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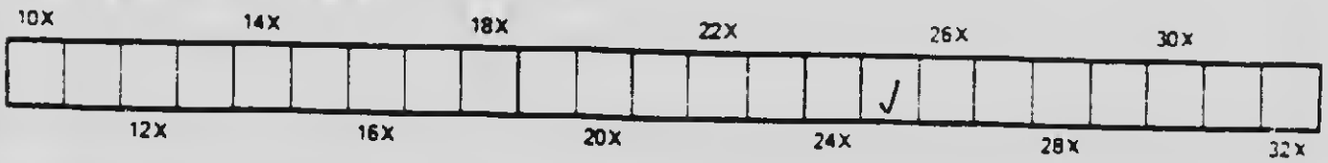

# A COMMENTARY

ON THE

# CANADIAN LAW OF SIMPLE CONTRACTS.

WITH ADDITIONAL CHAPTERS ON

THE RULES GOVERNING CANADIAN APPEALS

TO THE

JUDICIAL COMMITTEE OF T. PRIVY COUNCIL
AND THE SUPREME COU OF CANADA.


BY

W. WYATT PAINE,

OF THE INNER TEMPLE AND NORTH-EASTERN CIRCUIT,

BARRISTER-AT-LAW.

*Author of "A Commentary on the Law of Instruments," &c., &c.;*

*Editor of the 4th edition of "Macqueen's Law of Husband and Wife," the 3rd, 4th, 5th and 6th editions of "Clerk and Lindsell on Torts," and the 15th and 16th editions of "Chitty on Contracts."*


Nulla potentia supra leges esse debet."

CICERO.


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1914.

*The Author desires to express his acknowledgments to his friend, Mr. Hubert Charles Meysey-Thompson, of the Inner Temple and North-Eastern Circuit, Barrister-at-Law, not only for preparing the Index and Table of Cases, but also for valuable assistance in the task of selecting the very numerous judicial decisions upon which the work is founded.*

To

THE RIGHT HONOURABLE

RICHARD BURDON, VISCOUNT HALDANE, P.C., K.T.,

This Book

IS (BY PERMISSION)

Dedicated.

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# PREFACE.

The primary object of the Author in preparing a Commentary on the Canadian Law of Contracts, has been to select and exhaustively treat of those matters connected with Simple Contract which are of common occurrence in business, and which are consequently of the highest practical utility.

It is believed, however, that *all* matters germane to the British Law of Contracts in the Dominion are adequately dealt with, although more recondite points have been treated in a succinct manner, whilst those of everyday occurrence are more fully discussed.

Throughout the book the aim of the Author has been to extract, from the various judicial decisions considered (which include *inter alia* many judgments of the Province of Quebec), the principles upon which they are founded, and he has spared no pains to arrive at correct conclusions in this particular.

As the book is designed to be a companion volume to the English edition of "Chitty's Treatise on the Law of Contracts," the Author, in order to enhance its utility and increase its value as a repertory of British Law, has inserted throughout the work frequent marginal references to those pages in the latest edition of Chitty's Treatise in which a similar point has been discussed. It is hoped that by this method Canadian practitioners, with a minimum of trouble, will be enabled to ascertain

the consensus of judicial opinion throughout the Empire on any particular matter considered in the text of the work.

With regard to method, the large number of Provincial Statutes and Territorial Ordinances dealt with preclude each being set out at length.

Where, therefore, an Act or Ordinance dealing with a specific matter is contained in the Statute Book of more than one Province or Territory of the Dominion, the whole of the Provincial or Territorial cases relevant thereto have been collected together, and will be found in the foot-notes appended to the different sections of that particular Act which has been selected for insertion in the text.

The additional Chapters relating to the Rules governing Appeals from the various Provincial Courts of the Dominion to the Judicial Committee of His Majesty's Privy Council, and to the Supreme Court of Canada, have been prepared with considerable care, and it is believed will be found accurate and reliable.

W. WYATT PAINE.

4, HARCOURT BUILDINGS,
TEMPLE, LONDON, E.C.,
*January*, 1914.

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*CORRIGENDUM.*

Page 355, side-note.—For 2 Geo. V. c. 27, *read* 1 & 2 Geo. V.

# INTRODUCTION.

## LAW IN FORCE IN CANADA.

(NOTE.—*The references in the side notes throughout the work are to the sixteenth edition of Chitty on Contracts.*)


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THROUGHOUT the provinces and territories of Canada (with the exception of the province of Quebec) the common law of England, and in the majority of cases so much of the statute law also, relating to civil matters, as was operative prior to the particular date specified in the adoptive Act of each province (*a*), is in force; in so far as the same is applicable to local conditions and has not been repealed, altered, varied, modified, or affected by any later Act of the Parliament of the United Kingdom, having the force of law in the Dominion, or by any Act of the Parliament of Canada or of the Legislative Assembly of any particular province. Common law of England operative in Canada.

(*a*) Thus in Ontario it is provided by the Property and Civil Rights Act, 1910 (10 Edw. VII. c. 15), that "(2) in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th day of October, 1792, as the rule for the decision of the same, and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof in the Courts of Ontario shall be regulated by the rules of evidence established in England as they existed on that day, except so far as such laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament still having the force of law in Ontario, or by any Act of the late province of Upper Canada or of the Province of Ontario still having the force of law in Ontario." But nothing in this section shall extend to any of the laws of England respecting the maintenance of the poor.

**Dominion legislation overrides provincial legislation.**

But where a given field of legislation is within the competence alike of the Parliament of Canada and of a provincial Legislature, and both have legislated, the enactment of the Dominion Parliament prevails over that of the province if the two are in conflict (*b*).

**Method of construing statutes.**

As regards the construction of statutes, it is a well-known rule that retrospective legislation, especially such as divests vested interests, is to be construed most strongly against him who seeks to take advantage of the provisions of the statute to the detriment of another.

Moreover, in such cases when the language of the statute is either ambiguous or capable of more than one meaning, the particular rule of construction to be employed is embodied in the well-known maxim, *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. Indeed, it seems probable that even in construing an Act which is to a certain extent retrospective, or in construing a section which is to a certain extent retrospective, the Court ought to regard that maxim as applicable whenever the words of the section cease to be plain and unambiguous; that being a necessary and logical corollary of the general proposition that no one should give a larger retrospective power to a section (even in an Act which is to some extent intended to be retrospective) than it is obvious the Legislature meant (*c*).

Moreover, where a statutory duty exists, and in breach thereof an official of the Crown definitely refuses to comply with the requirements of the statute, any person damnified by such refusal is entitled to sue the official in respect of such breach, and the assessment of damages arising therefrom is a matter which must be submitted to a jury, the rule in such cases being that a payment into Court of a nominal sum, without an opportunity being afforded for threshing out the question, is not sufficient amends, such a case being peculiarly one for a jury to assess damages in, if they come to be assessed (*d*).

**Ambit of provincial legislation.**

Again, it may be stated as a general proposition of Canadian law that a provincial Workmen's Compensation Act, or, in fact, any provincial statute, has no application outside the territorial limits of the province in which it was enacted, save where there

(*b*) *La Compagnie Hydraulique de St. François* v. *Continental Heat and Power Co.*, [1909] A. C. 194, P. C.; see also *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1912] A. C. 571, P. C. This case is discussed at pp. 49, 50, *post*.

(*c*) *Schmidt* v. *Ritz* (1901), XXXI. S. C. R. 602.

(*d*) *Fulton* v. *Norton*, [1908] A. C. 451, P. C.

is an extension of application expressly or impliedly set forth therein; the rule in such and cognate cases being, in the absence of an intention clearly expressed or to be inferred from the language of the statute, that its operation is conterminous only with the physical boundaries of the province by whose Legislature it was enacted. But where a statutory obligation or duty arises within the ambit of a provincial statute, the mere fact that the obligee or person to whom the duty is owed is not resident within the boundaries of the province, does not prevent the statute operating.

Where, therefore, the widow of an alien workman who lost his life by an accident in the course of his employment, claimed compensation therefor as a dependant of the deceased, under the provisions of a provincial Workmen's Compensation Act, the fact that she was resident in a foreign country at the respective dates of both accident and death was held no bar to her right to recover (*e*).

Acts *ultra vires* of a provincial Legislature.

With regard to the incidence of duties and taxes, it is *ultra vires* the Legislature of a province to tax property not situate within its boundaries (*f*).

Accordingly the Ontario Succession Duty Act (*g*) has been held not to include within its scope movable properties of a domiciled resident of Ontario locally situated outside the province, the rule in such cases being that, although the law of a testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are for the purposes of legal representation, of collection, and of administration (as distinguished from distribution among the successors) governed by the law of their own locality and not by that of the testator's domicile (*h*).

Rules governing the imposition of duties in the case of simple contract debts.

But although the law of a testator's domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are, for the purposes of legal representation, of collection, and of administration, as distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator's domicile, and are consequently subject to any duties leviable thereon in the locality where the assets are situated (*i*).

The general doctrine of the attraction of personal estate to the place of domicile at the testator's death is a very elementary

(*e*) *Mike Krzus* v. *Crow's Nest Pass Coal Co.*, [1912] A. C. 590, P. C.
(*f*) See British North America Act, 1867, s. 92, sub-s. 2.
(*g*) R. S. O., 1897, c. 146.
(*h*) *Woodruff* v. *Att.-Gen. for Ontario*, [1908] A. C. 508, P. C.
(*i*) *The King* v. *Lovitt*, [1912] A. C. 212, P. C.

proposition, and the rules with regard to it are thus distinctly laid down in Story's Conflict of Laws, sect. 380: "It is a clear proposition, not only of the law of England, but of every country in the world, where the law has the semblance of science, that personal property has no locality. The meaning of that is not that personal property has no visible locality, but that it is subject to the law which governs the person of the owner, both with respect to the disposition of it and with respect to the transmission of it, be it either by succession or by the act of the party.

It follows the law of the person.

An owner in any country may dispose of his personal property.

If he dies it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." The legal effect of these words has been pithily formulated in the well-known maxim: *Mobilia sequuntur personam* (*k*).

Modification of imperial legislation by colonial judicial decision.

The general proposition as to the applicability of the statute law of the United Kingdom throughout Canada in cases where it has been neither expressly repealed nor modified by Dominion or provincial legislation has, however, been somewhat limited by judicial decision.

The rules governing this discrimination or election on the part of judicial personages in choosing or rejecting particular statutes have been thus formulated: "Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of the . . . colony, such, for instance, as the general rules of inheritance and of protection from personal injuries.

The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force.

What shall be admitted, and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council" (*l*).

Concrete instances of modification.

Applying the above stated rule of inclusion or exclusion to concrete cases, such as the Statute of Frauds or the Limitations Act, it will be found that, although the underlying principle of these statutes has been adopted throughout most of the provinces

(*k*) See *Blackwood* v. *The Queen* (1882), 8 A. C. 82, P. C.
(*l*) *Uniacke* v. *Dickson* (1848), 2 N. S. Repts. 287, at p. 300.

of the Dominion, their terminology has been modified and certain material alterations made in the ambit of their operation. Generally, however, the enactments follow the lines of the Imperial legislation on which they are modelled.

The Ontario Act respecting written promises and acknowledgments of liability (*m*) may be taken as an example of the adaptation of Imperial statutes, such as the Limitation Act of 21 Jac. I. c. 16, and the Statute of Frauds, 29 Car. II. c. 3, to the commercial requirements of the Dominion. Chitty, 832 Chitty, 84—93.

This statute, now repealed as to sects. 1 to 5 by the Limitation of Actions Act, 1910, and replaced by sects. 55 to 59 of that Act, which are as follows, provides that:

Verbal promise only not sufficient to take the case out of the Limitation of Actions Act. Chitty, 844.

Sect. 55.—No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of this Part (*i.e.*, Part III. of the Limitations of Actions Act, 1910) any case falling within its provisions respecting actions,

(a) Of account and upon the case;

(b) on simple contract or of debt grounded upon any lending or contract without specialty; and

(c) of debt for arrears of rent,

or to deprive any party of the benefit thereof unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorised to make such acknowledgment or promise.

(2) Nothing in this section shall alter, take away, or lessen the effect of any payment of any principal or interest by any person.

Effect of payment of principal or interest. Chitty, 844.

Sect. 56.—Where there are two or more joint contractors, or joint obligors or covenantors or executors or administrators of any debtor or contractor, no such joint debtor, joint contractor, joint obligor or covenantor or executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed, or by reason of any payment of any principal or interest made by any other or others of them.

Case of two or more joint contractors or executors. Chitty, 845.

Sect. 57.—In actions commenced against two or more such joint contractors, executors, or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by this Act as to one or more of such joint contractors, or executors or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise, or payment, judgment shall be given for the plaintiff as to the defen-

Judgment when plaintiff is barred as to one or more defendants, but not as to all. Chitty, 845.

(*m*) R. S. O., 1897, c. 146.

dant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff.

Endorsement, &c. made by the payee not to take a note, &c. out of the Act.

Chitty, 845.

Sect. 58.—No endorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom the payment has been made, shall be deemed sufficient proof of the payment so as to take the case out of the operation of the said Act of King James (*n*).

Statute to apply to set-off.

Chitty, 845.

Sect. 59.—This part (of the Act) shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off on the part of any defendant.

Chitty, 82, 564, 568, 856.

*The Written Promises and Acknowledgments of Liability Act* (*o*).

As to ratification of promise made during infancy.

Chitty, 162—163.

No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy unless the promise or ratification is made by some writing signed by the party to be charged therewith, or by his agent duly authorised to make the promise or ratification (*p*).

As to representation regarding the credit, &c. of a third party.

No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, goods, or credit thereupon, unless the representation or assurance is made in writing signed by the party to be charged therewith.

*Consideration* for promise to answer for another need not be in writing.

Chitty, 560, 564.

No special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorised, shall be deemed

(*n*) Throughout the Dominion of Canada (excepting only the province of Quebec), all actions for recovery of merchants' accounts, *bills*, *notes*, and all actions of debt grounded upon any lending or other contract, without specialty, must be commenced within *six* years after the cause of such action arose. In the province of Quebec (Civil Code, § 2260), all actions upon inland or foreign bills of exchange, promissory notes (other than bank notes), or upon any claim of a commercial nature, must be made within five years from the date of maturity of the bill or note, or after the cause of action has arisen.

(*o*) R. S. O., 1897, c. 146.

(*p*) A false and fraudulent representation by an infant as to age will not estop him from subsequently pleading his lack of contractual capacity, nor will relief be granted against him in equity (*Jewell* v. *Broad* (1909), 19 O. L. R. 1, affirmed 14 O. W. R. 1272). Clear evidence of ratification after attaining majority is a necessary condition to a vendor obtaining the price of goods sold to a minor (*Great Western Implement Co.* v. *Grams* (1908), 1 Alberta L. R. 411; 8 W. L. R. 160).

invalid to support an action, or other proceeding to charge the person by whom the promise has been made, by reason only that the consideration for the promise does not appear in writing, or by necessary inference from a written document.

Statute of Frauds, 29 Car. II. c. 3, extended to contracts for goods to be delivered at a future time. Chitty, 84, 426.

Sect. 17 of the Act passed in England in the twenty-ninth year of the reign of King Charles the Second (*q*), entitled "An Act for the Prevention of Frauds and Perjuries," shall extend to all contracts for the sale of goods of the value of $40 and upwards, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

29 Car. II. c. 3, s. 4. Chitty, 84.

No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate.

Promises and agreements by parol. Chitty, 564.

(2) Or, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person (*r*).

Chitty, 84, 541.

(3) Or, to charge any person upon any agreement made upon consideration of marriage.

Chitty, 84.

(4) Or, upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them (*s*).

Chitty, 85—88.

(5) Or, upon any agreement that is not to be performed within the space of one year from the making thereof.

Chitty, 84.

(6) Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

(*q*) 1676. This is really only the 16th year of the reign of Charles the Second.

(*r*) See *Gloutnay* v. *Davignon* (1911), Q. R. 40 S. C. 228.

(*s*) An agreement or "guarantee" collateral to a sale of lands in order to be valid, need not strictly conform with the requirements of this section (*Crippen* v. *Hitchner* (1911), 18 W. L. R. 259 (B. C. R.).

# THE LAW OF SIMPLE CONTRACTS.

## CHAPTER I.

### ESSENTIAL CONCOMITANTS TO VALIDITY OF CONTRACTS.


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Definitions. Chitty, 6.

A SIMPLE contract is a mutual agreement between parties of full age and capacity whereby for valuable or good consideration the one party agree with the other to do or abstain from doing some lawful act (*a*).

The reduction of a simple contract into writing will not at common law enhance the general cogency of the obligation so as to dispense with any one of the above-stated essentials to validity (*b*).

Mutuality. Chitty, 19—22.

A contract of simple obligation in order to be legally binding must therefore be one in which both parties unconditionally agree about the same subject-matter in the same sense.

(*a*) The following is an admirable summary of the essentials to a valid contract. "A contract is an agreement entered into by several persons whereby one becomes bound to another to perform or abstain from doing a particular thing. The contract is either verbal or written. To constitute a parol contract five things must concur: (1st) persons eligible to contract; (2nd) persons competent to be contracted with; (3rd) a valuable consideration; (4th) an article to be contracted for; and (5th) a mutuality in the parties contracting" (Petersdorff's Abridgment, *tit.* Contracts). According to Comyn the concurrence of six things is essential to validity, viz.: "(1) a person able to contract; (2) a person capable to be contracted with; (3) a thing to be contracted for; (4) a good and sufficient consideration or *quid pro quo*; (5) clear and explicit words to express the contract or agreement; (6) the assent of both the contracting parties" (Comyn's Law of Contracts and Promises, 1824 (2nd ed.), p. 2).

(*b*) At common law any contract is invalid which is in contravention of the precepts of religion or morality, or the rules of public decency (Co. Litt. 206b). By statute any contract is invalid which is prohibited and made unlawful by any statute, though the statute does not say it shall be so.

Or, in other words, the acceptance of a proposition must be a simple and direct affirmative in order to constitute a valid contract.

Consequently, if the party to whom an offer or proposition is made accept it conditionally, or with some material change of its terms or provisions, it is no contract until the party making the offer assents to the modification. The underlying principle in such and all cognate cases being that there can be no contract which the law will enforce until both of the parties thereto agree upon the subject-matter hereof in the same sense (*c*).

Consideration. Chitty, 22—38.

As regards consideration, although it is undoubtedly true that every man is by the law of nature bound to fulfil his engagements, it is, nevertheless, equally true that British law supplies no means nor affords any remedy to compel the performance of a simple contract made without sufficient consideration. Such an agreement being *nudum pactum ex quo non oritur actio*.

At one time, indeed, a contrary view prevailed, it being argued that an express promise founded simply on an antecedent moral obligation, if such promise were reduced into writing, was sufficient to raise a ground of action for the breach. This view is, however, no longer tenable, and it is clear law that either good or valuable consideration is essential to the validity of a simple contract (*d*).

Inadequacy of consideration no ground for avoiding contract.

But a very small consideration, if it be either an immediate benefit to the party promising or a loss or detriment to the party to whom the promise is made, will suffice to support an agreement (*e*). And even in equity, apart from fraud, inadequacy of consideration or value is in general, of itself, no ground for impeaching a contract, whether such contract relate to the sale of an estate, or an annuity, or the compromise or abandonment of a doubtful right, or any other subject (*f*). But a mere promise "favourably to consider" will not support an action. And in this connection it may be laid down as a general principle of law that although a Court will construe a document in that manner which most readily conforms to the obvious intention of the parties, it is not bound, nor will it give a definite meaning to words so loose in their signification as to be incapable of crystallisation into a concrete agreement. Or, in other words, if there is not a dis-

(*c*) *Cole* v. *Sumner* (1900), XXX. S. C. R. 379.

(*d*) "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved" (*Rann* v. *Hughes* (1797), 7 Term R. 350, n.).

(*e*) *Hawkes* v. *Saunders* (1775), 1 Cowper, 289.

(*f*) Sugden V. & P., 14th ed., vol. 1, p. 272.

tinct contract between the parties that one shall do certain acts on his part on condition that the other shall do certain acts on his part, the Court will not make a decree for specific performance (*g*). Where, therefore, a trading corporation gave a written promise to another party that if satisfied with him as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration, it was held that such written promise did not amount to a contractual obligation to renew for the breach of which the customer might sue. And further, that parol evidence was not admissible to extend the scope of the written document (*h*).

Contracts of executors and administrators.

Again, it is an essential concomitant of validity that the promise on which a contract is based should be co-extensive with the consideration therefor, and naturally relate to and arise out of the benefit or forbearance. For if a promisor undertake generally to pay upon request what he is liable to pay upon request in respect of another right, he derives no advantage or convenience from the promise, and, therefore, there is no sufficient consideration for it (*i*). Thus, an administrator or executor cannot personally be charged on his bare promise with the payment of a debt due from the estate of the deceased person (*k*). But, on the other hand, it may be laid down as a general proposition of law that neither an executor nor an administrator can pledge the credit of the estate, of which he is either executor or administrator, generally so as to make the person with whom he contracts a creditor of the estate, although he may have power to grant a lien on specific effects. Or, in other words, it is plain that no contract can be made with an executor, subsequently to the death of his testator, which will not charge him personally, but will charge him *de bonis testatoris*, for to rule otherwise would give executors power to create debts to an unlimited extent chargeable upon the estates of their testators.

There is, however, this exception to the above rule, if, indeed, it be an exception, that where the executors are empowered by the express terms of the will of the testator to carry on a business in which the testator was interested at the time of his decease, they would be entitled to carry on the business of the testator for such reasonable time as was necessary to enable them to sell his business

(*g*) *Reg.* v. *Demers*, [1900] A. C. 103, P. C.
(*h*) *Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595, P. C.
(*i*) *Rann* v. *Hughes* (1797), 7 Term R. 350, n.
(*k*) *Reech* v. *Kennegal* (1748), 1 Ves. Sen. 123; see also *Porter* v. *Bills* (1673), Freeman's Rep. 125. The executor *qua* executor can, of course, be charged with the debt, and must satisfy it up to the amount of the testator's estate in his hands (*Fish* v. *Richardson* (1605), Yelv. 55).

property as a going concern, and might even, for the furtherance of this object, as against his creditors if they acquiesced in such an arrangement, be entitled to an indemnity in respect of the liabilities properly incurred in so doing.

But no executor is entitled generally to charge his testator's estate with responsibility for the continuance of a business in which the deceased was only collaterally interested.

And a like remark applies to an executor who should seek to perpetuate the existence of a continuing guarantee or contract of suretyship after the death of the guarantor. Where, therefore, the executors of a testator, whose guarantee was determined by death and notice thereof to the creditor, in violation of their duty to wind up his estate entered into an agreement to continue indefinitely their testator's guarantee of a debt owed by a limited business company to a bank, it was held that their action could not be supported by the Courts, and that in spite of the fact of the arrangement into which they had entered being evidenced by deed, the Statute of Limitations applied to it and extinguished the liability, the original guarantee not having been by reason of the subsequent deed turned into a specialty (*l*).

Contracts incidental to specific things.

It is, however, possible for a prior contract incident to a specific thing to be binding upon the person to whom the property in that thing has been transferred by the original contractor.

Where, therefore, property, either immovable or movable, is disposed of with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.

For reason and justice seem to prescribe that (at least as a general rule), where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and to employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

But this rule—although applicable alike in general to movable and immovable property, and recognised and adopted alike by the English and the Dominion law—may, in common with other general rules, be liable to exceptions arising from special circumstances. Thus, for example—in the case of movable property—

(*l*) *Union Bank* v. *Clark* (1910), XLIII. S. C. R. 299.

so there is no privity between the original contractor and a subsequent owner of the property, a contract which might be binding upon its maker would not necessarily be obligatory upon a subsequent possessor without notice, and a like rule would almost of necessity apply to immovable property in cases in which the contract did not run with the land (*m*).

**Executed consideration** Chitty, 38.

Again, it is a clear proposition of law that "a consideration altogether past is not good" (*n*), consequently no action will lie thereon (*o*) unless, either actually or by implication, there has been an antecedent request. And in amplification of this proposition it has been said that an executed consideration whereon the law implies a promise to pay on request (as upon an account stated) is not sufficient to support a promise to pay at a future date (*p*), and it has also been held that a pecuniary benefit voluntarily conferred upon one person by another, and accepted by that other, is not such a consideration as will support an action on a subsequent express promise by the recipient to reimburse the donor (*q*).

**Nature of consideration.** Chitty, 22—40.

Marriage is always a present and good consideration for a contract (*r*), but natural love and affection or near relationship are not (*s*), save perhaps in the case of family arrangements (*t*).

**Valid considerations.** Chitty, 23.

As already stated, inadequacy of consideration will not of itself defeat a contract, nor will mere folly and weakness or want of judgment on the part of the promisor (*u*). But if the folly of the contract be extremely gross, the total inadequacy of consideration is a circumstance which, if there be other facts in corroboration, may establish a case for relief on the ground of fraud. Apparently, however, apart from such corroborative evidence, the consideration, even if totally inadequate, will be adjudged sufficient to support a contract. Thus, in the old case of *James* v. *Morgan* (*x*), in which action was brought in special assumpsit on an agreement to pay for a horse at the rate of a barleycorn a nail for every nail in the horse's shoes, doubling it each nail, which came, there being thirty-two nails in the shoes, to five hundred quarters of barley. The report states that at the trial before

(*m*) *Deschenes Electric Co.* v. *Royal Trust Co.* (1907), XXXIX. S. C. R. 567.
(*n*) Vin. Abr., vol. 1, *tit.* Actions, Assumpsit (Q.).
(*o*) The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor (*Wigan* v. *English and Scottish Law Society*, [1909] 1 Ch. 291 (an English case)).
(*p*) *Hopkins* v. *Logan* (1839), 5 M. & W. 241.
(*q*) *Eastwood* v. *Kenyon* (1840), 11 Ad. & E. 438 (an English case).
(*r*) Vin. Abr., vol. 1, *tit.* Actions, Assumpsit (Q. 26).
(*s*) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; but see *Gale* v. *Williamson*, 8 M. & W. 405 (an English case).
(*t*) *Persse* v. *Persse* (1840), 7 Cl. & F. (H. of L. Cas.) 279.
(*u*) *Persse* v. *Persse* (1840), 7 Cl. & F. (H. of L. Cas.) 279.
(*x*) B. R. 15 Car. II.; 1 Lev. 111.

Hyde, J., the jury, on his direction, gave the real value of the horse, £8, as damages. It is to be collected, however, that the contract in this case was considered valid, for it appears there was afterwards a motion to the Court in arrest of judgment, for a small fault in the declaration, which fault being overruled, the plaintiff had judgment.

Collateral contracts.

Again, it is quite evident, alike on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds" is, in every sense of the word, a complete legal contract.

But such collateral contracts must from their very nature be rare. The effect of such a collateral contract as that above instanced would be merely to increase the consideration of the main contract by £100; and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract.

Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts, but also the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown.

Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them, and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter (*y*).

(*y*) *Heilbut* v. *Buckleton*, [1913] A. C. 30, at p. 47, H. L. (E.).

# CHAPTER II.

## THE STATUTE OF FRAUDS.


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Statute of Frauds. Chitty, 84.

By virtue of sect. 4 of the Statute of Frauds (*a*) certain contracts therein specified in order to be valid must be reduced into writing. This section enacts "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, tenements and hereditaments, or any interest in or concerning them: or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

It may be observed generally of this section that the cases in which the Court has required proof of an agreement in writing are those wherein the agreement has been made the subject of an action.

Where, therefore, a suit is brought upon any contract specified by the Act, it is necessary to prove the existence of a written agreement, otherwise action cannot be maintained against the party charged.

But, on the other hand, the words "no action shall be brought whereby to charge . . . unless the agreement upon which such action shall be brought . . ." do not render it necessary

(*a*) 29 Car. II. c. 3. This Act is of general application in the Dominion of Canada.

to prove an agreement in writing in cases where it is not the subject of the suit, but comes only collaterally in evidence (*aa*).

Again, so much of the section as relates to a note or memorandum to answer for the debt, default or miscarriage of another makes it an essential to validity for the writing to disclose upon the face of it the consideration for the promise (*b*). But this is no longer obligatory, it being provided by sect. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97) (which it is believed applies by implication to the Dominion of Canada), that, "No special promise . . . being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document" (*c*). Chitty, 82, 564.

**Agreement in consideration of marriage.**

The agreement made in consideration of marriage, referred to in the Statute of Frauds, applies to a promise or agreement by one person in consideration of a marriage by another, and does not apply to the marriage contract itself. Therefore, a promise of marriage is binding although by parol.

**Contracts relating to land.**

Again, so much of the fourth section of the statute as relates to land applies not merely to contracts relative to houses or lands in the ordinary acceptation of those terms, but also to all agreements the subject-matter of which partakes of the realty. Where, therefore, anything is done which substantially amounts to a sale or parting with an interest in land, the case is within the statute. It should, however, be remembered that a parol agreement for a sale of lands is an actual contract, although owing to it being within the fourth section of the Statute of Frauds it cannot be enforced as such in an action brought by either of the parties thereto. Chitty, 81.

The Statute of Frauds does not say that a contract by parol is void, it merely says that "no action shall be brought" to enforce it without writing. The writing is not required and does not constitute one of the solemnities of the contract, it is merely evi-

(*aa*) See on this point *Pulbrook* v. *Lawes* (1876), 1 Q. B. D. at p. 289; *Griffith* v. *Young* (1810), 12 East, 513; *Green* v. *Saddington* (1857), 7 El. & Bl. 503.

(*b*) This clause does not apply to a case where the person giving a guarantee is himself liable to the demand for which it is given. It must be exclusively the debt, default, or miscarriage of another (see *Couturier* v. *Hastie* (1852), 8 Ex. 40). This much-discussed case apparently accurately expresses the law on the point in question.

(*c*) As to the application of this statute, see *Holmes* v. *Mitchell* (1859), 7 C. B. N. S. 361; approved and followed in *Sheers* v. *Thimbleby* (1897), 76 L. T. 709, C. A.

dence against the other party to it, and a writing sufficient to prove it may be signed after the agreement is made at any time before action brought.

Where, therefore, a representation as to a contract is made in good faith and upon reasonable grounds for believing and making it, the fact that such a contract is unenforceable in law does not make it any the less a contract or entitle a party who by reason of such representation has sustained loss to sue the person who made the representation for deceit or fraud (*d*).

Moreover, an agreement though unenforceable under the statute may give rise to a valid claim on a *quantum meruit* (*dd*).

**Partnership to deal in land.**

Again, the Statute of Frauds does not apply to a partnership formed by parol agreement for the purpose of dealing in land, the doctrine of equitable conversion, whereby everything pertaining to a firm of partners must be sold and converted into money in order to effect a winding-up of the partnership, applying in such a case. Consequently, the proceeds of the sale of the land, and not the subject-matter sold, constitute the assets. And as a partnership may always be proved by parol, should it turn out that the assets consist of lands or interests in land bought for the purpose of being sold again, such lands will be treated as any other property not coming within the statute (*e*).

**Necessity for mutuality.**

And, generally, in discussing this subject it should be remembered that the Statute of Frauds is a weapon of defence, not offence, and is not designed to, and does not, make any signed instrument a valid contract merely by reason of the signature if it be not such according to the good faith and real intention of the parties (*f*). Therefore, a contract is not necessarily within the statute merely because certain of the terms thereof have been reduced into a writing which, without more, would have been sufficient to fulfil the conditions required by the Statute of Frauds were there nothing outside these terms to the contrary.

**Inchoate agreements in writing.**

But if in fact there were other matters, within the contemplation of both, as to which neither of the parties were *ad idem*, the contract remains inchoate and is not necessarily binding upon either, although it might otherwise fulfil the requirements of the statute.

Or, in other words, the observation so often made that a contract established by letters may sometimes bind parties who, when they wrote these letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound, is

(*d*) *Lumbers* v. *Gold Medal Furniture Manufacturing Co.* (1899), XXX. S. C. R. 55.
(*dd*) *Pulbrook* v. *Lawes* (1876), 1 Q. B. D. 284, at p. 289.
(*e*) *Archibald* v. *McNeehanie* (1899), XXIX. S. C. R. 564.
(*f*) *Jervis* v. *Berridge* (1873), L. R. 8 Ch. App. 351, at p. 360.

subject to the qualification that (in equity) no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it be clear upon the facts that there were other conditions of the intended contract beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement (*g*).

Complete contracts in writing.

But, on the other hand, if the letters or other documents exchanged between the parties and relied upon by one or other of them as fulfilling the requirements of the statute obviously contain all the terms which were within the contemplation of both at the time when they entered into the contract, there is left no *locus pœnitentiæ* for either, and the party claiming specific performance of the agreement is entitled to the assistance of the Court (*h*).

Contracts not to be performed within a year. Chitty, 85.

As regards the application of the statute to contracts "not to be performed within the space of one year from the making thereof," it may be succinctly stated that this clause of sect. 4 applies only to those cases in which it is expressly stipulated, or in which it appears to be the understanding of the parties, as collected from the terms of the agreement, that they are not to be performed, that is, completed, within the twelve calendar months next ensuing after the agreement is entered into (*i*).

Hence, cases depending upon contingencies which may or may not happen in the course of a year from the making of the agreement are not within the statute, for it has no application to agreements in which it is possible for the whole contract to be performed within a year, even though it may appear as a fact that the performance extended over a longer period.

But an agreement for a year's service to commence on a subsequent day, being a contract not to be performed within the year, must be in writing (*j*).

Therefore, no action can be maintained for the breach of a verbal contract made on the 27th of May for a year's service or other contractual obligation to commence on the 30th of June following (*k*).

But a general hiring of a servant, which by custom may be construed as a hiring for a year, and so on from year to year so long as the parties respectively please, operates as a yearly hiring and need not be in writing. Though, if the contract be for more

(*g*) *Hussey* v. *Horne-Payne* (1879), 4 A. C. 311, at p. 323.
(*h*) *Andrews* v. *Calori* (1907), XXXVIII. S. C. R. 588.
(*i*) *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, at p. 429.
(*j*) *Dollar* v. *Parkington* (1901), 84 L. T. 470.
(*k*) *Broccairdle* v. *Heald* (1818), 1 B. & Ald. 722; see also *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123.

than a year, the fact that it is defeasible within the year will not take it out of the operation of the statute (*l*).

**What is a sufficient agreement in writing.**

To satisfy the statute the agreement upon which the action is brought, or some memorandum or note thereof, must be in writing and signed by the party to be charged, or some other person thereunto by him lawfully authorised, and must in addition sufficiently set out the agreement between the parties (*m*), though, as already stated, it is not necessary that the consideration should appear in the writing.

The statute is not sufficiently satisfied by a letter from one of the contracting parties admitting that he made a parol agreement but not setting out its terms (*n*).

Nor will a letter complaining of the non-arrival of goods, or of a defect in their quality (*o*), constitute a sufficient memorandum, and a like rule applies to a contract drawn up but not signed (*p*).

It is not, however, essential to validity for all the terms or necessary parts of the agreement to be contained in a single paper or document. The statute enacts only that they shall be in writing, and does not require them to be included in a single instrument. It is therefore a matter of common usage to establish contracts by the evidence of several writings, nor need these writings be contemporaneous with the contract (*q*), or in other words, "when a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them" (*r*). The documents must, however, for validity, be connected or plainly refer to each other either by their contents or by the context; mere connection by parol will not suffice (*s*).

The statute does not require a formal agreement of technical precision; anything under the hand of the party stating that he has entered into the agreement, and showing the terms thereof, will suffice (*t*). Thus an agreement annexed to conditions of sale at a sale by auction to which the plaintiff (an illiterate person) had put his mark, stating that he had purchased from the defendant,

(*l*) *Davey* v. *Shannon* (1879), 4 Ex. Div. 81; note judgment of Hawkins, J., at p. 84.
(*m*) As to what will suffice, see *Frost & Co., Ltd.*, [1893] 2 Ch. 556, at p. 561.
(*n*) See *Seagood* v. *Meale* (1721), Prec. Chan. 560; this case is referred to in *Maddison* v. *Alderson* (1883), 8 A. C. at p. 478, H. L. (E.).
(*o*) *Archer* v. *Baynes* (1850), 5 Ex. Rep. 625.
(*p*) *Snelling* v. *Huntingfield* (*Lord*) (1834), 1 C. M. & R. 20.
(*q*) *Ridgway* v. *Wharton* (1857), 6 H. L. C. 238.
(*r*) *Dobell* v. *Hutchinson* (1835), 3 Ad. & E. Lord Denman, at p. 371; cited with approval in *Cave* v. *Hastings* (1891), 7 Q. B. D. at p. 128.
(*s*) *Crane* v. *Powell* (1868), L. R. 4 C. P. 123.
(*t*) *Saunderson* v. *Jackson* (1800), 2 B. & P. 238.

the vendor, the premises mentioned in the annexed particulars, subject to the conditions of sale, has been held a good memorandum in writing within the fourth section of the statute (*u*).

Moreovor, although parol evidence cannot be admitted either to connect or to extend the terms of a written agreement, nevertheless, even in the case of contracts within this section, parol evidence is admissible in explanation (*x*).

(*u*) *Dyas* v. *Stafford* (1881), 7 L. R. Ir. 590
(*x*) *Shore* v. *Thimbleby* (1897), 76 L. T. 709, at p. 711, C. A.

## CHAPTER III.

### PARTIES TO CONTRACTS.


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**Parties to contracts. Chitty, '57—200.**

ALL parties of full age and capacity are capable of *animus contrahendi*: consequently, given the other conditions desiderated in the initial definition, the contracts entered into by them are capable of legal enforcement.

**Infants. Chitty, 162.**

As regards infants, the general theory of the British common law is that there are some few contracts (not a great many) which are absolutely void because under no circumstances can they possibly be for the benefit of the infant—as, for example, a bond with penalties. The great bulk of infants' contracts are, however, only voidable. By which is meant that when an infant comes of age he can elect either to affirm or to disaffirm the contract. If he does nothing within a reasonable time after he attains twenty-one the presumption is that he has affirmed the contract. The contract is binding, and has been binding on him ever since he attained his majority, unless he shows the contrary by repudiating it within a reasonable time (*y*). The only contracts absolutely binding upon an infant at common law are those which he enters into for necessaries, and for those matters which he is bound to do by law (*z*).

(*y*) See *Edwards* v. *Carter*, [1893] A. C. 360, H. L. (E.).

(*z*) *Keane* v. *Boycott* (1795), 2 Hy. Blackstone, 512; see Comyn's Digest, *tit.* Infant; Vin. Abr. *tit.* Infants. "An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards; but if he bind himselfe in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him. Also other things of necessity shall bind him, as a presentation to a benefice, for otherwise the lapse shall incur against him. Also if an infant be an executor upon payment of any debt due to the testator, he may make an acquittance; but in that case a release without payment is void, and generally what an infant is bound to do by law the same shall bind him."

Insane persons. Chitty, 158.

In case of insanity, the mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion be connected with the subject-matter of such disposition or contract. In such circumstances it is a question for the jury as to whether or no the delusion has so affected the understanding of the person entering into the disposition or contract as to preclude him from comprehending its meaning (*a*). As regards such contracts, the general principle to be deduced from the various decisions may be summarised thus: A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made it that the person with whom he was dealing was of sound mind.

In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties. Therefore, a defendant who seeks to avoid a contract on the ground of his insanity must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of the fact. And unless he prove these two things he cannot succeed (*b*).

Intoxication. Chitty, 161.

As regards the contracts of intoxicated persons the law is thus stated by Pollock, C. B. (*c*): "Although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of the act, is binding upon him" (*d*). With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between *express* and *implied* contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting; in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies

(Coke on Litt. sect. 259). For certain statutory provisions relating to infants, see 53 Vict. c. 33, s. 22, Bills of Exchange Act, R. S. C., 1906, c. 119, ss. 47, 48; 57 & 58 Vict. c. 28, s. 124, Land Titles Act, R. S. C., 1906, c. 110, s. 165; 1 Geo. V. c. 28, s. 89, Land Titles Act (Ont.), 1911.

(*a*) *Jenkins* v. *Morris* (1880), 14 Ch. D. 674, C. A. The above statement of law is deduced from the judgments of Jessel, M. R., Baggallay, L. J., and Bramwell, L. J.; see also *Smee* v. *Smee* (1879), 49 L. J. N. S. P. 8.

(*b*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A.; see also Kent's Comm., 12th ed., vol. 2, p. 451. For statutory provisions relating to insane persons, see Bills of Exchange Act, R. S. C., 1906, c. 119, ss. 47, 48; Land Titles Act, R. S. C., 1906, c. 110, s. 165; Land Titles Act (Ont.), 1 Geo. V. c. 28, s. 89.

(*c*) Citing Kent's Comm., vol. 2, p. 451; see *Gore* v. *Gibson* (1845), 13 M. & W. at p. 625.

(*d*) See also *Matthews* v. *Baxter* (1873), L. R. 8 Ex. 132.

a contract from the circumstances. In fact the law makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may be against the defendant, even though he may have protested against such a contract. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail.

Contracts of married woman.
Chitty, 201–261.

By the common law of England a married woman is incapable of entering into a contract on her own behalf during coverture. But by statute her contractual powers are now those of a *feme sole*. Marriage at the present day, at least in the eye of the law, must therefore be regarded as:—

(a) The voluntary union for life of one man with one woman to the exclusion of all others; and

(b) As a collateral agreement for a partnership, in which each of the contracting parties strictly reserves to himself or herself the control over all property not actually dealt with by the settlements made in consideration of the marriage.

The following, *inter alia*, are provincial statutes dealing with the property of married women:—

*British Columbia.*

The Married Women's Property Act (R. S. 1897, c. 130).

*Manitoba.*

The Married Women's Property Act, 1900 (63 & 64 Vict. c. 27).

*New Brunswick.*

The Married Women's Property Act (Consolidated Statutes), 1903, Vol. I. c. 78.

Amended by 6 Edw. VII. c. 9, intituled "An Act to amend the Married Women's Property Act."

*North-West Territories.*

Married Women's (Personal) Property Act (Ordinances, 1905, c. 47).

*Nova Scotia.*

Married Women's Property Act (2 R. S. 1900, c. 112) (*e*).

Amended by 3 Edw. VII. c. 30 (1904).

(*e*) By virtue of sect. 12 of this Act, a promissory note indorsed to the maker's wife can be sued on by the latter against her husband (*Michaels* v. *Michaels* (1900), XXX. S. C. R. 547).

Married Women's Deeds Act (2 R. S. 1900, c. 113).
Amended by 2 Edw. VII. c. 14 (1902).
Amended by 6 Edw. VII. c. 52 (1906).
Amended by 8 Edw. VII. c. 49 (1908).
Amended by 10 Edw. VII. c. 17, s. 12 (1910).

*Ontario.*

Married Women's Real Estate Act, 1887 (R. S. O. 1897, c. 165).

Amended by 63 Vict. c. 17, s. 21 (1900).

Married Women's Property Act, 1887 (R. S. O. 1897, c. 165).

Amended by 1 Geo. V. c. 17, s. 36, which provides:—

"Section 3 of the Married Women's Property Act is amended by adding thereto the following sub-section:—

"(5) Where any freehold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*, and without her husband joining in the conveyance." Chitty, 243.

The principal Act is also amplified by 9 Edw. VII. c. 50, intituled the Fraudulent Debtors' Arrest Act, which enacts by sect. 14 that—

"A married woman shall not be liable to arrest on mesne or final process."

*Saskatchewan.*

Married Women's Property Act (R. S. 1909, c. 45).

*Contracts of Wife binding Husband.*

As a general rule, where a wife is living with her husband, the presumption is that she has his authority to bind him by her contract for articles suitable to that station of life which he permits her to assume, but that presumption may be rebutted by showing that she has not such authority: or, in other words, the power of the wife living with her husband to contract for *necessaries* rests on the law of principal and agent. It is part of that law, that, if the principal's representation or acts clothe the agent with an appearance of authority larger than the agent really possesses, the principal is bound by the agent's acts within the limits of that apparent authority. A wife's power to bind her husband therefore reposes on the apparent authority with which the husband invests her by cohabitation. He thereby represents her to tradesmen as being within certain limits his domestic manager, and is therefore responsible for her contracts within the margin of that apparent authority. Nor will a private revocation of authority or

Effect of cohabitation. Chitty, 236.

a private agreement between husband and wife not communicated to a tradesman who has been in the habit of honestly dealing with the wife by supplying necessaries for the family in the ordinary course of domestic affairs affect the tradesman's right to rely on the apparent authority of the wife. Such, briefly, is the general rule of law alike in Great Britain, the Dominion of Canada, and in the United States of America (*f*).

But although the presumption *primâ facie* arises in such a case of an actual authority impliedly given to the wife by the husband to pledge his credit for necessaries for the household, that presumption may be rebutted, in cases where the husband has neither actually nor impliedly consented to the agency, by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit. And in such case the fact that a husband and wife, each having property, have been living together and that necessaries have been supplied for the household on the orders of the wife, will afford no evidence of a joint liability on the part of the husband and wife to pay for the necessaries so supplied (*g*).

Chitty, 283.

Moreover, if a creditor elect to sue a wife, living with her husband, in respect of a claim for household necessaries, and recover judgment against her, he must abide by such election, and cannot subsequently proceed against her husband for the same debt, the whole cause of action in cases of alternative liability being exhausted by the recovery of a judgment against one of the parties (*h*). The only safe rule when giving credit in such cases therefore seems to be for the trader to make inquiry, at the time when the purchase is made, as to whether or no the husband is cognizant of the transaction. Lord Bramwell, discussing the question, remarks: "Shopkeepers have said, when suing a husband, that they could not possibly ask a wife if she had his authority to pledge his credit—she would be offended. An excellent reason for not asking her, but not for making him pay" (*i*).

Contracts of children.

Chitty, 180.

As a general proposition, however, apart from the law of agency, a son has no authority to bind his father by his contracts, even for necessaries. Legally, a father who gives no authority and enters

(*f*) See Kent's Comm., [illegible] h ed., vol. 2, p. 146.
(*g*) *Morel* v. *Westmoreland* (*Earl of*), [1904] A. C. 11.
(*h*) *Ibid.*
(*i*) Bramwell, Lord, in *Colonial Bank* v. *Cady & Williams* (1890), 15 A. C. 267, at p. 282. A husband is, however, always liable for medical and funeral expenses of his wife, and cannot charge her separate estate with such expenses (*Lumbers* v. *Montgomery* (1911), 17 W. L. R. 77 (Man.); and generally, whoever makes arrangements for the funeral of a deceased person is *primâ facie* liable for the expenses thereof ((1912), 10 R. de J. 14).

into no contract, is no more liable for goods supplied to his son than a brother or an uncle or a mere stranger would be. No doubt if a father does any specific act from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted (*k*). But the mere moral obligation on the father to maintain his child affords no inference wherefrom may be deduced a legal promise to pay his debts, and consequently there ought not to be put upon a parent's acts an interpretation which without reference to that moral obligation, they will not reasonably warrant (*l*).

**Torts of children.**

And *à fortiori* this rule is applicable to torts committed by a son without the privity or acquiescence of his father, for if it be once established that a father is not liable upon contracts made by his son within age, it would be going against the whole tenor of the law to hold him to be liable for his son's trespasses. Though, on the other hand, where an act is done by a son as agent for his father in the course of his employment and for the benefit of his principal, even though the agent be an unemancipated member of the family of his principal, the latter is liable upon that general principle of law which makes the act of the agent the act of his principal (*m*).

(*k*) *Ruffe* v. *Abbott* (1833), 6 C. & P. 286.

(*l*) *Shelton* v. *Springett* (1851), 11 C. B. 452; *Blackburn* v. *Mackey* (1823), 1 C. & P. 1; *Flack* v. *Tollemache* (1823), 1 C. & P. 3; see also Vin. Abr. tit. Actions, Assumpsit (U. 1).

(*m*) Deduced from the decision in *Moon* v. *Towers* (1860), 8 C. B. N. S. 611 (an English case).

## CHAPTER IV.

### CONTRACTS OF COMPANIES.


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**Fiduciary position of persons selling to a company.**
**Chitty, 315—330.**

PERSONS who acquire property and then create a company to purchase from them the property which they possess, stand in a fiduciary position towards that company, and must faithfully state to the corporation all those facts and circumstances applying to the property which would influence a purchaser when deciding on the reasonableness of acquiring it.

But where there is full disclosure, even assuming that the price paid by the company is an exorbitant one, if all the shareholders are perfectly cognizant of the circumstances under which the company is formed and the conditions of the purchase, it is impossible subsequently to contend that the transaction is tainted with fraud.

Where, therefore, a small syndicate bought a railway as a going concern, and subsequently sold it at a greatly enhanced price to a company, which afterwards went into liquidation, it was held that the syndicate (or its assignees) was entitled to rank as a creditor of the insolvent company for the amount of the unpaid balance of purchase-money (*a*).

**Contractual powers of companies.**
**Chitty, 322.**

Again, it is an elementary principle of law that a Court has no jurisdiction to interfere with the internal management of such of the affairs and contracts of a company as are *intra vires*.

And further, it is clear law that in order to redress a wrong done to the company or to recover money or damages alleged to

(*a*) *Att.-Gen. Dominion of Canada* v. *Standard Trust Co. of New York*, [1911] A. C. 498, P. C.

be due to the company, the action should *primâ facie* be brought by the company itself.

But there is this exception to the above rule, that where the persons against whom the relief is sought themselves hold and control the majority of the shares of the company, and will not permit an action to be brought in the name of the company, then, and in such case, the Court will allow the shareholders to bring an action in their own names.

But this personal right of action by shareholders is subject to the same restrictions and limitations as would apply to the right of the corporation itself; it being obvious that in such an action the individual right of a shareholder to relief against a third party cannot be larger than that which the company itself would have had against such third party if it were the plaintiff. Consequently, no individual shareholder is entitled to complain of acts which would be valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority.

The instances, therefore, in which the minority can maintain such an action are confined to those cases in which the acts complained of are of a fraudulent character or are beyond the powers of the company. As a familiar example may be cited the case in which a majority of the shareholders are endeavouring directly or indirectly to appropriate exclusively to themselves money, property or advantages which belong to the company and in which the other shareholders are entitled to participate (*b*).

