expressly retains the property in them until payment, then the consignor should sue.

You will remember that I gave you rules as to when the property in goods passes in the absence of express agreements on the subject, and, in reading this letter, I should advise you to consult them again.

Let me add that if you are sending goods of a dangerous character, you must be careful to give notice of the dangers likely to arise from them.

As to a passenger's luggage, the law is that with respect to it, the railway company is "a common carrier." This is certainly so with regard to luggage not carried in the carriage with the passenger and, I think, is also so with luggage so carried. There is this difference however, that in the latter case we must allow for acts of the passenger himself, and say that the railway company is not liable for loss or injury to

luggage so carried, where the loss is attributable to the acts or omission of the passenger, otherwise it is liable.

Will you kindly note the difference in the two examples I am now going to give you. If you leave your luggage with an employé of the railway company a reasonable time before the starting of your train and it is lost, the company is liable for the loss, but if you leave the luggage an unreasonable time, the company will not be liable for the loss.

I have here been taking of what is known as personal luggage. "Personal luggage" means all things which under the particular circumstances of the case, a passenger would ordinarily carry with him, for instance ,a bicycle is not "personal luggage." With respect to luggage which is not strictly personal and is carried with the passenger, a railway company is not liable for its loss, unless it has been grossly negligent.

I would have you recall to your mind that a common carrier is liable for loss without proof of negligence. To that statement of law I will now add that a warehouseman, i.e. a person who keeps goods for hire, is not liable for loss unless negligence is shown (while a person who keeps goods, but not for hire, is only liable for gross negligence, as in the case of the railway company and luggage taken by a passenger with him, but not being personal luggage).

It is often hard to make out whether a railway company is acting as a "common carrier" or as "a warehouseman." Thus, a merchant sent goods by rail "to be left till called for." Two days after they arrived at the named station, they were destroyed by fire. The Railway Company were held not to be liable for the loss, having ceased to hold the goods as "common carriers" and begun to hold them as "warehousemen."

The rule is that after a reasonable time has elapsed, after arrival, the company ceases to be a common carrier and becomes a warehouseman. The consignee cannot be expected to be present to receive delivery of goods which arrive in the night time, or of which the arrival is uncertain.

as of goods coming by sea, or by a freight train; the time of the arrival of which is liable to delay. On the other hand, he cannot for his own convenience, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance—at all events when the carrier has no means of communicating with him—cannot avail him in prolonging the liability of the carrier, as such, beyond a reasonable time.

You complain that a person is trespassing upon your land, and wish to know how you may legally deal with them. You may remove the trespasser, but in so doing you must only use such force as is absolutely necessary. You may also take an action against him and you are entitled to damages without having to prove that you have sustained actual loss by the trespassers. Speaking strictly, you cannot prosecute them, that is, you cannot take a criminal action against them, unless indeed, the trespass is accompanied by wilful injury to property such as breaking down fences or trampling growing crops. Under those circumstances, indeed, you might prosecute them, as for maliciously injured property.

The ordinary notice board declaring that "trespassers will be prosecuted" has accordingly been called "a wooden falsehood."

LETTER 32.

YOU suggest that I should write you just one more letter, answering the very miscellaneous set of questions which you enclose. I do not know that to do so is quite within the plan of my correspondence, but as I am assured that this is to be my last letter, I comply with your request.

You ask me whether a lien note (and by that you apparently mean something in the form of a promissory note with words upon it, showing that the ownership of the article for which it is given is retained by the vendor until the note is paid) is a negotiable instrument. I can only tell you that there have been many Canadian decisions to the effect that such a note is not negotiable. For instance it was held in one case that a note bearing this memorandum "Given for Suffolk Stallion, "His Grace," same to remain the property of J. H. Truman, until this note is paid" was not negotiable and that the right to the money secured by the note could not be assigned by endorsement and delivery of the note. Of course, the endorsement might in words purport to assign the moneys secured and, if it did so, I presume the right to the moneys would be effectually transferred to the assignee, though of course he would then take subject to any equities there might be between the maker of the note and the payee, as lawyers say, i.e. to claims of the maker against the payee, which he could use to wipe out or lessen the amount payable on the note. The reason these lien notes are held not to be promissory notes, are that the payment promised by them is said to be conditional. I should advise you to take it that such notes are not negotiable, though I must candidly confess, I cannot see why they are not, especially, where the added words are merely a statement of the transaction which gave rise to the bill.

You are puzzled as to what you have heard about the duty to repair roads. Perhaps what you mean is this:—

You cannot sue the local authorities for damages for injuries you have sustained owing to non-repair of roads, unless, indeed you can find that they are bound by some particular piece of legislation to repair the road in a particular way, but you can sue them, if the damage is occasioned not by want of repair, but through repairs having been done carelessly or negligently.

You seem to me to be confusing fire insurance and life insurance; fire insurance is only a contract of indemnity, so you can only get from the Insurance Co. the amount of your loss, and not the amount for which you have insured. Do not let this remark lead you into under-insuring your property against fire, on the supposition that the whole of it will never be destroyed, for, as a rule, you can only get a proportionate part of the insurance moneys. Thus if you insure property worth $10,000 for $5,000 and you actually suffer a loss of half your property, yet you cannot recover $5,000. You will only receive $2,500.

You comment on my previous remarks about not being liable for the wrongs of an independent contractor. I think I can clear up your difficulties by telling you that, in general, if you employ an independent contractor to do work which is illegal, or work which is obviously dangerous to the public without proper safeguards, or if you interfere in the work, giving orders from time to time, you may become liable for the wrongs done by the independent contractor.

You remind me that though I have said a lot about the right to take an action being barred by length of time, yet, I have said nothing about debts being "outlawed" as you term it.

Well, any debts due upon a bond or under seal must be sued for within twenty years, actions for rent, nuisance, trespass, libel, debt, breach of contract and generally all actions not mentioned here specifically, must be brought within six years, actions for slander and statutory penalties should be brought within two years, actions for assault, false imprisonment and trespass to the person (as distinct from

trespass to property) should be brought wthin four years, and an action to recover compensation for the death of a person accidentally killed through the negligence of another must be brought within one year of death.

A written acknowledgment or part-payment will cause the periods of limitation to recommence, (except in the case of rent or a legacy), but the acknowledgment must in the case of claims under contracts, be such that a promise to pay may be reasonably inferred from it. There may be in some of the Canadian jurisdictions periods different from those I have here set down. I do not, however, know of any differences.

To conclude this whole series of letters, let me quote the words of that great man, Lord St. Leonards, who wrote so many of them:

"I have now only to express my hope that you may derive some benefit from my correspondence. If it merely teach you to distrust your own knowledge on the subject, I will not have written in vain. Much which I have written has cost me little more than the labour of writing "currente calamo"..... The learning which my Letters contain is of common occurrence; but you will not therefore find it of less use. It has been justly observed, that refined sense and enlightened sense are not half as good as common sense. The same may be said in this instance of legal learning. It would have been idle in me to have furnished you with nice disquisitions on abstruse points of law. I have felt no anxiety in any case to point out to you how you may evade or break in upon any rule. I have avoided the lanes and byways, and endeavoured to keep you in the public high-road. If you wander from it, the blame will rest with youself.—Farewell!"

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