**Contracts *ultra vires* of corporation. Chitty, 323—328.**

In discussing the doctrine of *ultra vires* in its relation to the contracts of corporations it is essential to remember that there are several classes of corporations. Thus, there are public municipal corporations, the ostensible object of which is to promote the public interest; corporations technically private, but yet of a *quasi*-public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important statutory powers—of this class are railroads and canal companies; and, lastly, corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, save the indirect benefits resulting from the promotion of trade, and the development of the general resources of the Dominion. These last derive nothing from the Government except the right to be a corporation and to exercise the powers granted

(*b*) *Burland* v. *Earle*, [1902] A. C. 83, P. C., on appeal from the Court of Appeal (Canada); see also *Dominion Cotton Mills Co., Ltd.* v. *Amyot*, [1912] A. C. 546, P. C.

to them. In all other respects, to the extent of their powers, they stand upon the footing of natural persons, having such property as they may legally acquire, and holding and using it ultimately for the exclusive benefit of the shareholders.

In this last class, the shareholders and those dealing with the corporation are the only parties directly and immediately interested in their acts, so long as the corporation confines itself within the general scope of its powers. The rights of the corporation, the corporators, and of strangers dealing with the corporation, may in some respects, however, vary according to the circumstances surrounding a given transaction.

*Ultra vires.*

The term *ultra vires*, when applied to the contracts of corporations, whether with strict propriety or not, is also used in different senses.

An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose whatsoever. Thus, apart from authorisation thereto, a corporation *quâ* corporation cannot make itself liable on a bill of exchange, it being provided by sect. 47 of the Bills of Exchange Act (*c*) that "nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or endorser of a bill unless it is competent to it so to do under the law for the time being in force relating to such corporation." An act is also, sometimes, said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorised to perform it without their consent; or to be *ultra vires* with reference to some specific purpose when it is not authorised to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. And the rights of strangers dealing with corporations may vary, according as the act is *ultra vires*, in one or the other of these senses. All these distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation.

**Corporations as drawers, acceptors, or endorsers of bills.**

**Limitations on doctrine of *ultra vires*.**

When an act is *ultra vires* in the first sense mentioned, it is generally, if not always, void *in toto*, and the corporation may avail itself of the plea. But when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case.

Thus, a contract which may be *ultra vires* to one party entering into it may be entered into on the other side without any participation in the initial illegality and without any knowledge

(*c*) R. S. C., 1906, c. 119.

even of the vice which contaminates it. Consequently an innocent person may part with value, or otherwise change his situation, upon the faith of a contract which the other party thereto may know to be void *ab initio* for illegality. A railroad corporation, for example, might purchase iron rails, and give its obligation to pay for them with the design to sell them again on speculations, instead of using them for the legitimate purposes of their undertaking. Such a transaction is clearly unauthorised, and is, therefore, said to be illegal. But if the corporation is competent to make the contract, or, in other words, if it is legally possible for corporations to make contracts outside of their just powers, how can their initial illegality be set up against the other party who knows nothing of the unlawful design underlying the apparently innocent proposition? Again, an incorporated bank may purchase land, having power to do so for the erection of a banking house, but actually with the intention of speculating in real estate, or may engage in a prohibited trade or business (*cc*). Such transactions, like the speculation in rails, are therefore *ultra vires*, but can the want of authority in either of the above supposititious cases be interposed in repudiation of the just obligations to pay for the rails or for the land, or for the goods, neither of the vendors being *in pari delicto*? Such a doctrine, if maintainable, would not only shock the reason and conscience of mankind, but would also go far beyond the existing law in regard to the illegal contracts of private individuals.

**Plea of *ultra vires* as a defence.**

It may well be, therefore, that a plea of *ultra vires* is not to be understood as an absolute and peremptory defence in all cases of excess of power without regard to other circumstances and considerations, and it seems quite possible there may be cases in which a corporation would be estopped from setting up such a defence although its contract might have been really unauthorised.

Thus, a company authorised to give bills or notes for any purpose would be estopped from setting up, as a defence to an action brought against it by a *bonâ fide* indorsee of a negotiable bill of exchange, that the bill or note sued upon had been issued by the corporation for an unauthorised purpose, upon the ground that the company by giving the note virtually warranted that it was given for some legitimate purpose; nor could the indorsee be presumed, by implication, to know the contrary. The note or bill, however, if given by a corporation absolutely prohibited by its charter from issuing notes would be void not only in the

(*cc*) See Bank Act, 1913, s. 146.

hands of the original payee, but also in those of any subsequent holder, because all persons dealing with a corporation are deemed to have constructive, if not actual, notice of the extent of its chartered powers.

And the same principle is of general application to all those contracts of corporations in which the want of power is apparent upon comparing the act done with the terms of the charter. The party dealing with the corporation in such and cognate cases being presumed to have knowledge of the defect, consequently the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who by reason of the premises could not be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of its corporate officers, then the corporation would in all probability be estopped from denying that which, by assuming to make the contract, it had virtually affirmed. Or, in other words, the very fact that the appointed officers of the corporation assume to do an act in the apparent performance of those duties which they are authorised to perform for the lawful purposes of the corporation is a representation to those dealing with them that the act performed is for a proper and legitimate purpose. And such being the presumption of law, upon such presumption strangers, having no notice in fact of the unlawful purpose, are entitled to rely.

But apart from such exceptional cases, it is apparently clear in principle, as well as in accord with settled authority, that any contract of a corporation, if unauthorised by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought against it.

**When misuser will avoid an exclusive franchise.**

Again, a private corporation created by legislative charter and invested with exclusive rights may lose its franchises by a misuser or non-user of them, and they may thereupon be resumed by the Government or authority which granted them under a judicial judgment based upon sufficient and legal evidence of such misuser or non-user by the donees of the charter.

Thus, where it was proved to the satisfaction of a Court of competent jurisdiction that a corporation in whom was vested an exclusive franchise to supply an article of public necessity was guilty of wilful and persistent disregard of its obligations to the authority that created it, it was held that such wilful and persistent disregard operated as an initial breach of the contract made

between the parties and justified the donors in rescinding the franchise (*d*).

But *e converso* it is not competent for a Legislature to repeal statutes or charters creating private corporations, or confirming to them property already acquired under the faith of antecedent laws, nor can they by such repeal legally vest the property of such corporations exclusively in the State or dispose of the same to such purposes as they please without the consent or default of the corporators, and should any Legislature attempt so to do it would thereby violate the fundamental laws of every constitutional Government (*e*).

### *Contracts relating to Shares in Companies.*

**Allotment of shares.**
Chitty, 780, 781.

The course of the decisions has determined that in order to obtain a binding allotment of shares in a limited company there must be an unconditional application, and subsequently an allotment and a communication of the allotment to the applicant, and if either of these essentials is absent there is no contract.

Where, therefore, an application, though unconditional in form, is accompanied by a letter expressing a condition upon which (and upon which alone) the applicant is willing to take the shares for which he applies, the two documents must be read together, and in the absence of the fulfilment of the condition there is no valid contract.

And a like rule as to invalidity applies where an agent (without the authority of his principal) applies on behalf of such principal for an allotment of shares in a limited company, the admitted fact of the agency being sufficient to throw upon the company the duty of inquiry (*f*).

**Rights, duties and obligations of buyers and sellers of shares.**
Chitty, 679—688.

In the absence of some express stipulation, or, what comes to the same thing, of some custom to that effect incorporated in the contract, there is no obligation on a person who has agreed to buy shares to have the transfer either made out in his own name, or registered in his own name, and consequently a person who has agreed to sell shares has not the right to object to execute a transfer to the nominee of the buyer, any more than a vendor of real estate would be entitled to object to execute when required a conveyance, on the ground that it was not a conveyance direct to the person with whom he made his contract, or than a vendor of

(*d*) *La Ville de St. Jean* v. *Molleur* (1908), XL. S. C. R. 629.
(*e*) *Dartmouth College* v. *Woodward* (1819), 4 Wheaton, 578.
(*f*) *Ottawa Dairy Co.* v. *Sarley* (1904), XXXIV. S. C. R. 508.

goods could refuse to deliver them to the order of the purchaser, and insist on delivering them to the purchaser himself.

The vendor has a right to require the person contracting with him to procure the execution of the transfer by his (that is the purchaser's) nominee, and after execution the registration of such nominee as owner, so as to relieve him (the vendor) from all future liability, and he has a right to hold the party contracting with him personally liable if this be not done, but he has no right to dictate to the contractor whether he shall do this by taking the shares in a nominee's name or in his own (*g*).

**Rights and obligations of transferors and transferees of shares.**

It may be laid down as a general proposition of law that if parties without inquiry take documents which have on their face anything to put the takers on inquiry, they take them at their own risk, and if those from whom they take the documents have not a good title which they can transfer, then the transferees do not acquire a good title, although at the time when they take the documents they are not in fact aware of the real title of those who subsequently assert it, the title of the transferees in such case being no better than that of the transferor. Applying this general proposition to the concrete case of a transfer of shares the ordinary presumption is that if shares are delivered by or with the authority of the owner to a third party in order to transfer them, such delivery will suffice for the purpose. But if there has been no intention on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them; upon the ground that if the owner of a chose in action clothes a third party with the apparent ownership, and right of disposition of it, he is thereby estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value.

But this presumption may be rebutted if the particular facts attendant upon the transfer are such as should suffice to put a person of ordinary business capacity upon inquiry.

Thus, if there be a disparity between the name of the person inscribed upon the certificate, as being the registered owner, and the names of those purporting to transfer, or if the transfer be unsigned or not properly witnessed, or, to take an extreme case, if the signature upon the transfer is evidently not in the handwriting of the registered owner, then and in either of such cases the true owner is not estopped from setting up his title to the shares and the certificates which represent them, by the fact that

(*g*) See *Boulthee* v. *Gzowski* (1898), XXIX. S. C. R. 54.

a subsequent holder may have received them for valuable consideration (*h*).

As to the correlative duties and obligations of transferor and transferee in a case where the bargain of sale and purchase complies so far with the ordinary requirements of transference as to put neither of the parties upon inquiry. The contract by the seller upon the bargain and sale of registered shares of a company is not only that he will execute or cause to be executed a valid transfer of the shares and hand it to the transferee, but also that he is in a position to pass to the person receiving the transfer and certificate a title legal and equitable, which will enable the transferee to vest himself with the shares, subject only to any right the company may have to object to register such person as shareholder, and should he not do this he is responsible to the purchaser in damages—commensurate with the loss which he has sustained by reason of the transferor not complying with the terms of his bargain; and in amplification of the above doctrine it may be stated that where shares in a company are sold for valuable consideration and without notice by a person other than the registered owner or his agent, the actual vendor warrants his ability to give the purchaser a title which will enable him to obtain from the company a certificate of registration of such shares in his own name.

But it is the duty of the transferee and not of the transferor to obtain recognition of himself as a shareholder, and thereby relieve the vendor from any burdens which might otherwise arise from the fact that the shares, prior to transference, had been registered in his name (*i*).

### *Powers of Court to grant relief to Directors of Companies.*

It is alike the law of England (*k*) and of the province of Quebec in the Dominion of Canada that, if in any proceeding against a director, or person occupying the position of a director of a banking company, for negligence or breach of trust, it appears to the Court hearing the case that the director or person has acted honestly and reasonably, and ought fairly to be excused, then and in such circumstances the Court may relieve him from his liability, if any. Where, therefore, the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the

(*h*) *Colonial Bank* v. *Cady & Williams* (1890), 15 A. C. 267, H. L. (E.).

(*i*) *Castleman* v. *Waghorn, Gwynn & Co.* (1908), XLI. S. C. R. 88.

(*k*) 8 Edw. VII. c. 69, s. 278.

bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers, it was held by the Privy Council that a charge of negligence could not be established against the president of the bank, simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts (*l*).

(*l*) *Prefontaine* v. *Grenier*, [1907] A. C. 101, P. C.

## CHAPTER V.

### CONTRACTS BY POST.

Chitty, 16—19.

In Canada, as in other parts of the British Empire, contracts by correspondence are completed when the letter of acceptance is deposited in the post for transmission, and it is not necessary in order to perfect the agreement between the parties for the letter containing the acceptance of the offer actually to reach the party making it (*a*). Throughout the Dominion the law on this point has been crystallised by the Post Office Act (*b*), which enacts that, "From the time any letter or mailable matter is deposited in the post office for the purpose of being sent by post, it shall cease to be the property of the sender, and shall be the property of the person to whom it is addressed or the legal representatives of that person. . . ." Where, therefore, negotiations are carried on by correspondence, the general law of contractual obligation throughout the Dominion applies, and consequently it is not necessary for the completion of a contract that the letter accepting an offer should have actually reached the party by whom it is made in order to make the agreement binding, as it becomes obligatory directly the unconditional acceptance of a previous offer is mailed in the general post office (*c*). But if the contract is inchoate and amounts to no more than an offer, the converse of the above rule applies, and the bargain does not become binding upon the sender until the recipient of the letter has ratified it by acceptance and mailed his confirmation. Moreover, in such case the domicile of the recipient and not that of the sender is the place at which the contract is completed.

Where, therefore, a contract for the sale of goods is made and completed in a country or province in which the making and completion of such a contract of sale is lawful, the mere fact that the delivery of the goods is made in another country or province in which the reception and sale of the particular commodity purchased is forbidden and illegal, will not avoid the bargain so as to preclude the seller from suing the purchaser for the price, especially if the former had no notice of the illegality at the time when the contract was made (*d*).

(*a*) *Magann* v. *Auger* (1901), XXXI. S. C. R. 186.
(*b*) R. S. C., 1906, c. 68, s. 82.
(*c*) *Magann* v. *Auger* (1901), XXXI. S. C. R. 186.
(*d*) *Bigelow* v. *Craigellachie-Glenlivet Distillery Co.* (1905), XXXVII. S. C. R. 55.

## CHAPTER VI.

Chitty, 618—639.

### CONTRACTS OF MASTER AND SERVANT.


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*Respondeat superior.*

Chitty, 269.

WHERE false representations are made by an agent *quâ* agent, the rule of *respondeat superior* applies as in other cases of agency, and neither express authority to make the representations nor subsequent ratification or participation in profits are necessary ingredients in order to make the principal liable (*a*). And the above rule applies to all the acts and representations of an agent or servant when such acts or representations are made by him in the course of his employment (*a*). There is, however, one important exception, it having been decided that police officers can in no respect be regarded as agents or officers of the corporation of the city to which they are attached. Their duties are of a public nature. Their employment is devolved on cities and towns by the Legislature as a convenient mode of exercising a function of government, but this does not render the city or town liable for their unlawful or negligent acts.

Limitation on doctrine of *respondeat superior.*

The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment.

For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the Legislature.

(*a*) *Milburn* v. *Wilson* (1901), XXXI. S. C. R. 481: and see Principal and Agent, at p. 131 *et seq.*

They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants.

In the enforcement of such laws, therefore, police officers act in their public capacity, and not as agents or servants of the city, and consequently the maxim *respondeat superior* does not apply (*b*).

Doctrine of common employment. Chitty, 525, 620.

The principle, or, rather, the proposition of law established by the various cases dealing with the question of common employment is that where two or more persons are the servants of one master, and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by the reason of the negligence of another in the work or employment which is common to both, or incidental to the carrying on of the general business, or the operations in which the one and the other are engaged. And the ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant, under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive (*c*). In the Supreme Court of Canada, however, the above general proposition has been somewhat modified by certain decisions which, though not easily, or perhaps logically, reconcilable with the underlying principle upon which the doctrine of common employment is based, have, nevertheless, been adopted by the Court and may be summarised as follows:—It is not enough that a master should give proper directions to his servants, he is responsible for their performance, it is his duty to see that those directions are carried out. The master who puts a servant in a position of great responsibility and commits to him the management of his business, or entrusts him with the discharge of important duties in which the lives of other servants are involved, cannot escape from the discharge of those duties which the law imposes upon himself by simply entrusting their performance to another. The law imposes, in this case, certain duties upon the master for the better security of his employés. It requires the performance of these duties at his hands and makes the master responsible if there be neglect.

To exempt a master from all responsibility in a case of this kind would tend to defeat the legislative enactments passed to

(*b*) *McCleave* v. *City of Moncton* (1902), XXXII. S. C. R. 106. As to unenforceable by-laws, see *Municipal Corporation of Toronto* v. *Virgo*, [1896] A. C. 86, P. C.

(*c*) *Hastings* v. *Le Roi* (1903), XXXIV. S. C. R. 177.

give greater security to life in hazardous operative enterprises. Consequently, there is laid upon the master a specific obligation to see that the provisions of the law are faithfully complied with; and this obligation is not so much a duty in a common employment as an antecedent duty, the due performance of which the law demands at the hand of the master, and which, in order to escape responsibility, he must show he has discharged (*d*).

Moreover, the doctrine of common employment does not prevail in all the provinces of the Dominion so far as to defeat a claim (*e*), although it may go in mitigation of damages (*f*). Therefore, in certain provinces, acts and omissions by fellow-servants of the deceased do not exonerate employers from liability for those acts of negligence of a servant which may have led up to the injury (*g*). And wherever this liability exists in the Dominion there is no exemption therefrom—it having been decided by Canadian law, that the reigning Sovereign is liable to make compensation for damage to the property of an individual occasioned by the negligence of a servant of the Crown in a preceding reign (*h*).

Breach of contract of service.

In the case of contracts of service it may be laid down as a general proposition of law that in declaring against a master for the wrongful dismissal of his servant, it is sufficient to allege that the plaintiff was "ready and willing" to continue in the service (*i*), and it seems probable that where a servant is improperly dismissed, he need not keep himself in a state of readiness to serve during the residue of the term of hiring, although, according to the better opinion, he should endeavour to find another situation in order to minimise damages (*k*), and sue on the special contract for the loss he has actually sustained by reason of the *wrongful dismissal*. But such damages cannot include compensation for the manner of the dismissal, for his injured feelings, or for the

(*d*) *Grant* v. *Acadia Coal Co.* (1902), XXXII. S. C. R. 427; and see *Warmington* v. *Palmer* (1902), XXXII. S. C. R. 126; see also *McKelvey* v. *Le Roi Mining Co.* (1902), XXXII. S. C. R. 664.

(*e*) The doctrine does not prevail in Quebec. *The Queen* v. *Grenier* (1900), XXX. S. C. R. 42; see also Workmen's Compensation for Injuries Act, R. S. O., 1897, c. 160, s. 3, sub-s. 5.

(*f*) *The King* v. *Desrosiers* (1909), XLI. S. C. R. 71.

(*g*) *Asbestos and Asbestic Co.* v. *Durand* (1900), XXX. S. C. R. 265. As to the meaning of a "person who has charge or control" so as to render his employer liable, see *Toronto Railway Co.* v. *Snell* (1901), XXXI. S. C. R. 241.

(*h*) *The King* v. *Desrosiers* (1909), XLI. S. C. R. 71; compare *Canterbury (Viscount)* v. *Att.-Gen.* (1842), 1 Phillips, 306.

(*i*) This allegation has been held unnecessary, *Beaucage* v. *Winnipeg Store Co.* (1910), 14 W. L. R. 575).

(*k*) Even this has been held unnecessary when the dismissal took place at a time of year when a similar situation was unlikely to be obtained (*Beaucage* v. *Winnipeg Store Co.* (1910), 14 W. L. R. 575).

loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment (*l*).

Moreover, loss inflicted upon the employer by reason of a negligent mistake on the part of the servant has been held recoverable on a counterclaim (*m*).

Illness of servant. Chitty, 633.

If while the contract of service remains in force the servant is disabled from performing his work, otherwise than by his own misconduct, no deduction can be made in respect thereof from his wages. But if, during the continuance of the term, by the visitation of God the servant become incapacitated for further service, as, for example, if by reason of paralysis or any other incurable bodily or mental disorder he is rendered permanently incompetent to act in the capacity in which he was engaged, the master is justified in terminating the agreement, as in such case the fact that he could never return to his work would amount to a valid ground of dismissal. Nor will the circumstance that both the servant and his medical adviser alike hoped and believed that the illness was only temporary, if in fact it was incurable, alter the respective position of the parties (*mm*). But mere temporary illness is no sufficient justification for a master summarily discharging his servant.

A master is not at common law bound to provide medical attendance and medicines for his servant in husbandry, his shop assistant, or his menial servant, even though the illness of the servant has been caused by an accident which occurred whilst he was engaged in the duties of his situation.

But if a master send for a medical practitioner for his servant whilst the latter is under his roof, he is liable, nor can he deduct the expense occasioned thereby from the servant's wages, unless it was especially so agreed.

In the province of Ontario the following statutory provisions as to wages apply:—

R. S. O., 1897, c. 157, s. 11.

"Any one or more of the justices upon oath of such servant or labourer against his master or employer concerning any non-payment of wages [including wages earned by piecework (*n*)] may summon the master or employer to appear before him or them . . . to examine into the matter of the complaint . . . and upon due proof of the cause of complaint the justice or justices may discharge the servant or labourer from the service or employment of the master, and may direct the payment to him of any wages found to be due not exceeding the sum of $40."

(*l*) *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488, H. L. (E.).

(*m*) *Beaucage* v. *Winnipeg Store Co.* (1910), 14 W. L. R. 575.

(*mm*) *Dartmouth Ferry Commission* v. *Marks* (1904), XXXIV. S. C. R. 366.

(*n*) Added by Statute Law Amendment Act, 1908 (8 Edw. VII. c. 33), s. 39.

**Statute Law Amendment Act. 1901 (1 Edw. VII. c. 14), s. 14.**

"In case any person enters into an agreement under which he receives as an advance of wages, money, food, lodging, or railway or steamboat tickets to enable him to reach any place at which he has engaged to perform labour, work or other services, if such person thereafter without the consent of his employer, leaves his employment before the money or cost of such food, lodging or transportation has been repaid, he shall on proof thereof before a justice of the peace be liable on summary conviction to a penalty not exceeding $25. and in default of payment of such penalty to imprisonment . . . for a period not exceeding 30 days."

**Master's right of set-off.**

It is usually stated in text-books that in an action by a servant for wages a master is not entitled to set off the value of goods lost or damaged by the servant's negligence, unless there has been a specific agreement between the master and servant to the effect that the latter shall pay to the former out of his wages compensation for all goods lost or damaged by reason of his negligence (o). But in the case of *Sharp* v. *Hainsworth* (p), upon a complaint by a workman against his employer for wages due, it was held that the latter was entitled to take into account the quality of the work done, and if loss had actually been sustained by reason of the badness thereof he might set off the amount of such loss against the wages claimed. The above general proposition can, therefore, scarcely be regarded as correctly stating the law.

**Quantum of wages for which master is liable.**

If a master engage a servant and agree to pay him so much by the day, month or year (q), the servant has a right of action against the master or against his executors on the contract (r). But where by the terms of a contract of service the wages are not payable until the time of service has expired, and the servant dies or the service is otherwise terminated without the master's fault in the interim, none are due *pro tanto* unless under custom or usage (s).

**Valid ground for dismissal Chitty, 832.**

If a servant wilfully disobey any lawful order of his master, or unlawfully absent himself from his work, or if he be guilty of moral misconduct or behaviour conducing thereto (t), or habitual neglect (or general incompetence), he may be discharged without warning before the expiration of the period for which he was hired, and in such case he is not entitled to any wages from the day when he is discharged, if they had not then accrued due. But a servant who is paid periodically and who is dismissed for good

(o) *Le Loir* v. *Bristow* (1815), 4 Camp. 134.

(p) *Sharp* v. *Hainsworth* (1862), 32 L. J. M. C. 33 (an English case).

(q) A contract of service for a year is none the less a yearly contract because wages are paid weekly (*Noble* v. *Gunn, Ltd.* (1910), 16 O. W. R. 504; 1 O. W. N. 884).

(r) Bacon's Abr. *tit.* Master and Servant (H.).

(s) Comyn's Dig. *tit.* Master and Servant (K. 19).

(t) *Ouimet* v. *Fleury and Recorder's Court*, 16 R. L. N. S. 62.

cause, or leaves without reasonable excuse, is entitled to his wages up to the last period when such wages accrued due, although where a servant leaves without reasonable excuse the master can recover damages for breach of contract (*u*).

Moreover, a dismissal may be justified on the ground that the servant was guilty of fraudulent misrepresentations and deceit in the conduct of the employer's business, to the injury of his employer, or that he refused to work during the customary hours of labour, or that he was in collusion with a rival firm (*x*), or had slandered his employer (*y*), or had negligently allowed the property of his master to fall into disrepair (*z*). It is not essential that the master at the time of dismissal allege any special cause of complaint on the part of the servant as the cause of such discharge, it being sufficient if such a cause existed in fact at the time of dismissal. It has been said that if a ground of dismissal existed although unknown to the master at the time when he discharged the servant, he may subsequently avail himself of it as a defence to an action for wrongful dismissal (*b*).

Where payment of wages is to be made monthly, quarterly, yearly, or at any other fixed period, and a servant improperly leaves his master, or is guilty of such misconduct as to justify his discharge during the currency of such period, he is not entitled to wages for any part thereof, even to the day he quits. But where the contract of service is determined by mutual consent, the servant may recover wages *pro ratâ*. Chitty, 630.

And where there is no evidence of any special contract of hiring, but merely proof of service, and it is shown that the agent or servant voluntarily quitted his employment, he will be entitled to be paid for his services as on *quantum meruit* up to the time of his so quitting. *Quantum meruit.* Chitty, 616, 631, 770.

But, *e converso*, where wages are contracted to be paid at certain stated intervals, and the servant is tortiously discharged during the currency of one such period, he may not only recover at once for the time he has actually served on a claim for work and labour, but also for the balance of the period upon a special claim for being wrongfully prevented from completing his term of service, together with a count for damages for the wrongful dismissal.

(*u*) *Taylor* v. *Kinsey* (1899), 4 Terr. L. R. 178.

(*x*) *Eastmure* v. *Canada Accident Insce. Co.* (1896), XXV. S. C. R. 891.

(*y*) *Bousquet* v. *Nellis* (1908), Q. R. 35 S. C. 209.

(*z*) *French* v. *Morton* (1909), 14 O. W. R. 243.

(*a*) See *McRae* v. *Marshall* (1891), XIX. S. C. R. 10.

(*b*) *Goby* v. *Gordon Ironsides and Fares Co.* (1910), 16 W. L. R. 258 (decided on the authority of *Boston Deep Sea Co.* v. *Ansell* (1888), 39 Ch. D. 339).

And in this connection it may be stated that according to the law of Quebec a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a *quantum meruit* either against the Crown by petition or against a private individual by action in respect of professional services by him (*c*). Again, it has been held that a solicitor employed by a corporation at a fixed salary is entitled, if it be one of the terms of his contract of employment, in addition to his salary, to be paid all fees and costs which his employers may recover in the course of successful litigation conducted by him on their behalf (*d*).

Written notice of dismissal.

And where a contract of service provides that it shall be terminable "by written notice," reasonable notice must be given (*e*). But the ordinary rule that a domestic or menial servant is entitled to a month's notice before dismissal has been held not to apply to the manager of a restaurant, who is entitled to reasonable notice only (*f*). And where the facts of the case clearly indicate a temporary contract of service the employé cannot sue as on a yearly agreement (*g*).

### *Mechanics' Liens.*

Chitty, 630.

Throughout most of the provinces of the Dominion the local Legislatures have placed upon their statute books a provision whereby any workman, servant, labourer, mechanic, or other person employed in any kind of manual labour, who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the construction, alteration, reparation, or improvement of any of the multifarious matters specified in the statute shall by virtue thereof have a lien for the price of such work, service or materials on the structure, edifice or thing upon which such labour was expended, or in which such materials were used.

It is generally provided, however, that such lien shall be limited in amount to the sum justly due to the person entitled to the lien and to the sum justly owing by the owner. Moreover, it has been held that the provisions of these Acts do not apply to an owner of land who has in fact, in good faith and without notice, paid to a contractor who was unable to finish the work a sum in excess of what was due and owing for the works executed by him at the

(*c*) *The Queen* v. *Doutre* (1884), 9 A. C. 745, P. C. As to the fund from which such remuneration can be paid out, see *Tucker* v. *The King* (1902), XXXII. S. C. R. 722; see also in Ontario, the Statute Law Amendment Act (1 Edw. VII. c. 12), s. 15.

(*d*) *Ponton* v. *City of Winnipeg* (1909), XLI. S. C. R. 366.

(*e*) *Graham* v. *Cudahy Packing Co.* (1010), 16 R. de J. 407.

(*f*) *Lamberton* v. *Vancouver Temperance Hotel Co.* (1904), 11 B. C. R. 67.

(*g*) *Bain* v. *Anderson & Co.* (1998), XXVIII. S. C. R. 481.

date when he relinquished the contract. And further, that the fact of the insolvent contractor having given promissory notes, which were subsequently dishonoured, to a creditor who had supplied him with materials for the purposes of the undertaking, did not, in such circumstances, render the owner of the building responsible to the creditor for the amount of the unpaid bills (*h*).

(*h*) *Travis* v. *Breckenridge-Lund Lumber and Coal Co.* (1910), XLIII. S. C. R. 59.

## CHAPTER VII.

### MISCELLANEOUS CONTRACTS.


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### *Husband and Wife.*

Solemnization of marriage in Canada.

IT has been decided by the Privy Council that sects. 91 and 92 of the British North America Act, 1867, the former of which (sect. 91), by clause 26, confers upon the Dominion exclusive legislative authority in the matter of marriage and divorce; and the latter of which (sect. 92), by clause 12, confers upon provincial Legislatures exclusive legislative authority in the matter of the solemnization of marriage within the respective provinces of the Dominion, are so far mutually antagonistic the one to the other, as to make clause 12 of sect. 92 an exception to the legislative authority conferred upon the Dominion by sect. 91, clause 26; or, in other words, the effect of clause 12 in sect. 92 of the British North America Act, is to confer upon provincial Legislatures within their provincial boundaries the exclusive right to enact conditions as to the solemnization of marriage, and the persons by whom the ceremony must be performed in order to give validity to the contract (*a*).

Chitty, 592—595.

### *Agreements as to Custody of Children.*

As a general rule of British law, any agreement, whether for valuable consideration or not, whereby a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy.

And the reason of this rule may be stated as follows (*b*):

It is not competent for a father to fetter and abandon his parental authority over his child, or, in other words, the Court will

(*a*) *Marriage Legislation in Canada, In re*, [1912] A. C. 880, P. C.

(*b*) *Vansittart* v. *Vansittart* (1858), 2 De G. & J. pp. 259, 260.

not allow or assist a father to make any arrangement which will preclude him from acting, according to his judgment and discretion, in the most advantageous manner for the welfare of his child. It is, as a general rule, desirable and right that the father should exercise superintendence over his children, and that he should not be permitted by contract to deprive himself of this inherent obligation imposed upon him by nature.

But this general rule is not an inflexible one, as, for example, where a father agrees to emancipate or forisfamiliate the child out of regard for his welfare in view of benefits, pecuniary or otherwise, bestowed or expected.

In such a case, if a change has actually taken place in the condition and prospects of the child, the parent will be prohibited from interfering so as to disappoint the expectations of the child, and is to be deemed to have waived his parental rights; or, in other words, where a father has consented to the child being maintained by another, and a fund has been set apart for that purpose, and there has been a continuance of the new relations resulting in advantages to the child in the way of education and training, the Court will not allow the father to interfere with the expectations of the child, or capriciously alter a voluntary contract which is clearly for the child's benefit.

Moreover, in considering the legality of the agreement, it is unimportant to weigh very nicely the *quantum* of benefit to be gained by the child. The real point is, was the arrangement one *bonâ fide* intended for the benefit of the child, or was it a colourable attempt to contravene the policy of the law? If the former, and not the latter, is the correct view, the contract by Canadian law is not necessarily void as being opposed to public policy.

Nor will the fact that the agreement includes an allowance to the parent in all cases render it obnoxious.

Thus, where a widow in necessitous circumstances agreed to relinquish her maternal right of guardianship over her daughter to the child's paternal grandfather; the fact that the latter undertook to make his daughter-in-law an annual allowance was held by the Supreme Court of Canada not to constitute such a breach of public policy as would avoid the agreement (*o*).

(*o*) *Chisholm* v. *Chisholm* (1908), XL. S. C. R. 115; see also *Roberts* v. *Hall* (1882), 1 O. R. 388; *Nault* v. *Nault* (1911), 13 Q. P. R. 221. As to the effect by the law of Quebec of remarriage upon the tutorship of the mother, see *Russiere, Ex parte* (1911), 13 Q. P. R. 133. As to the right of a testator to impose absolute conditions with regard to the form of marriage and religious education of the beneficiaries under his will, see *Renaud* v. *La Mothe* (1902), XXXII. S. C. R. 357.

Chitty, 596.

### *Quasi-Contractual Obligations arising from Proximate Relationship.*

It is settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant exists between them.

Consequently, a person employing a contractor to do work is not liable for the negligence of that contractor or his servants.

But, on the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.

And this rule applies even where there is no contractual relationship between plaintiff and defendant, if the proximate cause of an accident to the plaintiff is the initial negligence of the defendant in respect of an easy and reasonable precaution which he was bound to take in connection with the installation of a dangerous machine. Should he therefore in such circumstances neglect so obvious a duty, he is liable for all results immediately proceeding from his want of care.

The principle of law in such cases being, that although there may be no relation of contract between the negligent party and the party who is injured by the lack of precaution, and consequently the latter cannot appeal to any defect in the machine supplied by the defendants which might constitut a breach of contract; there may be, nevertheless, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty.

What that duty is will vary according to the nature of the operation or the character of the installation.

Chitty, 734.

It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded fire-arms, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles, when it is a necessary sequence from the circumstances of the case for other parties to come within their proximity.

The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency

than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger; a poison is innocuous unless some one takes it: gas will not explode unless it is mixed with air, and then a light is set to it.

Interposition of third party.

But, on the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another's volition, then he will not be liable.

For against such conscious act of volition no precaution can really avail (*a*).

When contractor liable.

Apart, however, from the interposition of a third party, who by actual misfeasance induces the accident, a contractor undertaking to supply an admittedly dangerous substance or thing obviously intended to be used by parties other than those with whom the contract is actually made, is liable to third parties for all consequences immediately arising out of his neglect to take reasonable precautions.

Thus, the duty arising out of a contract to supply electric light or heat to the house and premises of a consumer is not a personal one, and is consequently not limited to the individual with whom the company or firm undertaking to supply electric light or energy is immediately in privity, but extends to every member of the consumer's household (*b*).

In a contract of this description it is clearly within the contemplation of both the parties thereto that the electricity supplied should be for the benefit of the whole of the premises occupied by the consumer, and therefore necessarily for the use of all the occupants thereof.

Consequently the duties and obligations arising out of such a contract extend to all those for whose use and benefit it was clearly entered into, and are not limited to the person actually contracted with.

The measure of duty and obligation owing to the members and servants of the household of a consumer, is the same in character and equal in degree with that due to the householder himself.

In all cases this duty, which is an implied one, can only be discharged by those upon whom it devolves, by the exercise of the most exact skill and attention in the general conduct of their undertaking, and particularly by especial care with regard to the wires and the transmission through them into the premises of a consumer of so dangerous an elemental energy as electricity.

(*a*) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins*, [1909] A. C. 640; P. C.

(*b*) As to the nature of such a contract, see *City of Montreal* v. *Montreal Light, Heat and Power Co.* (1909), XLII. S. C. R. 431

Liability for non-feasance.

Nor is this obligation limited only to active and positive negligence or misfeasance, it also includes nonfeasance by failing to maintain and keep the wires, through which the current is transmitted, in a proper state of insulation.

But whilst a company is legally liable to all those damnified thereby for any positive or negative dereliction from duty of which they may be guilty, they are at the same time entitled to plead, as a bar to action, any defence which may be conferred upon them by statute. Where, therefore, an action against an electric railway and power company, guilty of nonfeasance resulting in personal injury, was time-barred by a clause in the provincial Railway Company's Act, under the provisions of which it carried on its undertaking, it was held by the Supreme Court of Canada that the delinquent company was entitled to the benefit of the limitation of actions provided by statute (*c*).

And in cases where judgment is recovered in an action against one of several parties guilty of a joint tort, such judgment is a bar to an action against the others for the same cause, although the judgment may remain unsatisfied.

It not being for the general interest that, having once established and made certain his right against one of several wrongdoers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong.

And this rule is based upon the principle of policy and convenience, which is expressed in the maxim, *Interest reipublicæ ut sit finis litium* (*d*).

(*c*) *British Columbia Electric Railway Co.* v. *Crompton* (1910), XLIII. S. C. R. 1.

(*d*) *Longmore* v. *J. D. McArthur Co.* (1910), XLIII. S. C. R. 640.

# CHAPTER VIII.

## VARIATION OF WRITTEN CONTRACTS BY EXTRANEOUS EVIDENCE.


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Method of interpreting a written organic instrument.

In the interpretation of a completely self-governing Constitution, founded upon a written organic instrument, such as the British North America Act, if and when the text is explicit that text is conclusive, alike in what it directs and what it forbids.

But when the text is ambiguous and capable of more than one meaning, as, for example, when the words establishing two mutually exclusive (and conflicting) jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act for the purpose of deciding to which jurisdiction the powers claimed by both shall be allocated.

Nor must it be understood that there is no enabling capacity to allocate a particular power to one or other of rival jurisdictions merely by reason of the fact that the text of the Constitution creating such jurisdiction is silent or ambiguous on the particular matter in controversy.

But *e converso* it is to be taken for granted that the enabling power to allocate is actually existent, unless the matter in regard to which it is invoked is extraneous to the statute creating the Constitution or otherwise clearly repugnant to its sense.

Applying this general proposition to the Constitution of Canada, it is axiomatic that whatever is an essential appanage of self-government in Canada must belong either to the Legislature of the Dominion or to the Legislature of the provinces within the limits prescribed by the British North America Act.

Consequently, the power to place upon the Supreme Court of Canada the duty of answering questions of law or fact when put

by the Governor in Council, is incident to and resident in the Parliament of the Dominion, although it is not mentioned in either explicit or ambiguous terms in the British North America Act.

But although such a power not being repugnant to the British North America Act may be regarded as *intra vires* and consequently exercisable, the answers of the Supreme Court to questions addressed to it by the Governor in Council are advisory only, nor does the Court by expressing extra-judicial opinions when thus called upon to do so vacate its right to review such opinions when the point arises in a concrete case embodying the same point comes judicially before it (*a*).

**Instances in which evidence of trade custom is admissible.**

**Chitty, 43, 122.**

Customs of trade, as distingnished from other customs, are generally courses of business invented or relied upon in order to modify or evade the application of some judicial rule of law to business, where its application has seemed irksome or has proved injurious to some of the merchants affected thereby.

And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether or no it is in accordance with fundamental principles of right or wrong.

A mercantile custom is hardly ever invoked, save when one of the parties to the dispute has not, in fact, had his attention called to the business procedure to be enforced by it; for if his attention had in fact been called to such course of business, his contract would be specifically made in accordance with it, and no proof of it as a custom would be necessary.

A stranger to a locality, or trade, or market, is not held to be bound by the custom of such locality, trade, or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market, wherein all who are not strangers do know and act upon such custom.

When considerable numbers of men of business carry on one side of a particular business they are apt to set up a custom which acts very much in favour of their side of the business.

So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to

(*a*) *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1912] A. C. 571, P. C.

be enforced against a person in fact ignorant of it, is unreasonable, contrary to law and void. And the general rule employed by a judicial forum in deciding whether or no a custom of trade is one that should be upheld by the Court or one that should be disapproved, is based upon the consideration whether or no the alleged custom of trade merely controls the method in which the contract is to be performed, or whether it so changes its intrinsic character as to substitute for it something unlike or perhaps altogether antagonistic to its original terms. If it does the latter it is unjust towards the party against whom it is sought to be enforced, and is, therefore, void; if the former, it is not unjust, and should, therefore, be allowed to prevail (*b*).

*Rule as to varying a Written Document by Parol Evidence.* Chitty, 116—128.

The general rule undoubtedly is, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and in such case extrinsic evidence for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it: for the ablest advice might be controlled, and the clearest title to land undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention or reservation in making the instrument, or of the objects or persons whom he intended to benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

Method of interpreting written instruments.

The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and

(*b*) Deduced from judgments in *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; see also *Butler* v. *Murphy & Co.* (1909), XLI. S. C. R. 618, in which a custom was held not binding.

meaning of the language may be investigated and ascertained by evidence outside the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party.

**Instruments written in a foreign language.**

Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning and significance from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many cases use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known, peculiar, idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or judge to construe the instrument, and to carry such real meaning into effect.

**Extrinsic evidence generally.**

But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such extrinsic evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, the exception to the general rule must be strictly limited to cases of the description above specified and to evidence of the nature above detailed, and in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations or explanations by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before alluded to; it would be evidence which in most instances could not be met or controverted by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed (*c*).

***Prima facie* presumption in case of written instrument.**

But although the production of a paper purporting to be an agreement by a party with his signature attached affords a strong presumption that it is his written agreement, and if in fact he did

(*c*) Tindal, C. J., in *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at p. 565.

sign the paper *animo contrahendi*, the terms contained in it are conclusive and cannot be varied by parol evidence. Nevertheless, if it can be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is clearly admissible. Or, in other words, although no addition to or variation of the terms of a written contract can be made by parol, there is no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement until money was paid or something else done.

Thus, for example, where a promissory note is indorsed upon the express understanding that it shall only be available upon the happening of a certain condition, the happening of that event is a condition precedent to the note becoming binding upon the indorser (*d*).

Ambiguous or obscure instrument. Chitty, 116—125.

And a like rule prevails where the language of an instrument is ambiguous or obscure. Consequently, in such case the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement (*e*).

Again, as it is a positive rule of law that wherever practicable a Court of justice ought to attribute to the ordinary transactions of business such a legal character as will effectuate, and not such as will frustrate the real intentions of the parties to them, it has been held that where the terms of a document, although admittedly ambiguous, are reasonably capable of a construction in accordance with the parol interpretation of them by the party seeking to enforce it, and any other construction thereof would render the whole transaction nugatory, the Court will construe the document so as to render it effectual (*f*).

Moreover, when once the existence of a parol contract is admitted by the party to be charged it does not lie in his mouth to object to the admissibility of oral evidence by the other party to prove the terms of such contract (*g*).

Collateral verbal agreement.

Again, in the case of a contract in writing parol evidence of a collateral verbal agreement is admissible, provided such alleged

(*d*) *The Commercial Bank of Windsor* v. *Morrison* (1902), XXXIV. S. C. R. 98; see also *Mutual Life Insce. Co. of Canada* v. *Giguère* (1902), XXXII. S. C. R. 348.

(*e*) *Deserres* v. *Brault* (1906), XXXVII. S. C. R. 613.

(*f*) *Traves* v. *Forrest* (1909), XLII. S. C. R. 514.

(*g*) *Campbell* v. *Young* (1902), XXXII. S. C. R. 547.

oral contract does not traverse, limit or contradict any of the terms of the agreement which has been reduced into writing. Where, therefore, a plaintiff alleged that the defendant, when giving him written instructions to negotiate a sale of real estate, verbally undertook to reimburse him for any expenses reasonably incurred in his endeavour to obtain a customer, the Court gave effect to such collateral oral agreement (*h*).

Chitty, 125.

But, on the other hand, an express stipulation in a contract for the sale of goods, as in any other contract, is conclusive evidence of the terms of the agreement between the parties thereto, and parol evidence of a local mercantile or other custom inconsistent with such stipulation is inadmissible to vary the terms of the written agreement (*i*). And, generally, where the effect of an alleged parol agreement is to vary and annul the terms of a written instrument which clearly and precisely sets out the respective rights of the parties, such verbal agreement is not admissible in evidence (*k*), even in cases where the written contract, by reason of fortuitous conditions, becomes unprofitable.

Unprofitable contracts.

Upon the ground that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen circumstances, the performance of the contract has become unexpectedly burthensome. And in amplification of this rule, it may be laid down as a general proposition of law that a Court has no right to read into a written contract an implied stipulation varying its express terms, unless upon considering the whole tenour of the instrument in a reasonable and businesslike manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

Nor is it enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in order to be valid (*l*).

The underlying principle in such cases being that when a person by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract (*m*).

(*h*) *Dansmuir* v. *Lauwenburg, Harris & Co.* (1900), XXX. S. C. R. 334.

(*i*) *Dafresne* v. *Fee* (1904), XXXV. S. C. R. 274.

(*k*) *Jackson* v. *Drake, Jackson & Helmcken* (1906), XXXVII. S. C. R. 315.

(*l*) *Connolly* v. *City of St. John* (1904), XXXV. S. C. R. 186; see also *Battle* v. *Willox* (1908), XL. S. C. R. 198.

(*m*) *Hall* v. *Wright* (1859), E. B. & E. 765, at p. 789; see also *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, at p. 833; and *Battle* v. *Willox* (1908), XL. S. C. R. 198.

Contract of impossible performance.

But the above rule is only applicable when, as stated, the contract is positive, absolute, and not subject to any condition either express or implied. For if it be either conditional, or, perhaps, unlimited as to time (*a*), the authorities seem to establish the principle that where, from the nature of the contract, it appears that the parties must, from its inception, have known that it could not be fulfilled, unless when the time for performance arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty by the contractor that the thing shall continue to exist, the contract is not to be construed as a positive contract to be fulfilled in all events, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible by reason of the perishing of the thing without default of the contractor.

Again, there are certain contracts of delivery of goods conditioned upon assumption of the continued existence of a particular chattel, the due fulfilment of which by the contractor will be excused if, by misadventure and without negligence, the subject-matter of the contract is destroyed.

Thus, for example, where, by virtue of a present contract of bargain and sale, the property in specific goods, for delivery at a future date, is transferred to a buyer, should they without fault in the vendor perish in the interval, although the purchaser must pay the price, the vendor nevertheless is excused from performing his contract to deliver, as it has become impossible (*b*).

Effect of anticipatory breach of contract by one party.

The doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not by itself amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action.

Consequently, when one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of itself amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renuncia-

(*a*) 1 Rol. Abr. 450, pl. 10; see also *Hadley* v. *Clarke* (1799), 8 T. R. 259.

(*b*) *Rugg* v. *Minett* (1809), 11 East, 210; see also *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; and *Boast* v. *Firth* (1868), L. R. 4 C. P. 1.

tion of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.

The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.

He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach.

If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait . the arrival of the time when, in the ordinary course, a cause of action would arise. He must elect which course he will pursue. Such is the general doctrine recognised by the law with regard to anticipatory breach of contract (*p*).

Apparently, however, where the renunciation by one party, and the adoption of such renunciation by the other party, results from a mutual misconception of rights under the contract, and such contract is partly performed, the claim of one party, if any, may be set off against the counterclaim of the other party, if any (*q*).

(*p*) *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460, at p. 467; cited in *Phelps* v. *McLachlin* (1904), XXXV. S. C. R. 482.

(*q*) *Phelps* v. *McLachlin* (1904), XXXV. S. C. R. 482.

# CHAPTER IX.

## VOID AND VOIDABLE CONTRACTS.


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THE question whether or no a particular contract is, or is not, in restraint of trade, is a question of law for the discrimination of the Court, and not of fact for a jury (*a*); and the general principles governing such contracts are perfectly well established. Most actions of this class arise out of a breach of the restrictive clause usually contained in a contract of sale or service, whereby the person who has sold a business or profession to another, or the person who has learned a particular trade and its secrets from another, is prohibited from carrying on the same trade, profession, or avocation in competition with the other party to the contract for a certain specified period of time within certain reasonable limits of space.

**Contracts in restraint of trade, Chitty, 702—711.**

Certain modifications of this general doctrine have from time to time been submitted for the decision of the Courts, and prominently amongst these modifications may be mentioned the custom which has prevailed during recent years of leasing out patented machines of complicated construction for the manufacture of certain specific articles upon a condition called a "tying clause," whereby the lessee contracts, during the subsistence of the agree-

**"Tying clauses" in contracts.**

(*a*) *United Shoe Company of Canada* v. *Brunet*, [1909] A. C. at p. 341, P. C.

ment, not to employ the hired machines, in conjunction with other machines not comprised in the lease, for the purpose of manufacturing the class of goods for which the leased machines were specially hired.

Or, in other words, the lessee of such machines specifically agrees with the lessor, as a term of the demise, not to combine the user of the leased apparatus with that of any competitive machine for the purpose of manufacturing the whole or any component part of the particular commodity which the leased machine is constructed to produce. Of course, if the effect of such a "tying clause" in an agreement is proved not only to create a monopoly, but also unjustly to hamper or oppress the manufacturers of the commodity, and thereby to impose an excessive burden on the ultimate consumer, it would come within the mischief contemplated by the Patent Acts, and might possibly upon such grounds be avoided at the suit of the lessees.

But probably nothing short of unjust oppression would suffice to release a lessee from the terms of a contract into which he had voluntarily entered. Shorn of the element of oppression, above discussed, a "tying clause" presents to a manufacturer no more than the alternative of either doing without the machines altogether or of hiring them upon the terms which the lessors choose to impose as a condition of the demise.

This alternative does not, it is suggested, subject would-be customers of the lessors to any coercion other than that which their desire to promote their own trade interests imposes upon them. Consequently, by virtue of the privilege which the law secures to all traders, namely, that they shall be free to conduct their own trade in the manner which they deem best for their own interests, so long as that manner is not in itself illegal the (manufacturer) lessees are at liberty to hire or not to hire the lessors' machines, as they choose, irrespective altogether of the injury their refusal to deal may inflict on others.

The same privilege entitles the lessors to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they deem best in their own interests, irrespective of the like consequences.

This privilege is, indeed, of the very essence of that freedom of trade in the name and in the interest of which the lessees claim to escape from the obligations of their contracts. The well-known case of the *Mogul Steamship Co.* v. *McGregor, Gow &*

Chitty, 704—710.

*Co.* (*b*) affords a striking example of the lengths to which traders in the *bonâ fide* defence or promotion of their own trade interests may lawfully push this privilege, regardless of the injury, clearly foreseen by them, which they may thereby incidentally inflict on the trade of their rivals (*c*).

In the case of the *United Shoe Co. of Canada* v. *Brunet* (referred to above), it was not disputed that the machinery manufactured by the appellant lessors was of a superior description, but it was also argued by the counsel for the lessees that, if machin superior to theirs should be put upon the market during the c rency of the leases, the respondent lessees, and others in the l position, would, to the vast injury of their trade, be by suc leases prohibited from using the improved or superior machines.

It would, of course, always be open to any individual trader, who might be induced to hire machines by a false representation of the lessors as to the validity or universality of their patents, to repudiate his contract and, whether he repudiated it or not, sue for damages in an action for deceit; but in the case above cited, putting aside fraud and coercion, the defence of the lessees resolved itself into a claim that the lessors should be compelled to relinquish their free right of contract and, in substitution therefor, be obliged to produce and dispose of their manufactures on terms similar to those imposed by the Canadian Patent Act on patentees.

It may be quite reasonable and right that the Dominion, in consideration of the valuable rights and privileges it confers by its patents, should, in the interests of the public, impose these terms and conditions on their patentees, but they cannot, in the alleged interest of the freedom of trade, of which such terms and conditions are in truth to a large extent the negation, be imposed upon persons who are not patentees, nor can contracts containing terms and conditions different from and more onerous on traders who are parties to them than those which the Dominion prescribes be held, solely because of that circumstance, to be in restraint of trade and void as against public policy; "particularly as the argu-

(*b*) [1892] A. C. 25; compare *Weidman* v. *Shragge* (1912), XLVI. S. C. R. 1.

(*c*) If parties having a patent see fit to make ten thousand bargains for a limited use thereof with people who are ready and willing to accept such limitations, that is no evidence that it has become impossible to obtain the unlimited use of the article so patented at a reasonable price. Where, therefore, the patentee of a patented device sold it upon a condition that it should be used only in conjunction with certain unpatented articles sold by him, it was held by the Supreme Court of Canada, that such an agreement was valid and binding upon the purchaser, and was not in contravention of that rule of law which requires a patentee to supply the subject-matter of a patent without restriction as to user to any member of the public who is willing to pay a reasonable price therefor (*Guertin* v. *Copeland-Chatterson Co.* (1906), XXXVII. S. C. R. 651).

ment of public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law—especially as it is rarely argued at all, save when other points fail" (*d*).

Chitty, 709.

But, of course, if the monopoly established by the lessors and their mode of carrying on their business be as oppressive as is alleged, then the evil, if it exists, may be capable of cure either by legislation or competition (*e*).

It is not, however, *primâ facie* unlawful for a wholesale trader to enforce against a retail customer the terms of an agreement whereby the latter undertakes for a specified period to purchase, exclusively from the former, the commodity in which he deals (*f*).

But, on the other hand, it is a generally recognised principle of law that a municipal power of regulation or of making by-laws for good government—without express words of prohibition—does not authorise the municipality in declaring it unlawful (for the persons affected by the by-laws) to carry on a lawful trade in a lawful manner (*g*).

And applying this principle to a grant by the Crown, it may be laid down as a general proposition of law that the Crown cannot derogate from its own grant to an individual by subsequently imposing conditions on an unconditional and unlimited grant (*h*).

Where, however, the agreement of a combination of traders constitutes a direct infringement of the criminal or statute law it is *à fortiori* illegal and void (*i*).

And in no case throughout the Dominion of Canada has a provincial Legislature jurisdiction to permit an act forbidden by the criminal statutes of the Dominion. Consequently, a contract in connection with the promotion of a lottery, forbidden by the criminal statutes of Canada, is illegal and unenforceable in a Court of justice. Nor can the illegality which vitiates such a contract be waived or condoned by the behaviour or plea of the party against whom the contract is asserted, and it is the duty of the Court (without pleading) of its own accord to notice the nullity and unenforceability of such contracts at any stage of the proceedings. And a like rule applies to any contract prohibited by the criminal code as being *contra bonos mores* (*k*).

(*d*) Burroughs, J., in *Richardson* v. *Mellish* (1824), 2 Bing. at p. 252.

(*e*) *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, P. C.

(*f*) *Gervais* v. *Paquette & Turgeon* (1909), 37 Q. S. C. 501.

(*g*) *Municipal Corporation of Toronto* v. *Virgo*, [1896] A. C. 88, P. C.

(*h*) *The King* v. *Chappelle and others* (1902), XXXII. S. C. R. 586.

(*i*) *Hately* v. *Elliott* (1905), 9 O. L. R. 185; *Brown* v. *Moore* (1902), XXXII. S. C. R. 93.

(*k*) *L'Association de St. Jean Bap-*

Rule as to illegal contracts. Chitty, 735.

And generally, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, Courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the well-known maxim, "*in pari delicto potior est conditio defendentis et possidentis*." This is a maxim of law established not for the benefit of either plaintiffs or defendants, but founded on those principles of public policy, which refuse to assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract in recovering it back, for the Courts will not assist an illegal transaction in any respect (*l*).

And in the application of the above proposition to contracts against public policy, there is no doubt that, if a contract contrary to public policy be entered into, or if the performance of the contract would be contrary to public policy, performance cannot be enforced either at law or in equity (*m*); but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires (*n*).

### *Undue Influence.*

Contracts induced by undue influence. Chitty, 196-200.

It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other if the latter impeaches the gift within a reasonable time (*o*), unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must show (and the *onus* is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation.

A man of mature age and experience can make a gift to his father or mother because he stands free of all overriding influence, except such as may spring from filial piety: but a wife, or a young person (male or female) just of age, requires the intervention of

*tiste de Montreal* v. *Beaudt* (1900), XXX. S. C. R. 598.

(*l*) *Brophy* v. *N. American Life Assurance Co.* (1902), XXXII. S. C. R. 461.

(*m*) *Consumers Cordage Co.* v. *Connolly* (1900), XXXI. S. C. R. 244.

(*n*) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, at p. 151; cited in *Trudeau* v. *Standard Life Insurance Co.* (1899), Q. R. 16 S. C. 539 at p. 546.

(*o*) As to what is reasonable time, see *Turner* v. *Collins* (1871), L. R. 7 Ch. App. 329.

an independent mind and will, acting on his or her behalf and interest solely, in order to put him or her on an equality with the maturer donor, who is capable of taking care of himself

And, on the authorities, undue influence sufficient to avoid a contract is not essentially a question of actual pressure, or deception or undue advantage, or want of knowledge of the effect of the deed.

Existence of fiduciary relationship.

The mere existence of the fiduciary relation raises the presumption, which must be rebutted by the donee if the deed is to stand.

Further, apparently, it is not sufficient that the donor should have an independent adviser unless he acts on his advice.

If this were not so, the same influence that produced the desire to make the settlement or execute the deed would produce disregard of the advice to refrain from executing it and so defeat the rule; but the stronger the influence the greater the need of protection.

The real meaning of the rule is, that a woman under coverture, or a young person, being in the eye of the law unfit to deal irrevocably with husband or parent or guardian, as the case may be, in the matter of a gift of this kind, must appoint some independent adviser to act on his or her behalf. It is the action resulting from the advice, not action against the advice, that binds the donor.

Further, the donee does not discharge this burden by showing that his own solicitor acted for both parties.

A solicitor who accepts such a post puts himself in a false position: if he acts for both, he owes a duty to both, to do the best that he can for both.

But the Court requires that the donor should be placed in as good a position as if he or she were in fact emancipated. The solicitor, therefore, must be independent of the donee in fact, and not merely in name, and this he cannot be if he is the solicitor for both.

Again, his duty is to protect the donor against himself or herself, and not merely against the personal influence of the donee, in the particular transaction.

Domestic relationship between donor and donee.

The necessity for the protection arises in great measure from the natural bent of mind and will resulting from the relationship existing between the parties, as, for example, of husband and wife cohabiting together, or parent and child during the impressionable period of youth; and the solicitor does not discharge his duty by satisfying himself simply that the donor understands and

wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him or for her if he or she persists. He certainly ought not to continue to act for the donor if he disapproves, simply because he may think that someone else will do the work if he does not. The plea that offences must needs come does not exonerate the man by whom the offence cometh. The more foolish the conduct of the donor appears to the solicitor the less should he lend the sanction of his countenance to an irrevocable gift.

It is not the policy of the law to allow a husband or parent to take advantage of his position without giving the wife or child an opportunity of changing his or her mind within a reasonable time after the execution of the deed. The donor is benefited, not injured, by this; and the donee cannot be heard to say that it is an unjust rule, because, *ex hypothesi*, he does not come into Court with clean hands, and has no equity. Or, in other words, this rule is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play (*b*).

Again, although the jurisdiction exercised by Courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description, they have always been careful not unduly to fetter it by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction would not have been impeached if, under other circumstances, no such confidential relation existed (*c*).

When Court will infer undue influence.

In many cases the Court, from the relations existing between the parties to the transaction, will infer the probability of undue influence being exercised. There are the cases of husband and wife, parent and child, guardian and ward, solicitor and client, spiritual instructor and pupil, medical adviser and patient, trustee and *cestui que trust* (*d*), and the like; and in such cases the Court

(*b*) *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*c*) *Tate* v. *Williamson* (1866) L. R. 2 Ch. App. 55, at p. 61.

(*d*) *Smith* v. *Kay* (1859), 7 H. L. C. 750.

watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he or she was performing, but also in order to ascertain that his or her consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit; not necessarily because the influence itself, flowing from such relation, is either to be blamed or discountenanced, but because the Court holds, as an inseparable condition, that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it (*e*).

In all such cases the question to be asked is, does the transaction fall within the principles laid down by judicial decisions in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside?

These decisions may be divided into two classes: first, where the Court is satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee, or grantor and grantee, have at or shortly before the execution of the gift or grant been such as to raise a presumption that the donee or grantee had influence over the donor or grantor.

In the latter (second) class of cases the Court interferes, not necessarily on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.

In the former (first) class of cases the decisions may be considered as depending upon the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. This category includes cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor (*f*).

*Bank of Montreal* v. *Stuart.*

A concrete instance of the circumstances which will justify interposition and an exemplification of the method in which the Court will exercise its jurisdiction where either *mala fides* or undue or unfair exercise of influence is proved, is afforded by the

(*e*) *Haughton* v. *Haughton* (1852), 15 Beav. 278, at p. 299.

(*f*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, note pp. 171, 181.

decision of the Privy Council on appeal from the Supreme Court of Canada in the case of the *Bank of Montreal* v. *Stuart* (*g*).

The evidence in this case showed that the plaintiff, Mrs. Stuart, a confirmed invalid, was the donor of certain guarantees, agreements and transfers, which she was induced to execute by her husband and the solicitor of the donees, without any independent advice and without being made acquainted with the hopeless position of the commercial company for which she was making herself responsible.

The evidence further showed that it was vital to the enterprise for money or security to be found, and as the company's bankers were pressing for their overdraft, those interested in the company either would not or could not advance or guarantee it. In these circumstances Mr Stuart applied to his wife. The only persons who advised her in the matter were her husband and the solicitor of the bank which was pressing for a guarantee. This latter, was to the knowledge of the bank, who thus had constructive notice of all the circumstances, the friend, solicitor and confidential adviser of the husband, as well as a director and secretary of the embarrassed company, and to some extent a guarantor of its debts. Yet in spite of these circumstances, and although it was obvious the solicitor was personally interested in obtaining the guarantees, the bank employed him to obtain them and to prepare the necessary documents.

It was further proved that Mrs. Stuart was completely under the influence of her husband and his legal adviser, and without any independent advice and assistance in forming her own judgment, and that she received no personal benefit from any one of the impeached transactions, but was in the end denuded of the whole of her very considerable separate estate.

In these circumstances the Privy Council, affirming the judgment of the Supreme Court of Canada (although for different reasons), held that the transactions could not stand, Mrs. Stuart being in fact wholly under her husband's influence, and the solicitor in a position in which he could not advise fairly (*h*).

Again, when a deed, promissory note, or other obligation conferring a benefit on a husband or father is executed by a wife or child (whether or no such child is emancipated from the father's control), if the deed or other obligation is subsequently impeached on the ground of undue influence by the donor thereof, the *onus* is on the husband or father to show that the donor, contractor, or

(*g*) [1911] A. C. 120, P. C.
(*h*) See also *La Banque Nationale* v. *Usher*, 13 O. W. R. 896.

guarantor had in fact independent advice, and that the deed or obligation was executed with full knowledge of its meaning, and with a free and full intention of bestowing upon the beneficiary the advantage conferred by it; and if this *onus* be not discharged the obligation may be set aside, although it cannot be laid down as a hard and fast rule, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shown to have had independent advice (*i*). In most cases, however, the duties of discharging the *onus* discussed above extends not only to a third party claiming through the husband or father, but also to any person taking with notice of the circumstances which raise the equity, but not to others. Where, however, it can be shown to the satisfaction of the Court that the parties claiming the equity had in fact the advantage of adequate independent advice, the initial presumption of undue influence is rebuttable by proof of the fairness of the transaction, of full comprehension and free agency on the part of the donors, and of the absence of fraud, concealment, or imposition on the part of the beneficiary (*k*).

### *Contracts induced by Duress.*

Contracts induced by duress.

Chitty, 196—200.

It is a general proposition of law that where the execution of a deed obviously disadvantageous to the executant is obtained by undue influence, fraudulent promise, or threat of criminal proceedings, the instrument cannot be allowed to stand without an entire disregard of the principles upon which Courts of equity act in such cases (*l*).

Threat of criminal proceedings.

Consequently, where by a threat of the institution of proceedings against a delinquent who has rendered himself amenable to the criminal law, a near relation of the accused person is induced either to charge his estate in favour of the victim of the fraud, or otherwise contractually bind himself in order to indemnify him against the pecuniary loss which he has sustained by reason of the offence, a Court of equity will not allow the transaction to stand; such a contract being obnoxious alike as against public policy and as transgressing the general rule of law that a contract to give security for the debt or default of another, which is a contract without security, is, above all things, a contract that should be based upon the free and voluntary agency of the individual

(*i*) *Bank of Montreal* v. *Stuart*, [1911] A. C. at p. 126, P. C.; see also *Euclid Avenue Trusts Co.* v. *Hohs* (1911), 23 O. L. R. 377; 18 O. W. R. 787; 2 O W. N. 825.

(*k*) *Cox* v. *Adams* (1904), XXXV. S. C. R. 393.

(*l*) *Burris* v. *Rhind* (1899), XXIX. S. C. R. 493; *Religious Education, Newbery, In re*, L. R. (1866) 1 Ch App. 263

who enters into it. Where, therefore, a father whose son, or a wife whose husband, has committed a forgery or other criminal offence, is compelled, either covertly or expressly, by the victim of the fraud to take upon himself or herself a civil liability, with the knowledge that, unless he or she does so, the son or the husband will be exposed to criminal prosecution, with a moral certainty of conviction, the contract thus entered into is not enforceable in equity upon the ground that the undertaker was not a free and voluntary agent when it was made.

And the same rule applies in all cases where the relationship existing between the parties was such as to show that the grant of the indemnity as guarantee was induced by undue influence or duress on the one hand, and helplessness or terror on the other (*m*).

Moreover, money actually paid over under a threat of criminal proceedings is recoverable back in an action *condictio indebiti*, and *à fortiori* this is the case when the payment was induced by an unwarranted allegation of fraud and access was refused by the payee to certain books and vouchers which would have disposed of the accusation (*n*).

### *Contracts induced by Fraud.*

Contracts induced by fraud. Chitty, 127, 723—735.

It may be laid down as a general proposition of law that in a representation to induce a party to make a contract, it is equally false for a man to affirm that of which he knows nothing, as it is to affirm that to be true which he knows to be false, and in neither case is an allegation of *scienter* necessary or material in order to maintain an action for deceit; nor is there any substantial difference between the rules applicable to an action for breach of warranty and those applicable to an action for misrepresentation.

Moreover, where an action is launched, in a case of sale and purchase, for a false representation by a seller of a material fact, by reason of which the plaintiff was induced to buy, although the seller might have supposed the fact to be true, the same reasoning and the same rules apply. The difference between a warranty and a representation being rather of form than of substance, and at the most no more than this, that where there is a written contract, the warranty forms part of the contract, but a representation is a thing collateral to a contract, and may be made verbally, though the contract may be in writing: but if it be of a fact, without which the other party would not have entered into the contract at

Difference between warranty and representation.

(*m*) *Western Bank of Canada* v. *McGill* (1902). XXXII. S. C. R. 581.

(*n*) *Migner* v. *Goulet* (1900), XXXI. S. C. R. 26.

all, or at least on the same terms, it is equally effectual, if untrue, to avoid the contract, or to give an action for damages on the ground of fraud, it being a principle of natural law that the concealment of material circumstances vitiates all contracts.

Doctrine of *respondeat superior* in relation to fraudulent contracts.

Again, for substantial reasons of justice, the doctrine of *respondeat superior* applies to those representations or warranties of an agent or servant, which may have induced a contract of sale and purchase. Thus in the ordinary case of a servant employed to sell a horse, but expressly forbidden to warrant him sound, is it to be contended that the buyer, induced by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound, is not entitled to rescind the contract? Or, again, take the case of an agent, who in good faith and without intentional fraud, yet still by misrepresentation, induces an investor to purchase worthless shares from his principal at an exorbitant price; can it be argued in such circumstances that the contract must not be impugned, or that a Court of justice has not jurisdiction to annul the corrupt bargain?

Were it so, it would be tantamount to saying that though the principal is not bound by the false representation of his agent, he is nevertheless entitled to take advantage of that false representation for the purpose of obtaining a contract beneficial to himself, which he could not have obtained without it, and such an argument is obviously obnoxious to natural justice (*a*). Nor will *laches* in all cases avoid the right to rescission (*b*).

It must, however, be understood that a contract into which a person has been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the person defrauded after he has had notice of the fraud.

Unless and until he makes his election, and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all; and if once the defrauded party, after knowledge of the deceit, either by express words or by unequivocal acts affirms the contract, his election is determined for ever.

And lapse of time without repudiation will constitute evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined.

The general principle is precisely the same as that on which it is held that a landlord may elect to avoid a lease and bring

(*a*) *Gould* v. *Gillies* (1908), XL. S. C. R. 437.

(*b*) *Farrell* v. *Manchester* (1908), XL. S. C. R. 339.

ejectment, when his tenant has committed a forfeiture. But if with knowledge of the forfeiture he, by the receipt of rent or other unequivocal act, shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the demise.

Inter-dependent contracts.

Nor may a defrauded party avoid one part of a contract, and affirm another part, unless, indeed, the parts are so severable from each other as to form two independent contracts (*c*).

Effect of *laches* on contracts induced by fraud.

The doctrine of *laches* in Courts of equity, when applied to contracts induced by fraud, is neither an arbitrary nor a technical one. It applies in cases where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of the fraud, or else by his conduct and neglect, has, without actually waiving the remedy, put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; and in either of these cases lapse of time and delay are most material.

But, in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, where the delay does not amount to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. And the two circumstances always important in such cases are the length of the delay and the nature and effect of such of those acts done in the interval by one or other of the parties as may contribute to alter the balance of justice, and thereby render that course inequitable and inexpedient, which, apart from delay, would obviously be the right one to adopt.

Moreover, in order that the remedy should be lost by *laches* or delay, it is, if not universally, at all events ordinarily necessary that there should be sufficient knowledge of the facts constituting the title to relief. And where fraud is established against a party it is for him, if he alleges *laches* in the other party, to show when the latter acquired a knowledge of the truth and prove that subsequently thereto he knowingly forbore to assert his right (*d*); the general rule in such cases apparently being that if a man who has been defrauded, with complete knowledge of that fact, chooses to come again in contact with the person who has defrauded him, he thereby abandons his right to abrogate the contract and enters into such a plain and distinct transaction of confirmation

(*c*) *United Shoe Machinery Co. of Canada* v. *Brunet*, [1909] A. C. 330, P. C.

(*d*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221 (on appeal from the Court of Error and Appeal of Ontario).

as will thereafter estop him from denying that the document or other instrument purporting to express the terms of the agreement between himself and the other contracting party does not in fact do so. But where the original fraud is clearly and undoubtedly established by the circumstances of the case, the confirmation of such a transaction is so inconsistent with justice, so unnatural and so likely to be tainted with deception that it ought to be watched with the utmost strictness and to stand only upon the clearest evidence (e).

Untrue statements in prospectus.

Applying the above doctrine to a concrete case, it has been held by the Supreme Court of Canada in *Farrell* v. *Manchester* (f) that where an agent, who was employed by a company to sell shares in its capital stock, issued, without the knowledge or authority of the company, a prospectus containing untrue statements of a material character upon the faith of which shares were purchased, and the purchase-money therefor paid to the company, the purchaser might rescind the contract as against the company upon the ground that the agent's statements were binding upon his principals as being made within the scope of his authority and the scope of his employment. And further, that a delay by the purchaser of about eleven months in instituting proceedings was not such *laches* on his part as would bar his remedy.

Forgery incapable of ratification.

Again, it may be laid down as a general proposition of law that, although a fraud or a breach of trust may be ratified, ratification of a forgery is impossible (g). Therefore, the statement "that an act done for another by a person not assuming to act for himself, but for such other person, *though without any precedent authority whatever*, becomes the act of the principal if subsequently ratified by him" (h), is inapplicable to a forgery in any case where the position of the holder of the forged instrument has not been altered by reason of an express declaration or admission by the party whose signature has been simulated that the forged instrument has been in fact signed by him. And the reason of this is that ratification presupposes the actual existence of a contract or bargain, but in cases where a forged instrument is repudiated as such by its alleged maker, there is nothing left which can be the subject of ratification, the whole transaction from its inception being altogether void and, therefore, unenforceable; and a request for time, if coupled with re-

(e) See *Morse* v. *Royal* (1806), 12 Ves. 355, at p. 373 (an English case).
(f) (1908), XL. S. C. R. 339.
(g) *Barton* v. *London & North-Western Rly.* (1889), 6 T. L. R. 70.
(h) *Wilson* v. *Tumman* (1843), 6 M. & G. 236, at p. 242.

pudiation, does not estop the suppositious signatory from denying liability. Nor is the position of the holder of such an instrument improved by entering into a corrupt bargain with either the person whose signature has been forged, or with some third party, to compound the felony upon being indemnified against loss—such an agreement being against public policy and void as founded upon an illegal consideration (*i*).

And *à fortiori* it does not follow that if a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, that therefore he shall retain it in his hands against the lawful proprietor. If such a rule should prevail, it would certainly fully justify a proposition . . . once stated at the Bar of the Court of Chancery that the common equity of this country was to improve the right owner out of the possession of his estate (*k*).

### *Contracts of Imperfect Obligations.*

Effect of undue influence on testamentary dispositions. Chitty, 196.

There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees.

These latter are not called upon to substantiate the truth and honesty of the transaction as regards their legacies, it is enough in their case for it to be shown that the will under which they benefit was read over to the testator, and that when so read he was of sound mind and memory and capable of comprehending it; or, in other words, where a person gives instructions to his solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a valid document when executed by the testator is for him to accept the document so prepared as expressing his wishes with regard to the *post mortem* disposition of his property (*l*).

But there is a further duty cast upon those who take an individual benefit after having been instrumental in preparing or obtaining a will, of showing the righteousness of the transaction (*m*).

(*i*) *Brook* v. *Hook* (1871), L. R. 6 Ex. 89; approved and followed in *Hébert* v. *La Banque Nationale* (1908), XL. S. C. R. 458.

(*k*) *Kenney* v. *Browne* (1796), 3 Ridg. p. 519; cited in *Briggs* v. *Newswander* (1902), XXXII. S. C. R. at p. 414.

(*l*) See *Perera* v. *Perera*, [1901] A. C. 354, P. C. at p. 361.

(*m*) See *Fulton* v. *Andrew* (1875), L. R. 7 H. L. 448; cited in *Laramée* v. *Ferron* (1909), XLI. S. C. R. 391; see also *Mayrand* v. *Dussault* (1907), XXXVIII. S. C. R. 460, at p. 469.

**Positive evidence necessary.**

As to what constitutes evidence of such undue influence on the part of a beneficiary as will avoid a will, the evidence must be positive and not negative, and suspicions entertained by the Court must be "pregnant suspicions" in order to justify rejection.

It is true that by the civil law *qui se scripsit hæredem* could take no benefit under a will, but by British law this is not so, although the law of England desiderates in all instances of this sort that the proof of good faith on the part of the beneficiary should be clear and decisive, and that such proof should go not merely to the act of signing, but to knowledge by the signatory of the contents of the paper signed.

Where, however, a testator of sound and disposing mind executes a will, the law presumes that he is cognizant of its contents, and that presumption is not robutted by the circumstance of a benefit being given under the will to the person who drew it (*c*).

The above statement must, however, be qualified by the fact that the law views with extreme jealousy any attempt on the part of an interested person to exercise undue influence and control over the testamentary dispositions of a person of impaired health or intellect. And this is particularly the case when the will is actually prepared by a professional person who benefits thereunder; as, for example, where that relation of confidence (between client and solicitor, doctor and patient, or priest and penitent) exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. As in the case of an interested witness, it is not necessary to prove falsehood—a Court of law will not hear him at all; so in the case of a person who draws a will taking a benefit under it, it is not necessary to prove fraud and circumvention: he must remove the suspicion by clear and satisfactory proof.

**Corroborative evidence necessary to support claims against the estate of a dead person.**

It may perhaps be useful here to mention that where a living person makes a claim against the estate of a dead person it is a rule—and a sensible rule of law—to require, before giving credence to the testimony of the living claimant, that such testimony should be corroborated in some way or another either by collateral evidence or by circumstances proving some material point in the testimony which requires corroboration, nor must such evidence be testimony in corroboration of some other fact not material to the issue.

Although where a case founded upon an uncorroborated claim is tried before a jury, and the jury find in favour of the claimant, there is apparently no principle of law to enable such a verdict to be set aside. But, on the other hand, in cases tried without a jury, the ordinary practice of the Court is to regard with great

(*c*) *Kaulback* v. *Archbold* (1901), XXXI. S. C. R. 337.

reluctance, if not with grave suspicion, the uncorroborated statement of anybody against the estate of a deceased person, and to decline to give effect thereto (*d*).

Conflicting interests of trustee and *cestui que trust*.

Apart from misrepresentation, and where there is no fiduciary relationship between the persons, the general law relating to contractual obligations of sale and purchase imposes no legal duty upon either of the contracting parties to disclose to the other, at the time of bargain and sale, any facts tending to enhance or diminish the value of the subject-matter of the contract, of which one or other of them may be secretly aware.

And this rule applies although by reason of such concealment either the vendor succeeds in selling for a grossly exaggerated price, or the purchaser manages to buy for a totally inadequate sum (*e*).

But, on the other hand, it is an universal and well-established principle of law that a trustee or executor cannot sell (either to himself, his partner, or to any other person) any portion of the trust estate if by so doing, in any manner whatsoever, he derives any personal benefit therefrom. And, altogether apart from any imputation of fraud, a sale made in violation of this principle, though regular in every respect, will be set aside upon equitable principles (*f*): it being a general principle of law, which Courts of justice are bound strictly to apply, that no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements or assume functions in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those he is bound to protect. Therefore, neither a trustee, agent, or mandatory can be allowed to put his duty in conflict with his interest (*g*).

Nor will specific performance of the contract be enforced where a purchaser contracting on his own account falsely represents himself to be the agent of a third party, and by tendering deceitful advice as to the value of the subject-matter of the contract of sale and purchase induces the seller to part with his property to him at a lower price than he would otherwise have done (*h*).

Agreements of illiterate contractors.

It is a general proposition of law that where a party executing a document can neither read nor write (even though the document be in his own language), such document cannot be held to be executed by him where there is either—

(a) refusal of the request that the document shall be read to him by the party putting it forward; or

(*d*) *Thompson* v. *Coulter* (1903), XXXIV. S. C. R. 261.

(*e*) *Fox* v. *Mackreth* (1788), 2 Cox, at p. 321.

(*f*) *Moore, In re* (1881), 51 L. J. Ch. 72; *Daly* v. *Brown* (1907), XXXIX. S. C. R. 122.

(*g*) *Dovis* v. *Kerr* (1890), XVII. S. C. R. 235; *Gastonguay* v. *Savois* (1899), XXIX. S. C. R. 613.

(*h*) *Henderson* v. *Thompson* (1909), XLI. S. C. R. 445.

(b) where the document is misread; or

(c) where the contents are misrepresented (*i*).

But, on the other hand, a deed is well executed by an illiterate person if it be signed on his behalf by a third person at his request and in his presence. Nor is it necessary, apart from specific request, that the deed should be previously read over to him (*k*).

Chitty, 717—720.

### *Champerty.*

Champerty (*campi partitia*—a division of a field) is properly a bargain between a plaintiff or defendant in a cause and another party who has no interest in the subject in dispute to divide the land or other property sued for between them, if they prevail at law, in consideration of the other person carrying on the suit at his own expense.

Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it.

According to Lord Coke, the offence of champerty consists in "a bargain with a demandant or tenant, plaintiff or defendant, to have part of the thing in suit, if he prevail therein, for maintenance of this or that suit." A champertous agreement has always been regarded as being alike odious and contrary to public policy, because it tends to foster "an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." Contracts, therefore, which have this offence within their object or operation are invalid. How far, however, this initial illegality is excused by a community of interest between the parties combining for the prosecution of a suit has often constituted a nice point for the decision of a Court; thus, in 2 Roll. Abr. p. 115, tit. "Maintenance" (H.), "Consanguinity," it is stated, though with some doubt, that "generally a man may maintain his blood or his ally," but this proposition has been denied in later cases; and apparently the true proposition of law at the present day is, that the fact that the maintainer is a relation of the maintainee and has some collateral interest in the suit does not prevent a contract by which he is to receive a portion of what the maintainee recovers through his assistance, illegal and champertous (*l*).

(*i*) *Letourneau* v. *Carbonneau* (1904), XXXV. S. C. R. 110.

(*k*) *Rex* v. *Longnor* (1833), 1 Nev. & M. (M. C.) 128 (an English case).

(*l*) *Meloche* v. *Déguire* (1903), XXXIV. S. C. R. 24.

# CHAPTER X.

## Limitation of Actions on Contracts.


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Chitty, 832—856.

## *Fundamental Propositions—Statute of Limitations.*

Definitions.

(1) According to British law the word "possession" as applied to real estate has a purely technical meaning. The word "occupancy" is not a word of legal import apart from its popular acceptation. Occupancy may, as a matter of fact, negative possession in its legal sense, but possession in the same sense is consistent with non-occupancy. In other words, all lands in the dominions of the Crown must be in the possession of some one, whether that "some one" be the Crown itself or a natural or artificial entity. "Vacant" land, "abandoned" land (where title is involved) is an impossibility. Possession must be somewhere—in somebody—and he who has the title is presumed to have the possession unless the actual dominion and occupancy is elsewhere.

(2) Where the owner (also a non-technical word)—that is, the person having a present legal estate, whether by word of mouth or by a written instrument—lets Blackacre, the tenant accepting and entering by virtue thereof has possession of every foot of ground comprised in Blackacre, although he may possess himself of but one foot of it only.

Occupation by "squatter."

(3) Where a person without title and without right (in Canada called a "squatter") enters upon land, his possession in a legal sense is limited to the ground which he actually occupies, cultivates and encloses; it is *possessio pedis*, nothing more (*a*).

Possession under "colour of title."

(4) But where a person in good faith, under a written instrument from one purporting to be the proprietor, enters into Blackacre—a definite territorial area—his actual occupancy of a part, no matter how small, in the absence of actual adverse occupancy by another, gives him a constructive possession of Blackacre as a whole. He has it, as the phrase is, under "colour of title."

(5) At common law, and notwithstanding the old limitation statutes, the actual and exclusive possession of a tenant or par-

(*a*) But see in this connection *Swinshammer* v. *Hart* (1912), 11 E. L. R. 260 (N. S. B.).

cener could not work to the detriment of his co-tenant or co-parcener. His possession was theirs, and could be invoked not only as against the alleged title of a trespasser, but in aid of their own. (But this principle has long since been changed by statute both in England and Canada.)

(6) Since this change, therefore, exclusive possession by one of such co-owners is regarded as adverse against the others (*b*).

(7) But independently of that, and notwithstanding the statute, his grant or feoffment of the whole estate to one entering into possession under it operates as an ouster of the others, and the latter's right under the Statute of Limitations begins from the date of the grant (*c*).

Action to recover possession.

In an action to recover possession of lands, to which the Statute of Limitations is pleaded as a defence, it is elementary law that the statute does not run against a party out of possession unless there is a person in possession. But, on the other hand, should there have been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity, nevertheless the bar of the statute is complete. But if there has been any interval between the possession of such persons, then, inasmuch as during that interval the law refers the possession to the real owner having title, the benefit of the former possession of a precedent wrongdoer is lost to a trespasser who subsequently enters, in whose favour the statute consequently runs only from the date of his own entry.

And it is a rule of law in such cases that the *onus* of proving that the possession has been such as to entitle a trespasser to the bar of the statute is upon the person or persons who have pleaded that defence (*d*).

Unregistered deed.

Where the legal title in land vests in a person, and the property, which is the subject of such title, is held by another, the Statute of Limitations begins to run against the holder of the legal title from the date of the deed conferring such title upon him. If, therefore, the person in occupation of the land continue in undisputed and adverse possession for the requisite period he acquires a good statutory title against him in whom the legal estate is vested (*e*).

Right to room in a building.

Again, the exclusive and unchallenged possession and user of any distinct portion of a building for the necessary period will

(*b*) *Ramsay* v. *Ramsay*, 21 Occ. N. 133.

(*c*) *Bentley* v. *Peppard* (1903), XXXII. S. C. R. 444.

(*d*) *Handley* v. *Archibald* (1899), XXX. S. C. R. 130, decided under the Nova Scotia Statute of Limitations; see also *Robinson* v. *Osborne* (1912), 27 O. L. R. 248.

(*e*) *McVity* v. *Tranouth* (1905), XXXVI. S. C. R. 455

mature under the Statute of Limitations into a statutory ownership.

Where, therefore, a person for a period exceeding twelve years had possession of an upper room, supported entirely by the subjacent parts of the building in which it was situated, it was held that his possession thereto had ripened into a title. And further, that he was entitled not only to so much support from the lower parts of the structure as was necessary to maintain his room in position (*f*), but also, presumably, to user of the staircase as a way of necessity.

Provincial Statutes of Limitation.

The following provincial statutes (*inter alia*) (*ff*) regulate the Law of Limitation in Canada:—

SASKATCHEWAN, c. 50 (Revised Statutes, 1909).

*An Act respecting Limitation of Actions in certain cases.*

1. All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within *six* years after the cause of such action arose.

2. The provisions of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), of the Imperial Parliament are hereby declared to be in force and to have been in force in Saskatchewan since the passing thereof.

3. No right to the access and use of light or any other easement, right in gross or profit *à prendre* shall be acquired by any person by prescription, and no such right shall be deemed to have been so acquired prior to the coming in force of this Act.

REVISED STATUTES, SASKATCHEWAN, c. 84.

The City Act, 1908 (c. 10, s. 404).

*Actions against Cities based upon Invalid By-laws.*

Actions upon invalid by-laws.

Sect. 404. In case a by-law or resolution is illegal in whole or in part, or in case anything has been done under it which by reason of such illegality gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law or resolution has been quashed or repealed nor until one month's notice in writing of the intention to bring the action has been given to the city; and every such action shall be brought against

(*f*) *Iredale* v. *London* (1908), XL. S. C. R. 313.

(*ff*) Limitation Acts also exist in Newfoundland and Prince Edward Island

the city alone and not against any person acting under the by-law or resolution.

Effect of tender of amends.

Sect. 405. In case the city or the commissioners tender amends to the plaintiff or his solicitor, if such tender is pleaded, and if traversed, and no more than the amount tendered is recovered, the plaintiff shall have no costs, but costs shall be taxed to the defendant on such scale as the presiding judge may direct, and shall be set off against the amount recovered, and the balance due to either party may be recovered as in ordinary cases

REVISED STATUTES, SASKATCHEWAN, c. 85.

The Town Act, 1908 (c. 17, s. 394).

*Actions against Towns based upon Invalid By-laws.*

Sect. 394. In case a by-law or resolution is illegal in whole or in part, or in case anything has been done under it which by reason of such illegality gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring the action has been given to the town; and every such action shall be brought against the town alone and not against any person acting under the by-law or resolution.

Effect of tender of amends.

Sect. 395. In case the town tender amends to the plaintiff or his solicitor, if such tender is pleaded, and if traversed, and no more than the amount tendered is recovered, the plaintiff shall have no costs, but costs shall be taxed to the defendant on such scale as the presiding judge may direct, and shall be set off against the amount recovered, and the balance due to either party may be recovered as in ordinary cases.

REVISED STATUTES, SASKATCHEWAN, c. 86.

The Village Act, 1908 (c. 18, s. 149).

*Action against Village Council for Non-Repair of Public Works.*

Actions for non-repair of public works.

Sect. 150. No action shall be brought under the provision of sect. 149 except within *six months* from the date upon which the cause of action arose and unless notice of such action shall have been given to the secretary treasurer of the village within one month after the date upon which such damage was caused

REVISED STATUTES, SASKATCHEWAN, c. 87.

The Rural Municipality Act, 1908—1909 (c. 6, ss. 220—221).

*Action against Rural Municipal Council for Non-Repair of Public Works.*

Sect. 221. No action shall be brought under the provisions of sect. 220 except within *six months* from the date upon which the cause of action arose and unless notice of such action shall have been given to the secretary of the municipality within one month after the date upon which such damage was caused.

STATUTES OF ONTARIO.

The Limitations Act, 1910 (10 Ed. VII. c. 34).

Right to refuse relief on the ground of acquiescence, &c.

Sect. 3. Nothing in this Act shall interfere with any rule of equity in refusing relief on the ground of acquiescence, or otherwise to any person whose right to bring an action is not bound by virtue of this Act.

No entry by Crown after sixty years from time of accrual of right.

Sect. 4. No entry, distress or action shall be made or brought, on behalf of His Majesty, against any person for the recovery of or respecting any land or rent, or of land, (*sic*) or for, or concerning, any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress, or to bring such action shall have first accrued to His Majesty.

*Land or Rent.*

No land or rent to be recovered but within ten years after the accrual of right.

Sect. 5. No person shall make an entry or distress, or bring an action to recover any land or rent, but within TEN YEARS next after the time at which the right to make such entry or distress, or to bring such action first accrued to some person through whom, or if such right did not accrue to any person through whom he claims, then within TEN YEARS next after the time at which the right to make such entry or distress, or to bring such action first accrued to the person making or bringing the same.

ONTARIO STATUTES ((1910) 10 Edw. VII. c. 34).

*An Act respecting the Limitation of Actions.*

PART II.

Application of Statutes of Limitations

Sect. 47.—(2) In an action against a trustee or any person claiming through him, except where the claim is founded upon

any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:— to certain actions against trustees.

(a) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.

(b) If the action is brought to recover money or other property and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead, the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action or [*sic*] debt for [*sic*] money had and received; but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(3) No beneficiary as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this section had been pleaded.

(4) This section shall apply only to actions commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations (*g*).

Sect. 48.—(1) Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring an action against the trustee or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. In case of express trust the right shall not be deemed to have accrued until a conveyance to a purchaser.

(*g*) R. S. O., 1897, c. 129, s. 32.

Claim of *cestui que trust* against trustee.

(2) Subject to the provisions of the next preceding section no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

## PART III.

### *Personal Actions.*

Limitation of time for commencing particular actions.

Sect. 49.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:—

(a) An action for rent, upon an indenture of demise.

(b) An action upon a bond, or other specialty, except upon a covenant contained in an indenture of mortgage, made on or after the 1st day of July, 1894.

(c) An action upon a recognizance, within twenty years after the cause of action arose.

(d) An action upon an award where the submission is not by specialty.

(e) An action for an escape.

(f) An action for money levied on execution.

(g) An action for trespass to goods or land, debt grounded upon any lending or contract without specialty, debt for arrears of rent, detinue, replevin, or upon the case other than for slander, on or within six years after the cause of action arose.

(h) An action for a penalty, damages, or a sum of money given by any statute to the Crown, or the party aggrieved, within two years after the cause of action arose.

(i) An action upon the case for words, within two years after the words spoken.

(j) An action for assault, battery, wounding, or imprisonment within four years after the cause of action arose.

(k) An action upon a covenant contained in an indenture of mortgage, made on or after the 1st day of July, 1894, within ten years after the cause of action arose.

Actions for penalties.

(l) An action for a penalty imposed by any statute, brought by an informer suing for himself alone, or for the Crown as well as himself, or by any person authorised to sue for the same, not being the person aggrieved, within one year after the cause of action arose (*h*).

Where time specially limited.

(2) Nothing in this section shall extend to any action where the time for bringing the action is by any statute specially limited.

(*h*) 4 Edw. VII. c. 10, s. 20.

Actions of account, &c., to be commenced within six years.

Sect. 50. Every action of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of action arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of the action (*i*).

*Actions of Account.*

When statute begins to run.

[In all actions of account or breach of contract the statute begins to run from the breach and not from the promise (*j*).

Where a person enters upon property and collects the rents expressly declaring that he is in possession on behalf of the true owner, whoever such true owner may turn out to be, he cannot afterwards, while still continuing in possession and receipt of the rents, throw off the character in which he entered, and set up the statute against the true owner by claiming the land and rents received as his own. But *e converso*, where one of two co-owners collects rents on behalf of both and makes deductions therefrom for outgoings, an action for an account will lie against him only in respect of the six years immediately antecedent to the institution of proceedings (*k*).]

10 Edw. 7, c. 34.

In case of the disability of the plaintiff.

Sect. 51. Where a person entitled to bring any action mentioned in either of the next two preceding sections is at the time the cause of action accrues an infant, idiot, lunatic or of unsound mind, the period within which such action should be brought shall be reckoned from the date when such person became of full age or of sound mind (*l*).

Non-resident defendants.

Sect. 52. If a person against whom any cause of action mentioned in sects. 49 and 50 accrues is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario (*m*).

As to cases where some joint debtors have been

Sect. 53.—(1) Where a person has any such cause of action against joint debtors or joint contractors he shall not be entitled to any time within which to commence such action against any one

(*i*) R. S. O., 1897, c. 72, s. 2.

(*j*) *East India Co.* v. *Oditchurn Paul* (1849), 7 Moo. P. C. 85; see also *Wilson* v. *Howe* (1903), 5 O. L. R. 323.

(*k*) *Ross* v. *Robertson* (1904), 7 O. L. R. 413.

(*l*) R. S. O., 1897, c. 72, s. 3.

(*m*) R. S. O., 1897, c. 72, s. 5, and c. 324, s. 40.

within and some without Ontario.

of them who was within Ontario at the time the cause of action accrued, by reason only that some other of them was, at the time the cause of action accrued, out of Ontario (*n*).

Recovery against one joint debtor no bar to action against another who is absent.

(2) The person having such cause of action shall not be barred from commencing an action against a joint debtor or joint contractor who was out of Ontario at the time the cause of action accrued, after his return to Ontario, by reason only that judgment has been already recovered against a joint debtor or joint contractor who was at such time within Ontario (*o*).

Effect of written acknowledgment or part payment.

Sect. 54. Where an acknowledgment in writing, signed by the principal party or his agent, is made by a person liable upon an indenture, specialty, or recognizance, or where an acknowledgment is made by such person by part payment, or part satisfaction, on account of any principal or interest due on such indenture, specialty, or recognizance, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, within twenty years, or in cases mentioned in clause (k), subsect. 1 of sect. 49, within ten years after such acknowledgment in writing, or part payment, or part satisfaction, or where the person entitled is at the time of the acknowledgment under disability, as aforesaid, or the person making the acknowledgment is, at the time of making the same, out of Ontario, then within twenty years or in the cases aforesaid within ten years, after the disability has ceased, or the person has returned, as the case may be (*p*).

Promise by words only not sufficient to take the case out of Part III.

Sect. 55.—(1) No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of this Part, any case falling within its provisions respecting actions

(a) Of account and upon the case.

(b) On simple contract or of debt grounded upon any lending or contract without specialty.

(c) Of debt for arrears of rent, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise (*q*).

Effect of payment of principal or interest.

(2) Nothing in this section shall alter, take away, or lessen the effect of any payment of any principal or interest by any person (*r*).

(*n*) R. S. O., 1897, c. 72, s. 6.
(*o*) R. S. O., 1897, c. 72, s. 7.
(*p*) R. S. O., 1897, c. 72, s. 8.
(*q*) R. S. O., 1897, c. 146, s. 1.
(*r*) 9 Geo. IV. Imp. c. 14, s. 1, part.

Case of two or more joint contractors, obligors, covenantors, or executors.

Sect. 56. Where there are two or more joint debtors or joint contractors, or joint obligors or covenantors or executors or administrators of any debtor or contractor, no such joint debtor, joint contractor, joint obligor or covenantor or executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed, or by reason of any payment of any principal or interest made by any other or others of them (*s*).

Judgment where plaintiff is barred as to one or more defendants, but not as to all.

Sect. 57. In actions commenced against two or more such joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by this Act as to one or more such joint debtors, joint contractors, or executors or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff (*t*).

Endorsement, &c. made by the payee not to take a note, &c. out of the statute.

Sect. 58. No endorsement or memoranda of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the person to whom the payment has been made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the Act (*u*).

Part III. to apply to set-off.

Sect. 59. This Part shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off on the part of the defendant (*x*).

Breach of contract by statutory corporation.

[In determining whether or no a statutory corporation, charged with a breach of their contractual obligation to "afford all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their railway," is protected from action by a Statute of Limitation, it is expedient for the Court before holding a claim to be barred by lapse of time to see clearly that the statute is applicable (*y*).]

ONTARIO (R. S. O. 1897, c. 88, s. 13).

*Actions against Justices of the Peace.*

Sect. 13. No action shall be brought against a Justice of the Peace for anything done by him in the execution of his office unless the same is commenced within six months next after the act complained of was committed.

(*s*) R. S. O., 1897, c. 146, s. 2.
(*t*) R. S. O., 1897, c. 146, s. 3.
(*u*) R. S. O., 1897, c. 146, s. 4.
(*x*) R. S. O., 1897, c. 146, s. 5.
(*y*) *Canadian Northern Rail. Co.* v. *Robinson* (1910), XLIII. S. C. R. 387.

### *Difference between Statutory Limitations of Actions and Prescription.*

Difference between "limitation" and "prescription."

A "limitation" differs from a "prescription" in the essential feature that it causes the extinction, by lapse of time, of a right of action and is an absolute bar of which the Courts are bound to take notice. Extinctive prescription, on the other hand, merely gives rise to a presumption that the obligation affected by it has been discharged.

Hence it is no bar to an action to enforce the obligation, but a ground of defence that must be specially pleaded, otherwise the Court can take no notice of it. When a statute prescribing performance of an act within a specific period makes non-compliance a penal offence, the crime is committed and the penalty recoverable at the expiration of the period specified. Hence, the period limited for bringing the action runs from the same time (*z*).

BRITISH COLUMBIA.

Revised Statutes, 1897 (c. 156), as amended by Statutes of British Columbia, 1906 (c. 25).

THE PRESCRIPTION ACT.

*Profits à prendre.*

Sect. 2. All claims to right of common or other profits *à prendre* not to be defeated after THIRTY years' enjoyment thereof by showing that such right, profit or benefit was *first* taken or enjoyed at some time prior to such period of THIRTY years.

After *sixty* years' enjoyment such right to be deemed absolute and indefeasible unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 3. Claims of right of way, water-course, use of water, or other easement, the actual enjoyment of which by any person claiming a right thereto, has been exercised without interruption for the full period of TWENTY years shall not be defeated by showing only that such right was first taken or enjoyed at any time prior to such period of TWENTY years although such claim may be defeated in any other way by which the same is now liable to be defeated.

After FORTY years' enjoyment such right shall be deemed absolute and indefeasible unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

(*z*) *Croysdill* v. *Anglo-American Telegraph Co., Ltd.* (1909), Que. R. 19 K. B. 193.

Sect. 5. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have, notice thereof, and of the person making or authorising the same to be made. 61 Viet. c. 156.

Sect. 8. The time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been, or shall be, an infant, idiot, *non compos mentis, feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

Sect. 9. Time during which the easement has been held for any life term or for any term of years exceeding three years shall be excluded in the computation of the said period of FORTY YEARS, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

### Ancient Lights Declaratory Act, 1906 (c. 25).

Sect. 2. No person shall acquire a right by prescription to the access and use of light to or for any building: but this section shall not apply to any such right which has been acquired before the passing of this Act nor affect the rights of the parties to any proceeding now pending in which such question has arisen before the passing of this Act. Ancient lights.

## NOVA SCOTIA.

### STATUTE OF LIMITATIONS (*a*).

### *Limitation of certain Actions.*

Sect. 2.—(1) The actions in this section mentioned shall be commenced within and not after the times respectively in such section mentioned, that is to say— Time within which certain actions shall be brought.

(a) Actions for assault, menace, battery, wounding, imprison- Assault, slander, *one year*.

(*a*) Revised Statutes of Nova Scotia, 1900, c. 167.

ment or slander, within one year after the cause of any such action arose;

Penalties, damages, &c., *two years.*

(b) Actions for penalties, damages, or sums of money given to the parties aggrieved by any statute, within two years after the cause of any such action arose;

Lease, bond, specialty, judgment on recognizance, *twenty years.*

(c) Actions for rent upon an indenture of demise, actions upon a bond or other specialty, actions upon any judgment or recognizance, within twenty years after the cause of any such action arose, or the recovery of such judgment;

Actions grounded on simple contract, &c., *six years.*

(d) All actions grounded upon any lending or contract, expressed or implied, without speciality, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods, and chattels; actions for libel, malicious prosecution and arrest, seduction, criminal conversation; and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within *six* years after the cause of any such action arose.

Actions on account, &c., *six years.*

(2) All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced within *six years* after the cause of any such action arose; and no claim in respect to a matter which arose more than *six years* before the commencement of any such action, shall be enforceable by action by reason only of some other matters of claim comprised in the same account having arisen within *six years* next before the commencement of such action.

Act not to override limitations under special statutes.

(3) Nothing in this section contained shall extend to any action given by any statute when the time for bringing such action is by any statute specially limited.

*Disabilities and Exceptions.*

When statute begins to run against plaintiffs in case of disability or absence.

Sect. 3. If any person who is entitled to any action in the next preceding section mentioned is, at the time any such cause of action accrues, within the age of twenty-one years, (a married woman (*b*)), a person of unsound mind, or out of the province, then such person shall be at liberty to bring the same action, so as such person commences the same within such time after his or her coming to or being of full age, (discovert (*b*)), of sound mind,

(*b*) See Married Women's Property Act (Nova Scotia), R. S. 1900, c. 112, noting especially sect. 13.

or returned to the province, as other persons having no such impediment should according to the provisions of this chapter have done.

When statute begins to run against defendants in case of disability or absence.

Sect. 4.—(1) If any person against whom there is any such cause of action is, at the time such cause of action accrue, within the age of twenty-one years, (a married woman (*b*)), a person of unsound mind, or out of the province, then the person entitled to any such cause of action shall be at liberty to bring the same against such person within such times, after his or her coming to or being of full age, (discovert), of sound mind, or returned to the province, as are before limited.

Rule in case of joint debtors.

(2) Provided that where the cause of action lies against two or more joint debtors, the person who is entitled to the same shall not be entitled to any time within which to commence such action against any one of the joint debtors who was within the province at the time such cause of action accrued, by reason only that some other of the joint debtors was, at the time such cause of action accrued, out of the province.

When separate actions maintainable against joint debtors.

(3) The person so entitled as aforesaid, shall not be barred from commencing an action against the joint debtor who was out of the province at the time the cause of action accrued, after his return to the province, by reason only that judgment has been already recovered against the joint debtor who was within the province at the time aforesaid.

### *Written Promises and Acknowledgments.*

In actions on simple contracts a promise in order to take the case out of the statute must be in writing.

Sect. 5.—(1) In any action grounded upon simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the preceding sections of this chapter or to deprive any person of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or his agent duly authorised to make such acknowledgment or promise.

Preservation of rights of co-contractor, &c.

(2 (*c*)) When there are two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any co-contractor or co-debtor, no such co-contractor or administrator shall lose the

(*b*) See note (*b*), opposite page.

(*c*) By 10 Edw. VII. c. 29, subsects. (2), (3) and (4) of sect. 5 of chap. 167 of the Revised Statutes of Nova Scotia are repealed, and the subsections herein reproduced are substituted therefor.

benefit of the preceding sections of this chapter, or any of them, by reason only of—

(a) Any written acknowledgment or promise made and signed by any other or others of such co-contractors or co-debtors, executors or administrators; or

(b) Any payment of any principal, interest or other money made by any other or others of such co-contractors or co-debtors, executors or administrators.

**Effect of new acknowledgment and allocation of costs in successful or unsuccessful actions.**

(3) In any actions against two or more co-contractors, co-debtors or executors or administrators of any contractor, if it appears at the trial or otherwise that the plaintiff, though barred by such sections as to one or more of such co-contractors or co-debtors, or executors or administrators, is nevertheless entitled to recover against any other defendant by virtue of a new acknowledgment or promise or payment, judgment may be given and costs allowed for the plaintiff as to such defendant against whom he recovers, and for the other defendant against the plaintiff.

**Defendant cannot set up non-joinder of another defendant if the remedy against such other is statute-barred.**

Sect. 6. If any defendant, in an action on a simple contract, pleads any matter to the effect that any other person ought to be jointly sued, or makes any application grounded upon such contention, and it appears that the action could not, by reason of this chapter, be maintained against such person, such pleading or application shall be dismissed.

**Effect of written acknowledgment or payment in actions upon indenture, specialty, or recognizance.**

**Effect of disability.**

Sect. 7. If any acknowledgment has been made, either by writing signed by the party liable by virtue of an indenture, or by virtue of any specialty or recognizance, or his agent, or by part payment, or part satisfaction on account of any principal or interest being then due thereon, the person entitled may bring an action for the money remaining unpaid, and so acknowledged to be due, within *twenty years* after such acknowledgment by writing or part payment or part satisfaction, as aforesaid; or in case the person entitled to such action is, at the time of the acknowledgment, under disability as aforesaid, or the party making the acknowledgment is, at the time of making the same, out of the province, then within *twenty years* after such disability has ceased, as aforesaid, or the party has returned to the province, as the case may be; and the plaintiff in any such action on any indenture, specialty or recognizance may, by way of reply, state such acknowledgment, and that such action was brought within the time aforesaid to answer to a pleading setting up this chapter.

**Indorsement by payee not to constitute evidence.**

Sect. 8. No indorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange, or

other writing, by or on behalf of the party to whom such payment was made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of such chapter.

NEW BRUNSWICK.

### LIMITATION OF ACTIONS (*d*).

#### *Respecting Limitation of Personal Actions.*

Action on judgment, bond, or specialty.

1. No action or *scire facias* upon any judgment, recognizance, bond, or other specialty, shall be brought but within twenty years after the cause of action. (C. S. c. 85, s. 1.)

Action for penalty, &c.

2. No action for any sum of money given to the party aggrieved by any Act or Statute, or for any penalty, shall be brought but within two years after the cause of action, unless the time is otherwise limited by the Statute. (C. S. c. 85, s. 2.)

Action for assault, defamation, &c.

3. No action for assault, battery, wounding, imprisonment, or for words, shall be commenced but within two years after the cause of action. (C. S. c. 85, s. 3.)

Other actions.

4. No other action shall be commenced but within six years after the cause of action. (C. S. c. 85, s. 4.)

Acknowledgment of liability to be in writing, &c.

5. No acknowledgment or promise shall be evidence of a new or continuing contract, or liability, whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be in writing, signed by the party chargeable thereby, but a payment made on account of any such debt shall have the effect of such acknowledgment or promise. (C. S. c. 85, s. 5.)

Effect of payment.

Acknowledgment or payment by co-contractor, &c.

6. No person jointly contracting, or liable or his representatives, shall be answerable for or by reason of any payment, acknowledgment, or promise of his co-contractor or debtor, or his representatives. (C. S. c. 85, s. 6.)

Recovery against co-contractor, &c. though action barred against other.

7. In actions against persons jointly contracting, or liable, or their representatives, the plaintiff may recover against one of the parties, though barred by the provisions of this chapter as to the other. (C. S. c. 85, s. 7.)

Plea of abatement not to lie where action barred against person not joined as defendant.

8. If in any action on a contract the defendant plead in abatement that any other person ought to have been jointly sued, and issue be joined, and it shall appear that the action was, by reason of the provisions of this chapter, barred against the person so named in the plea, the issue shall be found for the plaintiff. (C. S. c. 85, s. 8.)

(*d*) Consolidated Statutes of New Brunswick, 1903, c. 138.

Chapter applicable to set-off.

9. This chapter shall apply to any demand alleged by way of set-off on the part of any defendant. (C. S. c. 85, s. 9.)

Action on set-off where non-suit.

10. If the defendant is deprived of the benefit of his set-off by the non-suit, or any act of the plaintiff, he may bring a new action therefor within one year thereafter. (C. S. c. 85, s. 10.)

Disability or absence of plaintiff or defendant.

11. Actions by or against minors, married women, persons insane, or out of the province, may be commenced within the like period after the removal of the disability, as is allowed for bringing the action in ordinary cases. (C. S. c. 85, s. 11.)

Action where judgment for plaintiff reversed.

12. If in any action judgment be given for the plaintiff, and the same be reversed by error, or if judgment be arrested after verdict, the plaintiff may commence a new action within one year after such judgment reversed or arrested. (C. S. c. 85, s. 12.)

New action where abatement of writ for form.

13. If a writ abate for any matter of form, the plaintiff, or his representatives in case of his death, when the action survives, may bring a new action within one year after the abatement. (C. S. c. 85, s. 13.)

Death of plaintiff or defendant.

14. If any person bring or be liable to any action, and shall die before the time limited therefor expires, or within thirty days thereafter, and the cause of action survives, the action may be commenced by or against his representative within six months thereafter. (C. S. c. 85, s. 14.)

Chapter not applicable to bank note.

15. The provisions of this chapter shall not apply to any action brought for the recovery of a note issued by any incorporated bank. (C. S. c. 85, s. 15.)

NORTH-WEST TERRITORIES ORDINANCES, 1905 (c. 31).

Actions on simple contracts.

(1) All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within SIX YEARS after the cause of such action arose.

Real Property Limitation Act (Imp.) in force.

(2) The provisions of the *Real Property Limitation Act*, 1874, being Chapter LVII. of the Statutes of the Imperial Parliament passed in the 37th and 38th years of Her Majesty's reign, are hereby declared to be in force, and to have been in force in the Territories since the passing thereof.

No prescription in case of ancient lights or profit *à prendre*.

(3) No right to the access and use of light or any other easement, right in gross or profit *à prendre* shall be acquired by any person by prescription, and no such right shall be deemed to have been so acquired prior to the coming into force of this Ordinance.

YUKON TERRITORY ORDINANCE.

By Ordinance of the Yukon Territory, c. 31 of 1890, it is provided that "all actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of such action arose." Yukon Territory Ordinance.

[The effect of this statutory proviso, as decided by the Supreme Court of Canada, is, apparently, to bar absolutely the right of recovery of any simple contract debt in the Territorial Court of Yukon after the expiration of six years from the date when the cause of action arose notwithstanding that the debtor has not been for that period resident within the jurisdiction of the Court (*e*).]

*Prescription of Actions in the Province of Quebec.*

In the province of Quebec the following actions are prescribed by *five* years (*f*):—

(1) For professional services and disbursements of advocates and attorneys, reckoning from the date of the final judgment in each case.

(2) For professional services and disbursements of notaries and fees of officers of justice, reckoning from the time when they become payable.

(3) Against notaries, advocates, attorneys, and other officers or functionaries who are depositaries in virtue of their office, for the recovery of papers and titles confided to them; reckoning from the termination of the proceedings in which such papers and titles were made use of, or, in other cases, from the date of their reception.

(4) Upon inland or foreign bills of exchange (*g*), promissory notes or notes for the delivery of grain or other things, whether negotiable or not, or upon any claim of a commercial nature (*h*) reckoning from maturity: this prescription, however, does not apply to bank notes. No prescription of bank notes

(5) Upon sales of movable effects between non-traders, or between traders and non-traders, these latter sales being in all cases held to be commercial matters.

(*e*) *Rutledge* v. *United States Savings and Loan Co.* (1906), XXXVII. S. C. R. 546.

(*f*) Civil Code, Lower Canada, 2260.

(*g*) In order to save the statute, an action upon a bill of exchange must be commenced one day before the date upon which the last day of grace expired. Where, therefore, the last day of grace upon a promissory note was Sept. 19th, 1894, it was held that an action begun on Sept. 19th, 1909, was one day too late to save the statute (*Bank of Toronto* v. *McBean*, 21 Ont. N. 41; *Sinclair* v. *Robinson* (1858), 16 U. C. R. 211; but see *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759, C. A. (an English case)).

(*h*) The accidental overpayment of a business debt is "a claim of a commercial nature" (*St. Maurice Lumber Co.* v. *Scott* (1908), Q. R. 33 S. C. 532).

(6) For hire of labour, or for the price of manual, professional or intellectual work, and materials furnished. . . .

(7) For visits, services, operations, medicines of physicians or surgeons, reckoning from each service or thing furnished. As regards whatever is sued for within the year, the oath of the physician or surgeon makes proof as to the nature and duration of the services. It is further provided by sect. 2262, *inter alia*, that hotel or boarding-house charges are prescribed by one year.

Prescription of hotel charges.

# CHAPTER XI

## ESTOPPEL IN RELATION TO CONTRACTS.

Chitty, 7, 817—821.


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Definition.

An estoppel, which cannot be invoked against the Crown (*a*), is an admission, or something which in law is regarded as equivalent to an admission, of so high and so conclusive a nature that the party whom it affects is not permitted either to repudiate or offer evidence to controvert it (*b*). Though he may show that the person relying upon it is also estopped from setting it up, since that is not to deny its conclusive effect as regards himself, but to incapacitate the other from taking advantage of it.

Such being the general nature of an estoppel it matters not what is the fact thereby admitted nor whether the primary evidence of that fact be a matter of record or specialty or merely a writing unsealed or a verbal statement, because the fact so admitted is in each case capable of proof by the estoppel and not by the ordinary methods of evidence. Nor is this an infringement of the rule of law requiring best evidence, and forbidding the adduction of secondary evidence till the sources of primary evidence have been exhausted. For the estoppel professes not to supply the absence of the ordinary methods of proof, but to supersede the necessity of adducing any evidence at all by showing that the fact is already admitted, and is, therefore, not traversable.

Various kinds of estoppels.

"Touching estoppels," says Lord Coke, "which are a curious and excellent sort of learning, it is to be observed, there be three kinds of estoppels, viz., by matter of record (*c*), by matter in writing (which means by deed under seal), and by matter *in pais*" (that is, by conduct or representation).

(*a*) *The Queen* v. *Bank of Nova Scotia* (1885), XI. S. C. R. p. 1; *Humphrey* v. *The Queen* (1891), 2 Ex. C. R. 386; *Quebec North Shore Turnpike Road Trustees* v. *The King*, XXXVIII. S. C. R. 62; but see *Fonseca* v. *Att.-Gen. of Canada* (1889), XVII. S. C. R. 612.

(*b*) For other definitions, see *Manitoba Assurance Co.* v. *Whitla* (1903), XXXIV. S. C. R. 191, at p. 207.

(*c*) See *Citizens Light and Power Co.* v. *Town of St. Louis* (1904), XXXIV. S. C. R. 495; see also *Willcocks* v. *Howell* (1885), 8 O. R. 576 (libel).

The conclusive effect of an estoppel of the first kind, that is, by matter of record, is, however, limited by certain rules and considerations, which are thus set out by Comyns in his Digest, viz.:—

(1) Where the record is *coram non judice*
(that is, where the Court had no jurisdiction to try the matter (*d*)).

(2) Where the truth appears by the same record
(that is, where the record itself shows that the judgment relied upon as an estoppel was afterwards reversed).

(3) Where the thing averred is consistent with the record
(as, for example, if a man purchase land sold by order of a Court he may thereafter deny the right of the Court to dispute his title).

(4) Where the allegation is uncertain.
"An estoppel ought to be certain to every intent" (*e*).

(5) If it is only a supposal
(therefore, matters alleged in a statement of claim or of defence, before judgment given, are traversable).

(6) If it is not traversable or material.
(Thus, a tenant is not estopped from asserting the validity of his lease by reason of a merely technical misdescription of the nature of the demised land.)

(7) If there be an estoppel against an estoppel.
(Because estoppel against estoppel sets the matter at large. Thus, if a man defend as co-owner and his opponent claims as sole owner, the defendant may alter his plea and allege a sole ownership in himself, nor can the plaintiff deny his right so to do.)

(8) If an interest passes, though not *pro tanto*.
(Thus, a person who accepts a grant is not estopped from asserting that it does not pass so great an estate as it purports to convey, though he is estopped from saying that it passes no estate at all.)

Estoppel by deed.

In the case of an estoppel by deed, it is essential that the allegation should be certain, as any ambiguity or dubiety will suffice to set the matter at large. Nor will a general recital in a deed amount to an estoppel. Where, however, it can be collected from the instrument that the parties to it have agreed upon a certain admitted state of facts as the basis of the statements contained therein, though they be but by way of recital, such admissions estop either from subsequently averring the contrary. But a

(*d*) See *Cowan, In re* v. *Affie* (1893), 24 O. R. 358. Where a Court is equally divided, and subsequently a like case is brought before it, it is not bound by the result in the earlier case (*Stanstead Election Case* (1891), XX. S. C. R. 12).

(*e*) Co. L. 352 b, 303 a.

recital in a deed does not necessarily estop the parties where the action is founded on a matter wholly collateral to the instrument.

As regards estoppel by matter *in pais* those acts which bind parties by way of estoppel by conduct or representation are in their original not less formal and solemn than those evidenced by writing. For it is an universal principle of law, dating from immemorial antiquity, that if a man either by words or by conduct intimates that he consents to an act which, to his knowledge, has been or is being done by another and offers no opposition thereto, although it could not be lawfully done without his consent, he cannot thereafter question the legality of the act which he has thus sanctioned to the prejudice of those who have so given faith to his words or to the fair inference deducible from his conduct (*f*), as he thereby tacitly induces others to do that from which they otherwise might have abstained. Or, in other words, "where a person, whatever his real intention may be, so conducts himself that a reasonable man would take the act or representation to be true and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation will be precluded from contesting its truth" (*g*). Thus, a railway company, by placing signals on its line, is subsequently estopped from alleging that disregard of such signals is not negligence (*h*). Again, where a business man, familiar with banking operations, their meaning and scope, is informed by a bank, in accordance with banking custom, that his name is being used as maker of a note for cash credit either already made or about to be made, he is under an obligation promptly to reply to his informant that his signature has been used without his authority, or, if such be the fact, that it has been forged, and if he should not do so his silence will estop him from subsequently repudiating the signature affixed to the note. Or, in other words, where a party is shown a bill and, making no objection thereto, allows the creditor to remain in the belief that the signature thereto is his own, he thereby adopts the bill and incurs liability for any loss which may be occasioned to the holder by reason of its dishonour (*i*).

**Estoppel *in pais*.**

**Estoppel by *laches*.**

(*f*) See *Cairncross* v. *Lorimer* (1860), 3 Macq. H. L. C. at p. 827; *Smith* v. *Kay* (1859), 7 H. L. C. 750.

(*g*) *People's Bank of Halifax* v. *Estey* (1904), XXXIV. S. C. R. 429; Nesbitt, J., at p. 451, citing Eng. and Am. Ency.; see also *Langelier* v. *Charlebois* (1903), XXXIV. S. C. R. 1.

(*h*) *Canadian Pacific Rly.* v. *Lawson*, Cass. Dig., 2nd ed., 729.

(*i*) *Ewing* v. *Dominion Bank* (1904), XXXV. S. C. R. 133. It should, however, be remembered in this connection that though fraud and breach of trust may be ratified, forgery cannot, and it is therefore difficult to see how one can be estopped by conduct from denying his signature to a forged cheque (*Merchants' Bank of Canada* v. *Lucas* (1889), XVIII. S. C. R. 704).

And this rule of estoppel by *laches* is of general application (*k*). Thus, a person who neglects, within the period limited by statute, to take the requisite steps for the annulment of an imposition of taxes, is subsequently estopped from raising any question as to their legality (*l*). And a like decision as to estoppel was held applicable to judgment creditors who after receiving payment out of the proceeds of a sale, authorised by the Court of Probate, sought to attack the validity of the licence under which the sale took place (*m*).

**Estoppel by misrepresentation.**
**Chitty, 832—856.**

Moreover, in cases where a false representation is made by one of the parties to an agreement the powers of equity are sufficiently extensive either to set aside the contract altogether or else compel the person who made the assertion to make good his representations.

Where, therefore, a vendor of land by wilfully misstating the position of the boundary line induced the purchaser to believe that he had acquired a strip not actually included in the deed, the representation of the seller was held to amount to an estoppel, and consequently that the strip acceded to the land purchased by the vendee (*n*).

**Acquiescence.**

Again, it has been held that acquiescence in an incorrect representation as to an existing state of affairs will amount to such an admission of the accuracy of the representation as will preclude a person from subsequently denying the truth thereof. Thus it will constitute such an acceptance of, and acquiescence in, an existing state of affairs as will preclude an action for rescission, if a party enter into possession of and use and enjoy the subject-matter of a contract, even though such subject-matter does not, in fact, conform with the original specification therefor (*o*).

And generally, "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving" (*p*). And the same doctrine has thus been laid down by Blackburn, J. (*q*): "Where one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound,

(*k*) *Beatty* v. *Neelon* (1886), XIII. S. C. R. 1.
(*l*) *Cameron* v. *Westmount City* (1908), Q. R. 18 K. B. 300.
(*m*) *Clark* v. *Phinney* (1895), XXV. S. C. R. 633.
(*n*) *Zwicker* v. *Feindel* (1899), XXIX. S. C. R. 516.
(*o*) *Town of Richmond* v. *Lafontaine* (1899), XXX. S. C. R. 155.
(*p*) *Gregg* v. *Wells* (1839), 10 A. & E. 90, Lord Denman, C. J., at p. 98.
(*q*) *Knights* v. *Wiffen* (1870), L. R. 5 Q. B. 660, at p. 665

and the matter is regulated by the state of facts imported by the statement."

The doctrine of estoppel *in pais* has been so much discussed alike at law and in equity, and definitions of it are so numerous, as to render it unnecessary to cite more, especially as Lord Esher has formulated certain propositions which practically embrace all the cases to which the rule is applicable. He says (*r*): "One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist" (*s*). Chitty, 45, 46, 727—730.

"Another recognised proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts" (*t*).

Thus a land owner who stands by and watches a surveyor staking out a boundary line on adjacent land is estopped from afterwards setting up, when a building has been partially erected up to the line, that the boundary is not the true one (*u*).

"And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." Estoppel by representation.

Thus the true owners of bonds or other instruments transferable by delivery are estopped from asserting their title to the detriment

(*r*) *Carr* v. *London & North-Western Rail. Co.* (1875), L. R. 10 C. P. 307, at p. 316. These rules have been commented on by Lord Macnaghten in *Whitechurch* v. *Cavanagh*, [1902] A. C. 117, at p. 130.

(*s*) For Canadian cases germane to this proposition, see *Dillon* v. *Township of Raleigh* (1887), XIV. S. C. R. 739; *Caldwell* v. *Stadacona Fire and Life Insce. Co.* (1882), XI. S. C. R. 212; *Dominion Grange Mutual Fire Asce. Association* v. *Bradt* (1895), XXV. S. C. R. 154.

(*t*) *City of London Fire Insce. Co.* v. *Smith* (1888), XV. S. C. R. 69.

(*u*) *Grasett* v. *Carter* (1883), X. S. C. R. 105. Where an owner of land allowed a bridge and wharf to be erected, and after lying by for many years claimed a right of demolition upon the ground of nuisance, he was held to have abandoned his right to invoke the assistance of the Court to order its removal, and to be liable in damages should he remove it himself (*Caverhill* v. *Robillard* (1878), II. S. C. R. 575).

of a *bonâ fide* holder for value without notice should they, either by negligence or accident, suffer them to remain in the hands of a fraudulent agent, who converts them to his own use (*x*).

And where third parties who by their representation of indebtedness to the defendant induced a plaintiff who had obtained judgment to commence garnishee proceedings against them for its recovery subsequently pleaded there was no debt due, the plea was held bad upon the ground that they were estopped by their representation from subsequently denying liability (*y*).

Limitation on estoppel.

But, on the other hand, where a statutory liability attaching only to an actual shareholder in a company is sought to be imposed on a party who questions the legality of the issue of the shares, the mere fact of the reception of transfers of certificates of stock in the company by the party will not estop him from disputing the legality of the issue (*z*). And where a taxpayer pays taxes under protest and to avoid execution, such payment will not estop him from afterwards taking proceedings to have the assessment quashed (*a*).

Nor will the fact of an owner of property giving notice to quit to a sub-tenant, with whom he has no privity, upon the termination of the original demise, estop him from repudiating the existence of a continuing tenancy even if he distrain whilst the sub-tenant remains in on sufferance (*b*). And in an action on the construction of a will the acceptance of costs by a party to the suit at one stage of the proceedings will not estop him from subsequently appealing against the judgment (*c*).

(*x*) *Young* v. *MacNider* (1895), XXV. S. C. R. 272.

(*y*) *Shanly* v. *Fitzrandolph* (1882), Cass. Dig. (2nd ed.) 279.

(*z*) *Page* v. *Austin* (1882), X. S. C. R. 132.

(*a*) *Lewin, Ex parte* (1885), XI. S. C. R. 484.

(*b*) *Gilmour* v. *Magee* (1890), XVIII. S. C. R. 579.

(*c*) *Ferguson, In re, Turner* v. *Bennett* (1897), XXVIII. S. C. R. 38.

# CHAPTER XII.

## EFFECT OF ACCORD AND SATISFACTION ON CONTRACTS.


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Definition. Chitty, 798—803.

THE expression "accord and satisfaction" technically imports an agreement to accept, and the receipt of some equivalent for an antecedent vested right. The accord is the contract; the satisfaction the substituted equivalent. The former must not be of an inferior nature to the contract to which it relates, hence a deed cannot be revoked or discharged by parol, or even by writing not under seal; but an executory agreement in writing (not a sealed instrument) may before breach be discharged by subsequent parol agreement.

But after breach even a simple contract, or any right of action once vested, cannot be discharged unless by a release under seal or by an accord and satisfaction.

Essential constituents to accord and satisfaction.

Moreover, in order to constitute a valid plea, the accord and satisfaction must be complete and executed, so it would seem that where the plaintiff has agreed to accept the promise of the defendant in satisfaction, if the promise be not performed, the remedy of the plaintiff is by action for the breach of the agreement he has so accepted

But if a plaintiff has agreed to accept only the performance of the promise as a satisfaction, there is no satisfaction without actual performance or execution.

Chitty, 858.

It also appears, upon competent authority(*a*), that an accord with mutual promises to perform is good though the thing be not performed at the time of action, for the party has a remedy to compel the performance. And this is no exception to the rule that the satisfaction must be executed, for if the promise is the agreed satisfaction, when it is given and accepted it becomes executed (*b*).

It is for the defendant to prove the accord executed according to

(*a*) Comyn's Dig., Accord, B. 4 (6). (*b*) Petersdorff's Abr., vol. 1, p. 90.

its terms, otherwise there will be no remedy for a non-performance. Therefore, an accord to pay money in satisfaction is not good if he shows only that he is ready to pay, for he ought to say that he has paid it. But an accord by deed, though without satisfaction, may operate as a conclusive extinguishment of a right, and so may the order of a Court of competent jurisdiction (*c*).

Consideration.

It seems, however, that a judgment against a co-contractor is no extinguishment, unless realised by execution, and then only to the amount actually recovered. But the slightest additional consideration to the money actually received in a case where the sum paid is smaller than the amount of the liquidated demand, will amount to satisfaction provided the payment be a sum certain. Thus the substitution of a negotiable instrument for a smaller sum may be taken in satisfaction of a simple contract debt for a larger amount (*d*). But the converse of this rule applies if the thing given and accepted in satisfaction of the debt be uncertain in value (*e*).

Moreover, the satisfaction must in contemplation of law be advantageous to the party agreeing to receive it, and it will be inoperative if it appear that it cannot possibly benefit him.

But a mere agreement with a shareholder in a limited company to set off the amount of any calls which might at any time be made against debts owing to him by the company, will not relieve the shareholder from being put on the list of contributories in respect of calls made before the winding-up, as such an agreement between the parties neither constitutes an accord and satisfaction in law nor a set-off: and a like rule has been held to apply, where upon the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid-up shares, at their par value, in satisfaction of his interest in the partnership assets, it being held in such case that the debt owing to the vendors as the price of the partnership business could not be set off or counterclaimed by them against their individual liability upon their shares (*f*).

Burthen of proof.

As already stated, the burthen of establishing an allegation of accord and satisfaction is on the defendant, who is bound to establish it beyond all reasonable doubt.

Where the evidence is verbal and has to be submitted to a

(*c*) Comyn's Dig., Accord, B. 2 (4, 5).

(*d*) *Sard* v. *Rhodes* (1836), 1 M. & W. 153 (an English case).

(*e*) *Cooper* v. *Parker* (1855), 24 L. J. C. P. 68 (an English case).

(*f*) *Turner* v. *Cowan* (1903), XXXIV. S. C. R. 160; see also *Fothergill's Case* (1873), 8 Ch. App. 270; *Johannesburg Hotel Co., In re*, [1891] 1 Ch. 119; *North Sydney Investment and Tramway Co.* v. *Higgins* [1899] A. C. 263. P. C.

jury, it is the duty of the jury to find against the defendant on this issue unless his evidence establishes it to their satisfaction beyond all reasonable doubt.

So if he relies on documents, which the Court have to construe, as establishing his defence of accord and satisfaction, and they are so ambiguously worded as to be fairly capable of a construction inconsistent with the defendant's contention, the Court (unless satisfied beyond reasonable doubt that what is put forward as an accord and satisfaction was intended by both parties as such) should not deprive a plaintiff of a legal right by putting a strained interpretation on ambiguous terms (*g*).

Executory agreements.

An inchoate or executory agreement for the payment of an existing debt or other liability, although reduced into writing, will not amount to an accord and satisfaction (*h*). But if there be an actual delivery and acceptance of the document embodying the terms of the agreement between the parties, such delivery and acceptance constitute a novation and amount to an accord and satisfaction of the pre-existing liability (*i*).

An agreement is not merely executory but complete in law where the contract between the parties is mutual, and by its terms so binding each to the other that upon either one, within reasonable time, performing his own part, such performance amounts to an accord and satisfaction.

And the consideration for such an agreement may be a forbearance on the part of the promisee to defend an action (*k*).

Moreover, when one of the terms of such a compromise is the transference from one party to the other of the document of title to securities or chattels, the effect of such compromise is to cure, on behalf of the transferee, a substantial defect of title (*l*).

And generally, the compromise of a suit or the forbearance to sue or to defend a suit is sufficient consideration to support a plea of accord and satisfaction (*m*).

Collateral security.

But a collateral security will not support a plea of accord and satisfaction (*n*).

And a similar rule applies in the case of a breach of the covenants of a lease, the acceptance of a collateral thing in satisfaction not barring the right of action on the express covenants (*o*).

(*g*) *Weldon* v. *Vaughan* (1880), V. S. C. R. 35, at p. 42.

(*h*) *Jones* v. *Cameron* (1866), 16 U. C. C. P. 271; see also *Utter* v. *G. W. Rail. Co.* (1858), 17 U. C. Q. B. 392; *Balsam* v. *Robinson* (1869), 19 U. C. C. P. 263.

(*i*) *Stewart* v. *Hawson* (1853), 7 U. C. C. P. 168; *Dempsey* v. *Carson* (1862), 11 U. C. C. P. 462.

(*k*) *Forsyth* v. *Moulton* (1893), 25 Nov. Sco. L. R. 359.

(*l*) *Armstrong* v. *Buchanan* (1903), 35 Nov. Sco. L. R. 559.

(*m*) *Beer* v. *McLeod* (1890), 22 Nov. Sco. L. R. 535.

(*n*) *Bank of British N. America* v. *Sherwood* (1848), 6 U. C. Q. B. 552.

(*o*) *McIntyre* v. *City of Kingston* (1847), 4 U. C. Q. B. 471.

Nor can accord and satisfaction be pleaded to a deed before breach. Where, therefore, a defendant pleaded that before breach of covenant he satisfied and discharged the plaintiff's claim by a delivery of goods which he accepted in full satisfaction thereof, it was held a bad plea (*p*). Nor is a legacy, although expressed so to be, an ademption of a bond so as to amount to a satisfaction thereof (*q*). And in like manner a loan of money cannot be pleaded in satisfaction of a bond and condition (*r*).

But, apparently, in cases not within the Statute of Frauds a verbal composition based upon mutual parol promises constitutes an accord and is valid even where the satisfaction is not given until after action brought (*s*).

And it seems that an actual delivery of goods upon a novation expressed to be as satisfaction in full for an antecedent breach of a simple contract and the damages resulting therefrom amounts to an accord and satisfaction for the original liability (*t*).

**Tender and acceptance of smaller sum.**

**Chitty, 788, 801.**

The acceptance by a creditor of a conveyance by way of mortgage in satisfaction of a simple contract debt for a larger amount constitutes such a valid discharge of the original claim as to amount to a complete accord and satisfaction (*u*).

It must, however, be borne in mind that in all cases where the payment of a smaller sum has been held to constitute a valid accord and satisfaction for a larger amount, there has been something more between the parties (or on the part of a third person on behalf of the debtor (*x*)) than a mere actual tender and acceptance of the lesser amount in ademption of the greater (*y*), it being a general proposition of law that there cannot be a good accord and satisfaction of the whole of a liquidated debt unless there be a good consideration for giving up the remainder (*z*). Thus, while the giving by a debtor of his own negotiable note or acceptance for £50 would be allowed to be a good satisfaction of a promise to pay £100, if so accepted, the paying of the same amount in money in satisfaction, though averred to be accepted in discharge, would not bar the action (*a*).

It is, moreover, essential in cases where the claim for the larger

(*p*) *Robison* v. *Flanigan* (1863), 22 U. C. Q. B. 417.

(*q*) *Cole* v. *Cole* (1839), 5 O. S. 744.

(*r*) *Prindle* v. *McCan* (1847), 4 U. C. Q. B. 228.

(*s*) *Brunskill* v. *Metcalf* (1852), 2 U. C. C. P. 431.

(*t*) *Thomas* v. *Mallory* (1849), 8 U. C. Q. B. 521.

(*u*) *Allen* v. *Alexander* (1862), 11 U. C. C. P. 541.

(*x*) *Hanscombe* v. *Macdonald* (1855), 4 U. C. C. P. 190.

(*y*) *Pitfield* v. *Kimball* (1885), 25 New Brun. Rep. 193.

(*z*) See on this point, *Crockett* v. *MacFarlane* (1895), 33 New Brun. Rep. 29.

(*a*) *Holmes* v. *McDonell* (1855), 12 U. C. Q. B. 469; see also *Shanly* v. *Midland Rail. Co.* (1874), 33 U. C. Q. B. 604.

amount consists of several distinct items, that the plea of tender and acceptance of the lesser sum should be shown to be for each and all of the various constituent parts of the claim (*b*).

And, apparently, a document purporting to be a receipt in full in consideration of the payment of a lesser amount than the whole claim is subsequently voidable at the suit of the creditor, should such creditor's solicitor, in ignorance of the compromise, obtain judgment for the full amount and costs (*c*).

Retention of cheque. Chitty, 552 n.

Nor is the retention by the creditor of a cheque drawn by the debtor, and marked as being a discharge in full of a claim for a larger amount, conclusive evidence in law of an accord and satisfaction of such larger amount unless it can be shown that the payment was so accepted by the creditor (*d*).

Action for breach of contract.

But an action for breach of contract founded on the original claim has been held not to lie against a debtor upon the dishonour of a negotiable instrument accepted by the creditor in full satisfaction and discharge of his cause of action in a simple contract debt (*e*); and the same rule was held applicable in a case where the note was not indorsed (*f*).

And as a general proposition of law the acceptance of a note by the plaintiff in full discharge of a cause of action affords the defendant the right to plead accord and satisfaction (*g*) even though the acceptance be after breach (*h*); but actual acceptance is essential (*i*).

Mortgage debt.

Where a debt is secured by a mortgage deed there is no accord and satisfaction outside the express terms contained therein, the remedy under the deed being only suspended during the currency of the negotiable instrument and again reviving on its dishonour (*k*).

Joint debtors.

Moreover, the note of one of two joint debtors is no accord and satisfaction of the debt (*l*). Though the converse of this rule applies in the case of a note made by one of several partners on

(*b*) *Ritchey* v. *Bank of Montreal* (1848), 4 U. C. Q. B. 222; *Thompson* v. *Armstrong* (1847), 3 U. C. Q. B. 153.

(*c*) *Soder* v. *Yorke* (1896), 5 B. C. R. 133.

(*d*) *M'Pherson* v. *Copland* (1909), Sask. L. R. 519; but see *Nash* v. *Dever* (1866), 6 Allen, 404. In *Nathan* v. *Ogdens* (1906), 94 L. T. 126; 22 T. L. R. 57, C. A., it was held that the acceptance and endorsement by the payee of a cheque to order, upon the back of which was a statement that it was received in satisfaction of a pre-existing claim for a much larger amount, did not amount to an accord and satisfaction.

(*e*) *Loomer* v. *Maida* (1854), 11 U. C. Q. B. 16.

(*f*) *Jacques* v. *Beaty* (1864), 13 U. C. C. P. 327.

(*g*) *Freeman* v. *McCarthy* (1869), 19 U. C. C. P. 229.

(*h*) *Brown* v. *Erie and Ontario Ins. Co.* (1862), 21 U. C. Q. B. 425; *Dinwoodie* v. *Smith* (1875), 25 U. C. C. P. 361.

(*i*) *Macfarlane* v. *Ryan* (1865), 24 U. C. Q. B. 474.

(*k*) *Gibb* v. *Warren* (1859), 7 Gr. 496.

(*l*) *Leonard* v. *Atcheson* (1850), 7 U. C. Q. B. 32.

account of the firm if he be vested with authority to sign for and on behalf of his co-partners (*m*).

**Mutual promises.**

An accord with mutual promises is good though the thing be not performed at the time of action brought, for either party has a remedy to compel the performance. And such a plea is good alike in equity and law, and in such cases where the accord and satisfaction is based upon valuable consideration the Court will presume the existence of an instrument containing such mutual promises if it be necessary that there should be one (*n*).

**Substituted agreement.** Chitty, 799.

A substituted agreement may be accepted in accord and satisfaction of an existing cause of action, the new promise only, and not the performance of it, in such cases constituting the satisfaction and discharge, and in these circumstances the new agreement constitutes satisfaction of the old cause of action, leaving the parties to their own remedies upon the new one (*o*).

**Breach of original contract.**

The acceptance of a substituted contract operates as a waiver of any right of damages existent under the original contract, acquiescence in such substituted contract amounting to satisfaction of the breach (*p*).

**Fraud.** Chitty, 800.

An accord and satisfaction induced by fraud is voidable at the option of the deceived party. Where, therefore, a person was induced to take shares by a fraudulent misrepresentation and subsequently settled the claim for the price thereof by giving the vendor a renewal note, and thus obtained further time for payment, the forbearance of the seller and the acceptance of such forbearance by the purchaser was held not to avoid the latter's right of action for deceit (*q*).

**Re-opening settled account.**

And in the case of a settled account all that need be established in order to set aside a release and re-open the transaction between the parties is for the plaintiff to show that, in the accounts as taken, there were such errors and mistakes as would inflict material injustice upon him if the accounts should be held to be closed; and further, that there has not been such *laches* and acquiescence on his part upon discovering the errors and mistakes as would amount to a waiver of his claim (*r*).

(m) *Port Darlington Harbour Co.* v. *Squair* (1860), 18 U. C. Q. B. 533.

(n) *Clarke* v. *Carroll* (1867), 17 U. C. C. P. 538; *Whitefoord* v. *McLeod* (1869), 28 U. C. Q. B. 349.

(o) *Morton* v. *Judge* (1907), 40 N. S. R. 457.

(p) *Coristine* v. *Menzies* (1884), 2 Manitoba L. R. 84.

(q) *Goold* v. *Gillies* (1908), XL. S. C. R. 437.

(r) *West* v. *Benjamin* (1898), XXIX. S. C. R. 232.

# CHAPTER XIII.

## SPECIFIC PERFORMANCE OF CONTRACTS, INJUNCTIONS, SET-OFF AND CROSS ACTION.


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General proposition. Chitty, 868—873.

The whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages instead.

The right to sue on a contract is the same in law and in equity, but the remedies differ; and a Court of equity will grant the equitable remedy in all cases unless there has been some conduct on the part of the plaintiff disentitling him to such relief, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it.

But apart from the considerations above mentioned, the Court will not concern itself as to the comparative convenience or inconvenience to the parties which will result from an order for specific performance; for as to whether or no the contract is a convenient or an inconvenient one is for the parties to consider when they enter into the obligation (*a*).

Misdescription—Statute of Frauds.

Therefore, a mere technical misdescription will not avoid a contract of sale and purchase in cases in which there is no doubt in the mind of either of the parties to the bargain, as to the exact situation or description of the subject-matter of the contract.

Where, therefore, a vendor of realty resisted specific performance upon the ground, *inter alia*, that there was a mistake in the street number of the house which she had agreed to sell, although it was the only residence owned by her in that locality, it was held that

(*a*) *Hexter* v. *Pearce*, [1900] 1 Ch. 341.

as the description sufficiently identified the promises, the mere technical misdescription might be corrected by parol evidence, that the Statute of Frauds was not avoided, and that the purchaser was entitled to specific performance (*b*).

**Effect of *laches*.** **Chitty, 869.**

But in order to entitle a party to a contract to the aid of the Court in carrying it into specific execution, he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out its terms within a reasonable time, even though time itself may not have been of the essence of the contract. And *à fortiori* this rule applies where one party to the contract enters into possession of the subject-matter thereof without making any protest, and subsequently to such entry exercises acts of ownership over it by executing repairs and improvements, it being obviously inequitable that the party so entering should afterwards be allowed to say that the other contracting party has not fulfilled his agreement, the entry and acquiescence amounting to a waiver (*c*).

And as a general proposition, where there has been an innocent misrepresentation or misapprehension, such misconception will not necessarily authorise a rescission unless the facts are such as to show that there was a complete difference in substance between what was supposed to be offered for acceptance and that which was taken, so as to constitute a failure of consideration.

**Restrictive covenant.**

Where, therefore, a railway company sold land without any restrictive covenant, and afterwards sought to introduce a new and qualified term into the conveyance, specific performance was decreed in favour of the purchasers, free from any restrictive covenant (*d*).

**Mutual mistake.** **Chitty, 897—899.**

If, however, parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the agreement is liable to be set aside as having proceeded upon a common mistake. Consequently, where by the error of both parties, without fraud or deceit, there has been a complete failure of consideration in an executed contract of sale or purchase of either chattels or realty, a Court of equity will rescind the agreement and compel the vendor to return the purchase-money (*e*).

(*b*) *Anderson* v. *Foster* (1909), XLII. S. C. R. 251.
(*c*) *Wallace* v. *Hesslein* (1898), XXIX. S. C. R. 171.
(*d*) *Hobbs* v. *Esquimalt, &c. Rail. Co.* (1899), XXIX. S. C. R. 450.
(*e*) *Cole* v. *Pope* (1898), XXIX. S. C. R. 291.

*Injunctions.*

The general rule in such cases may be thus stated: if a plaintiff applies for an injunction to restrain a violation of a common law right, should either the existence of the right or the fact of its violation be disputed, he must establish his right at law, and then, unless there be something special in the case, he will be entitled, as of course, to an injunction to prevent the recurrence of the violation.

When injunctions will be granted. Chitty, 703—707, 872.

There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction, and these may be briefly summarised as follows:—

(1) If the injury to the plaintiff's legal rights is small;
(2) And is one which is capable of being estimated in money;
(3) And is one which can be adequately compensated by a small money payment;
(4) Where the case is one in which it would be oppressive to the defendant to grant an injunction;

then damages in substitution for an injunction may be given.

In addition to the above, there may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for example, by hurrying up his buildings so as, if possible, to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction. Again, it is almost impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to a window in a cottage, represented by $75, might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building, in the centre of Toronto, represented by ten times that amount, might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception.

The jurisdiction to give damages instead of an injunction is in words given in all cases. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles, and Courts of equitable jurisdiction have for a very long time past repudiated the notion that there was any intention on the

part of the Legislature to turn them into tribunals for legalizing wrongful acts; or, in other words, the Courts have always, and rightly, protested against the notion that they ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury which he may inflict.

Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e.g.*, a gas or electric or water company) even been considered a sufficient reason for refusing to protect, by injunction, an individual whose rights are being persistently infringed (*f*).

### *Set-off and Cross Action.*

Principles. Chitty, 858—860.

If a debt secured by mortgage deed, duly registered under the Merchant Shipping Act, is sued on by the mortgagee, a cross claim for unliquidated damages under a contract distinct from the mortgage cannot be pleaded by way of set-off or abatement of the mortgage debt; or, in other words, a claim for unliquidated damages for the breach of a contract *in personam* cannot be set off against a claim for the enforcement of a contract *in rem* (*g*).

Unliquidated damages.

And in amplification of the above stated rule, it may be laid down as a general proposition of law that where damages are unliquidated and there is no mutuality there cannot be a set-off.

Liquidated damages.

But *e converso*, liquidated damages which constitute a debt may be set off against a demand, for they represent a sum certain, and it appears that in an action for a debt due from a defendant to a plaintiff the former is entitled to set off a debt originally due from the plaintiff to a third party if such third party has assigned it to him, the debts being mutual by virtue of the assignment (*h*).

Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract: in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as the amount of any consequential damage, might have been recovered, and this course was alike simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held

(*f*) *Saunby* v. *London (Ont.) Water Commissioners*, [1906] A. C. 110, P. C.
(*g*) *Dow, McLachlan & Co.* v. *Ship Camosun*, [1909] A. C. 597, P. C.
(*h*) *Bennett* v. *White*, [1910] 2 K. B. 643, C. A.

that he ought to pay it and seek his remedy on the plaintiff's contract of warranty.

In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the practice was for the defendant to pay the whole, and subsequently recover for any breach of contract committed by the other side.

But subsequently a different practice began to prevail, and being attended with much practical convenience, has been since generally followed, the defendant in the action for the price being now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were both diminished in value. And it must now be considered that in all cases of goods sold and delivered with a warranty, and in cases of contracts of work and labour, as well as in the case of goods agreed to be supplied according to a contract, the above stated rule is established, and that it is competent for a defendant in either one or all of them not as formerly to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract than it would otherwise have been, and on that account and to that extent would be entitled to obtain or be capable of obtaining an abatement in the price commensurate with the damage which he has sustained; though in such case any abatement must be considered as constituting satisfaction *pro tanto* for the breach of contract, and consequently thenceforward he will be estopped from launching a further action on that ground (*i*).

(*i*) Deduced from *Mondel* v. *Steel* (1841), 8 M. & W. 858 (an English case).

# CHAPTER XIV.

## MEASURE OF DAMAGES FOR BREACH OF CONTRACT.


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**General principles.**
**Chitty, 874—879.**

THE general intention of the law in giving damages in an action of contract is to place the party complaining, so far as this can be done by money, in the same position as he would have been in if the contract had been performed.

But, in applying this general intention of placing the complainant in the same position as he would have been in if the contract had been performed, it must be remembered that the altered position to be redressed must be one directly resulting from the breach, and not from any act or omission of the complainant subsequent to the breach and not directly attributable to it.

It is not sufficient that it be an act or omission which would not in fact have taken place but for the breach. Or, in other words, where there is a contract to supply a thing to you which is not supplied, the damages are the difference between that which ought to have been supplied, and that which you have to pay for it; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had, and the best substitute you can get upon the occasion for the purpose. That is to say, the measure of damages to be adopted is one that will generally give complete indemnity to the buyer. That is the ruling principle, and it is a just principle.

And the market value is taken as the standard of appraisement because it is presumed to be the true value of the goods to the purchaser.

**Damages for non-delivery of goods.**

In the case of non-delivery, where the buyer does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market,

and that if he wanted to get others in their stead he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have re-sold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter, and the buyer, by way of complete indemnity for not having got his goods, should receive enough to buy similar goods in the open market.

Damages for delay in delivery.

Similarly, where the delivery of goods purchased is delayed, the goods are presumed to have been at the time when they should have been delivered worth to the purchaser what he could then sell them for or buy others like them for in the open market; and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell them for in that market. But if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, the above-stated presumption is rebutted and the real value of the goods to him is proved by the very fact that the price realised at the sale is more than their market value, and consequently the loss he sustains must be measured not by the market price, but by the difference between the contract price and the price at which he sold the goods; unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been placed if the contract had been performed, but in a much better position (*k*).

Loss of profit. Chitty, 883, 884.

Where, however, a loss of profit, capable of exact estimation, arises by reason of the breach of contract to deliver, the rule may thus be stated: in cases where the contracting party is shown to have been acquainted with all the consequences that must of necessity follow from a breach on his part of the undertaking, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (*i.e.*, according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it.

Now, if the special circumstances under which the contract was actually made were communicated by the buyer to the seller, or, in the case of a contract of carriage, by the consignor to the carrier,

(*k*) *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301, P. C.

and were thus known to both parties, the damages resulting from the breach of contract to deliver or to carry which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.

But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

For had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

It is, indeed, said that certain other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land or chattels, are to be treated as exceptions to the above-stated rules and as governed by a conventional rule.

But as, in such cases, both parties must be supposed to be cognisant of the well-known rule, these cases may, it seems, be more properly classed under the rule above enunciated, as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule (*l*).

**Damages for negligent performance of contract.**

Again, where one party to a contract either performs it in such a perfunctory and negligent manner as to render the subject-matter thereof either ineffective or absolutely harmful to the other party, or else puts an end to the contract altogether by refusing to perform it, the party damnified by such imperfect compliance or absolute refusal is entitled to an equivalent in damages to the gains or profits which he would have realised from performance, but not necessarily to the gains or profits of collateral enterprises in which such party has been induced to engage by relying on the performance of the contract; it being a general rule of law that remote and contingent damages depending upon the result of successive schemes are not allowed for the violation of a contract.

The general rules governing the allocation of damages in such cases may be thus summarised:—

When the books and cases speak of the profits anticipated from a good bargain as matter too remote and uncertain to be taken

(*l*) *Hadley* v. *Baxendale* (1854), 9 Ex. 341.

into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract, and these are altogether too remote and subtle to be appraised by legal proof or judicial investigation.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing.

These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as the fulfilment of any other stipulation.

They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only or chief inducement to the arrangement.

The parties may, indeed, have entertained different opinions concerning the advantages accruing from the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself (*m*).

Damages for breach of contract to give work.

In an action by a contractor for damages for breach of contract in giving work which the plaintiff had contracted to do to some other contractor, the proper measure of damage is the amount of profit which the contractor would have made if he had done the work, and in arriving at this computation such matters as "superintendence generally, wear and tear of plant, &c.," should not be deducted from the total profits (*n*).

Measure of damages recoverable from trustees.

In estimating the *quantum* of damages assessable in a case where the defendant is to be treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent*, the true rule seems to be that such damages are to be measured upon the basis that every presumption is to be made against the trustee as a wrongdoer, and conse-

(*m*) *Corbin* v. *Thompson* (1907), XXXIX. S. C. R. 575.

(*n*) *Boyd* v. *The Queen* (1887), 1 Ex. C. R. 186.

quently the loss must be calculated as being measured by and the *cestuis que trustent* must be credited with the highest prices which the property might have realised in the market at any time between the date when they became deliverable over to the *cestuis que trustent* and the actual date when they were in fact so delivered.

But, on the other hand, if the defendant is no more than a contractor who has failed to deliver the property which was the subject of the contract in accordance with the terms of his agreement, he is liable only for damages based on the selling price of the property at the time when his obligation to deliver it arose (o).

Measure of damages in fraudulent contracts. Chitty, 733—735.

In order to render one party to a contract liable to the other party thereto on the ground of misrepresentation it is not necessary that such misrepresentation should amount to actual fraud.

A man may make a statement in order to induce another to enter into a contract believing that his statement is true, and not intending wilfully to deceive, but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions and did not intend to defraud.

But it is not every misstatement—although untrue, and untrue to its maker's knowledge—that will afford ground for an action.

It may be that the misstatement is trivial—so trivial that it could not at all affect the mind of the person to whom it was made or induce him to enter into the contract, and if this be so the mere fact that the statement was wilfully inaccurate will not suffice to avoid the contract.

To render a misstatement actionable it must amount to what, for want of a better term, may be conveniently called "legal fraud." This phrase, which has been in use for many years past, is apt to describe that degree of moral culpability in the statement of an untruth (uttered as an inducement to another to alter his position) to which the law attaches responsibility.

And in order that a misstatement should come within this category it must have been made recklessly, that is, without any reasonable or probable ground for believing it to be true, and in total disregard of anything save the interest or profit of him who makes it.

No doubt the word "fraud" is in common parlance reserved for actions of great turpitude, but the law also applies it to lesser breaches of moral duty, such as the making of any statement upon

(o) *McNeil* v. *Fultz* (1906), XXXVIII. S. C. R. 198.

which others are intended to act without reasonable ground for its enunciation and without reasonable ground for believing it to be true; and any such dereliction constitutes alike a breach of moral and legal duty for which the proper remedy is an action at law, although it may not be a fraud of such dark complexion as to blast for ever the character of the man who perpetrates it.

It has, indeed, been stated by a great legal authority (*p*) that the expression "legal fraud" "has no more meaning than legal heat or legal cold, legal light or legal shade"; but the later, if not the better, opinion seems to be that there are many and fine gradations in the popular estimate of moral obliquity, and that it is quite possible for a person to remain a respectable member of society and yet at the same time to practise, for his own advantage, upon his neighbour's ignorance and credulity.

**Measure of damages in legal fraud.**

As to the measure of damages recoverable by a plaintiff who has been induced by misstatements amounting to legal fraud to enter into a contract which without such misstatements he would not have entered into, it seems that the *quantum* of damages is limited to the loss that the plaintiff has actually sustained by reason of the misrepresentations of the defendant coupled with all additional outlays legitimately attributable to his fraudulent conduct, and does not include the fruits of an unrealised speculation; or, in other words, the damages to be recovered must always be the natural and proximate consequence of the act complained of: those results only being considered proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract (*q*).

**When a creditor is entitled to interest.** Chitty, 662—684.

In order to entitle a creditor to interest on his debt under 3 & 4 Will. IV. c. 42, s. 28 (Imp.), it is not necessary that the day for payment should be named, provided the time can be ascertained by the terms which are in the writing and which will enable the jury to form a safe basis of calculation as to the time certain at which it is to be payable. Or, in other words, the Statute applies only to debts or sums certain; consequently, if such debt or sum certain cannot be found in the agreement or contract itself it is not sufficient that the same may be made certain by some process of calculation or by some act to be performed in the future (*r*).

Moreover, a provision in a provincial statute (*s*) enacting that "interest shall be payable in all cases in which it is now payable

(*p*) Bramwell, L. J., in *Weir* v. *Bell* (1878), 3 Ex. Div. at p. 243.

(*q*) *Syndicat Lyonnais du Klondyke* v. *Barrett* (1905), XXXVI. S. C. R. 279 (leave to appeal granted 14th Dec., 1905).

(*r*) *Sinclair* v. *Preston* (1901), XXXI. S. C. R. 408.

(*s*) Ontario Jurisdiction Act, R. S. O., 1897, c. 51, s. 113.

by law or in which it has been usual for a jury to allow it" applies in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by payment of interest, and in cases within this definition it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think just and right (*t*).

And generally an agreement to pay interest up to a specified date raises by implication an agreement to continue the payment of such interest until the capital sum or other consideration, in respect of which the interest was payable, has been repaid or otherwise satisfied (*u*).

**Limitation on interest chargeable by a bank.**

It may be remarked in this connection it is enacted by the Bank Act, 1913, s. 91, that throughout the Dominion of Canada a "bank may stipulate for any rate of interest or discount not exceeding 7 per cent. per annum, and may take in advance any such rate, but no higher rate of interest shall be recoverable by the bank."

(*t*) *Toronto Railway* v. *Toronto Corporation*, [1906] A. C. 117, P. C.

(*u*) *The Queen* v. *Grand Trunk Rly.* (1890), II. Ex. C. R. 132.

# CHAPTER XV.

## WARRANTIES.

### *General Principles.*

Chitty, 428—432.


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The best definition that can be given of a warranty, that is, of a representation incorporated in a contract, appears to imply that it is a representation of some certain or existing past or present matter of fact, known or capable of being known, as that the article or thing is the work of a certain maker or manufacturer, or that it is in a certain ascertainable condition, or is fitted for a certain specified duty, or, if it be house property, that the building is constructed of the materials specified (*a*), or, if it be either chattels or realty, that the vendor has a good title to the property or merchandise which he professes to sell. And in either of such cases, if the representation form an integral part of the consideration which moved the purchaser to enter into the contract, misrepresentation will entitle him to an action for the deceit.

Nature and extent of warranty by Crown.

It has been held by the Court of Exchequer that the Crown in agreeing to grant leases or licences to cut timber upon specified lands impliedly promises and warrants that it has a good title to such lands and agrees to grant valid leases or licences (*b*). But it is submitted, even in such case, that apart from an express covenant for title or warranty on the part of the Crown, the existence of a warranty by implication should not be presumed (*c*); the mere fact of a general grant by the Crown, without more, to an individual of lands or of non-tidal water (*i.e.*, of land

(*a*) *Pagnuelo* v. *Choquette* (1903), XXXIV. S. C. R. 102.

(*b*) *Bulmer* v. *The Queen* (1893), III. Ex. C. R. 184.

(*c*) *The Queen* v. *Robertson* (1882), VI. S. C. R. 52, n. p. 126; *Wyatt* v. *Att.-Gen. of the Province of Quebec*, [1911] A. C. 189. P. C.

covered by water) being insufficient to establish the exclusive title of the Crown thereto (*d*).

Moreover, in the case of a grant from the Crown it is a principle alike of the common law of England and of the Dominion of Canada that if the King make a grant which cannot take effect in the manner in which it ought to take effect according to its terms, by reason of an antecedent grant, it is to be concluded that the King has been deceived, and therefore that the subsequent grant is void.

The above rule is, however, qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant, though void as to the rest.

This rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice, and if he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing thereunder (*e*).

**Warranties in general.**

Adverting to the general subject of warranties, every affirmation made at the time of sale of personal chattels is a warranty, provided it appears to have been so intended, and no *scienter* need be alleged or proved (*f*).

**Difference between warranty and statement of opinion.**

The difficulty is in ascertaining whether or no the representation was intended to form part of the contract, for if it should turn out to be intended merely as a statement of opinion, no action is maintainable upon it unless it was false within the knowledge of the party making it (*g*).

Thus a warranty that a grey four-year-old colt is sound in every respect has been held to be a warranty of soundness only and (apart from fraud) no more than a representation as to age (*h*). But the very distinction between warranty and mere representation being that the latter may be a mere expression of one man's belief and so not actionable unless shown to be wilfully false, seems to imply that a warranty, which is an absolute undertaking, must be a warranty of something which a man *can* undertake, and is therefore ordinarily limited to some fact present or past.

**Informal warranties binding.**

To create such a warranty, no special form of words is necessary.

(*d*) *Bristow* v. *Cormican* (1878), 3 A. C. 641. As regards an implied term in a contract by the Crown, see *Archibald* v. *The Queen* (1891), 11. Ex. C. R. 374.

(*e*) *Alcock* v. *Cooke* (1829), 5 Bing. 340; principle applied in *City of Vancouver* v. *Vancouver Lumber Co.*, [1911] A. C. 711, P. C.

(*f*) *Heilbut* v. *Buckleton*, [1913] A. C. 30, H. L. (E.).

(*g*) See *Taylor* v. *Bullen* (1850), 5 Ex. 779; see also *Pagnuelo* v. *Choquette* (1903), XXXIV. S. C. R. 102.

(*h*) *Budd* v. *Fairmaner* (1831), 8 Bing. 48; see also *Anthony* v. *Halstead* (1877), 37 L. T. 433.

It must, however, be either an integral part of the agreement, or else an interdependent collateral undertaking of equal cogency with the original contract. Moreover, it must be given during the course of the dealing which leads up to the bargain, and not subsequently, as in such case it would be without consideration.

Warranties must synchronise with contract.

The rule being that although an affirmation made at the time of sale as an inducement to the purchaser, or a statement made at the time when a contract is entered into as an inducement for the other party thereto to clinch the bargain, amounts to a warranty provided it appear on evidence to have been so intended, a subsequent affirmation will not relate back to an antecedent agreement. And in determining whether or no a collateral affirmation was intended to be a warranty, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely to state an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment.

Mode of testing whether or no a statement is a warranty.

In the former case it is a warranty, in the latter not.

And the above rule as to a warranty applies not only to the sale of a chattel, but also to a sale of real property, or to the granting and taking of a lease, provided the affirmative warranty be collateral (*i*).

Limitations on warranties.

A man *cannot* undertake as to something future, unless it is necessarily the consequences of something present and continuing in the nature of the article, as that good sound seed will grow, or that good copper sheathing will last as long as such sheathing usually does, or that a lock shall be such as to resist an ordinary picklock, or that an iron safe shall be reasonably strong, secure, and able to resist ordinary and likely assaults under ordinary and likely conditions, and so forth.

But even in such cases it would be probably found that these warranties, however express and unlimited in time they may be, really resolve themselves into warranties of the present and proper construction of the article with a natural and reasonable inference deducible therefrom as to the future, just as some dealers will warrant a horse for a twelvemonth, though such warranty naturally means no more than that it is sound now, and consequently is likely, with ordinary work and ordinary care, to be able to work for a year, and, further, that the dealer for that limited period is willing to take the risk and liability of his continuing sound during the succeeding twelve months, but not that he shall never succumb to any amount of work or any illness.

(*i*) *May* v. *Simpson* (1908), XLII S. C. R. 230.

Again, on the sale of a ship there may well be a warranty that she is properly constructed of plates of a specified thickness, or, if she be timber-built, that she is copper-fastened or copper-sheathed, and that imports no more, in either case, than that that which is alleged is so, and not that the seller will be responsible for faults or defects which a steel vessel, or copper-sheathed ship, may have (*k*).

So there may be a warranty that a safe for the custody of valuables is of steel and patented, &c. (*l*).

Again, there is a warranty ordinarily, though not necessarily, implied that any manufactured article is reasonably fit for use, and if an article peculiarly adapted for a specific purpose, as, for example, an iron safe, is ordered for the object for which it is particularly adapted, that is for the safe custody of valuables, or a chain for the haulage of goods, and either article should be found by reason of some defect unfit for present use in that capacity, then there is a breach of an implied warranty of fitness sounding in damages against the warrantor (*m*); and the same principle is of general application (*n*), it being clear law that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods shall be merchantable (o), nor is there any exception or limitation to this rule in cases where the goods are rendered unmerchantable by reason of latent undiscoverable defects (*p*).

Chitty, 431.

Moreover, the constructor of a chattel is held by implication to warrant that it is reasonably fit for the purpose for which it is constructed, even though the written contract by the maker is silent as to warranty (*q*); and *à fortiori* this is the case where a custom is observed in a particular trade to specify defects in writing at the time of sale, as in such case the omission so to do raises an implied warranty that the goods are exempt from flaw, and consequently in such circumstances if, in fact, the goods are imperfect, an action lies for the deceit (*r*).

(*k*) *Shepherd* v. *Kain* (1821), 5 B. & Ald. 240; *Cowdy* v. *Thamas* (1877), 38 L. T. 22; *sed contra*, *Taylor* v. *Bullen* (1850), 5 Ex. 779.

(*l*) See *Walker* v. *Milner* (1865), 4 F. & F. 745.

(*m*) *Brown* v. *Edgington* (1841), 2 Man. & G. 279.

(*n*) *Wallis* v. *Russell*, [1902] 2 Ir. R. 585.

(*o*) *Laing* v. *Fidgeon* (1815), 6 Taunt. 108.

(*p*) *Randall* v. *Newson* (1877), 2 Q. B. D. 102, C. A.

(*q*) *Gillespie* v. *Cheney*, [1896] 2 Q. B. 59; *Shepherd* v. *Pybus* (1842), 3 Man. & G. 868; *Raphael* v. *Burt* (1884), 1 Cab. & E. 325.

(*r*) *Jones* v. *Bowden* (1813), 4 Taunt. 847; see also *Curtis* v. *Peek* (1864), 13 W. R. 230.

In order, however, for a chattel to come within the above stated rule, there must be either an express or implied warranty that the article is fit, and though the sale of any raw material for a particular purpose may raise an implied warranty of fitness, the rule is inapplicable to the sale of a specific or known article as, for example, a patented apparatus, which, in order to support an action in case of defect, requires an express warranty that it is fit for the purpose, without which the mere description of it will not suffice to raise the warranty. Or, in other words, where a known, described and defined article is ordered of a manufacturer, although it is stated to be required for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer (*s*). The sale of an article of a particular description, even if made by sample, does not necessarily and in all cases import a warranty, if all the circumstances show that the statement of the vendor was understood as a mere expression of opinion or belief (*t*). Warranties in relation to specific articles.

And a like rule applies to a piece of mechanism of a known designation and description, or, indeed, to any chattel, if the very article asked for be in fact supplied (*u*).

The cases apparently proceed upon the principle that a description or representation of an article is to be restricted to its present nature, condition, or quality, and does not extend to nor comprise its future capacity under uncertain and indefinite conditions.

The chief actual distinction in law between a representation and a warranty apparently is that a mere representation is not a constituent part of the contract (being in many cases no more than a mere puffing appreciation by a seller of the value of the article which he has for sale) (*x*), whilst a warranty is a representation forming either so integral a part of the contract as to be inseparable therefrom; or else is something which, if not actually part of the contract, would render the seller liable to an action for deceit if it were wilfully false. Or, in other words, a representation in order to amount to a warranty must be something inseparable from the contract which might be wilfully false and would be reasonably understood to be a matter of absolute undertaking.

Again, though, perhaps, not impossible, it is almost inconceivable, that a warranty could be held to be either perpetual or as Warranties limited in duration.

(*s*) *Ollivant* v. *Bayley* (1843), 5 Q. B. 288.

(*t*) *Carter* v. *Crick* (1859), 4 H. & N. 412.

(*u*) *Chalmers* v. *Harding* (1888), 17 L. T. 571; *Pridgeon* v. *McMurray* (1860), 2 F. & F. 225; compare *Sawyer and Massey Co.* v. *Ritchie* (1910), XLIII. S. C. R. 614.

(*x*) *Stuckey* v. *Baily* (1862), 1 H. & C. 405.

extending over a long succession of years, as owing to the infinite mutations of temporal things it would be most difficult to prove the breach. For example, how could a statement that an article would last a hundred years or that it would resist all future and indefinite violence be shown to be wilfully false or be rationally understood as an absolute undertaking? The very attempt to twist such a statement into a permanent guarantee would constitute a flagitious attempt to transform the warranty into an absolute insurance against loss. For example, could there be a warranty that a ship shall resist all tempests? There may indeed be a warranty that a vessel is reasonably seaworthy and an express warranty that she is of a certain class or build; but a warranty of absolute safety would be to turn warranty into insurance without the reasonable safeguards imposed thereon by recent legislation.

No doubt, so far as anything is a matter of absolute certainty, that thing may be the subject of warranty, as, for example, it would be possible to guarantee that an iron girder shall resist a certain pressure or bear a certain weight, for that is a matter of mechanical science and absolute certainty. But, on the other hand, such a guarantee would be only a warranty that the iron girder, *now* or within the period which limits the reasonable existence of such a girder if subjected to ordinary wear or tear, would bear such a weight; not that under all circumstances, or as against unforeseen contingencies, or after exposure for years to weather, vibration or rust it would still continue firm and unyielding. And *à fortiori* there would be a manifest absurdity in warranting that so long as it remained *in situ* it would successfully resist all future effects of chemical action, atmospheric exposure or molecular change of structure.

# CHAPTER XVI.

## CONTRACTS OF AGENCY.

### *Principal and Agent.*

Chitty, 262—298.


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"Agent" and "principal" defined.

An agent is one appointed to do anything in the place of another (*a*), who has authority given him to act in the place and stead of him by whom he is delegated . . . in contracts and agreements (*b*).

Or, in other words, "an agent" is a person employed to do any act for another or to represent another in dealings with third

(*a*) Com. Dig. *tit.* Attorney A. (*b*) Bacon's Abr. *tit.* Attorney.

persons. The person for whom such act is done or who is so represented is called the principal (*c*).

**Who may employ an agent.**

Any person who has attained the age of twenty-one years and who is of sound mind is competent to employ an agent to transact his affairs for him, nor is any consideration necessary in order to create a contract of agency.

**Who may be an agent.**

Moreover, as between the principal and third parties, any person, whether an infant, a married woman, an alien, or an outlaw (*d*), may become an agent, and within the scope of his or her authority may bind the principal duly to perform the engagements which are entered into on his behalf.

But although any person may be constituted the agent of an adult principal, no agent, unless he has in fact attained the age of twenty-one years and is of sound mind, can become personally responsible to his principal in respect of any contract which he may enter into on his principal's behalf.

**Agent's authority either express or implied.**

The authority of an agent may be conferred upon him verbally or in writing, in either of which cases the authority is said to be express, or it may arise by implication in cases where the existence of authority is necessarily to be inferred from the circumstances of the case; the existence of an agency with all its duties and responsibilities being quite compatible with the absence of express words of appointment and acceptance.

But the fact that a man employs another to do a specific act for him at a particular time raises no presumption whatever that the person so employed has authority to do a similar act at a different time (*e*).

**Existence of agency question for Court.**

And when the actual existence of an agency is in question, whether or no tendered evidence is admissible, and whether or no such evidence affords some scintilla of proof of the existence of an agency, is a matter for the judge, although the actual question of agency, being a question of fact, is for the jury (*f*). Where, however, a person acts notoriously as the officer or agent of either a corporation or an individual, and is recognised by it or him as such officer or agent, a regular appointment will be presumed, and his acts will bind his principal although no written proof is or can be adduced of his appointment (*g*).

**Agent a trustee.**

Chitty, 264.

Moreover, when once the existence of a contract of agency is established, the agent, as trustee for his principal, is bound to

(*c*) Indian Contract Act, s. 182.
(*d*) Bacon's Abr. *tit.* Attorney.
(*e*) *Smith* v. *Roe* (1865), 1 C. L. T. 154; see also *Greenwood* v. *Commercial Bank of Canada* (1867), 14 Gr. 40.
(*f*) *De Blaquiere* v. *Becker* (1859), 8 U. C. C. P. 167.
(*g*) *School Trustees of Hamilton* v. *Neil* (1881), 28 Gr. 498.

account to him for all profits either directly or indirectly arising out of the transaction, the contract being one in which *uberrima fides* is desiderated.

Further, it is a settled rule of law that a trustee or agent may neither purchase from nor sell to his principal without disclosing the fact (*h*).

Moreover, in order to avoid the mischief resulting from illicit dealing or the reception of a secret commission, it is not enough for an agent to tell his principal that he has or is going to have an interest in the purchase. He must tell him all the material facts, and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the latter, or that in order to cloak the transaction the agent has made use of another person's name as a purchaser, instead of his own, however fair the transaction may be in other respects, from that moment it has no validity in the Court (*i*). **Secret commission.**

Again, if an agent employed by a principal to purchase property for him sells the principal property of his own, which he acquired before the agency existed, concealing from the principal the fact that it is his own property, the buyer has a right on discovering the real circumstances to rescind the contract (*k*). **Agent trafficking with his principal.**

Or, conversely, if an agent, appointed by parol, is instructed by his principal to attend an auction sale on his behalf for the purpose of buying certain specified property for him, and in breach of his contract of agency buys the property for himself, the law will regard him as a trustee for his principal and will compel him to transfer the property to his employer at the actual price he paid for it (*l*). Nor is a plea of non-compliance with the Statute of Frauds any defence to such an action (*m*).

Again, if an agent entrusted with the sale of property by his principal conceals a material fact, and thereby induces him to accept a lesser sum for it than he otherwise would have done, he thereby renders himself liable to his principal in an action for deceit, the measure of damages in such case being the actual loss sustained by the vendor owing to the wrongful act of his agent (*n*). **Deceit of agent. Chitty, 274—276.**

And generally, it is a well-settled principle of law, applicable to cases where the fiduciary agent of a vendor of land takes a con-

(*h*) *Harrison* v. *Harrison* (1868), 14 Gr. 588; *Wright* v. *Rankin* (1871), 18 Gr. 825; *Arthurton* v. *Dally* (1850), 2 Gr. 1.

(*i*) *Newstead* v. *Rowe* (1910), 14 W. L. R. 509; *Pommerenke* v. *Bate* (1910), 13 W. L. R. 248.

(*k*) *Burland* v. *Earle*, [1902] A. C. 83, P. C.

(*l*) *Ross* v. *Scott* (1875), 22 Gr. 29; see also *Barton* v. *McMillan* (1891), XX. S. C. R. 404.

(*m*) *Ross* v. *Scott*, *supra*.

(*n*) *Ring* v. *Potts* (1903), 36 N. B. Rep. 42.

veyance of the property to himself, that in order for the transaction to be supported in such circumstances there must be clear evidence of entire good faith on the part of the agent. And *à fortiori* this is the rule where a purchaser is the solicitor of the vendor; in such case it being incumbent on the buyer not only to satisfy the Court that he has done as much for his client as he would have done if the purchaser had been a third party, but also that his client either thoroughly understood the matter or else had independent advice (*o*).

**When knowledge of agent is and is not knowledge of principal. Chitty, 273—276.**

And where an agent is guilty of fraud upon his principal, the ordinary rule as to the principal's constructive or implied notice of the act of the agent does not apply; it being a well recognised exception to the general rule that in cases where the agent is party or privy to the commission of a fraud, misfeasance, or irregularity upon or against his principal, his (that is, the agent's) knowledge of the fraud, misfeasance or irregularity, and of the facts and circumstances connected therewith, cannot be imputed to his principal (*p*).

**Collusion of agent.**

Moreover, if an agent carelessly and negligently, or falsely and fraudulently, and in collusion with third parties, forwards to his principal a misstatement of facts, and his principal by acting thereon incurs loss and is put to legal costs and expenses, the agent is responsible to his principal for the loss and costs and expenses so incurred, although the third party who was in collusion with the agent derives no benefit from the false and fraudulent misstatement (*q*).

**Agent no property in goods of principal.**

Again, an agent entrusted with chattels belonging to his principal is not the owner thereof, but a bare trustee; and consequently, as a trustee or *quasi*-trustee, can never assert a title of his own to the goods. Such a person may destroy the property and render himself liable in consequence. If it is stock, he may sell that stock and invest the proceeds in other property. If he destroy the trust fund by paying away the money, the trust is at an end; but if he invest it in other property, and that can be traced, he is still a trustee in possession of trust property, and to that he can never assert a right. And consequently, a sheriff may not attach such trust goods under a *fi. fa.* for a personal debt of the trustee (*r*).

**Secret commission or illicit profit. Chitty, 292.**

It is clear that if a servant, or a managing director, or an agent, or any person who is authorised to act and is acting for another

(*o*) *Clergue* v. *Murray* (1902). XXXII. S. C. R. 450.

(*p*) *Commercial Bank of Windsor* v. *Morrison* (1902), XXXII. S. C. R. 98.

(*q*) *Norwich Union Fire Ins. Soc.* v. *McAlister* (1902), 35 N. B. Rep. 691.

(*r*) *MacDonnell* v. *Robertson* (1893), 1 Terr. L. R. 438.

in the matter of any contract receives, as regards the contract, any consideration or any sum of money, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty.

It is a dishonest act, and is sufficient to show that he cannot be trusted to perform the duties which he has undertaken as servant or agent (*s*): the general proposition of law in such cases being that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent alike with his duty towards his master and the continuance of confidence between them. He does the wrongful act and commits the substantive offence whether such profit be given to him in return for services which he actually performed for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground. If it be an illicit profit which arises out of the transaction it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or receive it without bargain unless his master knows of it and acquiesces in its reception (*t*).

Scope of agent's authority. Chitty, 269 - 274.

An agent having an authority from his principal to do an act has authority to do every lawful thing which is necessary in order to do such act.

Where, therefore, an agent has authority to carry on a business he is impliedly vested by his principal with authority to do every lawful thing necessary for the purpose of his employment or which is usually done in the course of conducting such business.

Thus, the managing owner of a vessel is deputed by the co-owners, as their agent, to employ the vessel for their benefit. Therefore, it must follow as a necessary consequence, that he is by them vested with authority to give orders for the necessary repair, fitting and outfit of the vessel. But he has no power to make improvements in the vessel or to effect unusual or structural alterations, the limit of his authority being to do what is reasonably necessary for the purpose of a contemplated employment of the vessel in the ordinary course of trade suitable to the class to which she belongs (*u*).

Again, where one employs a broker to do business for him on a stock exchange, the principal, in the absence of anything to

(*s*) *Hutchinson* v. *Fleming* (1908), XL. S. C. R. 134.

(*t*) *Manitoba and N. West Land Corp.* v. *Davidson* (1903), XXXIV. S. C. R. 255.

(*u*) *Troop* v. *Everett* (1894), Cout. Cas. 131.

show an express agreement to the contrary, must be taken to have employed the broker on the terms of the Stock Exchange.

Consequently, where a principal authorised his broker to deal in shares on his behalf, such authorisation was held by the Privy Council, in the case of *Forget* v. *Baxter* (*x*), to amount to an implied consent by him to the sale of his shares upon his failure to supply the broker with the requisite funds for carrying on the transaction.

And a like rule applies where a partner, mercantile agent or factor in possession of goods, or of the documents of title to goods, makes a sale, pledge, or other disposition of the property to a third party in the ordinary course of business (*y*).

Again, if a woman either actually or impliedly appoints her husband her agent for the carrying on of her separate business she thereby becomes bound by his contracts on her behalf with all persons dealing in good faith with him. And this rule is of universal application in contracts of agency whenever the very act of the agent is authorised by the terms of the appointment. And even if the agent betray his trust, the fact cannot affect third parties acting in good faith and without notice. Nor are persons thus dealing with an agent bound to inquire into facts *aliunde* (*z*).

And applying the same rule to contracts of insurance, it has been decided that a general agent for effecting insurances on behalf of a company has full power to insure, to renew, and to take a note of hand for the premium; and his giving a renewal receipt and subsequently accepting the premium, even though it be coupled with notice of a breach or variation of the terms of the insurance, is as effectual a waiver of the breach as if the premium had been paid in cash at the time when the renewal receipt was issued (*a*).

Moreover, it is an undoubted proposition of law that the responsibility of the principal towards third parties is not confined to cases where the contract has been actually made under his express or implied authority, but extends further and binds the principal in all cases where the agent is acting within the scope of his usual employment or has been held out to the public or to the other party as having competent authority, although in fact he may have in a particular instance exceeded or violated his instructions and acted without authority.

(*x*) [1900] A. C. 467, P. C.

(*y*) *Dingwall* v. *McBean* (1900), XXX. S. C. R. 441.

(*z*) *Quebec Bank* v. *Jacobs* (1902), Q. R. 23, S. C. 167. For application of this rule to marine insurance, see *Providence Washington Ins. Co.* v. *Chapman* (1885), Cass. Dig. 217.

(*a*) *Manufacturers' Accident Ins. Co.* v. *Pudsey* (1897), XXVII. S. C. R. 374; see also *Providence Washington Ins. Co.* v. *Chapman* (1885), Cass. Dig. 217.

And if, owing to a dereliction from duty by the agent, one of two innocent persons must suffer, he ought to suffer who misled the other by holding out the agent as competent to act and as enjoying his confidence.

Yet, nevertheless, even in such cases, the authority of an agent unless under the express authorisation of his principal, evidenced either by power of attorney or in some other unequivocal manner, is limited to the class of acts which it is customary for an agent to perform (*b*).

Liability of principal for fraud of agent. Chitty, 270—273.

Moreover, in amplification of the above general proposition that a person is liable for the acts of his agent, it is undoubted law that a principal is answerable for every fraudulent or wrongful act committed by his servant or agent in the course of his service or employment, and for his principal's benefit, so long as the wrongful act is no more than an illegal method of doing an initially lawful thing: nor is it necessary to prove any express command or privity of the principal in order to make him liable (*c*).

And generally, where a principal benefits by the misfeasance of his agent, he is affected by notice to the agent of any matter cognate to the tainted transaction, unless it appear that the agent was actually implicated in a fraud upon his principal. And it is not sufficient ground for rebutting this assumption that he is affected by constructive notice for him to show that the agent had an interest in deceiving him (*d*).

Limitations on authority of agent. Chitty, 273—276.

But, on the other hand, the authority of a general agent is restricted to the range of matters necessarily comprised within the scope of his employment, and to the acts and representations which a prudent and ordinarily sagacious and experienced person placed in such a position might reasonably be expected to make, having regard to the particular class of business entrusted to him by his principals.

Thus, where, by power of attorney, an agent for mortgagees was authorised to enter into possession of the mortgaged property, and sell the same either by public auction or private contract, it was held that the power did not authorise him to sell on credit (*e*). Nor will the fact that a landlord permits an agent to collect rents, and allows and authorises him to make repairs to the demised

(*b*) *Germain* v. *McCarthy* (1904), XXXV. S. C. R. 14; but see the very important case of *McVity* v. *Tranouth*, [1908] A. C. 60, P. C.

(*c*) *Richards* v. *Bank of Nova Scotia* (1896), XXVI. S. C. R. 281, at p. 355; *Mabarn* v. *Wilson* (1901), XXXI. S. C. R. 481.

(*d*) *Commercial Bank of Windsor* v. *Morrison* (1902), XXXII. S. C. R. 98.

(*e*) *Dodham* v. *Fairway* (1888), XVI. S. C. R. 297.

premises, give him authority to adjust matters of tenure or extend or cancel the lease entered into by the landlord with the tenant (*f*).

Again, no reasonable person would imagine an insurance agent had authority from his principals to take a chattel in satisfaction of the renewal premium, or suffer him to be entitled to set off his personal indebtedness to the assured by giving him a premium receipt for the current year, and were he to do either of these things, or some other thing of a like kind, a reasonable presumption would be raised in the mind of any intelligent person that he was exceeding his authority (*g*), and consequently that his principals were not responsible for his acts; the rule in such and cognate cases being, that where an agent acting outside the apparent scope of his authority makes a representation to advance his own private ends (or, what is the same thing, the private ends of some one other than his principal), it can in no sense be called the representation of the principal. Or, in other words, it is not a representation by him as agent. And in such case the belief of the person acting upon the representation is immaterial as against such obvious want of authority (*h*). Nor will the fact that the person by acting upon the representation has altered his position, estop the principal from repudiating the action of his agent. Nor is this rule confined to cases in which the representation is made exclusively in the interests of the agent. Thus, it is not within the competence of a local agent, or other subordinate official of an insurance company or trading corporation, to waive (on behalf of the company) compliance with a condition precedent embodied in the policy issued to the assured.

Where, therefore, "an adjuster," employed by an insurance company to investigate a claim, waived a condition requiring certain matters to be done by the assured within a limited period such waiver was held not to estop the insurance company from disputing the claim on the ground of non-performance of the condition precedent to bringing an action on the policy (*i*).

Upon similar grounds it has been decided that an agent or shipmaster signing, on the owner's behalf, a bill of lading for goods which have either never been delivered to his principal, or else have never been shipped, is not the agent of the owner in that

(*f*) *Rex* v. *Forbes, Bramhall, Ex parte* (1903), 36 N. B. Rep. 333.

(*g*) *Manufacturers' Accident Ins. Co.* v. *Pudsey* (1897), XXVII. S. C. R. 374.

(*h*) *Richards* v. *Bank of Nova Scotia* (1896), XXVI. S. C. R. 381, n., p. 386.

(*i*) *Atlas Assce. Co.* v. *Brownell* (1899), XXIX. S. C. R. 537; *Commercial Union Assce. Co.* v. *Margeson* (1899), XXIX. S. C. R. 601; *Torrop* v. *Imperial Fire Ins. Co.* (1896), XXVI. S. C. R. 585; but see *contra Providence Washington Ins. Co.* v. *Chapman* (1885), Cass. Dig. 217.

behalf so as to make his principal responsible to one who has made advances upon the faith of the bills of lading so signed (*k*).

In further exemplification of the doctrine that an agent has no authority to vary the terms or extend the scope of the mandate given him by his principal may be cited the case of *Wilson* v. *Canadian Development Company* (*l*), in which it was held that the shipping agent of a consignor has no authority to assent to a variation of the terms of a special contract of affreightment made by the carrier with his principal. And for similar reasons an agent, who is merely authorised by an owner of property to find a purchaser and negotiate a transfer, has no authority to make a binding contract of sale on behalf of the vendor (*m*).

Moreover, if a principal authorise an agent to sell property on his behalf for a specified sum as a minimum price, the agent has no authority to sell for a lesser amount, and should he do so, the contract entered into by him on behalf of his principal is abortive, and specific performance thereof will be refused (*n*).

But where the authority given to the agent by his principal amounts to an express authorisation to sell real estate, such authority need not be in writing in order to entitle the agent to sign a contract of sale, which will be binding under the Statute of Frauds: though it has been held—perhaps with doubtful accuracy—that the authority of an agent to take shares for another in a land company should be in writing in order to charge the principal (*o*).

Agent mixing goods of several principals.

Again, in further illustration of certain limitations imposed by judicial decisions upon the authority of an agent to bind his principal, it has been held that the agent of two independent and unconnected principals has no authority to bind them, either jointly or severally, by the sale of the goods of both in one lot, when the chattels included in such sale, although different in kind, are sold for a single lump price not susceptible of ratable proportionment, save by the mere arbitrary will of the agent. Nor can there be ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly, by conduct and with full knowledge of all the terms of the agreement made by

(*k*) *Erb* v. *G. W. Rly. of Canada* (1881), V. S. C. R. 179.

(*l*) (1903), XXXIII. S. C. R. 432; see also *Gilmour* v. *Simon* (1906), XXXVII. S. C. R. 422.

(*m*) *Gilmour* v. *Simon* (1905), 15 Man. L. R. 205; *Osborne* v. *Farmers' Building Society* (1855), 5 Gr. 326.

(*n*) *Clergue* v. *Murray* (1902), XXXII. S. C. R. 450; see *Clergue* v. *Murray*, *Clergue, ex parte*, [1903] A. C. 521, P. C., in which the appeal to the Privy Council was dismissed on a technical ground.

(*o*) *Ingersoll Gravel Road Co.* v. *McCarthy* (1858), 16 U. C. Q. B. 162.

the agent, assented to the conditions, and agreed to be bound by the contract undertaken on their behalf (*p*).

Commixture by trustee.

But *e converso*, a person placed in a fiduciary relation with another may mix dealings of his own with those which he makes on behalf of his *cestui que trust*. Although, when once such a fiduciary relationship has been created, if the fund is misapplied, and it cannot be shown which portion of the proceeds of the fund is really subject to the trust, the trust is considered as attaching to the whole of the proceeds, and it does not lie in the mouth of the trustee to say that any portion of the proceeds is not affected with the trust (*q*).

And a like rule, as to commixture, applies to chattels; where, therefore, an agent is entrusted by his principal with money to buy goods, if the goods, when purchased, are mixed with those of the agent, the principal has an equitable title to a quantity taken from the aggregate mass equivalent to the amount advanced by him for use in the purchase (*r*).

Immoral *quasi-contracts.*

Again, although a fraudulent or illegal contract of agency is absolutely void, there are certain contracts of imperfect obligations, which, though voidable by reason of their subsequent degeneration into immorality, are nevertheless, whilst still inchoate, capable of imposing alike upon principal and agent certain well recognised liabilities and obligations.

Thus, in a transaction which amounts to a gamble, whether it be on horses or in Stock Exchange differences or margins or in wheat or any other commodity, the person, whether stakeholder or agent, with whom the stakes (in connection with such an illegal wager) have been deposited is liable to an action at the suit of either of the parties, if, before the event is ascertained, such party repudiate the wager and demand back his share of the deposit.

And a like rule applies to transactions between the principals themselves, either of whom may demand back from the other any securities which he may have deposited as cover against losses, provided he make the demand before the expiry of the time limit stipulated for in the agreement as the period at which the account shall be closed, or before the margin has run off and the account is in debit, but not afterwards or otherwise.

This rule, apparently, is based upon the ground that until the stipulated time has elapsed, or the margin has run off, there is *locus pœnitentiæ*, of which either party may avail himself to avoid a

(*p*) *Cameron* v. *Tate* (1888), XV. S. C. R. 622.

(*q*) *Carter* v. *Long* (1896), XXVI. S. C. R. 430.

(*r*) *S. C.*

contract, which certainly at its consummation (if not at its inception) is illegal, and therefore unenforceable, as, in accordance with well-known principles of law, no Court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking its aid is implicated in the illegality. And in such case it matters not whether the def[illegible] has pleaded the illegality or whether he has not; if the evidence adduced by the plaintiff proves the illegality the Court [illegible] to assist him.

For although the objection that a contract is immo[illegible] sounds at all times very ill in the mouth of a defendant, [illegible] nevertheless always allowed, as being founded on genera[illegible] policy, which the defendant has the advantage of [illegible] justice as between him and the plaintiff, because *ex [illegible] non oritur actio*, and consequently no Court will lend its aid to a man who founds his action upon an immoral or illegal act (*s*).

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency a sub-agent must, be employed (*t*). And the maxim *delegatus non potest delegare* is of general application throughout the British Empire.

When agent may not delegate. Chitty, 278.

Therefore, a person to whom a power, trust, or authority is given to act on behalf of or for the benefit of another cannot delegate it, that is, he cannot put another person in his place, unless he be specially authorised so to do; nor without such authority is his principal bound by a contract effected through the medium of the sub-agent with a third party (*u*).

Moreover, as a general rule, the clerks of agents are not agents for the principal unless the principal has specifically consented to their acting as such (*x*). And as a further exemplification of this principle, it has been decided that local bank agents have no authority to grant powers of attorney to third parties to receive money ordered to be paid to the bank by a decree of the Court (*y*).

Moreover, if under an award or judgment money is to be paid to a plaintiff or his attorney, the latter has no implied authority to

(*s*) *Pearson* v. *Carpenter* (1904), XXXV. S. C. R. 380.

(*t*) For a case in which delegation was permitted, see *Owens* v. *Davidson* (1869), 10 C. P. R. 302.

(*u*) *Canadian Fire Ins. Co.* v. *Robinson* (1901), XXXI. S. C. R. 488; *Summers* v. *Commercial Union Ass. Co.* (1881), VI. S. C. R. 19.

(*x*) *Hope* v. *Dixon* (1875), 22 Gr. 439.

(*y*) *Bank of British North America* v. *Rattenbury* (1877), 1 Ch. 65.

substitute other attorneys under him to act as attorneys for the plaintiff (*z*).

And *à fortiori* the rule applies when the person holding himself out to the public as a sub-agent was never authorised thereto by either the principal or the agent (*a*). And in this latter case, in order to bind the parties, in whose names and on whose behalf an unauthorised person has assumed to enter into a contract by subsequent recognition and adoption, it must be shown that either expressly, or, perhaps, impliedly by conduct, the parties whom it is sought to bind have, with full knowledge of all the terms of the agreement come to by the person who assumed to bind them, actually assented to the terms and agreed to abide by and be bound by the contract entered into on their behalf (*b*).

Representation by properly appointed sub-agent binding on principal.

Where, however, a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is as much bound by and responsible for his acts, as if he were an agent originally appointed by the principal. Moreover, in such case the agent is responsible to the principal for the acts of the sub-agent, although as between agent and sub-agent the latter is responsible only to the former and not immediately to the principal, except in case of fraud or wilful wrong.

Thus where a sub-agent took an illicit commission in a transaction which he was concluding on behalf of the superior agent and his principal, it was held, in spite of the interposition of another entity, that he stood in a fiduciary relation to the principal, and was therefore accountable to him for the commission which he had received (*c*).

### *Ratification.*

Chitty, 278—280.

Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or disown such acts.

But until such ratification where an agreement is entered into by an agent (whether on behalf of an individual or a corporation) in excess of his authority, it is in effect merely an unilateral contract: the other party is bound, while the principal may adopt or repudiate the contract as he may think fit. If, however, he elect to repudiate, he should make known his election promptly, so that

(*z*) *Maxcox* v. *Chambers* (1846), 4 U. C. R. 171.

(*a*) *Canadian Fire Ins. Co.* v. *Robinson* (1901), XXXI. S. C. R. 488.

(*b*) *Cameron* v. *Tate* (1888), XV. S. C. R. 622, at p. 633.

(*c*) *Powell and Thomas* v. *Evan Jones & Co.*, [1905] 1 K. B. 11, C. A. (an English case).

the person with whom his agent has dealt may remain as short time as possible subject to an unequal bargain, and if he neglect to do so within a reasonable time his *laches* may amount to acquiescence and subsequently estop him from repudiating the bargain (*d*).

If he ratify the act, the same effect will follow as if it had been performed by his antecedent authority. Where, therefore, an act is done for another by a person not assuming to act for himself but for such other person (though without any precedent authority whatever), the transaction nevertheless becomes the act of the principal if subsequently ratified by him, provided the ratification takes place at a time and under circumstances in which the ratifying party might himself have lawfully done the act which he thus subsequently ratifies (*e*).

Nor will it make any difference in the application of the general principle if the party professing to act as the agent for another commit thereby an indictable offence.

Thus, if a payment of money is obtained from a debtor by one who falsely and fraudulently represents to him that he is the agent of his creditor, although the supposititious agent thereby commits a fraud upon the debtor, nevertheless if the creditor afterward ratify and confirm the payment so made he thereby adopts the agency of the party who has received the money and it becomes equivalent to a payment made by the debtor to a person having proper authority to receive it (*f*).

But payment to a third party receiving the same as for himself will not operate so as to avoid the Statute of Limitations running against a principal creditor, even though such creditor may subsequently endeavour to adopt and ratify the act of the person who received the payment (*g*).

Again, the right of a person to do an act with regard to the property of another depends upon the actual authority or right which he really has to do the act and not upon that which he untruly arrogates to himself.

Where, therefore, a person having authority to distrain for rent due to another says at the time of the distress that he distrains for rent on his own behalf, he may, nevertheless, justify as bailiff or agent for the other. And *à fortiori* this is the case if his principal subsequently ratify his action (*h*).

(*d*) *Conant* v. *Miall* (1870), 17 Gr. 574.

(*e*) *Taylor* v. *Ainslie* (1868), 19 U. C. C. P. 78.

(*f*) *Scott* v. *Bank of New Brunswick* (1894), XXIII. S. C. R. 277, n. p. 282.

(*g*) *Moore* v. *Roper* (1905), XXXV. S. C. R. 533.

(*h*) *Grant* v. *McMillan* (1863), 10 C. P. 536.

**When doctrine of ratification is inapplicable.**

The doctrine of ratification is not, however, applicable to cases where a party after primarily contracting with another as principal subsequently seeks to turn the transaction into a contract of agency; it being undoubted law that a contract made by a person on behalf of a third party cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal

**Parties to contracts alone able to sue thereon.**

Or, in other words, as a general rule of law, only persons who are parties to a contract, acting either by themselves or by an authorised agent, can sue or be sued on the contract. A stranger cannot enforce the contract nor can it be enforced against a stranger; the underlying principle in such and cognate cases being that civil obligations are not to be created by or founded upon undisclosed intention: "car comen erudition est q̈ l'entent d'un home ne serr trie, car le Diable p'ad conusance de l'entent de home" (*i*).

But where it is once established that the person who contracted was in fact the agent of a principal, whether that principal was disclosed or undisclosed, then the doctrine of ratification as established alike in English and Canadian law applies, and will enable the principal to adopt the transaction and sue on the bargain made on his behalf by his agent.

For it is undoubted law that an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him. And in such case the principal is bound by the act, whether it be to his detriment, or for his advantage, and whether it be founded on a tort or a contract.

And so by a wholesome and convenient fiction a person ratifying the act of another who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. The same rule as to the non-admissibility of ratification by third parties of contracts made on their behalf by a stranger appears in American law, the doctrine being thus laid down by Story (*k*):—

"One other consideration is important to be borne in mind: it is that a ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent

(*i*) Year Book, 17 Edw. IV. 2, pl. 2 (Brian, C. J.).

(*k*) Agency, 9th ed., s. 251 a.

himself, or of some third person. This would seem to be an obvious deduction from the very nature of a ratification which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it purported to have been done, and as his own act" (*l*).

### *Termination of Agency.*

Revocation of authority. Chitty, 264—269.

An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the destruction of the subject-matter of the agency, or by the business of the agency being completed, or by either the principal or agent dying (*m*), or becoming of unsound mind, or by the bankruptcy of the principal. But the bankruptcy of the principal does not affect the personal right of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal before his bankruptcy, but received afterwards (*n*). And, generally, an act done by an agent within the scope of his authority, and before any notification of its revocation, by death or otherwise, is valid, although it may, in fact, be entirely revoked at the time (*o*).

The general law relating to revocation is thus concisely expressed by Story (*p*): "As to the agent himself . . . revocation takes effect from the time when it is made known to him; and as to third persons, when it is made known to them, and not before. Until, therefore, the revocation is made known, it is inoperative. If known to the agent, as against his principal, his rights are gone; but as to third persons, who are ignorant of the revocation, his acts bind both himself and his principal. Hence it is, that if a clerk or agent is employed to sign, indorse or accept bills or notes for his principal, and he is discharged by the principal, if the discharge is not known by persons dealing with him, notes and bills subsequently signed, indorsed or accepted by him will be binding on the principal (*q*). Indeed, this is but another application of the known maxim of law and equity, that where one of two innocent persons must suffer, he shall suffer, who, by his confidence or silence or conduct, has misled the other."

(*l*) And see *Moore* v. *Roper* (1905), XXIV. S. C. R. 533.

(*m*) *Jacques* v. *Worthington* (1859), 5 Gr. 192.

(*n*) *Alley* v. *Hotson* (1815), 4 Camp. N. P. 325 (an English case); and see Kent's Comm., vol. 2, sect. 645.

(*o*) *Kerr* v. *Lefferty* (1859), 7 Gr. 412; see also *Lamothe* v. *St. Louis Marine Railway and Dock Co.* (1852), 17 Mis. 204.

(*p*) Story on Agency, sect. 470.

(*q*) *Goode* v. *Harrison* (1821), 5 B. & Ald., Parke *argu*, at p. 155; *Salte* v. *Field* (1793), 5 Term Rep. 211, at p. 215 (English authorities for these propositions).

**Powers of attorney.**

As regards powers of attorney within the province of Ontario, it is enacted by the Powers of Attorney Act, 1910 (*r*), which repeals Ch. 116, R. S. O. 197, that-

As to a power of attorney provided expressly to be exercised after death of constituent.

(1) Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators, of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual, and subject to such conditions and restrictions, if any, as may be therein contained.

Where things done after the decease, &c. of constituents to be valid.

(2) Independently of such special provision in a power of attorney, every payment made, and every act done under and in pursuance of a power of attorney, or a power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of the person who gave such power, or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act, be valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bonâ fide* done as aforesaid, and as respects all claiming under such last-mentioned person.

### *Agent's Duty to Principal.*

Agent's duty in conducting principal's business.

Chitty, 262—264.

An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. And if he vary the terms without authority, the principal is not bound by the action of the agent, nor will specific performance be decreed against him (*s*). When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.

As already stated (p. 126), the position of an agent is a fiduciary one; where, therefore, sums of money are entrusted to an agent to buy goods and carry on business, he becomes a trustee for the person to whom the money belongs, and the proceeds of the money are affected by the trust (*t*); upon the ground that where

(*r*) 10 Edw. VII. c. 47.

(*s*) *Gilmour* v. *Simon* (1900), XXXVII. S. C. R. 422.

(*t*) *Carter* v. *Long* (1896), XXVI. S. C. R. 430.

a confidence is created between two persons, and the one receives the money on the faith that he will do a certain thing, and leads the other, who has given the money, to understand that the thing has been done, as between these two persons it is considered in equity to have been done. And in such cases the person receiving the money is bound to hold what he gets therewith for the person who has provided the funds.

Moreover, if goods are bought by an agent in his own name on behalf of his principal, and paid for by him with the latter's money, they are the property of the principal and not of the agent, and consequently do not pass on the agent's insolvency to his trustee in bankruptcy (*w*). Nor will the mere fact of a person employed to sell goods being allowed by way of remuneration all the profit obtained by him over and above an agreed price prevent the relationship between the parties being that of principal and agent.

When an agent does not conform to the instructions he has received, if any loss be sustained, he must make it good to his principal, and if any profit accrue he must account for it.

For the law does not allow a man to place himself in a position where his interest may be brought into contact with his duty. Where, therefore, an agent acquires a benefit for himself, which should justly belong to his principal as arising out of the subject-matter of the agency, equity regards him as a trustee for his principal in respect of such benefit (*x*).

Reception of secret commission evidence of fraud.

Moreover, if a servant or a managing director, or an agent, or any person who is authorised to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is thereby committing a breach of duty. It is a dishonest act, and, without more, is sufficient to show that he cannot be trusted to perform the obligations which he has undertaken as servant or agent (*y*).

Negligence.

An agent is liable to his principal for any loss which may arise immediately out of the negligence or want of precaution of the agent in the conduct of the affairs of his principal.

Thus, an agent who undertakes to collect rents for another is, during the continuance of the agency, liable to his principal for all rents actually lost by reason of his wilful default and neglect in collection (*z*).

(*w*) *Lemelin, In re* (1902), Q. R. 22 S. C. 87.

(*x*) *Thompson* v. *Holman* (1880), 28 Gr. 35; *Williams* v. *Jenkins* (1871), 18 Gr. 536; *Upper Canada College* v. *Jackson* (1852), 3 Gr. 171.

(*y*) *Hutchinson* v. *Fleming* (1908), XL. S. C. R. 134.

(*z*) *Braithwaite* v. *Shanly* (1859), 7 Gr. 569.

And a like rule applies to a paid agent, whose duty it is to receive moneys from other agents on account of his principal, such a person being bound not only to take all reasonable steps for the collection of the moneys due to his employer from the subordinate agents, but also to defend any action improperly instituted against his principal.

And should an agent, in such circumstances, allow judgment to go by default, and subsequently pay over to the plaintiff the sum in dispute, he is disentitled to deduct the amount so paid from the account of his payments and receipts on behalf of his principals (*a*).

Moreover, an agent who induces his principal to advance money on an inadequate security is guilty of negligence sounding in damages should he omit to take reasonable and proper precautions to ascertain the actual value of the security before recommending it to his principal. The measure of damages in such case is not, however, the amount advanced with interest, but merely the difference between that sum and the actual value of the security (*b*). And a like rule as to negligence sounding in damages applies to an agent who (without the authority of his principal) invests money for such principal on the security of a second mortgage (*c*), or who, being employed by his principal to purchase real estate, purchases lands subject to mortgage (*d*).

Illegal agency. Chitty, 614.

But this rule does not apply in the case of an initially illegal contract of agency. Consequently, an agreement between a principal and agent that the latter, on the former's behalf, should gamble in margins, or buy shares at a fictitious premium to rig the market, being *ab initio* illegal, should the principal supply the agent with funds for such a purpose, he cannot afterwards legally recover them back, nor is the agent liable for negligence, the maxim *ex turpi causâ non oritur actio* applying in such and cognate cases; it being a proposition based alike upon good sense and good law that no Court should enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and the person invoking the aid of the Court is himself implicated in the illegality.

And in such cases it is immaterial whether or no the defendant has pleaded the illegality. Nor does it justify the plaintiff for

(*a*) *Jay* v. *Macdonell* (1870), 17 Gr. 436.

(*b*) *Lowenbury, Harris & Co.* v. *Wolley* (1895), XXV. S. C. R. 51.

(*c*) *Holmes* v. *Thompson* (1876), 38 U. C. Q. B. 292; *Carter* v. *Hatch* (1880), 31 C. P. 293.

(*d*) *Butterworth* v. *Shannon* (1885), 11 O. A. R. 86.

him to say that what has been done is very commonly done. Picking pockets, thimble-rig, and various forms of cheating are common enough, yet their frequency does not render them less illegal or less amenable to punishment (*e*).

### *Remuneration of Agent.*

Chitty, 297, 298, 611—614.

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

But in order to earn his commission upon a sale of chattels or realty, an agent must be the direct cause of the sale and be authorised to act by the principal (*f*). It is not sufficient that he should mention the property to a person who afterwards brings it to the notice of the ultimate purchaser. The agent must himself bring the purchaser and the vendor together, and he does not earn his commission if the introduction is made through the medium of another person, who is neither his agent nor the agent of the purchaser (*g*).

But mere ignorance on the part of the vendor that an agent was in fact the connecting link between himself and the actual purchaser does not avoid the right of the agent to remuneration (*h*); though in order to entitle an agent to his commission he must obtain for the vendor a customer who is alike ready, willing, and able to purchase the property for sale upon the terms propounded by the vendor (*i*).

Again, in order to found a legal claim for commission on a sale, there must not only be a causal, but also a contractual relation, between the introduction of the purchaser and the ultimate transaction of sale. But given this necessary conjunction of circumstances, the mere fact that the vendor behind the back of the agent sold the property on terms which the latter had advised the vendor not to accept will not debar the agent from recovering his commission (*k*).

(*e*) *Pearson* v. *Carpenter* (1904), XXV. S. C. R. 380.

(*f*) *Hafftner* v. *Northern Trusts Co.* (1910), 14 W. L. R. 403; *Smith* v. *Crump* (No. 1) (1910), 14 W. L. R. 295.

(*g*) *Fuchan* v. *Stratton* (1909), 10 W. L. R. 157; *S. C.* (1910), 14 W. L. R. 3; see also *Willis* v. *Colville* (1909), 14 O. W. R. 1019; *Donovan* v. *Hyde* (1908), Q. R. 18 K. B. 310; *Blackstock* v. *Bell* (1910), 14 W. L. R. 519.

(*h*) *Hughes* v. *Houghton Land Co.* (1909), 9 W. L. R. 646.

(*i*) *Coward* v. *Lloyd* (1909), 11 W. L. R. 338; *McCuish* v. *Cook* (1909), 10 W. L. R. 319; *Millar and Ross* v. *Vappers* (1910), 14 W. L. R. 335; *Hammer* v. *Bullock* (1910), 14 W. L. R. 652; see also *Burchell* v. *Gowrie*, 7 E. L. R. 351.

(*k*) *Burchell* v. *Gowrie and Blockhouse Collieries, Ltd.*, [1910] A. C. 614, P. C.

It may moreover, be laid down as a general rule of law, rebuttable only by evidence to the contrary, that when *primâ facie* the agreement between an owner of property and the agent who is entrusted to sell it is to pay commission on a named price, it is for the latter to show in the clearest way the true intention of the parties was that commission should be paid *pro rata* on any lesser sum at which a sale might be effected (*l*).

Where, however, an agent complies with the above stated requisites, and the sale ultimately goes off solely by reason of some fault on the part of the owner, the agent's right to commission is not thereby avoided (*m*). And this rule is of general application (*n*). Moreover, when an agent employed for an agreed commission to sell either chattels or realty at a given price succeeds in finding a purchaser at the stipulated price, and the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and in such case a contract to pay what is reasonable is implied by law, and is not a question for the jury; the underlying principle of law in such case being that, where one party has absolutely refused to perform, or has rendered himself incapable of performing his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract, and sue on a *quantum meruit* for the work actually done (*o*).

Principles of *quantum meruit*.

And in one case it has been held (though with doubtful propriety) that the fact of the existence of a secret arrangement for dividing commission between a servant of the vendor and the agent employed by the principal to effect the sale did not avoid the right of the latter to his commission (*p*).

There is, however, no general rule of law that where an agent is employed to sell property, and his authority is revoked, he is at liberty to claim as on a *quantum meruit*, there being in such circumstances an understanding by implication that the agent is only to receive a commission if he succeeds in effecting a sale, and if not, nothing. And this rule generally applies where the agent fails to obtain a customer upon the terms specified by the

(*l*) *Bridgman* v. *Hepburn* (1908), XLII. S. C. R. 228.

(*m*) *Graham* v. *Case* (1909), 11 W. L. R. 170; *Kelly* v. *Hanson* (1908), Q. R. 35 S. C. 305; *McCallum* v. *Russell* (1909), 12 W. L. R. 267. *Cuthbert* v. *Campbell* (1909), 12 W. L. R. 219. *Ross* v. *Watkinson* (1910), 13 W. L. R. 490. As to when an agent in such circumstances is entitled to *quantum meruit*, see *Aldous* v. *Swanson* (1910), 14 W. L. R. 186.

(*n*) *Austen* v. *Canadian Fire Engine Co.* (1907), 42 N. S. R. 77.

(*o*) *Callaway* v. *Stobart* (1904) XXXV. S. C. R. 301.

(*p*) *Miner* v. *Moyle Lumber Co.* (1909), 10 W. L. R. 242.

owner. The mere fact that an agent succeeds in finding a purchaser who is able and willing to give the price stipulated for is not enough if such purchaser refuse to agree to the conditions collateral with the price expressed by the owner (*q*).

Intermediary a particular and not a general agent.

Moreover, an estate or other agent, who takes from a principal particulars of realty or chattel property which is for sale, is not thereby constituted the general agent of such principal for the sale of the property. He is no more than a particular agent vested with authority to introduce a purchaser to his principal if he can find one. Consequently, should the sale be effected through some other agent employed independently, the transfer confers no right to commission on any agent, save the one who actually introduced the purchaser. Moreover, the circumstance that one of several agents has in fact effected a sale, operates automatically as a revocation of the authority of all the other agents to whom particulars were supplied (*r*).

Right to commission applies to sale of specified article only.

Again, an undertaking by a principal to pay an agent or broker commission on the sale of a specific chattel applies to that article alone and to no other, and should the principal subsequently sell to the customer, introduced to him by the broker, an altogether different commodity in place of that for which a contract for commission was made, the broker is not entitled to claim commission on the price of the substituted article (*s*). But though (as already stated) in order to enable a broker or agent to recover a commission the mere fact of his taking particulars of the chattel or property for sale will not suffice; if it appears that the broker's introduction of the vendor to a subsequent purchaser, of a specific chattel or thing, was the foundation on which the negotiations were based, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands and thus deprive him of his commission (*t*).

Rule of evidence when witnesses are of equal credibility.

And in these and cognate circumstances, where the positive fact of a particular conversation is stated to have taken place between two persons of equal credibility, and one states positively that it took place, and the other as positively denies it, the general rule is for the Court to find that the words were said, and that

(*q*) *Calloway* v. *Stobart* (1904), XXXV. S. C. R. 301.

(*r*) *Calloway* v. *Stobart* (1904), XXXV. S. C. R. 301; see also *Gilmour* v. *Simon* (1906), XXXVII. S. C. R. 429; *Mainwaring* v. *Crane* (1902), Q. R. 22 S. C. 67; *Johnson* v. *Appleton* (1905), 11 B. C. R. 128; but see *Bell* v. *Rokeby* (1905), 15 Man. L. R. 327.

(*s*) *The Starr Co.* v. *The Royal Electric Co.* (1900), XXX. S. C. R. 384.

(*t*) *Atkins* v. *Allan* (1904), 14 Man. L. R. 549; *Wilkes* v. *Maxwell* (1904), 14 Man. L. R. 599; *Wyeott* v. *Campbell* (1871), 31 U. C. Q. B. 584.

the person who denies their having been said has forgotten the circumstance (*u*).

*Quantum meruit* payable where contract of sale abortive through fault of vendor. Chitty, 42, 616, 631.

Again where, as stated above, an agent employed on commission to sell land at a given price succeeds in finding a purchaser, but the principal subsequently declines to sell and rescinds the agent's authority or imports new terms into the agreement for sale (*x*), the latter is entitled to sue for a reasonable remuneration for his work and labour, and in such a case a contract to pay what is reasonable is implied by law and is not a question for a jury (*y*): it having long been settled law that if a contract of sale be not literally performed, the person for whom the work is done or the service performed, though he may reject the work, service or article, is nevertheless bound to pay for it, if he avail himself of it, to the extent to which it is of any value to him or to the amount at which the article, if perfect and complete, would be appraised; but from this must be deducted, if the article be unfinished, the amount that is necessary to finish it, the acceptance of the work, service or article in such case giving rise to a new contract raised by implication of law (*z*). It is, moreover, possible by a special parol agreement collateral with the written contract to raise an obligation on the part of a principal to compensate an agent for incidental expenses incurred by him in endeavouring to procure a customer for his principal. And parol evidence of such an agreement is admissible to show that the written instructions did not constitute the whole of the terms of the contract (*a*).

When agent entitled to incidental expenses.

Again, controversy sometimes arises as to whether the remuneration mentioned in the contract of agency is inclusive of all services rendered or no. And in such cases the rule apparently is, where an agent acts for his principal only in matters incidental to his agency the amount of remuneration agreed upon between him and his principal represents the entire sum to which he is entitled. But if he be engaged by his principal on matters beyond his duty as agent he is entitled to be paid for them separately, and the Court in the exercise of its discretion may allow interest on the sum so found to be due (*b*).

(*u*) *Wilkes* v. *Maxwell* (1904), 14 Man. L. R. 599, quoting Romilly, M. R., in *Lane* v. *Jackson* (1855), 20 Beav. at pp. 539, 540.

(*x*) *Marson* v. *Burnside* (1900), 31 O. R. 438.

(*y*) *Rudges* v. *Clement* (1904), 14 Man. L. R. 588; *Dunsmuir* v. *Lowenberg, Harris & Co.* (1903), XXXIV. S. C. R. 228; *Adamson* v. *Yeager* (1884), 10 O. A. R. 477; but see *contra*, *Culverwell* v. *Birney* (1887), 14 O. A. R. 266.

(*z*) *Milestone Land and Loan Co.* v. *Lucksinger* (1908), 7 W. L. R. 197; *Schuchard* v. *Drinkle* (1908), 7 W. L. R. 844.

(*a*) *Dunsmuir* v. *Lowenberg* (1900), XXX. S. C. R. 334.

(*b*) *Ridley* v. *Sexton* (1872), 19 Gr. 146.

### *Secret Commission.*

Chitty, 292, 613.

A broker or agent who makes a secret profit out of his principal is alike disentitled to receive his commission or to be paid for his work and labour as on a *quantum meruit* (*c*); and not only does he forfeit his right to remuneration, but the illicit profit so derived by him belongs to his principal (*d*). Nor will the agent's right to commission revive even if the impugned transaction be subsequently adopted by the principal (*e*).

Illicit profit belongs to principal.

Again, if an agent employed by his principal to purchase chattels or real estate on commission receives, or agrees to receive, from the seller any remuneration or commission contingent on the sale he thereby forfeits his right to commission from his principal (*f*).

And by the law of Quebec an agent who acts for both parties in a sale and purchase of real estate is entitled only to commission from the vendor, even if part of the consideration paid by the purchaser to the vendor is a transfer, by way of exchange, of real estate (*g*).

And upon general grounds of public policy a principal is justified in summarily dismissing an agent who, after engaging conscientiously to fulfil all the duties assigned to him and to act constantly for the best interests of his employer, enters into an illicit agreement with a business rival of his principal (*h*).

Furthermore, it is enacted by the Secret Commissions Act, 1909 (*i*), which forms part of the Criminal Code of Canada, that—

Secret Commissions Act, 1909.

"Everyone is guilty of an offence and liable, upon conviction on indictment, to two years' imprisonment, or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding one hundred dollars, or to both, who—

"(a) being an agent, corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act relating to

(*c*) *Hutchinson* v. *Fleming* (1908), XL. S. C. R. 134; *King* v. *Potts* (1903) 36 N. B. Rep. 42.

(*d*) *Manitoba Land Corporation* v. *Davidson* (1903), XXXIV. S. C. R. 255; see also *Newstead* v. *Rowe* (1910), 14 W. L. R. 509; *Pominerenke* v. *Bate* (1910), 13 W. L. R. 248.

(*e*) *Onsum* v. *Hunt* (1910), 12 W. L. R. 680; *Mitchell* v. *Sparling* (1910), 14 W. L. R. 268.

(*f*) *Kerstesman* v. *King*, 15 C. L. J. 140.

(*g*) *Browne* v. *Gault* (1900), Q. R. 19 S. C. 523.

(*h*) *Eastmure* v. *Canada Ins. Co.* (1896), XXV. S. C. R. 691.

(*i*) 8 & 9 Edw. VII. c. 33, s. 3.

his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person with relation to his principal's affairs or business; or

"(b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward or consideration to such agent for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act relating to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person with relation to his principal's affairs or business; or

"(c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which, to his knowledge, is intended to mislead the principal;

Liability of accessory.

"(d) every person who is a party or knowingly privy to any offence under this Act shall be guilty of such offence and shall be liable upon conviction to the punishment hereinbefore provided for by this section."

Unlike the corresponding British statute (*k*), the above-cited Act does not make the consent of one of the law officers of the Crown a condition precedent to action.

### *Lien of Agent or Factor.*

Chitty, 296.

A factor has a lien upon and can retain goods consigned to him by his principal and in his possession or under his control until the advances made in good faith by him to the consignor in the ordinary course of business have been paid.

Nor is this right avoided by the fact that the agent or factor knew that the consignor was himself only an agent, the pledgee in such case being in all respects in the same position as if the factor or agent giving the security was himself the absolute owner of the property (*l*).

### *Principal's Duty to Agent.*

Agent's right to indemnity.

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in good faith and in exercise of the authority conferred upon him, even

(*k*) 6 Edw. VII. c. 34.

(*l*) *Dingwall* v. *McBean* (1900), XXX. S. C. R. 441.

though they cause an injury to the rights of third persons: it being a general principle of law that when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done (*m*). And in like manner an agent is entitled to be indemnified should any transaction in which he engages on behalf of his principal and in accordance with his instructions result in pecuniary loss or damage.

Thus, if agents, acting on behalf of others, either buy or sell chattel property for their principals with the object of either transferring to others or acquiring in specie on behalf of their principals the particular commodity dealt in, the transaction is legal; and the mere fact that in the interests of business convenience the final settlement of accounts between the various parties interested in the contract is effected by a money set-off in no way invalidates the legality of the transaction or disentitles the agents to be indemnified against any loss which they may sustain by reason of their carrying out their principal's instructions.

Upon the very logical ground that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of a very express agreement, be terminated to the prejudice of such interest.

**Exception to right to indemnity.**

But, on the other hand, if there be from the commencement of the transaction no real intention to transfer the property or the commodity, which is the subject of the contract, then no matter what form the arrangement may assume or what are the terms of the agreement, if the whole device be colourable only and the real intention of the parties is that in fact there shall be neither sale nor delivery nor acceptance of the commodity, but merely an adjustment of the transaction by a settlement of differences, the contract is a gambling one, and neither principals nor agents can recover the one from the other the balance of profit or loss (*n*).

### *Effect of Agency on Contracts with Third Parties.*

**Liability of principal for acts of agent.**

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the con-

(*m*) *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392, H. L. (E.); Halsbury, L. C., at p. 397.

(*n*) *Rice* v. *Gunn* (1884), 4 O. R. 579.

tracts had been entered into and the acts done by the principal in person.

And any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, has, as between the principal and third parties, the same legal consequences as if it had been given to or obtained by the principal. But where a plaintiff desires to effect service of a *subpœna* by serving the agent of an absent defendant he must show that the party to be served is the agent of the defendant, in relation to the subject-matter of the suit, to such an extent as to satisfy the Court that the acceptance of the *subpœna* by such agent will fall within the authority conferred upon him by his principal (*o*).

Acts of agent in excess of authority.

And where an agent does more than he is authorised to do if that part of the thing done which is within his authority can be separated from the part which is beyond his authority, so much only of that which is done as is within his authority is binding as between himself and his principal.

But *e converso* where an agent does more than he is authorised to do, and what he does beyond the scope of his authority is inseverable from what is within it, the principal is not bound to recognise the transaction at all. Consequently, if an agent vary the terms of the commission with which he is entrusted by his principal without authority, the principal is not bound by the action of the agent and specific performance will not be decreed against him, although the agent himself may be liable in damages to the person with whom he contracted on behalf of his principal (*p*). But as a general proposition of law it cannot be doubted that (as regards third parties) an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority, as between himself and his principal, if the private instructions which limit that authority and the circumstance that his acts were in excess of it are alike unknown to the person with whom he is dealing (*q*).

Effect of principal holding out another as his agent.

Consequently, where a man, either actually or by implication represents another as his agent in order to procure a person to contract with him as such, and such person does so contract, the agreement binds in the same manner as if the principal made it himself, and it is his contract in point of law.

(*o*) *Passmore* v. *Nicolls* (1850), 1 Gr. 130.

(*p*) *Gilmour* v. *Simon* (1906), XXXVII. S. C. R. 122.

(*q*) *Montreal Assurance Co.* v. *McGillivray* (1859), 13 Moore, P. C. 87.

Thus, an agent or shop assistant can bind his principal or master by a parol warranty, provided such warranty be given by the agent or servant in the general course of the business carried on by his principal and in respect of which such agent or servant is employed. Nor need such warranty be embodied in the receipt given for the price of the commodity sold if there be no evidence of any agreement between the parties that the whole of the terms of the contract should be in writing (*r*). And upon similar principles an agent's subsequent written recognition of a verbal contract, where such recognition was made in the performance of his duty in the carrying out of the contract, is binding on his principal for the purpose of taking the case out of the Statute of Frauds (*s*).

Power of agent to transfer property in chattels.

Again, if an owner of negotiable securities, payable to bearer, and transferable by mere delivery, entrust an agent with the possession thereof, he gives him *ipso facto* in law, as regards third parties dealing with the agent in good faith, the right effectually to sell or pledge them. Where, therefore, principals unwittingly placed securities, transferable by delivery, in the hands of a fraudulent agent, and by s[illegible] enabled him to deal with them as his own, they were estopp[illegible] from subsequently asserting their title to the securities in such a way as to throw the loss on an innocent third party (*t*).

Rule of law where one of two innocent persons must suffer from the fraud of another.

And generally, where one of two persons must suffer *civiliter* from the incorrect conduct of an agent, he who employs and puts a trust and confidence in the deceiver should be rather the loser than a stranger (*u*); the rule being, in such and like cases, that where one, by his words or conduct, *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, he is by reason of the representation concluded from subsequently averring against the latter that the circumstances are not in fact such as were represented by him. Or, in other words, a party who *negligently* or *culpably* stands by and allows another to contract with him or with his agent upon the faith of the existence of a certain state of things or of a specified fact (when he knows or should know that the state of things averred is non-existent or the specified fact is untrue), is estopped, in an action against the person whom he has himself assisted in deceiving, from subsequently denying the

(*r*) *M'Mullen* v. *Williams* (1880), 5 A. R. 518.

(*s*) *Ward* v. *Hayes* (1872), 19 Gr. 239.

(*t*) *Young* v. *MacNider* (1895), XXV. S. C. R. 272.

(*u*) *Commercial Bank* v. *Merritt* (1862), 21 U. C. Q. B. 358, *dictum* of Robinson, C. J.

truth of the representations which were made by or for him as an inducement for the contract, even though he might not immediately profit by them (*x*).

And *à fortiori* this is the case when the acts of the agent were such as would conduce to the success of the enterprise in which he was engaged on behalf of his principal (*y*).

But, on the other hand, where there is neither an agency in fact nor any holding out as agent, and the dealing is with the party as principal, there can be neither undisclosed principal nor principal by estoppel. And where parties are general agents of an undisclosed principal, with a special restriction or limitation of their authority, one who contracts with them as principals can only resort to the real principal subject to the limitation which has been placed upon the agent's authority, because he had not dealt with them as agents nor had there been any holding of them out, or accrediting them as such, and therefore no contracting on the faith of the authority (*z*).

When action will lie against both principal and agent.

Although, where a purchase is made by a person in his own name, but in reality for the benefit of another, an action will lie against both for the payment of the consideration moneys, and in such case parol evidence of the agency by the purchaser who entered into the contract in his own name, is admissible to charge his co-purchaser (*a*).

Agent negotiating overdue bill.

If an agent improperly disposes of an overdue bill belonging to his principal for good consideration, the holder takes it subject to all imperfections and obtains no title as against the principal (*b*); it being provided by sect. 70 of the Bills of Exchange Act, c. 119 (R. S. C.), that, "Where an overdue bill is negotiated it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it."

And as a general proposition of law the fraudulent act of an agent does not bind his principal unless it is done for his benefit or unless the principal knows of and assents to it, or has derived advantage by reason of it (*c*).

(*x*) See on this point *Pratt* v. *Drake* (1858), 17 U. C. Q. B. 27; *Merchants Bank* v. *Bostwick* (1878), 28 U. C. C. P. 450.

(*y*) *Kantor Advtg. Co.* v. *Coleman* (1905), 11 O. L. R. 262.

(*z*) *Becherer* v. *Asher* (1896), 23 A. R. 202.

(*a*) *Sanderson* v. *Burdett* (1871), 18 Gr. 417.

(*b*) *West* v. *MacInnes* (1884), 23 U. C. Q. B. 357.

(*c*) *Gibbons* v. *Wilson* (1888), 17 O. R. 290; *Burns* v. *Wilson* (1897), XXVIII. S. C. R. 207; see also *Erb* v. *G. W. Rly. Co. of Canada* (1881), V. S. C. R. 179; *Oliver* v. *G. W. Rly. Co.* (1877), 28 C. P. 143.

Provincial statutes relating to mercantile agents.

Where, however, in Alberta, British Columbia, Nova Scotia, Ontario, Saskatchewan, and Yukon Territory (*d*), a mercantile agent is, with the consent of the owner, in possession of goods, or of the document of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, is as valid as if he were expressly authorised by the owner of the goods to make the same; provided the person taking under the disposition acts in good faith, and has not at the time thereof notice that the person making the disposition has not authority to make the same.

But not every person in possession of chattels belonging to another comes within the statutory definition of agent or factor. Where, therefore, a person obtained illicit possession of certain chattels belonging to another and disposed of them to an innocent buyer, it was held that as the goods had not been originally entrusted to the vendor by their true owner in a mercantile transaction for their sale, or for an object connected therewith, such true owner was entitled to recover their value from the *bonâ fide* purchaser who had bought them (*e*).

Supervision of agents by executors.

A testamentary executor or administrator who employs an agent as attorney is, however, bound personally to supervise the latter's management of the matters entrusted to him and take all reasonable precautions against a fraudulent misappropriation of funds by such agent. Nor will the fact that prior to his malversation the agent was a person of reputable character avoid the personal liability of the principal (*f*).

Responsibility of principal for signature of agent to negotiable instrument.

It has, however, been held that no presumption can be raised by implication that an agent or manager, merely by reason of his superintending a branch shop belonging to his employer, is thereby entitled to affix his principal's name to a bill of exchange or other negotiable instrument (*g*).

But, on the other hand, a general power of attorney to an agent to sign bills and notes confers upon him a power to indorse negotiable instruments, to give an acquittance and discharge of a mortgage (*h*); and generally, to do all that is necessary and expedient for the successful accomplishment of the subject-matter with which he is entrusted (*i*).

(*d*) Alberta Cons. Ord., 1905, c. 40; British Columbia R. S., 1897, c. 4; Nova Scotia R. S., 1900, c. 146; Ontario, 10 Edw. VII. c. 66; Saskatchewan R. S., 1909, c. 148; Yukon Territories Cons. Ord., 1902, c. 36.

(*e*) *Moshier* v. *Keenan* (1900), 31 O. R. 658, decided under the repealed Act R. S. O., 1897, c. 150, but still good law.

(*f*) *Low* v. *Gemlay* (1890), XVIII. S. C. R. 685.

(*g*) *Heathfield* v. *Van Allen* (1857), 7 U. C. C. P. 346.

(*h*) *Auldjo* v. *McDougall* (1833), 3 O. S. 199; *Lee* v. *Morrow* (1866), 25 U. C. Q. B. 604.

(*i*) *McClellan* v. *McCaughan* (1892), 23 O. R. 679.

And where a bill of exchange is drawn by a person signing as agent for a company, upon a drawee who accepts the bill, the acceptance admits alike the signature of the agent and his authority from the company to draw the bill. It also estops the acceptor from subsequently setting up any legal technical objections in regard to the composition or description of the company or its ability to draw the bill (*k*).

It should, however, be noted that a bill or note accepted or indorsed *per procuration* puts the taker on inquiry as to the extent of the agent's authority (*l*). And, moreover, that an agent (which term includes a banker and a land agent) instructed to receive payment on behalf of his principal cannot as a rule accept anything but money (*m*); although as a general proposition of law an agent appointed to receive money on behalf of his principal is also his agent to give a receipt for it (*n*).

### *Rights of Principal against Third Parties.*

Principal may sue on contracts of agent.

Chitty, 284.

A principal, although resident abroad, is entitled personally to sue a third party upon a contract entered into with such third party by an agent on his (the principal's) behalf in cases where the evidence shows that the agent was thereunto authorised by his principal, and that the third party dealt with him as an agent (*o*).

And, apparently, a principal for whose benefit a contract was made by his agent may sue the defendant in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject-matter of the contract (*p*).

And where an agent entered into a contract on behalf of his principal with a telegraph company for the transmission of a message, it was held that the principal, having sustained loss by reason of the negligence of the telegraph company in transmission, might maintain an action against them therefor (*q*).

(*k*) *Bank of Montreal* v. *De Lotbinière* (1849), 5 U. C. Q. B. 362.

(*l*) *Bryant* v. *Banque du Peuple*, *Bryant* v. *Quebec Bank*, [1893] A. C. 170, P. C.

(*m*) *Frazer* v. *Gore Dist. Mut. Fire Ins. Co.* (1883), 2 O. R. 416; *Donogh* v. *Gillespie* (1891), 21 O. A. R. 292; *Brown* v. *Smart* (1846), 1 E. & A. 148; *McMichael* v. *Wilkie* (1891), 18 A. R. 464; see, however, *Ætna Life Ins. Co.* v. *Green* (1876), 38 U. C. Q. B. 459.

(*n*) *Bedson* v. *Smith* (1863), 10 Gr. 292.

(*o*) *Webb* v. *Sharman* (1874), 34 U. C. Q. B. 410.

(*p*) *Mair* v. *Holton* (1847), 4 U. C. Q. B. 505; see also *McCarthy* v. *Cooper* (1885), 12 O. A. R. 284.

(*q*) *Feaver* v. *Montreal Telegraph Co.* (1874), 24 U. C. C. P. 258.

*Rights and Liabilities of Agents in respect of Contracts made with Third Parties*

Agent cannot sue on notes of his principal in his own name.

A holder of notes endorsed to him in blank as the agent of another cannot *qua* agent sue on the notes in his own name (*r*). Where, however, a person receives money from an agent on a promise to return it to him he cannot, in an action by the agent to recover it back, set up as a defence that the money really belongs to a third party, unless he act by the authority and with the consent of such third party. Upon the principle that a person receiving money or goods from another either by way of deposit or upon bailment for any purpose, may not subsequently turn round upon him by whom the trust has been reposed and put him to the proof of his title (*s*).

When agent may sue third parties on contracts.

And, apparently, though the point is by no means free from difficulty, an agent, to whom exclusive credit is given by his principal, if duly qualified by him to make contracts not under seal with third parties, is liable to be sued by and entitled to sue such third parties on all contracts entered into by him without resort being had either by or against his principal (*t*). And there is no doubt a party, whether agent or principal, may assign a *chose in action* in such an effectual manner as to transfer his rights to the assignee, and confer upon the latter the right to use his name to collect the debt (*u*). But *e converso* an agent on *del credere* commission cannot sue a vendee in his own name for a debt contracted, through his instrumentality, by a third party with his principal (*v*). And although by Canadian law a vendee of chattels, who deals with the agents of an undisclosed principal, is entitled in case of breach of contract to bring an action against the undisclosed principal, apparently the converse of the rule does not apply (*y*).

Agent not responsible for contracts made on behalf of his principal.

And, generally, upon the principle that the contract of an agent is the contract of the principal, an agent is not liable to a third party upon an agreement which he makes in his representative character, provided he does not at the time, when such contract becomes legally operative, personally contract or expressly pledge his own credit by concealing his principal or otherwise. Where, therefore, an agent who did not disclose his principal until afte-

(*r*) *Ross* v. *Tyson* (1869), 19 U. C. C. P. 294.

(*s*) *Lister* v. *Burnham* (1841), 1 U. C. Q. B. 419; *Allnutt* v. *Ryland* (1859), 11 U. C. C. P. 300.

(*t*) *Coquillard* v. *Hunter* (1875), 36 U. C. Q. B. 316.

(*u*) *Ham* v. *Ham* (1855), 6 U. C. C. P. 37.

(*x*) *Bramwell* v. *Spiller* (1870), 21 L. T. 672 (an English case); see also *Abbott* v. *Atlantic Refining Co.* (1902), 4 O. L. R. 701.

(*y*) *Hudon Cotton Co.* v. *Canada Shipping Co.* (1883), XIII. S. C. R. 401 at p. 414.

he had made a contract on his behalf, but did so before the contract became legally operative, was sued thereon, the agent was held not personally liable (*z*).

It is, however, almost needless to say that the above rule does not apply where an agent contracts in his own name without qualification (*a*).

Misrepresentation of agency. Chitty, 289.

And a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to him who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. And in such case the measure of damages is not only the expense actually incurred by reason of the misrepresentation, but also the loss of profit which would have been made had the contract been carried through (*b*).

Measure of damages in misrepresentation.

Again, an agent of two independent and unconnected principals has no authority to bind them, or either of them, by the sale of the goods of both in one lot, in cases where the articles included in such sale, though different in kind, are sold for one single indivisible price, susceptible only of a ratable apportionment by the mere arbitrary will of the agent.

Nor can there be ratification of such a contract unless the parties thereto have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the conditions and agreed to be bound by the contract. But in such case the agent himself is probably liable to the purchaser in damages for breach of the contract of sale (*c*).

Liability of agent for nuisance.

Again, although an agent employed merely to receive rents is not personally liable for a nuisance upon the demised premises, it is probable that such liability attaches to a general agent clothed with plenary powers to let, repair, and, in all respects, to act for the owner of the property should a nuisance be permitted thereon (*d*). And in no case can a party justify as agent of another for maintaining a public nuisance; nor will the fact that persons come to live within the ambit injuriously affected by a public nuisance after it has been created, preclude them from complaining thereof (*e*).

(*z*) *Haight* v. *Howard* (1862), 11 U. C. C. P. 437; but see *Boulthee* v. *Gzowski* (1898), XXIX. S. C. R. 54; *Campbell* v. *Denniston* (1873), 23 U. C. C. P. 339.

(*a*) *Ballantyne* v. *Watson* (1880), 30 U. C. C. P. 529.

(*b*) *Maneer* v. *Sanford* (1904), 15 Man. L. R. 181.

(*c*) *Cameron* v. *Tate* (1888), XV. S. C. R. 622; see p. 637.

(*d*) *Reg.* v. *Oster* (1872), 32 U. C. Q. B. 324.

(*e*) *Reg.* v. *Brewster* (1859), 5 U. C. C. P. 208.

# CHAPTER XVII

## PRINCIPAL AND SURETY.


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A GUARANTEE (which must be in writing: 29 Car. II. c. 3, s. 4 (*a*)) is a contract to be answerable for the payment of some debt or for the performance of some act by another person, who is primarily liable for the payment or for the performance. **Contracts of suretyship to be in writing.** Chitty, 556—684.

(*a*) In Nova Scotia, see Rev. Statutes, 1900, c. 144, s. 15.

In other words, the contract of guarantee or suretyship is a collateral promise by a person, called a guarantor or surety, to answer to a third party for the debt, default, or miscarriage of some person other than he who gives the promise.

For, if there be no contractual obligation or debt owing by a person other than the party who gives the undertaking, that is, *i. e.*, the party promising, is the principal debtor or obligor and the contract is not one of suretyship at all.

Again, one cannot be surety for the debt of another unless that other is himself liable as debtor. Consequently, wherever the relationship of principal and surety subsists there is to be found the element of liability of both principal and surety to the creditor.

Classification of contracts of suretyship.

Further, it will be found, upon examination of the principles and authorities applicable to the subject, that contracts of suretyship, in general, may be classified under one or other of the three following heads:—

(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party;

(2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and

(3) Those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of these persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid (*aa*).

Construction of guarantee. Chitty, 568, 569.

A contract of guarantee is therefore a contract of a special and peculiar description, for it is not a contract which a party enters into for the payment of his own debt, or on his own behalf, but it is a contract which he enters into for and on behalf of a third person.

It is therefore the duty of the party who takes such a security to see that the instrument of guarantee is couched in such words that the party giving it may distinctly understand to what extent he is binding himself.

The true rule of construction of such a contract consequently

(*aa*) *Dunsta, Fox & Co.* v. *North and South Wales Bank* (1880), 6 A. C. 1 at p. 11, cited by Moss, J. A., in *Forster* v. *Jeen* (1901), 2 O. L. R. at p. 186.

is, as in all other contracts, not to give a strict meaning to the words used against the party using them nor yet too rigidly to construe them against the party in whose favour they are used, but to collect the real intention of both the parties from the surrounding circumstances, and from the terms used in the contract, taking the terminology employed in the instrument in its plain ordinary and popular sense, unless by the known custom of trade they have acquired a peculiar and special significance (*b*).

Continuing guarantee.

And the foregoing rule of construction is also to be applied in cases where the guarantee is alleged by the obligee to be a continuing one; it being in such cases proper to ascertain from the surrounding circumstances what was the subject-matter which the parties had in their contemplation when the guarantee was given not, indeed, for the purpose of altering the terms thereof by parol explanation, but in order to ascertain by the actual conduct of the parties what was the scope and object of the intended guarantee (*c*).

Consideration essential to validity of contracts.

It is, moreover essential to the validity of the contract that there should be some consideration or forbearance moving from the creditor or obligee to the guarantor or obligor. And this necessary element must be either a matter of advantage to the party promising or of detriment to the promisee in order to make the contract a binding one. Or, in other words, any damage, or any suspension of right, or any possibility of loss which may result to one party by reason of the promise of another is a sufficient consideration for a contract of suretyship and will make it binding; even though the benefit granted may be so inadequate as practically to confer no advantage upon the promisor.

But a guarantee without any consideration or with merely a past consideration (*d*) is no more than a bare promise or *nudum pactum* by the obligor to answer for the debt or default of another, and as such is void under the Statute of Frauds (*e*).

Nor is parol evidence admissible to prove the existence of a

(*b*) *Kastner* v. *Winstanley* (1869), 20 U. C. C. P. 101.

(*c*) *Fennell* v. *M'Guire* (1870), 21 U. C. C. P. 131. As to what have and what have not been held to be continuing guarantees, see (continuing guarantees) *Russ* v. *Burton* (1857), 1 U. C. Q. B. 357; *Rainey* v. *Dickson* (1860), 8 Gr. 150; (not continuing) *Shaw* v. *Vandusen* (1848), 5 U. C. Q. B. 353; *Sutherland* v. *Patterson* (1884), 4 O. R. 585.

(*d*) *Lock* v. *Reid* (1841), 6 O. S. 295; *Shaw* v. *Campbell* (1852), 10 U. C. Q. B. 117; *Jenkins* v. *Rattan* (1851), 8 U. C. Q. B. 625.

(*e*) *Palgrave* v. *Murphy* (1864), 14 U. C. C. P. 153; *Lock* v. *Reid* (1841), 6 O. S. 295; *Macklin* v. *Kerr* (1877), 28 U. C. C. P. 90.

consideration not evidenced by the instrument (*g*), though it is apparently clear law that parol evidence may be admitted to show that by an agreement arrived at between the parties interested, a transaction which would otherwise operate so as to release a surety should not have that effect (*h*).

Effect of forbearance.

And a forbearance by the obligee either in time or in some other matter relevant to the issue, or even reliance on the assurance, if so expressed in the guarantee, will constitute a valid and binding consideration (*i*) to which the Court will give effect; and a like result arises where some act is performed by the obligee which he would not have performed were it not for the promise of the obligor. Thus, a letting into occupation of premises upon the faith of a collateral promise in writing to pay the rent thereof is a good consideration for the promise of the obligee (*k*); the rule in such and cognate cases being that, in order to make a guarantee legally binding upon the obligor, a previous acceptance by the obligee is not necessary if, as a matter of fact, the obligee alters his position upon the faith of the warranty.

Constituents of guarantee.

Consequently, where the party receiving the assurance and in reliance thereon acts on the faith of the promise made to him by the obligor the guarantee at once attaches and becomes obligatory on the party who gave it (*l*).

Part consideration.

But as already stated there must, however, be some consideration to support a guarantee, and a guarantee in which neither consideration nor part consideration (*m*) for the promise of indemnity appears in the instrument is no more than a bare promise by the obligor to pay the debt or to be answerable for the default of another, and as such is altogether null and void.

Statute of Frauds, Chitty, 360.

Again, an undertaking as surety must, in order to comply with the Statute of Frauds, designate the person to whom it is given, though where non-compliance with this condition avoids the

(*g*) *Perrin* v. *Bingham* (1862), 12 U. C. C. P. 306.

(*h*) *German* v. *Dixon* (1896), XXVI. S. C. R. 87; see also *Fleming* v. *McLeod* (1907), XXXIX. S. C. R. 290.

(*i*) *Vaughan* v. *Richardson* (1892), XXI. S. C. R. 359; *Moberley* v. *Baines* (1856), 15 U. C. Q. B. 25; *Evans* v. *Robinson* (1857), 16 U. C. Q. B. 169; *Davies* v. *Forsten* (1880), 45 U. C. Q. B. 369.

(*k*) *Merrick* v. *L'Esperance* (1859), 10 U. C. C. P. 259; *Hall* v. *Denholm* (1853), 11 U. C. Q. B. 354.

(*l*) *Jenkins* v. *Ruttan* (1852), 8 U. C. Q. B. 625; *Nichols* v. *King* (1849), 5 U. C. Q. B. 324. For illustrative cases of what will and what will not constitute a guarantee, see *Skilbeck* v. *Porter* (1856), 14 U. C. Q. B. 430; *Walker* v. *O'Reilly* (1861), 7 L. J. 300; *Johnestock* v. *Palmer* (1860), 20 U. C. Q. B. 307; *Tumbley* v. *Meyers* (1857), 16 U. C. Q. B. 143; *Grosett* v. *Hutchinson* (1859), 10 U. C. C. P. 265; *Rainey* v. *Dickson* (1860), 8 Gr. 450; *Whitelaw* v. *Taylor* (1880), 45 U. C. Q. B. 446.

(*m*) *Lock* v. *Reid* (1841), 6 O. S. 295; *Shaw* v. *Caughell* (1852), 10 U. C. R. 117; *Jenkins* v. *Ruttan* (1851), 8 U. C. R. 625.

instrument in law a part performance of the contract by the obligee, upon the faith of the guarantee, will enable the Court to enforce the agreement against a surety as well as against a principal debtor; the law of part performance being applicable to sureties as well as to principals (*n*).

Moreover, the fourth section of the Statute of Frauds, which provides that "no action shall be brought . . . upon a contract . . . unless some memorandum or note thereof shall be in writing . . . and signed by the party to be charged," is sufficiently satisfied if either the names of the contracting parties appear expressly upon the face of the memorandum or can be inferred either by a reasonable construction thereof or by reference to other documents physically or referentially attached to the actual contract of guarantee.

Contract may be contained in more than one document.

Nor is it necessary that the contract itself should be contained in one document, for if an agreement containing all the factors essential for validity be distributed through many documents, it matters not out of how many different papers it is collected so long as they can be sufficiently connected together in sense (*o*).

Where, therefore, a surety sent a letter by post to certain traders, guaranteeing the payment of goods to be supplied by them to a third party, without mentioning any names therein, the address on the envelope was held a sufficient agreement in writing to satisfy the statute (*p*). Moreover, as the primary necessities of the writing are merely for the purposes of evidence and in order to protect people from having parol agreements imposed upon them, letters or other writings given by the party to be charged, and sufficiently showing the terms of his undertaking, will in all cases suffice (*q*).

Signature of obligor necessary.

An actual signing of the name or of something intended by the writer to be equivalent to a signature, as, for example, a mark by a marksman, is, nevertheless, essential for validity.

And in cases where an entire contract of guarantee is contained in a number of different papers, the contract must be deducible from the documents themselves without the interposition of parol evidence: verbal explanations being inadmissible for the purpose of connecting them.

Nor will a collateral verbal promise to pay the debt of another,

(*n*) *County of Huron* v. *Kerr* (1868), 15 Gr. 265.
(*o*) *Laird* v. *Adams* (1908), 1 Sask. L. R. 352; 7 W. L. R. 881.
(*p*) *Richard* v. *Stillwell* (1885), 8 O. R. 511.
(*q*) *Thomson* v. *Ede* (1893), 22 O. A. R. 105.

who still remains liable, even though it be founded on good consideration, constitute a binding obligation (*r*) on the promisor.

And generally, the question whether or no a particular case comes within the Statute of Frauds depends "not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant (promisor) or his property, except such as arises from his express promise" (*s*).

**Guarantee signed by agent.**

A contract of guarantee may be signed by an agent duly authorised for that purpose, although the person to whom the security is given cannot be an agent of the surety for the purpose of signing the guarantee.

On the other hand, however, a person who, by reason of infancy, is incapable of binding himself as principal may, nevertheless, sign as agent of and bind another.

But where one partner in a firm without authority signed a guarantee in the name of himself and his co-partners, it was held that such guarantee, although void as against his co-partners, was, nevertheless, binding upon himself though the signature was in the name of the firm; and it was further decided that by signing he was estopped from alleging that his name was other than that which he had affixed to the instrument (*t*).

**Interpretation of contract of suretyship.**

With regard to the interpretation of the contract of suretyship, although where there is an ambiguity or obscurity in the operative covenant, which the other parts of the instrument do not explain, it is to be construed against the guarantor, nevertheless his liability will not be extended so as to include any subject or matter not specifically expressed or comprised in the contract; and this principle is adopted to its fullest extent alike by Canadian and English tribunals.

**Obligee's liability limited to amount of guarantee.**

If, therefore, the contract state a specific sum for which the surety is to be responsible, his liability will be limited to the amount expressed and will not extend to any arrears of interest which may be due thereon.

And in cases where the principal's default exceeds the amount of the surety's bond the surety, upon payment of the amount of such bond, is entitled to be discharged from further responsibility (*u*): although giving a guarantee for a fixed amount will not preclude the principal from incurring a personal liability exceeding that sum unless the contrary is expressly stipulated (*x*).

(*r*) *James* v. *Balfour* (1881), 7 O. A. R. 461.
(*s*) *S. C.* at p. 463.
(*t*) *Elliot* v. *Davies* (1800), 2 Bos & Pul. 338 (an English case)
(*u*) *Sinclair* v. *Baby* (1857), 2 P. R. 117.
(*x*) *Woods* v. *Cobalt* (1908), 12 O. W. R. 1135.

But if the obligation be in respect of a future debt, the surety will not be liable for any default of his principal in the payment of a debt already contracted by him when the bond was entered into?

And generally, sureties are only liable for defaults made by their principals after the execution of the bond (*y*). But where a particular condition precedent to the liability of the surety is inserted in the bond, that condition is avoided, and the surety's obligation becomes absolute, if there be some act or default on the part of the surety which renders it impossible for the obligee to comply with the terms of the condition (*z*).

When surety liable *in omnem causam*.

But, on the other hand, if the surety bind himself *in omnem causam*—that is, without reservation—he will be liable on his warranty, in case of dereliction, to the full extent demanded by the terms of the obligation or the nature of the act for which he has obliged himself.

Consequently, if the terms of the contract of suretyship or warranty are general and indefinite he is bound for all such of the obligations of his principal as are necessarily incident to or resultant from the contract or matter for which he has become surety (*a*).

Where, therefore, a surety expressly covenanted that his principal should well and truly perform and keep each and every of certain specified covenants, promises and agreements, he was held liable on the bond for a breach of covenant committed by his principal, although unattended by actual damage to the obligee; the inferential legal damage resulting from the breach constituting a sufficient cause for action against the surety (*b*).

Obligee's liability limited to obligor with whom he contracted.

Another branch of the rule respecting the construction of the contract of guarantee or suretyship is that it shall not be extended to persons who were not originally within the contemplation of the guarantor when he entered into the contract (*c*).

Thus, a simple guarantee to A. for the fidelity of a clerk in his employ does not necessarily extend to the services of that clerk after A. has taken in a partner and the clerk continues in the service of A. and his partner, the defalcations against which the surety guarantees being merely those of the clerk while in the sole service and employment of A., and not his defalcations whilst

(*y*) *Canada West Farmers' Mutual Ins. Co.* v. *Merritt* (1861), 20 U. C. Q. B. 111; but see *East Zorra Corporation* v. *Douglas* (1870), 17 Gr. 462.

(*z*) *Royal Canadian Bank* v. *European Ass. Soc.* (1870), 29 U. C. Q. B. 579.

(*a*) *The St. Lawrence Steel and Wire Co.* v. *Lyne* (1903), 6 O. L. R. 235; affd. 7 O. L. R. 72.

(*b*) *Royal Canadian Bank* v. *Goodman* (1870), 29 U. C. Q. B. 574.

(*c*) *Storrs* v. *Cosgrave* (1885), XII. S. C. R. 571.

in the service of A. and another; although the obligation may be so framed as to include not only surviving partners carrying on a concern upon the death of one of them (*d*), but also partners subsequently introduced into the firm (*e*), and this may be done upon the construction of a letter raising an agreement to that effect when the original instrument was held insufficient for such a purpose (*f*).

And where security is given to a company, which necessarily means a fluctuating or successive body of corporators, as a guarantee for the good conduct of a person engaged in the service of the corporation, a change among the shareholders will not put an end to the indemnity, it being, in such a case, an implied condition of the guarantee that, apart from notice of withdrawal by the guarantor, the contract of suretyship shall be conterminous with the employment of the person guaranteed.

And a like rule applies to the annual re-appointment of a principal when such re-appointment must have been within the contemplation of the surety when he entered into the bond (*g*).

**Time-limits on responsibility.**

But if the bond of suretyship is conditioned for a specified period only, the guarantor can be made answerable solely for those acts or default of his principal which take place during the time specified.

Nor can the obligee and the principal by an arrangement between themselves, made after the liability of the surety was created and without his consent, extend that liability beyond the period to which originally it was limited (*h*).

But, on the other hand, the mere fact that a surety entered into a fidelity bond when the contract of service to which it related was still inchoate will not avoid his liability thereunder. Nor can a surety compel the plaintiff to sue the principal debtor for it (*i*).

**Effect of alteration in contract of suretyship.**

Generally, however, where an alteration is made in the contract of suretyship, then, unless it is obvious that the alteration is unsubstantial or one which cannot be prejudicial to the surety, the Court will not go into an inquiry or permit the question of responsibility to be submitted to the jury, but will hold that the surety must be the sole judge as to whether or no he will

(*d*) See *Simson* v. *Cooke* (1824), 1 Bing. 452, at p. 460 (an English case).

(*e*) *Pease* v. *Hirst* (1829), 10 B. & C. 122 (an English case).

(*f*) *Marsh, Ex parte* (1815), 2 Rose, 239 (an English case).

(*g*) *Township of Adjala* v. *McElroy* (1885), 9 O. R. 580: but see *Waterford School Trustees* v. *Clarkson* (1896), 23 O. A. R. 213.

(*h*) *Wickens* v. *McMeekin* (1883), 15 O. R. 408; *Waterford School Trustees* v. *Clarkson* (1896), 23 O. A. R. 213; *Le Jeune* v. *Sparrow* (1893), 1 Terr. L. R. 384.

(*i*) *Great West* v. *Wolker* (1909), 14 O. W. R. 95.

continue liable upon the bond notwithstanding the alteration (*k*); the rule in such cases being that any variation in the terms of the agreement, to which the surety has subscribed, that is made without his knowledge or consent, and which may prejudice him, or amount to a substitution of a new agreement for that already existing, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety (*l*). And *à fortiori* this rule applies when the statements forming the basis of the contract are either untrue or misleading in a material sense (*m*), or where it is evident that there is a secret and collusive bargain between the obligee and the principal debtor (*n*).

**Non-disclosure or misrepresentation of material fact.**

But, on the other hand, although as a general proposition of law a person about to become surety for another should be informed of all circumstances which may affect his suretyship, and, consequently, if the party for whose benefit the guarantee is given intentionally conceals such circumstances, the surety will be entitled to have the bond delivered up to be cancelled (*o*). Nevertheless, unless the obligor can show that information, with regard to material facts, which would have decided him not to enter into the bond, was fraudulently withheld from him (*p*), he cannot avoid liability thereunder by reason only of information being withheld, it being essential for him to show that the concealment was fraudulent (*q*).

Chitty, 571, 572.

**When forbearance to principal will not release surety.**

And in Manitoba it is expressly provided by sect. 39 (14) of the King's Bench Act (58 & 59 Vict. c. 6) that a surety is not discharged by the giving of time, or dealing with or alteration of the security, unless he can show pecuniary loss or damage as a reasonably direct and natural result of the forbearance (*r*).

Moreover, there is no legal duty cast upon the obligee to the surety information with regard to the position of his p . . cipal (*s*). If the principal's statements or credit are doubtful, the surety should inquire into them for himself, and the very

(*k*) *Citizen Ins. Co.* v. *Cluxton* (1886), 13 O. R. 382.

(*l*) *S. C.*; *Chicago Life Ins. Co.* v. *Duncombe* (1906), 8 O. W. R. 898; *Titus* v. *Durkee* (1862), 12 U. C. C. P. 367; see also *O'Gara* v. *Union Bank of Canada* (1893), XXII. S.C. R. 404.

(*m*) *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (1906), 11 O. L. R. 339, C. A.

(*n*) *Clerke* v. *Ritchey* (1865), 11 Gr. 499.

(*o*) *Cashin* v. *Perth* (1859), 7 Gr. 340.

(*p*) *East Zorra Corporation* v. *Douglas* (1870), 17 Gr. 462; *Peers* v. *Oxford* (1870), 17 Gr. 472.

(*q*) *Peers* v. *Oxford*, *supra*.

(*r*) *Blackwood* v. *Percival* (1902), 14 Man. L. R. 216.

(*s*) But see *Confederation Life Association* v. *Brown* (1902), 35 N. S. Rep. 94 (a rather doubtful authority).

fact that a guarantee is called for should put the surety on the alert (*t*).

Nor is there any duty cast upon the holder of lien-notes to repossess himself of the goods to which they relate in order to safeguard a surety for the payment of the price (*u*).

But although such a contract is not necessarily one of those in which *uberrima fides* is desiderated, it is, nevertheless, one which must be based upon the free and voluntary agency of the individual who enters into it (*x*).

And as already stated the contract can be avoided in cases where there has been a material change or enhancement of responsibility in the nature of the duties to be performed by the person guaranteed (*y*), it being clear law that a surety by bond for the fidelity and proper performance of duty by a person employed in a particular office or capacity is not responsible to the obligee for any loss or malversation occurring after the nature of the duties pertaining to the office have been changed in a substantial and material degree (*z*). And *à fortiori* this rule applies where the change of position amounts to a release of the principal (*a*), or a novation (*b*), or there is concealment of the fact that there has been a material increase in the risk (*c*) or in the terms of the obligation.

**Effect of co-sureties refusing to join in bond. Chitty, 572.**

Moreover, where a party signs a bond of suretyship upon the clear and precise understanding that certain other parties, therein specified, shall join with him in the guarantee, and the parties so specified subsequently refuse to join in the bond, the obligor who signed the bond upon the faith of such understanding is, by reason of the refusal, released from his liability; the bond in such circumstances being no more than a conditional escrow (*cc*).

But, on the other hand, a surety is not discharged from his liability merely by showing that his principal at the time when

(*t*) *Cunningham* v. *Buchanan* (1864), 10 Gr. 523.

(*u*) *Massey-Harris* v. *Graham* (1909), 12 W. L. R. 593.

(*x*) *Niagara District Fruit Growing Co.* v. *Walker* (1896), XXVI. S. C. R. 629; *Bayne* v. *Eastern Trust Co.* (1897), XXVIII. S. C. R. 606.

(*y*) *Canada Permanent L. & S. Co.* v. *Ball* (1899), 30 O. R. 557; *Société des Artisans Canadiens-Français* v. *Trudel* (1904), Q. R. 26 S. C. 118.

(*z*) *Bank of Upper Canada* v. *Corert* (1837), 5 O. S. 541; *Goodeham* v. *Bank of Upper Canada* (1862), 9 Gr. 39; *Citizens Ins. Co.* v. *Cluxton* (1886), 13 O. R. 382; but see *Royal Canadian Bank* v. *Yates* (1869), 19 U. C. C. P. 439.

(*a*) *Allison* v. *McDonald* (1894), XXIII. S. C. R. 635; *Pearson* v. *Ruttan* (1864), 15 U. C. C. P. 79.

(*b*) *Canada Permanent L. & S. Co.* v. *Ball* (1899), 30 O. R. 557.

(*c*) *O'Gara* v. *Union Bank of Canada* (1893), XXII. S. C. R. 404; *Grieve* v. *Smith* (1863), 23 U. C. Q. B. 23.

(*cc*) *Corporation of Oxford* v. *Gair* (1888), 15 O. R. 362; *Toronto Brewing Co.* v. *Hevey* (1887), 13 O. R. 64; *Corporation of Huron* v. *Armstrong* (1868), 27 U. C. Q. B. 533; see also *Henderson* v. *Vermilyea* (1868), 27 U. C. Q. B. 544; *Sidney Road Co.* v. *Holmes* (1858), 16 U. C. R. 268.

he misappropriated moneys of his employers, which had been received by him in the ordinary course of business, was also employed by them in a matter outside the course of his usual employment (*d*). But a surety is discharged by the negligent breach of a collateral contractual obligation entered into by the creditor, if the effect of the breach be to enhance and make more onerous the liability of the guarantor. Thus, where a creditor accepted from a surety a transfer of seignorial rents as collateral security for safeguarding the repayment of a loan (with interest and reimbursement of necessary outgoings) which he had made to the principal debtor upon the security of a life policy, and the policy lapsed owing to the creditor omitting to pay the premium when due, it was held that the surety was entitled to be relieved from so much of his obligation of suretyship as the lapsed policy would have sufficed to extinguish (*e*). And generally, in the case of a compromise the agreement therefor must not only receive a strict construction, but must also be confined to the subjects which are either expressed therein or may necessarily be inferred from the terms of the compromise.

### *Extinction of Obligation of Suretyship.*

Chitty, 571—630.

The obligation of the guarantor or surety automatically ceases when the period to which his responsibility is limited by the contract has expired by efluxion of time, without the happening of any fraudulent act or default by the principal for whom he is liable (*f*).

And a like result takes place if the contract of the principal, for the due performance of which the surety became guarantor, was subject to a condition which was not performed (*g*). Consequently, if the warranty be one of credit or of fidelity, should either the creditor or the obligee omit to perform any condition express or implied, whether imposed upon him by the actual terms of the contract or to be deduced necessarily from the context of the guarantee, the surety will be thereby discharged from his liability.

Where, therefore, one of the specific terms of a contract of suretyship between an obligor and an obligee was that the principal's accounts should be from time to timo properly examined and

Effect of obligor's negligence.

(*d*) *Springer* v. *Exchange Bank of Canada* (1887), XIV. S. C. R. 716.

(*e*) *Trust and Loan Co. of Canada* v. *Wurtele* (1905), XXXV. S. C. R. 663.

(*f*) *Waterford School Trustees* v. *Clarkson* (1896), 23 O. A. R. 213.

(*g*) For a limitation on this proposition, see *Royal Canadian Bank* v. *European Ass. Society* (1870), 29 U. C. Q. B. 579.

verified by certain auditors appointed for that purpose, but in fact no such audit ever took place, it was held that the *laches* of the obligee avoided the contract of suretyship (*i*).

And a like decision was arrived at in the case of the *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.* (*k*), in which the specific statements of the employer as to the mode of business and the various checks used to detect dishonesty in an employé were treated by the guarantor as the basis of the contract upon which he undertook to indemnify the employer against malversation by his employé, the Court holding that the guarantee was avoided by reason of the fact that the employer did not in fact use the particular deterrents to dishonesty which had been specified by him.

*Laches* of obligor.

And where a bond of suretyship contained a proviso that notice of default by the principal debtor should be given by the obligee to the obligor, such a proviso for notice was held to be a condition precedent to the obligee's right to call upon the obligor to make good the default of the principal debtor; and where such notice was not given within a reasonable time, it was held that the obligor was discharged from his liability under the bond (*l*).

Generally, however, in order that the *laches*, neglect or misconduct of an obligee should discharge a surety from his liability under bond for the debt, default or malversation of his principal, it is not enough for the guarantor to show mere passive inactivity on the part of the person to whom the guarantee was given. Nor will an obligee's neglect to call the principal debtor to account in reasonable time, or his failure to enforce payment against him, necessarily discharge the sureties (*m*).

There must be, in order to relieve the obligor from liability, some positive act done by the obligee to the prejudice of the surety, or else such a degree of negligence on his part as will suggest connivance with the principal debtor and thus amount to either actual or constructive fraud (*n*).

Consequently, the mere omission to do some act which the creditor is not legally compellable to perform will not discharge a surety so long as the principal debt is not statute-bound, although, on the other hand, the neglect of the creditor to per-

(*i*) *Paris Board of Education* v. *Citizens Insurance and Investment Co.* (1879), 30 U. C. C. P. 132.

(*k*) (1906), 11 O. L. R. 330, C. A.; see also *Chicago Life Ins. Co.* v. *Duncombe* (1906), 8 O. W. R. 898; *Paris Board of Education* v. *Citizens Insurance and Investment Co.* (1879), 30 U. C. C. P. 132.

(*l*) *Corporation of Chatham* v. *McCrea* (1862), 12 U. C. C. P. 352.

(*m*) *Cunningham* v. *Buchanan* (1864), 10 Gr. 523.

(*n*) See the *McLaughlin Carriage Co.* v. *Oland* (1901), 34 N. S. Rep. 193, as to when forbearance will not discharge a surety.

form an active duty essential to the protection of the security may preclude him from subsequently suing the surety (*o*). And where there is an initial illegality in the agreement, a contract of suretyship is wholly avoided thereby (*oo*); the underlying principle in all cases being that, as the surety by his undertaking warrants the honesty of the person on whose behalf he enters into the bond, he is consequently not entitled to be relieved from the obligation into which he has entered merely because the obligee fails to use all the means in his power to guard against the results of dishonesty (*p*).

Bond not avoided by *laches* of Crown.

And with regard to sureties to the Crown it is an axiom of the general law, and as such applicable to the whole of the British Empire, that, in the absence of express statutory enactment to the contrary, the Crown is not liable for the *laches* or neglect of its officers. Where, therefore, the sureties of a defaulting subordinate servant of the Government were called upon to make good, to the amount of their respective guarantees, the peculations of their defaulting principal, the fact that such principal was retained in the service of the Crown after his offences were discovered was held not to amount to a condonation so as to discharge the sureties (*q*).

Other methods whereby the contract of suretyship may be discharged. Chitty, 571.

Other ordinary methods whereby the contract of suretyship may be extinguished are:—

Payment by the principal debtor to his creditor of the obligation for which the guarantor was surety.

Rule in *Clayton's Case* not always applicable.

And in this connection it may be stated that although it has been considered a general rule of law since *Clayton's Case* that when a debtor makes a payment to his creditor he may appropriate it to any debt he pleases, and the creditor is bound to apply it accordingly, yet, nevertheless, a surety has no right to complain of the method of appropriation of payments by the creditor when the principal debtor fails to make an appropriation of them himself and leaves them to be appropriated by the creditor as he pleases (*r*).

Moreover, the rule that general payments are appropriated first to the earliest items on the debtor side of an account does not entitle a surety to claim that a concealed item with which, from

(*o*) *Massey-Harris* v. *Graham* (1909), 12 W. L. R. 592, at p. 594.

(*oo*) *People's Bank of Halifax* v. *Johnson* (1892), XX. S. C. R. 541.

(*p*) *Exchange Bank* v. *Springer* (1887), XIV. S. C. R. 716; *McDonald* v. *May* (1847), 5 U. C. Q. B. 68; *Town of Meaford* v. *Lang* (1891), 20 O. R. 42, 541; *County of Essex* v. *Park* (1861), 11 U. C. C. P. 473; *County of Frontenac* v. *Breden* (1870), 17 Gr. 645; *East Zorra Township* v. *Douglas* (1870), 17 Gr. 462.

(*q*) *Black* v. *The Queen* (1899), XXIX. S. C. R. 693.

(*r*) *Cunningham* v. *Buchanan* (1864), 10 Gr. 525.

the fact of its existence not being known, the debtor had not been charged, should be deemed to have been satisfied by the moneys which had from time to time been paid to the creditor by the debtor (*s*). But where separate securities are given by different sureties for a joint debt, subsequent payments on account thereof in the absence of specific appropriation by the debtor, should be allocated by the creditor in equal proportions to the credit of each security (*t*).

A second method of discharge is by the payment of the obligation to the creditor or his authorised agent by the surety; and it should be noted that payment in these circumstances not only extinguishes the original obligation, but also entitles the surety to step in and occupy the place of the creditor; it being a general proposition of law that upon payment of the debt the surety has precisely the same rights as those possessed by the creditor to whom he has paid the obligation, and is entitled to have placed in his hands all securities which the principal debtor may have given to the creditor (*u*).

**Right of contribution between co-sureties.**

Moreover, if several persons are indebted and one makes payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors or co-sureties; the principle being that it would be inequitable for a creditor to exact or receive payment from one and permit an avoidance of contribution by the other debtors or co-sureties. A creditor, therefore, is bound seldom by contract, but always in conscience, so far as in him lies, to put the party paying him his debt upon exactly the same footing as those who are equally bound but have not paid their *quota*.

**Rights of surety in collateral security.**

And where a creditor has received as collateral security from a surety bonds of a value exceeding that which is required to satisfy the amount for which the surety is liable, the surplus so received in excess is, in equity, received for the use of the surety, and could be recovered by him either on equitable principles or as money had and received in an action at law (*x*).

And where, by an agreement entered into as collateral security to a deed of mortgage, it was mutually agreed by the lender, borrower and a surety that any judgment recovered against the surety should "stand as additional or collateral security for the payment of such mortgages, to pay and make up any deficiency

(*s*) *Frontenac County* v. *Breden* (1870), 17 Gr. 645.

(*t*) *Moore* v. *Riddell* (1864), 11 Gr. 69.

(*u*) *Burnham* v. *Peterboro'* (1860), 7 Gr. 366; *Trevine* v. *Burkett* (1882), 1 O. R. 80; see also *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), L. R. 6 A. C. 1 (an English case).

(*x*) *Milne* v. *Yorkshire Guarantee Co.* (1906), XXXVII. S. C. R. 331.

that might arise or exist should it at any time become necessary to sell the said farms, &c.," it was decided that the surety was entitled to have an account taken, the security realised, and credit given for the amount thereby obtained before he could be called upon to pay anything (*y*).

Surety not always entitled to "set-off."

But a surety cannot claim to have a judgment obtained by his principal set off a ...inst a judgment obtained by the obligee against him as sure...y (*z*). Neither may a surety who has satisfied the debt due from his principal, after arrangements had been made between the creditor and the principal debtor which practically amounted to an amortisation of liability, recover back the money he has paid (*a*). Nor can money voluntarily paid by a surety, when his liability is in fact barred by the Statute of Limitations, be recovered by him (*b*).

And in this connection it may be mentioned that where persons are severally or jointly and severally liable for a debt, a payment by one does not prevent the Statute of Limitations running in favour of the others (*c*).

Costs of legal proceedings.

It is doubtful whether or no a principal debtor is bound to refund to his surety the costs of proceedings commenced by the creditor against the latter in order to enforce payment of the amount which he had guaranteed (*d*); though in the case of the *Victoria Mutual Insurance Company* v. *Freel* (*e*), in which it was held that a surety against whom judgment had been obtained, and who upon paying the creditors the amount of their debt and costs, took an assignment of the judgment and then proceeded to enforce it against his principal, was entitled to recover from the original debtor the amount of his costs as well as the debt.

And this latter decision seems the more accurate and equitable of the two, for it savours of absurdity if, when a surety is sued for the debt of his principal, should he be unable to pay, he must not only suffer judgment therefor upon his property, but must be also penalised in the costs recovered and the expenses of the levy, because he did not pay his principal's debt with more promptitude than did the debtor himself whose primary duty it was to discharge the liability.

Moreover, as it is clear law that if a surety pay his principal's

(*y*) *Teeter* v. *St. John* (1863), 10 Gr. 85.
(*z*) *Gray* v. *Smith* (1840), 6 O. S. 62.
(*a*) *Grary* v. *Gore Bank* (1856), 5 Gr. 536.
(*b*) *Patterson* v. *Campbell*, 8 E. L. R. 49.
(*c*) *Wolmershausen, In re* (1890), 62 L. T. 541 (an English case).
(*d*) *Whitehouse* v. *Glass* (1858), 7 Gr. 45.
(*e*) (1885), 10 P. R. 45.

debt he may recover the amount as money paid to his principal's use, it seems equally clear that costs legitimately incurred should be recoverable by him in like manner.

**Death of guarantor.**

Apparently, the death of a surety will not in all cases extinguish the obligation. Thus, in *The Queen* v. *Leeming* (*f*), the executors of a deceased surety were held liable for the defalcations of the principal committed after the death of their testator, although they had given notice that they would be no longer liable. Nor will the death of one of several co-guarantors necessarily extinguish the guarantee (*g*). Where, however, the liability of a surety was conditioned not to arise until after a personal demand had been made upon his principal, and this latter, though in default, died before any such demand was made, the surety was held to be discharged (*h*).

Again, an agreement under seal, entered into between co-guarantors, for the prolongation of a guarantee will not convert the original simple contract liability into a specialty.

**Executors of guarantor.**

Where, therefore, upon the death of one of several guarantors, his executors executed a deed under seal with the deceased's co-guarantors agreeing to prolong for an indefinite period their testator's liability on the guarantee, it was held that the Statute of Limitations began to run from the death of the testator, and that after the effluxion of six years his estate ceased to be liable on the guarantee, and, further, that his executors had no power to bind his estate by agreeing to carry on the responsibility for a prolonged and indefinite period (*i*).

**Effect of compromise between creditor and principal debtor.**

The contract of suretyship may also be extinguished by a compromise or arrangement between the creditor and the principal debtor or between the creditor and the surety. But such compromise or arrangement, in order to be effectual in British law, should be of some value to the creditor, although this value may be merely nominal, as, for example, the settlement of some doubtful legal question or of some suit or action at a stage when its issue is still uncertain; for if the consideration for the settlement be a suit already *res judicata* it is no longer a ground for compromise because the issue is neither doubtful nor uncertain.

And as a general proposition of British law a compromise, composition, or agreement between the creditor and the principal debtor, if founded on such good and valid consideration as will discharge the principal debtor, will also automatically discharge his surety;

(*f*) (1850), 7 U. C. Q. B. 306.
(*g*) *Fennell* v. *McGuire* (1870), 21 U. C. C. P. 134.
(*h*) *Port Elgin Public School Board* v. *Eby* (1894), 26 O. R. 73.
(*i*) *Union Bank* v. *Clark* (1910), XLIII. S. C. R. 299

the principle being that if the creditor, without the consent of the surety, by his own act destroy the debt (*k*) or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged (*l*).

Effect of giving time. Chitty, 877.

And a like rule applies where a creditor or obligee enters into some binding obligation or agreement with the principal debtor, the effect of which is either temporarily or absolutely to prevent him from making any demand for either interest or capital upon such principal debtor (*m*); the true question in such or cognate cases being not whether the surety has in fact been actually injured by the delay, but whether he might have been (*n*).

But time given by a creditor to his principal debtor, after judgment recovered against the surety, will not discharge the latter (*o*).

Release of principal debtor.

Covenant not to sue.

And although a release of the principal debtor operates automatically as a release of the surety, because if once the original claim be extinguished there remains nothing in respect of which the creditor can sue (*p*), nevertheless a covenant not to sue the principal debtor, although entered into by the creditor without the surety's consent, even if qualified by a reserve of the obligee's remedies against the surety, is permissible in law provided it be conditioned so as to allow the surety to retain all his remedies over against the principal debtor; the effect of such a covenant being no more than to transfer from the creditor to the surety the original right of the former to sue the principal debtor (*q*).

Surety converting guarantee into personal obligation.

But, as already stated, if a surety has, prior to the agreement between the creditor and the principal debtor whereby the latter obtains a discharge, paid part of the debt and given security for the remainder, or otherwise so conducted himself as to convert the original contract of suretyship into an individual obligation, the

(*k*) *Cumming* v. *Bank of Montreal* (1869), 15 Gr. 686; but see *Bank of Montreal* v. *McPaul* (1870), 17 Gr. 254 (a decision of doubtful authority).

(*l*) See *Cragoe* v. *Jones* (1873), L. R. 8 Ex. 81 (an English case).

(*m*) *Hooker* v. *Gamble* (1862), 12 U. C. C. P. 512; *Ross* v. *Burton* (1847), 4 U. C. Q. B. 357; *Darling* v. *McLean* (1861), 20 U. C. Q. B. 372; *Todd* v. *City Bank* (1861), 7 L. J. 123; *Bailey* v. *Griffith* (1877), 40 U. C. Q. B. 418.

(*n*) *Cassiff* v. *Bogert* (1857), 6 U. C. C. P. 474; see also *Agricultural Ins. Co.* v. *Sargeant* (1895), XXVI. S. C. R. 29. The same rule applies in the case of a novation (*Bristol and West of England Land Co.* v. *Taylor* (1893), 21 O. R. 288 and compare *Farmers' Loan an Savings Co.* v. *Patchett* (1903), O. L. R. 255 (a case of alteration of contract of mortgage), and *Burland* v. *Valiquette* (1903), Q. R. 24 S. C. 94 (a case in which a surety for rent was discharged by the landlord rescinding the lease)).

(*o*) *Duff* v. *Barrett* (1870), 17 Gr. 187; *Bell* v. *Manning* (1865), 11 Gr. 142.

(*p*) *Cumming* v. *Bank of Montreal* (1869), 15 Gr. 683; *McGillay* v. *Hogan* (1893), 20 O. A. R. 298.

(*q*) *Hall* v. *Thompson* (1860), 9 C. P. 257.

creditor, notwithstanding the compromise with the original debtor, will, in the absence of evidence of an intention to the contrary, retain his right against the surety for the unpaid balance of his claim (*r*).

But in cases where the surety has by his conduct converted his original contract of guarantee into a personal obligation, it is no sufficient answer to his claim to be discharged from liability for the creditor to aver that by accepting a composition from the principal debtor everything has been substantially done for the benefit of the surety, nor will it avail that the composition originated in a mistake of law (*s*).

**Effect of creditor taking composition from principal debtor.**

Thus, where the holder of a promissory note signed an agreement to accept from the maker a composition in lieu of the full amount thereof, upon having collateral security given to him for such composition coupled with an assurance from an agent of the maker of the note, who carried the matter through, that, notwithstanding the signing of the agreement for the composition by him, an indorsee of the note for accommodation would continue liable for the balance of the debt, it was held that the execution of the agreement discharged the indorsee, and that the representation made to the holder respecting the legal effect of the instrument which he had signed did not so avoid the composition as to enable him to sue the indorsee for the balance due on the note (*t*).

The above rule is a sequence necessarily deducible from the unquestionable right of the surety to resist any action of a creditor against him which may derogate from his privilege of subrogation. Consequently, as already stated, it is not competent for a creditor when effecting any compromise with a debtor, which amounts to an absolute release, to reserve his rights against the surety.

In qualification of the above proposition, however, it should be stated that alike by British and Canadian law a creditor may, when he makes a composition with a principal debtor, stipulate for the reservation of his remedies against other persons, and in such case those persons will remain liable although the effect of such reservation may be to defeat the object of the composition itself.

(*r*) *Geary* v. *The Gore Bank* (1856), 5 Gr. 536; see also *Hall* v. *Hutchons* (1833), 3 Myl. & K. 426 (an English case); and compare *Bishop, Ex parte* (1880), 15 Ch. D. 400, at pp. 406 *et seq.* (an English case).

(*s*) *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317, P. C.; and see *Lewis* v. *Bowen-Jones* (1825), 4 B. & C. 506 (an English case).

(*t*) *Wilson, Ex parte* (1805), 11 Ves. 410; followed and approved in *Jacobs, Ex parte*, L. R. 10 Ch. App. 211 (English cases).

Thus, where a creditor having in his hands bills of exchange, accepted by a third party for the accommodation of the principal debtor, sufficient in amount to cover the balance of indebtedness left over after the payment of the composition, reserves to himself in clear and unmistakeable terms the power of enforcing the security in his hands, and by virtue of such reservation proceeds against the accommodation acceptor, the latter, after paying the bills, may recover from the principal debtor the amount so paid by him, though thereby the original debtor may derive no benefit whatever from the composition (*u*).

If, however, the instrument of composition be silent as to the securities in the hands of the creditor, and the agreement amounts to an extinguishment of the original debt, it also puts an end to the obligation of the surety, and, consequently, the right of the creditor to proceed against him is extinguished alike in law and equity (*x*).

**Agreement of creditor with one of joint sureties.**

In accordance, however, with general principles of law a compromise neither avails nor prejudices any save those who are parties thereto. Therefore, a creditor may enter into an arrangement with one of several sureties without prejudicing his right to resort to the others, although he cannot recover from the others more than the proportion they would have paid, supposing the co-surety with whom he entered into an arrangement had contributed his share; though, in such case, the co-sureties, when sued by the creditor, will be entitled to call upon the released surety to contribute his aliquot share of the total amount recovered from them under the bond, and may proceed against him therefor (*y*).

It should, moreover, be borne in mind, with regard to the last-stated proposition, that although a creditor's transaction with a principal debtor will discharge a surety, because as the principal debt is discharged so also is its collateral security, nevertheless the creditor's arrangement with the surety will not discharge the principal debtor.

**Release of several surety.**

Again, upon equitable principles, where two or more sureties contract severally (*z*), though, perhaps, subject to the right of the co-sureties to claim contribution, a creditor may release by covenant not to sue (*a*), or compound with or give time to one co-debtor or co-surety, without thereby prejudicing his right to proceed against the others; but apparently he cannot recover

(*u*) See as to this doctrine, *Muir* v. *Crawford* (1875), L. R. 2 H. L. (Sco.) 456.

(*x*) *Cragoe* v. *Jones* (1873), L. R. 8 Ex. 81 (an English case); see also *Boulthee* v. *Stubbs* (1810), 18 Ves. 20, and *Hall* v. *Hutchons* (1833), 3 Myl. & K. 426 (English cases).

(*y*) *Wolmershausen, In re* (1890), 62 L. T. 541 (an English case).

(*z*) *Ward* v. *National Bank of New Zealand* (1883), 8 A. C. 755, P. C.

(*a*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511, C. A. (an English case).

from the other co-sureties more than the proportion they would have paid, supposing the co-surety released had contributed his share.

Apart, however, from those equitable principles above-stated, which are of general application in cases of principal and surety, it is undoubted law (*b*) that if two are bound jointly, or, perhaps, jointly and severally (*c*), for the payment of an entire sum of money, a release to one may be pleaded as a bar against action by both: the general principle in such cases being that a personal action once suspended by the voluntary act of the party entitled to it is for ever gone and discharged.

**Right of contribution between joint sureties.** Chitty, 581.

The principle of contribution between joint sureties does not, however, rest on contract, but upon equitable principles, which may be modified by the extent to which each party has engaged himself, and this rule applies whether the parties are jointly or severally bound, and whether it be by one instrument or by several bond.

It is, moreover, clear that one surety may compel contribution from another towards payment of the debt in respect of which they are jointly bound. And in all such and cognate cases, whether the bond be joint or several, the sureties have a common interest and a common burthen, being bound as effectively *quâ* contribution as if bound in one instrument—with this difference only, that the sum specified in each instrument, if there be more than one, ascertains the proportions of contribution, whereas if they are all joined in the same engagement they must all contribute equally (*d*).

**Surety's right to disclosure.**

Moreover, a surety is entitled to the fullest disclosure of all matters and transactions germane to his contract of suretyship, and if by collusion between the creditor and a co-surety he is induced to pay a larger amount as his contribution to the sum guaranteed than he is legally bound to do, he may recover such surplus as money had and received (*e*). Although if one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot upon payment of the debt recover contribution from the co-surety who has been released (*f*).

(*b*) Com. Dig. *tit.* Pleader, 2 W. 30; 2 Rol. 410 D. 1 ("Si sont divers obligees et un releas, ceo barr touts").

(*c*) See on this point *Cocks* v. *Nash* (1832), 9 Bing. 341 (an English case decided on special facts); and also *Blyth* v. *Fladgate*, [1891] 1 Ch. at p. 353; this latter case seems to show that where there is a joint obligation and a separate one also, a plaintiff does not, by recovering judgment against one, preclude himself from suing the other.

(*d*) *Ostrander* v. *Jarvis* (1909), 18 O. L. R. 17.

(*e*) *Milne* v. *Yorkshire Guarantee Corporation* (1906), XXXVII. S.C.R. 331.

(*f*) *Worthington* v. *Peck* (1894), 24 O. R. 535.

Co-sureties' right of participation in moneys given to one by principal debtor.

But, on the other hand, where one of several co-sureties has in his hands moneys of the principal debtor, deposited with him for the express purpose of paying the creditor, he can be compelled by his co-sureties to pay over such moneys to the creditor; or if the creditor has been already paid by the sureties seeking relief, then they may compel their co-surety to hand over to them the moneys which he has received from the principal debtor (*g*).

And where one of two co-sureties has security from the principal debtor by way of indemnity, the other is entitled to share in the benefit. This right does not depend upon contract, but is based on the maxim that "equality is equity," and, consequently, that it would be inequitable for co-sureties, bound for the same debt, to bear unequal burdens, or that one should be at liberty to relieve himself entirely or partially from liability by means of a security from the debtor in the benefit of which his co-surety had no participation (*h*). Apparently, moreover, the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is ascertained, *id est*, until the claim of the principal creditor has been established against him, although at the time of the action for contribution the statute may have run as between the creditor and the co-surety.

But, on the other hand, where a voluntary payment is made by one of several co-guarantors to the creditor after legal liability has been extinguished by efflux of time, contribution towards the amount so paid is irrecoverable by him from his co-sureties (*i*).

Nor can a surety sue a co-surety jointly with the principal debtor for the amount of a debt contracted by the principal which he has been obliged to pay, because a defaulting surety is only liable in contribution to a co-surety for a proportionate part of the whole sum.

But if a surety should be sued jointly with his principal and judgment recovered against both, the surety would be liable for the whole amount upon default by his principal. And in accordance with the maxim *interest reipublicæ ut sit finis litium*, judgment in such case recovered against the principal debtor is *res judicata* against the surety also, provided that it determines and settles the responsibility of the principal debtor in a matter covered by the security.

But *e converso* where the judgment deals with a different matter altogether, *e.g.*, the neglect of the principal to collect

(*g*) *Macdonald* v. *Whitfield* (1897), XXVII. S. C. R. 94.

(*h*) *Menzies* v. *Kennedy* (1876), 23 Gr. 360.

(*i*) *Patterson* v. *Campbell* (1910), 8 E. L. R. 49.

certain premiums, and not his failure to account for moneys actually received, it will not sustain an allegation of *res judicata* as regards the surety (*f*).

### *Further Rights of Sureties by British Law.*

Discharge of surety by novation. Chitty, 576.

It is a settled principle of British law that a mere agreement to substitute a new contract in lieu of an original obligation is void, unless it be actually executed and accepted as satisfaction by the obligee (*g*). Consequently, no action can be maintained on the new agreement (*h*), nor can it be pleaded in bar to the original demand (*i*).

Therefore, the substitution of one surety for another surety without the consent of the creditor will not discharge the liability of the original obligor either in law or in equity. And although it is a general proposition of law that the acceptance by a creditor of another security of a nature higher than that upon which his former debt rested is an extinguishment of the first debt and the substitution therefor of the second, as where a person who is a creditor by simple contract accepts an obligation under seal, this rule must be understood to apply exclusively where the principal debtor himself enters into the security. For a bond given by a surety for a simple contract debt due by another does not extinguish the simple contract debt, and in like manner the contract of a guarantee or surety under seal does not by operation of law discharge the principal debtor (*k*).

Discharge of surety by extension of time to principal. Chitty, 577.

By British law a creditor who, without the consent of the surety, gives time to the principal debtor (*l*) or enters into any contract with him which, in its result, either alters the position between him and his debtor (*m*), or may have the effect of giving time to the debtor (*mm*), thereby releases the surety from his engagement in cases where the alteration of time is given either as an extension of the original contract (*n*) or by virtue of some subse-

(*f*) *Morgan* v. *Western Assurance Co.* (1903), Q. R. 13 K. B. 49.

(*g*) *Dane* v. *Mortgage Ins. Corp., Ltd.*, [1894] 1 Q. B. 54, C. A.; *Jacobs, Ex parte* (1875), L. R. 10 Ch. App. 211; *Provincial Bank* v. *Cussen* (1886), 18 L. R. Ir. 382 (all English or Irish cases).

(*h*) *Lynn* v. *Bruce* (1794), 2 H. Bl. 317.

(*i*) *James* v. *David* (1793), 5 T. R. 141.

(*k*) *White* v. *Cuyler* (1795), 6 T. R. 176, at p. 177.

(*l*) *Swire* v. *Redman* (1876), 1 Q. B. D. 536; *Oakeley* v. *Pasheller* (1836), 10 Bligh, N. S. 548; *Wilson* v. *Lloyd* (1873), 42 L. J. Ch. 559, L. R. 16 Eq. 60.

(*m*) *Holme* v. *Brunskill* (1877), 3 Q. B. D. 495, C. A.; *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755.

(*mm*) *Bowmaker* v. *Moore* (1819), 7 Price, 223.

(*n*) *Combe* v. *Woolf* (1832), 8 Bing. 156; *Croydon Commercial Gas Co.* v. *Dickinson* (1876), 2 C. P. D. 46.

sequent valid contract between the creditor and the principal debtor (*o*), by which the creditor in an effectual manner deprives himself of the power of suing the principal debtor (*p*). Nor will the fact that the extension of time or other benefit conferred upon the debtor was not disadvantageous to the surety deprive him of his right to claim a discharge, the guarantor being himself the best judge of what is or is not for his own benefit (*q*).

Statutory limitations on discharge by giving time.

But although as a general proposition the above is undoubted law, the statement is subject to certain limitations. Thus, by the Manitoba Queen's Bench Act (58 & 59 Vict. c. 6), s. 39, sub-s. (14), it is enacted that: "Giving time to a principal debtor or dealing with or altering the security held by the principal creditor shall not of itself discharge a surety or guarantor. In such cases a surety or guarantor shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but the same shall be allowed in so far only as it shall be shown that the surety has thereby been prejudiced" (*r*).

Limitations on discharge of surety by creditor granting forbearance to principal debtor.

And generally, by British law a surety is not discharged by a mere forbearance unless there be some stipulation in the contract that the creditor is to use due diligence against the principal (*s*).

Moreover, in order to constitute a valid discharge of the surety by reason of a contract of forbearance being made between the creditor and the debtor there must be some sufficient consideration therefor, as a contract without consideration is void (*t*). And even in such case the merely giving of additional security by a principal debtor will not discharge a surety, although if the giving of such security is really a consideration for granting time to the principal it will do so (*u*). The reason whereby a surety is discharged if time be given, by the creditor to the principal debtor, is that he (the surety) is thereby prevented from availing himself, should he discharge the obligation, of his right to enforce immediate payment from the principal, thus making his chance of reimbursement more uncertain (*x*).

(*o*) *Samuell* v. *Howarth* (1817), 3 Mer. 272; *Watts* v. *Shuttleworth* (1861), 7 H. & N. 353.

(*p*) *Samuell* v. *Howarth* (1817).

(*q*) *Samuell* v. *Howarth* (1817), 3 Mer. 272; *Ward* v. *National Bank of New Zealand* (1883), 8 A. C. 755, P.C.; *Durham Corporation* v. *Fowler* (1880), 22 Q. B. D. 394. See p. 417.

(*r*) As to the justice of this statutory enactment, see remarks of Blackburn, J., in *Petty* v. *Cooke* (1871), 40 L. J. Q. B. at p. 284.

(*s*) *Goring* v. *Edmonds* (1829), 6 Bing. 94; *Musket* v. *Rogers* (1839), 5 Bing. N. C. 728.

(*t*) *Philpot* v. *Briant* (1828), 4 Bing. 717; *Brickwood* v. *Annis* (1814), 5 Taunt. 614.

(*u*) *Oceanic, Gurney & Co.* v. *Oriental Financial Corporation* (1874), L. R. 7 H. L. 348; *Pooley* v. *Bradford Banking Co.*, [1894] A. C. 586.

(*x*) *Samuell* v. *Howarth* (1817), 3 Mer. 272; *Oakeley* v. *Pasheller* (1836), 4 Cl. & F. 207.

And a like rule applies where a creditor, whose debt is secured by bond, takes a less rate of interest by anticipation than the rate payable on the bond, the anticipation of such interest in advance amounting to a giving of time, since no action could be taken on the obligation to recover the principal money until the time had expired for which the creditor had received the interest (*y*). Moreover, the surety is discharged, when the creditor takes out execution against the principal and waives it (*z*). [But by English law the release of a principal debtor under the Bankruptcy Acts does not discharge the surety (*a*).]

Nor will the fact that the forbearance was manifestly for the surety's advantage operate so as to charge him (*b*), the surety alone, as already stated, having the right to determine what is and what is not for his advantage (*c*).

And it may be regarded as a general proposition of law that any indulgence by a creditor towards a principal debtor in a matter which it is obligatory on the debtor to perform without the consent of a surety and to his disadvantage will discharge the latter (*d*).

**Discharge of surety by alteration of contract.**
**Chitty, 574.**

It is undoubted law that any alteration in a principal obligation or contract in respect of which a person becomes surety for another extinguishes the agreement so far as the guarantor is concerned and discharges him from liability, unless he has by some subsequent contract acquiesced in the alteration and consented to continue his suretyship: the absolute rule in such cases being that any variation in a contract, made without the surety's consent, which is in effect a substitution of a new agreement, even though the original agreement may, notwithstanding such variation, be substantially performed, will suffice to discharge the surety (*e*).

**Discharge of surety by fraud.**

Any fraud by the creditor in relation to the obligation of the surety, or by the debtor with the knowledge or assent of the creditor, will discharge the surety from his liability, and correlatively if the original obligation by the debtor can be avoided

(*y*) *Blake* v. *White* (1835), 1 You. & Coll. 420; *Munster and Leinster Bank* v. *France* (1889), 24 L. R. Ir. 82.

(*z*) *Mayhew* v. *Crickett* (1818), 2 Swanst. 185; *English* v. *Darley* (1800), 2 Bos. & P. 61; *Forbes* v. *Jackson* (1882), 19 Ch. D. 615.

(*a*) *Jacobs, Ex parte* (1875), L. R. 10 Ch. 211.

(*b*) *Boultbee* v. *Stubbs* (1810), 18 Ves. 20.

(*c*) *Rees* v. *Berrington* (1795), 2 Ves. jun. 540; *Nisbet* v. *Smith* (1789), 2 Bro. C. C. 579; *Mactaggart* v. *Watson* (1835), 3 Cl. & F. 525.

(*d*) *Thomas* v. *Young* (1814), 15 East, 617; *Bowsfield* v. *Towse* (1812), 4 Taunt. 456; *Croft* v. *Johnson* (1811), 5 Taunt. 319.

(*e*) *Evans* v. *Whyte* (1829), 5 Bing. 485; *Eure* v. *Bastrop* (1818), 3 Madd. 221; *Bonar* v. *Macdonald* (1850), 3 H. L. Cas. 226; *Archer* v. *Hale* (1828), 4 Bing. 464; *Merchants' Bank of Canada* v. *McKay* (1888), XV. S. C. R. 672.

by fraud the surety will also be discharged; the governing principle in all such cases being that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law on the ground of fraud.

As to what constitutes such evidence of fraud as will vitiate the contract of suretyship, it is impossible to establish any invariable rule, fraud being alike protean and infinite, and were rules to be formulated defining it strictly repressive jurisdiction would necessarily be cramped and perpetually eluded by new and specious devices evolved by human cunning and invention (*f*).

But although precedents cannot always be found to serve as direct authority for subsequent decisions, if a case of fraud or presumption of fraud arises to which no principle already established can be applied, a new principle must be adopted to meet the new deception, there being always a possibility that the perverted ingenuity of man in contriving a fraud will go beyond any case which has before occurred (*g*).

**Discharge of surety by mistake of fact.**

Alike by the Civil and the British law, a surety is discharged from his obligation if it were entered into under a mistake of fact; and this error or mistake may relate either to the motive or consideration for the contract, the person with whom it is made, or its subject-matter. Concrete illustrations of this are furnished by the Code Civil, which states (*h*): "A compromise, proceeding on and originating in documents which are subsequently proved to have been false, or in respect of a suit treated as pending, but which has been in fact terminated by a definitive sentence, of which the parties, or one of them, had no knowledge, is void."

The contract of suretyship may also be avoided on the ground of error in respect of the person with whom it is made when the person, or the position or character which he sustains, forms the sole or principal cause of the contract. Thus, a compromise made by the creditor of an intestate with a person believed to be his heir, but who was not so, is void. And on similar grounds any mistake as to the subject-matter of a contract will discharge a surety who has guaranteed its fulfilment.

(*f*) Note *Preston* v. *Neele* (1879), 12 Ch. Div. at p. 766; see also *Lawley* v. *Hooper* (1745), 3 Atk. 278.

(*g*) Note *Webb* v. *Rorke* (1806), 2 Sch. & Lef. at 666; *Ford* v. *Olden* (1867), L. R. 3 Eq. 461.

(*h*) Art. 2054, 5, 6.

**Mistake of law.**

As regards the vexed question as to whether or no a mistake of law will avoid the liability of a surety, or, in other words, as to what are the precise limits and correct application of the maxim *ignorantia* or *error juris neminem excusat*, in the case of a contract of suretyship, there can be no doubt that where the surety undertakes his obligation in consequence of a wilful misstatement of law by either the creditor or the principal debtor, he is not bound, although, on the other hand, it seems probable that where the contract of suretyship is entered into owing to an innocent but erroneous interpretation of law any obligation which binds the principal debtor will also bind his surety; the sanction alike of public utility and judicial opinion concurring in preventing a person from relieving himself from an obligation, or protecting himself from the consequences of the violation of a contract or prohibition by another which he had legitimate reason to believe were capable of legal enforcement against such other when he entered into the agreement of suretyship for his principal; though, on the other hand, it may be urged, with some degree of plausibility, that there is neither reason nor justice in penalising the ignorance of a person who is under no moral obligation by enforcing against him a liability into which, had he known the true state of the case, he would never have entered.

**Discharge of surety by bankruptcy.**

**Chitty, 579.**

The bankruptcy of a surety discharges him from further liability on his obligation. Where, therefore, an insolvent debtor compromises with his creditors, he is thenceforward absolved from liability under his contract of guarantee, inasmuch as his obligation to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in his schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, is, nevertheless, a debt provable in the bankruptcy (*i*).

In such case, however, if the insolvent be one of several sureties, the principle was established in equity early in the seventeenth century that the total liability falls upon the other as if the defaulter had not been a surety at all (*k*), although after payment to the creditor, they would of course be entitled to prove in the bankruptcy.

**Discharge of surety by "confusion."**

Again, the obligation of a surety is extinguished if he become the heir of the creditor or if the debtor become the heir of the creditor, or *vice versâ* if the creditor become the heir to either the surety or to the debtor; for, as the heir succeeds to all the rights of the deceased, active as well as passive, he becomes, in

(*i*) *Hardy* v. *Fothergill* (1888), 13 A. C. 351, H. L. (E.).

(*k*) *Peter* v. *Rich*, 1 Rep. in Chancery, case 35, *temp.* Car. 1.

the character of heir, debtor for the very debt of which he is creditor on his own account; so if the debtor becomes the heir of the creditor, he becomes, in his quality of heir, creditor of that same debt of which he is debtor on his own account (*l*).

But this rule is to be construed strictly and does not operate so as to extinguish a collateral liability. Therefore, a person who was surety for two joint debtors, by succeeding to or being succeeded by one of them, is discharged only as to him in respect of whom he has succeeded, and still remains liable for the other debtor.

And in like manner if the creditor become the heir of the surety or the surety the heir of the creditor, the obligation of the surety is extinguished. But in such case the extinction of the accessory obligation of the surety does not operate as an extinction of the obligation as against the principal debtor, it being axiomatic in such a case that the principal obligation may subsist without the accessory, although the accessory cannot subsist without the principal.

Again, if the creditor make the surety and another executors of his will, although the surety never administers, nevertheless the common law action against him is gone for ever, and even should the surety die testate the surviving co-executor of the original creditor has no right of action against the executors of the deceased surety (*m*); and this rule is so far extended that, if the obligee in a joint and several bond make one of two co-sureties his executor with others, the action on the bond is discharged as to both (*n*).

But although where a creditor makes his debtor an executor of his will he thereby discharges the debt at common law, yet, nevertheless, in equity it is considered that, as the debt due from the debtor-executor has been paid to him by himself (that is, has been taken by him out of one pocket and put into the other), he is accountable for the amount of his debt as assets of his testator-creditor (*o*), and the debt is general assets not only for the payment of the testator's debts, but also of his legacies (*p*).

(*l*) *Codrington* v. *Johnstone* (1824), 2 Shaw's Sco. App. Cas. 118.

(*m*) *Wankford* v. *Wankford* (1704), 1 Salk. 299; *Freakley* v. *Fox* (1829), 9 B. & C. 130.

(*n*) *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Nicholson* v. *Revill* (1836), 4 A. & E. 675, 683.

(*o*) *Freakley* v. *Fox* (1829), 9 B. & C. 130, at p. 134.

(*p*) *Simmons* v. *Gutteridge* (1806), 13 Ves. 262; *Berry* v. *Usher* (1805), 11 Ves. 87, at p. 90.

### *Co-relative Rights of Principal and Surety.*

Chitty, 581 581.

The rights of the creditor against the surety are so necessarily connected with the privileges which can be claimed by the surety against the creditor in enforcing those rights that both must be considered together. The latter are subject to and qualified by the privileges which the law has conceded to the surety. The surety by claiming them does not deny—on the contrary, he admits—his obligation to the creditor, but he insists either that the creditor is not entitled to sue him until he has failed in procuring payment from the principal debtor, that is, he claims *beneficium ordinis* or *excussionis*, or else that the creditor has sued him for the whole amount of the debt when he ought also to have sued others who were joined with him as sureties, in which case he claims *beneficium divisionis*. As to the existence of these respective rights there seems to be no doubt that the surety can only claim *beneficium ordinis* if there be an express stipulation to that effect: for though there is no doubt that a surety who pays the creditor is entitled to have a cession of all the creditor's actions, securities and remedies against the principal debtor, there is, apart from agreement, no obligation on a creditor to sue the principal debtor before having recourse to the sureties.

As regards the second claim mentioned above, viz., the surety's right to *beneficium divisionis* in cases where he is one of several co-sureties, it may be at once stated that this doctrine has never found acceptance in the superior Courts of common law in England. It is true that by the Roman law as it stood in the time of Justinian sureties had, generally speaking, a right to compel the creditor to enforce payment against them *pro ratâ* only, but this rule of the civil law has no place in British jurisprudence. It is, however, competent for a surety, against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, even before paying the creditor, to maintain an action against a co-surety to compel him to contribute towards the common liability; and in such case the Statute of Limitations does not begin to run against the surety suing the co-surety until the claim of the principal creditor has been established against him, even though the statute may have run out as between the principal creditor and the co-surety (*q*).

(*q*) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514.

### *Rights of Creditor against Surety.*

As a general proposition of the law of guarantee the surety is equally liable with the principal debtor provided the original liability is a legal one (*r*). But as a surety is responsible only for the default of his principal, that default must have taken place and the creditor must have acquired a right to sue the principal debtor before the surety can be made liable. Chitty, 565.

If, therefore, any act has to be done by the creditor to the principal debtor as a condition precedent to his right to sue him, it follows that as until that act is done he has no right of action against the principal debtor, he can have none against the surety. Moreover, if it be an express term of the contract of suretyship, but not otherwise, that a request for payment shall be made by the creditor to the surety, such previous request by the creditor is necessary in order to render the surety liable (*s*).

Again, a creditor is entitled to the benefit of all the securities which the principal debtor has given to his surety, as well as to those which were given to the creditor by the principal (*t*).

Moreover, if the creditor has chattel security, or a fund in addition to the personal responsibility of the principal and surety, he may, nevertheless, at common law proceed against the surety personally without resorting in the first instance to the fund or pledge (*u*). But in equity the validity of this procedure is open to question (*x*). And there is no doubt that when the surety has paid the debt of the principal to the creditor he may compel him to proceed against the fund or pledge for his (the surety's) benefit if such a course be open to the surety himself (*y*).

Moreover, if the surety guarantee a limited amount only, and the creditor gives credit to the debtor for a larger sum, should the creditor prove under the principal debtor's bankruptcy and receive dividends in respect of his whole demand, the dividends so received by the creditor must be applied by him in reduction of the entire debt *pro ratâ*, and he is not at liberty to allocate the dividends so received by him solely in reduction of that part of his claim for which the surety is not responsible (*z*); and if the prin-

(*r*) *Swan* v. *Bank of Scotland* (1836), 10 Bligh, N. S. 627.

(*s*) *Moore* v. *Blawfield*, Noy, 95; see also *Brown's Estate, In re*, [1893] 2 Ch. 300.

(*t*) *Manor* v. *Harrison* (1692), 1 Eq. Ca. Ab. 93; and see *Wright* v. *Morley* (1805), 11 Ves. 11, at p. 22; *Forss* v. *Steel*, [1901] 2 Ch. 602.

(*u*) *Folliott* v. *Ogden* (1789), 1 Hy. Black. 124.

(*x*) *Wright* v. *Nutt* (1789), 1 Hy. Black. 137; but see *Wright* v. *Simpson* (1802), 6 Ves. 714.

(*y*) *Wright* v. *Simpson* (1802), 6 Ves. 714; note especially p. 733 *et seq.*

(*z*) *Rushforth, Ex parte* (1804), 10 Ves. 409; *Turner, Ex parte* (1796), 3 Ves. 243; *Midland Banking Co.* v. *Chambers* (1869), L. R. 4 Ch. 398.

cipal make an assignment for the benefit of his creditors *pro rata* the same rule applies, and the dividends which the creditor receives must be applied by him ratably to the whole debt, and not merely to that part to which the guarantee does not extend, because the payment made by the assignee does not relate only to a fraction of the entire indebtedness, but is so much in each and every pound of the whole amount of the debt (*a*).

Again, where a surety gives a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is, as between the surety and the creditor, *primâ facie* to be construed as applicable to a part only of the debt co-extensive with the amount of the guarantee. But this rule is not applicable to a guarantee limited in amount where the debt, already ascertained exceeds the limitation (*b*).

### *Rights of the Surety against the Creditor.*

Chitty, 582.

As a general proposition a surety cannot as against the principal creditor avail himself of defences which the principal debtor could not himself set up (*c*), but a surety may claim as a matter of right *beneficium cedendarum actionum*, or the privilege by which a surety can, upon paying the creditor, require from him a cession of all his rights of action against the principal debtor and the co-sureties, a necessary sequence flowing out of the contract of indemnity given by the surety to the creditor, but no such privilege results from a payment on account by the surety. The whole debt must be discharged in order to entitle the surety to stand in the shoes of the creditor; and, as regards co-sureties, this right of action is subject to the limitation that he must first deduct from the amount claimed by him that proportion of the debt which he, as one of the sureties, was bound to pay.

Moreover, each of the co-sureties is liable only for their respective proportions of the remainder of the debt paid by the surety, consequently if the payee sued one of them only it would be competent for the surety so sued to insist upon the benefit of a division of the liability amongst all; and if one of the co-sureties is insolvent, the loss is to be equally borne, as well by him who has paid the whole debt as by the other co-sureties.

Benefit of securities.

Again, a surety upon payment to the creditor of the debt of the principal is entitled to the benefit of all securities of which the

(*a*) *Bardwell* v. *Lydall* (1831), 7 Bing. 489; *Gee* v. *Pack* (1863), 33 L. J. Q. B. 49.

(*b*) *Ellis* v. *Emmanuel* (1876), 1 Ex. Div. 157, C. A.

(*c*) *Kent* v. *Letourneur* (1905), Q. R. 14 K. B. 60.

creditor is possessed or can render available against the principal debtor, whether the surety was aware of the existence of such securities or not (*d*), or whether they were deposited by the principal debtor with the creditor at the same or at different times, or even if they were not actually in existence at the time (*dd*), provided that they were deposited in respect of the particular transaction in regard to which the surety was liable (*e*).

### *Rights of Surety against Principal Debtor.*

As has already been stated, the surety upon payment to the Chitty, 581. creditor is entitled to a cession of and a subrogation to all those actions, rights and securities which the creditor himself could have enforced against the debtor.

In addition to these rights, by British law the surety upon paying the debt himself acquires an immediate right of action against the principal debtor, though, in order to acquire such right, the debt must in fact be due and payable and the principal debtor in default (*f*), because if the time of payment has not arrived when the surety pays he cannot deprive the principal of the term to which he is entitled. But given this premiss, it is immaterial whether the surety has made actual payment in specie, or substituted therefor as its equivalent an approved novation or compromise, as by either of these means he acquires a right to demand reimbursement from the principal debtor of the actual amount which he has paid in order to extinguish the obligation.

If, however, the creditor, from personal regard for the surety, gratuitously remit the debt, the surety cannot afterward demand anything from the principal debtor, because the remission, though profitable to the debtor, has cost the surety nothing. But *e converso* if the remission was made in recompense for services rendered by the surety to the creditor, the former may require reimbursement by the debtor, as in such case the extinguishment of the obligation was compounded for by the services rendered.

But the surety if he compromise either in work or in money for less than the debt can recover no more than he actually pays, it being his duty to settle the debt and procure the discharge of the debtor upon the best terms he can obtain (*g*).

(*d*) *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 A. C. 1 H. L. (E.).

(*dd*) *Scott* v. *Knox* (1838), 2 Jones Ir. Ex. Ca. 778.

(*e*) *Wade* v. *Coope* (1827), 2 Sim. 153; but see *Praed* v. *Gardiner* (1735), 2 Cox, Eq. Cas. 86.

(*f*) *Exall* v. *Partridge* (1799), 8 T. R. 308, at p. 310; *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811.

(*g*) *Reed* v. *Norris* (183[illegible]), 2 Myl. & Cr. 361; *Butcher* v. *Churchill* (1805), 14 Ves. 567.

A guarantor is, however, entitled to recover interest (*h*) and also damages and costs from the principal debtor if the latter have been sustained by him in consequence of the default of the principal (*i*), but not otherwise (*j*). The surety will also be deprived of his resort to the debtor if the latter, in consequence of the default of the surety in not apprising him of the payment, has paid the creditor a second time, but in such case the surety may call upon the creditor to repay to him the amount he has recovered from the principal debtor as money paid and received to his use.

Again, by British law, where the liability of the surety has attached by reason of the default of the principal debtor, the surety, without waiting to be sued by the creditor, may by operation of law compel the debtor to relieve him from his liability upon the ground that "where a person is security in a contract there is a joint contract that the principal shall indemnify the security, and the ground of equity is that when the money is due the equity arises" (*k*), for it is unreasonable that a surety should "always have such a cloud hang over him" (*l*). But a surety is not entitled to commence proceedings for an indemnity against a future breach of contract by his principal (*m*).

### *Rights of Sureties against each other.*

Chitty, 581.

By British law there is a right of contribution between co-sureties, and the fact that the liability arises on separate instruments affords no distinction as to the right of contribution between the sureties (*n*); and this right of contribution is founded upon general equitable principles of equality of burden and benefit, therefore where several sureties are bound by different instruments for the same principal debtor and the same obligation they are bound to contribute *pro ratâ* (*o*).

Where, therefore, several persons are sureties for one sum of

(*h*) But see *International Contract Co., In re* (*Hughes' Claim*) (1872), L. R. 13 Eq. 625.

(*i*) *Fisher* v. *Fallows* (1804), 5 Esp. 171.

(*j*) *Smith* v. *Blagrave* (1865), 2 H. & M. 457; *Dixon* v. *Steel*, [1901] 2 Ch. 602; see also *Smith* v. *Compton* (1832), 3 B. & Ad. 407; *Canavan* v. *Bruton*, [1900] 2 Ir. Rep. 359; *Bleaden* v. *Charles* (1831), 7 Bing. 246.

(*k*) *Hungerford* v. *Hungerford* (1711), 1 Gilb. Eq. Rep. 67, at p. 69; *Ferguson* v. *Gibson* (1872), L. R. 14 Eq. 379, at p. 386.

(*l*) *Ranelagh* v. *Hayes* (1683), 1 Vern. 190.

(*m*) *Lloyd* v. *Dimmock* (1877), 7 Ch. Div. 398; and see *Cock* v. *Rare* (1801), 6 Ves. 283.

(*n*) *Mayhew* v. *Crickett* (1818), 2 Swanst. 185, at p. 192; *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666, 67[illegible]; *Craythorne* v. *Swinburne* (1807), 14 Ves. 160, at p. 163; *Newton* v. *Chaplin* (1853), 10 Hare, 646.

(*o*) *Dering* v. *Winchelsea* (*Earl of*) (1787), 1 Cox, Ch. Ca. 318; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

money, even though by distinct instruments, and one pays more than his aliquot part of the debt, he may compel contribution from his co-sureties (*p*). But, on the other hand, where the sureties are bound by different instruments for equal portions of a debt due from the same principal, and the surety of each is a separate and distinct transaction, there is no right of contribution between them (*q*).

Nor is a surety entitled to recover from his co-sureties interest on the money paid by him, even though the debt for which all the sureties were alike liable was specialty (*r*); though *e converso* the surety on a bond is not deprived of his right to contribution by his co-sureties merely because time for payment has been given to him at his request by the creditor without the privity of his co-sureties (*s*).

As regards *lex loci contractus* in contracts of suretyship, the rule apparently is that, when the parties do not reside in the place where the contract is made, and it is effected through agents or by letters, the place in which the final assent is given by the party to whom the guarantee is offered is to be considered as the place where the contract is made. But where a contract, made in one country, is confirmed in another country, if the confirmation of the contract is a condition precedent to validity, the place of confirmation is to be deemed the *locus contractus*. As a general proposition of law, however, applicable to all contractual obligations, the place in which a contract is made is presumed to be that in which it is to be performed, unless it specifically mentions that it is to be performed in some other place. Hence, the law of the country in which a contract is made is deemed that by which it is entirely to be governed, unless by stipulation its performance is to take place elsewhere.

(*p*) *Morgan* v. *Seymour*, *temp.* Car. I.; 1 Rep. in Ch. 120.

(*q*) *Coope* v. *Twynam* (1823), 1 Turn. & Russ. 426.

(*r*) *Dugg* v. *Truebeck* (1831), 2 Moll. 31, at p. 42; *Salkeld* v. *Abbott* (1832), 1 H. & J. 119.

(*s*) *Dunn* v. *Slee* (1816), Holt's N. P. Cases, 399.

# CHAPTER XVIII.

## CONTRACTS RELATING TO THE SALE OF GOODS.

### *Bulk Sales Acts.*

IN British Columbia it is requisite, under the provisions of the Bulk Sales Act, 1908 (*l*), for the purchaser of any stock of goods, wares or merchandise in bulk, for cash or upon credit, before paying the price or any part thereof, or giving any promissory note or other document for or on account of the purchase price, to demand and obtain from the vendor or his agent a statutory declaration (in the form prescribed by the Act) setting out the names of the creditors to whom the vendor is indebted at the time of the sale, together with the sums due, in respect of the goods thus sold in bulk, under penalty of the transaction being deemed fraudulent and void.

A similar statute was passed in Manitoba in 1909 (*m*), the only material difference being that the Act applies to *all* creditors of the vendor to whom he is indebted in sums exceeding $50.

And like provisions are added to the Civil Code of Quebec by an Act passed in 1910 (*n*), intituled "An Act to amend the Civil Code respecting bulk sales of merchandise."

Definition of "bulk sales."

"Bulk sales," within the mischief contemplated by these Acts, are alienations by way of "sale or transfer of a stock of goods, wares or merchandise, or part thereof, out of the usual course of business or trade of the vendor, or whenever substantially the entire stock-in-trade of the vendor shall be sold or conveyed, or whenever an interest in the business or trade of the vendor is sold or conveyed, or attempted to be sold or conveyed, such sale, transfer or conveyance" constitutes a "sale in bulk" within the meaning of the Act (*o*).

(*l*) 8 Edw. VII. c. 7.
(*m*) 9 Edw. VII. c. 60.
(*n*) 1 Geo. V. c. 39.
(*o*) For cases on such sales, see *National Cash Registry Co.* v. *Dewar* (1905), Q. R. 14 K. B. 68; *Trusts and Guarantee Co.* v. *Ross* (1906), 9 O. L. R. 715.

## *Conditional Sales Acts.*

### SUMMARY OF SECTIONS.

2. Goods to include wares and merchandise.
3. Contracts invalid as against subsequent purchaser or mortgagee unless in writing duly filed.
(2) Hire receipts with option of purchase.
(3) Goods delivered to trader for purpose of resale.
(4) Goods sold in the ordinary course of business.
(5) Sales of certain goods marked with name of true owner invalid.
(6) Slight error or misdescription immaterial.
(7) Exclusion of rolling-stock sold to a railway company from provisions of Act.
4. Seller to give copy of contract to hirer or purchaser.
5. Clerk of district or county court to keep record.
6. Immaterial error in record not to avoid effect of filing.
7. Particulars of claim on goods to be furnished on request.
8. Goods retaken to be kept for twenty days before resale.
(2) Requirements as to notice of resale.
9. Goods affixed to realty subject to rights of seller or lender.

In certain provinces and territories of the Dominion, amongst which are included Ontario, Saskatchewan, New Brunswick, and the North-Western Territories, statutory provision has been made respecting the conditional sale of goods. In Saskatchewan and the North-West Provinces the Act applies to sales or bailments of goods of the value of $15 or over, in New Brunswick to $30 or over, whilst in the province of Ontario no monetary limit is prescribed.

The following are the material provisions of the Ontario Statute (*p*), which, *inter alia*, codifies the law in relation to contracts of hire-purchase:—

Chitty, 478 - 480.

Interpretation. "Goods."

**2.** In this Act "goods" shall include wares and merchandise.

Conditional sale of goods accompanied by delivery to be invalid against subsequent purchasers or mortgagees unless

**3.**—(1) Where possession of goods is delivered to a purchaser or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration-money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser, or hirer without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser or proposed purchaser or hirer shall be deemed the owner of the goods, unless (*q*)—

The contract is in writing.

(a) The contract is evidenced by a writing signed by the purchaser or proposed purchaser or hirer, or his agent stating the terms and conditions of the sale or hiring and describing the goods sold or lent for hire; and

(*p*) 1911 (1 Geo. V. c. 30).
(*q*) As to registration, see *Western Milling Co.* v. *Darke* (1894), 2 Terr. L. R. 40 (N. W. T.).

and a copy filed in office of clerk of county or district court.

(b) Within ten days after the execution of the contract a true copy of it is filed in the office of the clerk of the county or district court of the county or district in which the purchaser, proposed purchaser or hirer resided at the time of the sale or hiring (*s*).

Hire receipts.

(2) Sub-section (1) shall apply to the case of a hire receipt where the hirer is given an option to purchase.

Goods delivered for the purpose of resale.

(3) Where the delivery is made to a trader or other person for the purpose of resale by him in the course of business such provision shall also as against his creditors be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

(4) Where such trader or other person resells the goods in the ordinary course of his business the property in and ownership of such goods shall pass to the purchaser notwithstanding that the provisions of this Act have been complied with (*t*).

(5) Clause (b) of sub-section (1) shall not apply to a contract respecting manufactured goods, including pianos, organs or other musical instruments, which at the time possession is delivered has the name and address of the seller or lender painted, printed, stamped or engraved thereon, or plainly attached thereto, nor to a contract respecting household furniture other than pianos, organs or other musical instruments (*u*).

[By virtue of 7 Edw. VII. c. 17, a like proviso is contained in the Saskatchewan Ordinance respecting conditional sales (*x*)]

Error in name or description. Chitty, 104.

(6) An error or inaccuracy in the name or address of the seller or lender which does not mislead shall not prevent the application of sub-section (5) (*y*).

(*s*) See as to filing agreement, *Reinholz* v. *Cornell* (1909), 12 W. L. R. 121. As to effect of non-filing agreement, see *Miller* v. *Blair* (1905), 37 N. S. Rep. 293; *Lapierre* v. *McDonald* (1906), 39 N. S. Rep. 24.

(*t*) Resale by vendee in ordinary course of business, *Peoples' Bank of Halifax* v. *Estey* (1903), 36 N. B. Rep. 169, *Brett* v. *Fearsen* (1907), 17 Man. L. R. 241 *Delaney* v. *Downey* (1912), 21 W. L. R. 577 (Sask.).

(*u*) As to name of bailor or vendor on chattels, see *Mason* v. *Lindsay* (1902), 4 O. L. R. 365; *Great West Life Assce. Co.* v. *Leib* (1912), 21 W. L. R. 877 (Sask.); *Cox* v. *Schoen* (1902), 14 Man. L. R. 174 (non-compliance with a similar provision in Manitoba statute). Merely stamping on the chattel a name without more is not sufficient compliance with the ordinance (*Cockshutt Plow Co.* v. *Cowan* (1910), 3 Sask. L. R. 17, 43 W. L. R. 256). An abbreviated name does not constitute sufficient compliance with the Act (*Ericsson Manufacturing Co.* v. *Elk Lake Telephone and Telegraph Co.* (1912), O. W. N. 161).

(*x*) This ordinance in Saskatchewan is not retrospective, and therefore does not apply to sales before the passing thereof (*Dionne* v. *Moose Harris Co.* (1910), 3 Sask. L. R. 18; 13 W. L. R. 557).

(*y*) For the purposes of this sub-section an error or inaccuracy does not include an omission (*Toronto Furnace Cre nating Co.* v. *Ewing* (1910), 15 O. W. R. 381).

Rolling stock sold to railway company.

(7) This section shall not apply to a contract for the sale by an incorporated company to a railway company of rolling-stock if the contract or a copy of it is filed in the office of the provincial secretary within ten days from its execution.

[It is provided alike by sect. 1 of c. 145 of the Revised Statutes of Saskatchewan, 1909, and by sect. 1 of c. 44 of the Ordinances of the North-West Territories, 1905, that the writing prescribed by the section "shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished" (z).]

Copy of contract to be given to purchaser or hirer.

4. The seller or lender shall deliver a copy of the contract to the purchaser or hirer within twenty days after the execution thereof, and if after request he neglects or refuses to do so, the judge of the county or district court of the county or district in which the purchaser or hirer resided when the contract was made may, on summary application, make an order for the delivery of such copy.

Index to be kept by clerk of county or district court.

5. The clerk of the county or district court shall make a record of every contract of which a copy is filed in his office under this Act in an index book to be kept for that purpose, and he shall be entitled to a fee of ten cents for making the record and to a fee of five cents for every search in respect thereof.

Effect of error in copy of contract filed.

6. An error of a clerical nature or in an immaterial or non-essential part of the contract which does not mislead shall not invalidate the filing or destroy the effect of it (a).

Memorandum of satisfaction of seller.

[It is provided alike by sect. 6 of c. 44 of the Ordinances of the North-West Territories, 1905, and by sect. 6 of c. 145 of the Revised Statutes of Saskatchewan, 1909, that: "The seller or bailor shall, upon payment or tender of the amount due in respect of such goods or performance of the conditions of the bailment, sign and deliver to any person demanding it a memorandum in writing stating that his claims against the goods are satisfied, and such memorandum shall thereupon operate to divest the seller or bailor of any further interest or right of possession in any of the said goods. Any such memorandum if accompanied by an affidavit of execution of an attesting witness may be registered."]

Particulars of claim on goods to be given on written request.

7.—(1) The seller or lender shall within five days after the receipt of a request in writing from any proposed purchaser of any goods to which this Act applies, or from any other person inte-

(z) *Bowser* v. *Goodwin* (1911), 19 W. L. R. 873 (Sask.).

(a) Compare *Aricinski* v. *Arnold* (1906), 4 W. L. R. 536.

rested, furnish particulars of the amount remaining due to him and the terms of payment of it, and in default he shall incur a penalty not exceeding $50 recoverable under the "Ontario Summary Convictions Act."

How particulars to be given.

(2) If the request is by letter the person making the request shall give a name and post office address to which a reply may be sent, and it shall be sufficient if the information is given by registered letter deposited in the post office within the prescribed time addressed to the person enquiring at his proper post office address or where the name and address is given by him by the name and at the post office address so given.

Goods retaken to be retained for twenty days.

**8.**—(1) Where the seller or lender retakes possession of the goods for breach of condition he shall retain them for twenty days (*b*), and the purchaser or hirer, or his successor in interest, may redeem the same within that period on payment of the amount then in arrear, together with interest, and the actual costs and expenses of taking and keeping possession (*c*).

Notice of reselling.

(2) Where the purchase price of the goods exceeds $30 and the seller or lender intends to look to the purchaser or hirer for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to the purchaser or hirer or his successor in interest (*d*).

(*b*) A breach of this proviso throws the *onus* of proving the legitimacy of a sale before the efflux of twenty days upon the vendors (*Sawyer and Massey* v. *Bouchard* (1910), 13 W. L. R. 394).

(*c*) As to agreements in cases of default, see *Bridgman* v. *Robinson* (1904), 7 O. L. R. 591 (wrongful seizure); *Abell Engine Works Co.* v. *McGuire* (1901), 13 Man. L. R. 454 (held on special facts that a vendor retaking possession of goods was in like position to a mortgagee in possession, as to which, see *Henderson* v. *Astwood*, [1894] A. C. 150, P. C.). As to general principles governing "right to repossession on default," see *North-West Thresher Co.* v. *Bates* (1910), 13 W. L. R. 657; *Can. Port Huron Co.* v. *Fairchild* (1910), 3 Sask. L. R. 228; 14 W. L. R. 525.

(*d*) Apart from this sub-section (which in the absence of special contract, as to which see *Hopkins* v. *Danroth* (1907), 1 Sask. L. R. 225; 7 W. L. R. 303, does not apply in Saskatchewan, New Brunswick, or the North-West Territories), the remedy of the seller or owner in the case of a contract of conditional sale is confined to a revendication or resumption of possession of the goods. He is not entitled to sue the hirer or purchaser for the balance of the original price should the sale of the chattel upon his resuming possession thereof result in a deficiency (*Abell* v. *Campbell*, 21 Occ. N. 303; *Donnelly, Watson & Co.* v. *Roberts* (1912), 22 W. L. R. 379; *Travis* v. *Way* (1901), 33 N. S. Rep. 551 (B. C.); *Williams* v. *Nadon* (1907), Q. R. 32 S. C. 250; *American Abell Engine C.* v. *Weidenwilt* (1911), 4 Sask. L. R. 388; *Fairchild Co.* v. *Hammond* (1903), 7 Terr. L. R. 30). Nor is a vendor entitled to recover on collateral security (*Massey Harris Co.* v. *Lane* (1901), 6 Terr. L. R. 71). In Quebec a conditional sale or hire-purchase agreement is regarded as an inchoate contract, therefore, prior to revendication by the bailor of the goods, he must, as far as possible, place the vendee or bailee in the position which he occupied prior to entering into the agreement (*Dandurand* v. *Coffin* (1907), Q. R. 32 S. C. 83; *Daly* v. *Frank* (1911), 10 R. de J. 69). For application of a somewhat similar principle in Saskatchewan, see *Sawyer Massey Co.* v. *Dagg* (1911), 4 Sask. L. R. 228; 18 W. L. R. 612. As to rule in case of the destruction of the subject-matter of the conditional sale, see *Gillespie* v. *Hamm* (1899), 4 Terr. L. R. 78.

(3) The notice shall be served personally upon or left at the residence or last known place of abode in Ontario of the purchaser or hirer or his successor in interest at least five days before the sale, or may be sent by registered post at least seven days before the sale, addressed to the purchaser or hirer or his successor in interest at his last known post office address. Service of notice.

[In Saskatchewan it is enacted by sect. 8 of c. 145 of the Revised Statutes of Saskatchewan that the registered letter "must be deposited in the post office at least ten days before the time when the said eight days will elapse" (*e*).]

(4) The notice may be given during the twenty days mentioned in sub-section (1). Time for giving notice.

(5) This section shall apply notwithstanding any agreement to the contrary. Application of this section.

9. Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer thereof shall have the right as against the seller or lender, or other person claiming through or under him, to retain the goods upon payment of the amount owing on them. Goods affixed to realty subject to rights of seller or lender. Chitty, 397.

[A similar provision to the above is contained in sect. 8 of the Conditional Sales of Chattels Act (c. 143, Consolidated Statutes, New Brunswick, 1903), which provides, *inter alia*, that chattels affixed to the freehold, without the written consent of the vendor, shall not accede to the realty so as to become a part thereof (*f*).

### *Provincial Statutes concerning the Sale of Goods.*

In most of the provinces and territories of the Dominion the Imperial Sale of Goods Act, 1893 (*a*), has been adopted with certain modifications.

In Alberta, Manitoba, Nova Scotia, Saskatchewan, New- in British Columbia it is provided by chap. 34 of the Revised Imperial Act, which confers a good title upon a *bonâ fide* purchaser in market overt, is omitted.

In British Columbia it is provided by chap. 34 of the Revised Statutes, 1897, that—

"Where goods are sold in market overt, according to the Market *overt*. Chitty, 436.

(*e*) *Boucher* v. *Lunn* (1911), 18 W. L. R. 694 (Sask.).

(*f*) *Harrison* v. *Nepisiquit Lumber Co* (1911), 11 E. L. R. 314 (N. B. Rep.). It should be noted that compliance with the requirements as to filing contained in sect. 3 of the Act is a condition precedent to the privilege accorded by sect. 8.

(*a*) 56 & 57 Vict. c. 71.

usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

In the province of Ontario the commercial law respecting the sale of goods is still fluctuating and uncodified, the common law, modified by the provincial Statute of Frauds (*a*), being applied to the elucidation of matters in litigation.

It is enacted by sect. 2 (1) of the Property and Civil Rights Act, 1910 (*b*), that "in all matters in controversy relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th day of October, 1792, as the rule for the decision of the same . . . except so far as such laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament, still having the force of law in Ontario, or by any Act of the late province of Upper Canada, or of the province of Canada, or of the province of Ontario, still having the force of law in Ontario."

In New Brunswick and Prince Edward Island the common law of England, as modified by Imperial, Dominion or provincial legislation, governs the law relating to the sale of goods.

In nearly all the provinces and territories in which the law is codified the application of the statute is limited to contracts for the sale of goods of the value of fifty dollars and upwards, the only exceptions thereto being (a) Nova Scotia, in which the Act provides by sect. 6 (1) that: "A contract for the sale of any goods of the value of forty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf"; and (b) New Brunswick, wherein it is provided by sect. 4 of the Statute of Frauds (*c*) that: "No contract for the sale of any goods, wares or merchandise for the price of $40 or upwards shall be good unless the buyer accept and receive part of the goods so sold, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or his agent, whether such goods are actually made or ready for delivery, or

(*a*) Note Statute of Frauds (Ont.), 3 & 4 Geo. V., c. 27, s. 12.
(*b*) 10 Edw. VII. c. 45 (Ont.).
(*c*) Cons. Statutes of New Brunswick, 1903, c. 140.

are intended to be made or delivered or both at some future time or not."

In Ontario, in cases of sale of "future goods," it is provided by sect. 12 of the Statute of Frauds, 1913 (*d*), that the provisions of the Act shall extend to all contracts for the sale of goods to be delivered at a future time when the value of the goods is $40 and upwards (*e*). Chitty, 427—428.

The provisions of the Sale of Goods Act (*f*) set out below are practically identical with those of the other provinces and territories of the Dominion in which the law relating to the sale of goods has been codified, and are as follows:

## *Sale of Goods Act*, 1898.

### SUMMARY OF SECTIONS.

SECT.
2. Interpretation.
3. Definition of contract of sale.
4. Rules as to capacity to buy or sell. (Provisions in cases of minority, mental incapacity and drunkenness.)
5. Formalities of the contract.
6. Application of the Act to sales of uncertain amount.
7. Contract may relate to existing or future goods.
8. Contract of sale in cases where goods have perished.
9. Contract in case of goods perishing before sale but after agreement to sell.
10. Rules as to ascertainment of price.
11. Agreements to sell goods at valuation.
12. Stipulations as to time.
13. When conditions are to be treated as warranties.
14. Implied undertakings and warranties by seller.
15. Implied warranty in sale by description.
16. Implied conditions as to quality and fitness.
17. Implied conditions on sale by sample.

*Transfer of Property as between Buyer and Seller.*

18. Goods must be ascertained.
19. Intention governs passing of property.
20. Rules for ascertaining intention.
21. Effect of reservation of right of disposal.
(2) Goods shipped by bill of lading.
(3) Effect of draft being attached to bill of lading.

SECT.
22. Risk *prima facie* passes with transfer of property.
23. Sale by a person other than owner.
24. Effect of sale under voidable title.
25. Effect of seller or buyer continuing in possession of goods after sale.

*Performance of Contract.*

26. Co-relative duties of buyer and seller.
27. Payment for goods and delivery of goods concurrent conditions.
28. Rules as to delivery.
29. Effect of delivery of wrong quantity.
30. Instalment deliveries.
31. Delivery to carrier.
32. Rule as to risk where goods are to be delivered at distant place.
33. Buyer's right to examine goods before acceptance.
34. As to what will constitute acceptance.
35. Buyer not bound to return rejected goods.
36. Liability of buyer neglecting or refusing to accept delivery.

*Rights of Unpaid Seller.*

37. Definition of unpaid seller.
38. Remedies of unpaid seller.
39. Lien of unpaid seller.
40. Lien in cases of part delivery.
41. Termination of lien.
42. Right of stoppage *in transitu*.
43. Duration and termination of the transit.
44. How stoppage *in transitu* may be effected.
45. Effect on right of unpaid seller of sub-sale or pledge by buyer.

(*d*) 3 & 4 Geo. V. c. 27 (Ont.).

(*e*) As to appropriation to contract and passing of property, see *Wilson* v. *Shaver* (1901), 1 O. L. R. 107.

(*f*) Revised Statutes of Saskatchewan, 1909, c. 147.

SECT.
16. Generally no rescission of sale by lien or stoppage *in transitu*.
(3) Resale of goods of perishable nature.

*Breach of Contract—Remedies of Seller.*

17. Action for the price.
(3) Right to interest.
18. Damages for non-acceptance.
(2) Measure of damages.

*Breach of Contract—Remedies of Buyers.*

SECT.
49. Damages for non-delivery.
50. Specific performance of contract.
51. Remedy for breach of contract.
52. Recovery of interest and special damages for breach of contract in certain cases.

*Interpretation.*

Chitty, 421—450.

Interpretation of terms.

**2.** In this Act, unless the context or subject-matter otherwise requires—

(1) "Action" includes counterclaim and set-off:

(2) "Buyer" means a person who buys or agrees to buy goods:

(3) "Contract of sale" includes an agreement to sell as well as a sale:

(4) "Delivery" means voluntary transfer of possession from one person to another:

(5) "Document of title to goods" has the same meaning as it has in the Factors Acts:

(6) "Factors Act" means the Factors Act, 1898 (*ff*), and any enactment amending or substituted for the same:

(7) "Fault" means wrongful act or default:

(8) "Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale:

(9) "Goods" include all chattels personal (*g*) other than things in action and money. The term includes emblements, industrial growing crops (*g*), and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

(10) "Property" means the general property in goods, and not merely a special property:

(11) "Quality of goods" includes their state or condition:

(12) "Sale" includes a bargain and sale as well as a sale and delivery (*h*):

(*ff*) Revised Statutes of Saskatchewan, 1909, c. 148.

(*g*) A "frame building" may be a chattel personal (*Ross* v. *Doyle* (1887), 4 Man. 434). "Wild hay" comes within this definition (*Fredkin* v. *Glines* (1908), 18 Man. L. R. 249). The sale of a horse by a dealer to a private customer is a commercial contract by the former, and oral evidence of "warranty" by him is admissible (*Jacobs* v. *Gentlemen of the Seminary* (1908), 5 E. L. R. 567). A "future" crop of hay is not within this definition (*Sharpe* v. *Dundas* (1911), 15 W. L. R. 86 (Man.)).

(*h*) The term "sale" is sufficiently comprehensive to cover a contract of bailment of goods if the chattels are not to be returned in *specie* (*Lawlor* v. *Nicol* (1898), 12 Man. L. R. 224). As to when a "consignment" may constitute a sale, see *Acme Silver Co.* v. *Perret* (1887), 4 Man. L. R. 501.

(13) "Seller" means a person who sells or agrees to sell goods;

(14) "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made (*k*);

(15) "Warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

## PART I.—FORMATION OF THE CONTRACT.

### *Contract of Sale.*

Sale and agreement to sell.
Chitty, 425.

**3.** (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price (*k*). There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional (*l*).

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

(*i*) It is fraud in a vendor to supply goods other than those identified and agreed on at the time of the making of the contract of sale (*Wallace* v. *Garnett* (1902), 3 O. W. R. 640).

(*k*) In order that a contract of sale and purchase may be binding, it must be consensual, that is, the parties thereto must be *ad idem* (*Oppenheimer* v. *Brackman* (1902), XXXII. S. C. R. 699; *Frost, Wood & Co.* v. *Lacourse* (1905), Q. R. 14 K. B. 320). But a unilateral offer either to buy or to sell is binding upon the party who makes it if accepted without qualification or delay (*Thibaret* v. *Mercuey* (1905), Q. R. 27 S. C. 150).

(*l*) When a letter written by a prospective purchaser requires a reply from the vendor as a condition precedent to forwarding the goods it is not a concluded contract, but merely an offer (*Mechanical Equipment Co.* v. *Butler* (1912), 13 Que. P. R. 410). And in such case the sale is concluded at the domicile of the buyer (*Lyall* v. *London Brass Works Co.* (1911), Q. R. 40 S. C. 338).

Capacity to buy and sell. Chitty, 126.

**4.** Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor (*m*), or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

*Formalities of the Contract.*

Contract of sale, how made. Chitty, 426.

**5.** Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

Contract of sale for $50 and upwards. Chitty, 426.

**6.**—(1.) A contract for the sale of any goods of the value of $50 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (*n*).

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(*m*) As to what constitute necessaries, see *Jenkins* v. *Way* (1881), 14 N. S. Rep. 391.

(*n*) Although writing is essential to prove a contract for the sale of goods exceeding $50 in value, parol evidence of the acceptance of the contract and delivery of the goods is admissible (*Wark* v. *Clancy* (1901), Q. R. 25 S. C. 193). Nor is any special or formal acceptance necessary, a simple memorandum signed by the party to be charged will suffice (*Mallove* v. *Mitchell* (1901), Q. R. 11 K. B. 74). But if the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence will be admitted to introduce a term which does not appear therein (*Lindley* v. *Lacey* (1864), 17 C. B. N. S. 578 (an English case), discussed in *Watson* v. *Windsor Laundry Co.* (1900), 33 N. S. Rep. at p. 39; *S. C.* in XXXI S. C. R. 381; see also *Calder* v. *Hallet* (1900), 5 Terr. L. R. 1). The existence of a contract in writing must be alleged at the institution of the suit (*Leming* v. *Lefebvre* (1902), Q. R. 41 S. C. 541).

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not (*o*).

### *Subject-matter of Contract.*

**Existing or future goods.**
**Chitty, 427.**

**7.**—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

As regards the delivery of future goods, it cannot be laid down as an universal rule that where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. Thus, if a man contract to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. So, if a man contract to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. And this right of action in such and cognate cases is apparently based upon the ground that where there is a contract to do an act upon a future date, there is in the meantime a relation constituted between the parties by the contract, and they impliedly promise that during the intervening period neither will prejudicially affect the other by doing anything inconsistent with that relation. Nevertheless, as a general proposition of law, it is incumbent upon the party who seeks to enforce a contract to wait until the arrival of the time stipulated therein in order to see whether or no upon that date the other party to the agreement will fulfil his engagement (*p*); as it is within the bounds of possibility that

(*o*) As to when certain ministerial acts necessary to the reduction of the chattels into possession—though possibly constituting a qualified acceptance—do not amount to actual receipt, see *Livingstone* v. *Ewing* (1900), 4 Terr. L. R. 441; 21 Dec. N. 102.

(*p*) *Oppenheimer* v. *Brockman and Kee Milling Co.* (1902), XXXII. S. C. R. 699. As to contracts when parties are not *ad idem*, see *S. C.*

the defaulting contractor at the eleventh hour might repent him of his breach of contract, and, in the case cited above, of a contract to grant a lease, might prior to the time fixed for doing the act obtain a surrender of the lease which he executed, or, in the case of the contract to deliver specific goods, might re-purchase the goods so as to be in a situation to sell and deliver them to the plaintiff at the appointed time.]

Goods which have perished.

**8.** Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

Goods perishing before sale but after agreement to sell.

**9.** Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

*The Price.*

Ascertainment of price. Chitty, 428.

**10.**—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case (*q*).

Agreement to sell at valuation.

**11.**—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

*Conditions and Warranties.*

Stipulations as to time. Chitty, 428.

**12.**—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale (*r*). Whether any other

(*q*) See as to "market price" at time of appropriation, *McCutcheon* v. *Northern Fuel Co.* (1906), 4 W. L. R. 57 (Man.).

(*r*) *Hurlburt* v. *Stewart* (1903), Q. R. 24 S. C. 19. Damages can be recovered for "breach of warranty" although purchase price has not been paid in full (*Cook* v. *Thomas* (1889), 6 Man. L. R. 286; *Peoples' Coal Co.* v. *Port Hood Richmond Rly. Coal Co.* (1909), 43 N. S. Rep. 514).

stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *primâ facie* calendar month.

When condition to be treated as warranty.

**13.** Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated (*s*).

(a) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated (*t*), or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract (*u*). A stipulation may be a condition, though called a warranty in the contract (*x*):

(b) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertakings as to title, &c. Chitty, 430.

**14.** In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the

(*s*) As to when the fulfilment of a stipulation by a buyer is a condition precedent to a vendor's right to recover the price from the buyer, see *Patterson* v. *Larsen* (1902), 36 N. B. Rep. 4. A purchaser of chattels with a warranty is not estopped, by accepting them without demur, from subsequently showing that they were subject to a latent defect (*Smith* v. *Archibald* (1907), 41 N. S. Rep. 211).

(*t*) *Balcer* v. *Provancher* (1903), Q. R. 24 S. C. 137. As to the effect of *laches* on the right of the buyer to repudiate the contract, see *Brown* v. *Workman* (1900), Q. R. 20 S. C. 304; *Clarke* v. *Roberts* (1895), 27 N. S. Rep. 445; *New Hamburg Manufacturing Co.* v. *Weishrod* (1908), 7 W. L. R. 894; *Allcock* v. *Manitoba Windmill and Pump Co.* (1911), 18 W. L. R. 77; 4 Sask. L. R. 135.

(*u*) See *Howard* v. *Christie* (1900), 33 N. S. Rep. 367, in which evidence of a collateral parol agreement varying the terms of a written contract was rejected. As to collateral verbal agreements, see also *New Hamburg Manufacturing Co.* v. *Klotz* (1905), 1 W. L. R. 471. As to counterclaim for breach of warranty, see *Selby* v. *Mitchell* (1901), 2 O. W. R. 496. An agreement as to quality is a condition of a contract of sale (*Lewis* v. *Barrie* (1901), 14 Man. L. R. 32).

(*x*) An express stipulation by a vendor of "no warranty" (in the case of a chattel which is to his knowledge worthless), may amount to a fraudulent representation which will entitle the purchaser to rescind the contract (*Ducharme* v. *Charest* (1902), Q. R. 23 S. C. 82; *Thibodeau* v. *Viau* (1911), 18 R. de J. 299).

case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass (*y*):

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (*z*).

Sale by description. Chitty, 430.

**15.** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description (*a*); and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description (*b*).

Implied conditions as to quality or fitness. Chitty, 431.

**16.** Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose (*c*).

(*y*) *Dickie* v. *Dunn* (1887), 1 Terr. L. R. 83; *McFatridge* v. *Robb* (1892), 24 N. S. Rep. 506. As to implied warranty of title, see *Clark* v. *Mott* (1907), 10 O. W. R. 940. As to warranty for quiet enjoyment and limitations thereon, *Bastien* v. *Langlois* (1908), Q. R. 33 S. C. 255.

(*z*) *Turriff* v. *McHugh* (1889), 1 Terr. L. R. 186.

(*a*) *Burlington Canning Co.* v. *Campbell* (1908), 7 W. L. R. 544; *Webster* v. *McPherson* (1908), 11 O. W. R. 825 (defect in quality); *Mason and Risch Co.* v. *Mooney* (1911), 19 W. L. R. 733; 4 Sask. L. R. 303 (sale of piano).

(*b*) As to "passing off" actions, see *Chapleau* v. *Laporte* (1900), Q. R. 18 S. C. 14; *Vire Canera Co.* v. *Hogg* (1899), Q. R. 18 S. C. 1; *Wallace* v. *Garnett* (1902), 3 O. W. R. 640. For other decisions on breach of warranty, see *Finn* v. *Brown* (1901), 35 N. B. Rep. 335 (sale of horse); *Swilling* v. *Arnold* (1905), 2 W. L. R. 48; *Wurzburg* v. *Andrews* (1896), 28 N. S. Rep. 387 (canned lobster). As to implied warranties, see *Higgins* v. *Clish* (1901), 34 N. S. Rep. 135 (a case in which the maxim *caveat emptor* was held to apply); see also *North-West Thresher Co.* v. *Burrill* (1905), 2 W. L. R. 262 (Man.). As to written warranty by agent of vendor, *Cockshutt Plow Co.* v. *McC...* (1905) 2 W. L. R. 355 (N. W. T.).

(*c*) As to what constitutes an implied condition of reasonable fitness, see *Sawyer Massey Co.* v. *Ritchie* (1910), 13 W. L. R. 89; see also *New Hamburg Manufacturing Co.* v. *Shields* (1906), 16 Man. L. R. 212; *Hotchkiss* v. *Johnston* (1908), 8 W. L. R. 251 (B. C.); *Nargang* v. *Kirby* (1911), 18 W. L. R. 625; 4 Sask. L. R. 306. As to false representation, see *Carmichael Development Co.* v. *Alberta Pacific Elevator Co.* (1912), 21 W. L. R. 453

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed (*d*):

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith (*e*).

### *Sale by Sample.*

By English law, and in this respect the law of Canada is apparently identical, a purchaser of goods by sample is bound to examine them without delay, and if he find they are not conformable with sample, he is entitled to reject them and rescind the contract, but should he elect so to do it is his duty to give to the vendor immediate notice of rejection together with an intimation that henceforward the goods are at the risk and disposal of the seller. Should the vendor not agree, the purchaser should place the goods in neutral custody and apprise the seller of that fact. Chitty, 432.

A purchaser is not, however, entitled to hold by the contract and demand other goods instead of those to which he objects, and should he omit to rescind the bargain, and neither return nor offer to return the goods he is liable for the price; and a like rule applies

(Alberta). As to effect of reliance on skill and judgment of seller, see *Canadian Gas Power and Launches Co.* v. *Orr Bros.* (1911), 23 O. W. R. 315.

(*d*) The legal warranty of the seller applies, therefore, only where the defects are intent (*Dominion Lumber Co.* v. *Auger* (1911), Q. R. 40 S. C. 184). As to when the maxim *caveat emptor* applies, see *Higgins* v. *Olish* (1901), 34 N. S. Rep. 135; *Laurie* v. *Croucher* (1891), 23 N. S. Rep. 293; *Fraser* v. *Salter* (1869), 7 N. S. Decisions, 421; *Ordway* v. *Olson* (1911), 18 W. L. R. 171; 4 Sask. L. R. 343; *Mathieson* v. *Tremblay* (1912), 12 E. L. R. 78. The custom of traders unduly to appreciate their wares so as to induce a purchase, does not necessarily turn the puffing into a warranty (*Young* v. *McMillan* (1894), 40 N. S. Rep. 52 (sale of a fishing boat); *Irvine* v. *Parker* (1904), 40 N. S. Rep. 392 (sale of a horse, a doubtful case on the facts); but see *Taylor* v. *Poirier* (1907), 8 W. L. R. 949; 1 Sask. L. R. 204). The decision in the following case seems of very doubtful propriety (*McGill* v. *Hacin* (1903), 36 N. S. Rep. 414).

(*e*) An express warranty does not necessarily exclude the implied warranty contained in sect. 15 (*North West Thresher Co.* v. *Darrell* (1905), 15 Man. L. R. 553; *Sawyer Massey Co.* v. *Thibart* (1908), 6 Terr. L. R. 409; compare *Canada Produce Co.* v. *Hatley Dairy Co.* (1912), Q. R. 22 K. B. 12). In cases of express warranty the *onus* of proving compliance therewith is on the seller (*Canadian Fairbanks Co.* v. *Thompson* (1911), 18 W. L. R. 658 (Sask.)). For other decisions on "express warranties," see *Robert Bell Engine Co.* v. *Burke* (1912), 19 W. L. R. 934; *Manitoba Windmill and Pump Co.* v. *McLelland* (1911), 18 W. L. R. 680 (Sask.); *Harrison* v. *Knowles* (1913), 23 O. W. R. 672; *Cockshutt* v. *Mills* (1905), 7 Terr. L. R. 397; 2 W. L. R. 355. Where there is an inconsistency between a parol and a written warranty the former is invalid.

should he so deal with the goods as to evidence by his course of dealing that he intends to assume dominion over them.

Or, in other words, if goods are sold by sample and they are delivered, and accepted by the purchaser, and acceptance may be implied from lack of rescission or by the performance of some act amounting to an adoption of the contract of purchase, he cannot afterwards return them, but, on the other hand, if the purchaser takes the delivery conditionally he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample he is then entitled to return them (*f*).]

Sale by sample.

**17.**—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality (*g*):

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

## PART II.—EFFECTS OF THE CONTRACT.

### *Transfer of Property as between Seller and Buyer.*

Goods must be ascertained.

Chitty, 432.

**18.** Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained (*h*).

(*f*) *Boulay* v. *The King* (1910), XLIII. S. C. R. 61.

(*g*) As to defence that part of goods delivered are not up to sample, see *American Cotton Yarn Exchange* v. *Hoffman* (1901), 2 O. W. R. 413, 987; *O'Keefe Brewery Co.* v. *Gilpin* (1906), 8 O. W. R. 581; *Dougall* v. *Chouillon* (1906), Q. R. 15 K. B. 390; *Prout* v. *Rogers Fruit Co.* (1908), 9 W. L. R. 554. There is a positive duty cast on the purchaser to examine the sample, although he may waive his right to examine the bulk, and instead thereof rely on the warranty (*Carlstadt Development Co.* v. *Alberta Pacific Elevator Co.* (1912), 21 W. L. R. 433). *Laches* may avoid the right of a purchaser of goods by sample to rescind the contract on the ground that the bulk is inferior thereto (*Loynachan* v. *Armour* (1903), Q. R. 25 S. C. 158). As to general proposition that goods delivered must equal sample (*McKenzie Thompson Co.* v. *Edmonton Clothing Co.* (1906), 4 W. L. R. 22 (N. W. T.)).

(*h*) *Lee* v. *Culp* (1904), 8 O. L. R. 210; *Taylor* v. *McClive* (1903), 4 O. W. R. 252; *Delaplante* v. *Tennant* (1903), 4 O. W. R. 70; see also *Southampton Lumber Co.* v. *Archer* (1900), 1 O. W. R. 548.

Property passes when intended to pass.

**19.**—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for ascertaining intention.

**20.** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

*Rule* 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed (*i*).

*Rule* 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

*Rule* 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

*Rule* 4.—When goods are delivered to the buyer on approval or "on sale or return" (*j*) or other similar terms the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction (*k*);

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

*Rule* 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description

(*i*) *McNichol* v. *Brucks* (1905), 1 W. L. R. 478; *Craig* v. *Beardmore* (1904), 7 O. L. R. 674.

(*j*) The reception of goods by a vendor from a purchaser who is unable to pay for them is some evidence of an accord and satisfaction (*Boyce* v. *Soumes* (1900), 16 Man. L. R. 109).

(*k*) As to what constitutes a delivery "on approval," see *Johnson* v. *Durant* (1905), 37 N. S. Rep. 471.

and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer (*l*). Such assent may be expressed or implied, and may be given either before or after the appropriation is made (*m*):

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract (*n*).

Reservation of right of disposal. Chitty, 434.

**21.**—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal (*o*).

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Risk *prima facie* passes with property. Chitty, 435.

**22.** Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not (*p*).

Provided that where delivery has been delayed through the

(*l*) *Wilson* v. *Sharer* (1901), 1 O. L. R. 107.

(*m*) As to what constitutes "appropriation," see *Reynhart* v. *McCutcheon* (1899), 12 Man. L. R. 394.

(*n*) As to when dealing with the chattels forming the subject-matter of a contract of sale will estop a buyer from disputing the terms of the contract, see *Burton, Beidler & Co.* v. *London Street Rail. Co.* (1901), 7 O. L. R. 717.

(*o*) Where a vendor of goods takes bills of lading in his own name and sends them, without indorsation, to the purchaser, he does not thereby avoid his right of disposal (*Ontario Bank* v. *Gosselin* (1904), Q. R. 14 K. B. P.

(*p*) As to what constitutes delivery so as to pass the risk, see *Inglis* v. *Richardson* (1912), 23 O. W. R. 721. *Snow* v. *Wolseley Milling Co.* (1901), 7 Terr. L. R. 123.

fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault (*q*).

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

### *Transfer of Title.*

**23.**—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. **Sale by person not the owner.** Chitty, 435.

(2) Provided also that nothing in this Act shall affect

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

*Save in British Columbia, the following section does not appear in provincial Acts:—*

(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. **Market overt.** Chitty, 436.

(2) Nothing in this section shall affect the law relating to the sale of horses.

**24.** When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. **Sale under voidable title.**

### *Effect of Infirmity of Title on Property in Goods.* Chitty, 437.

In discharging the disagreeable duty of determining as between two parties, both of whom are perfectly innocent, upon which of

(q) As to when the breach by the seller of a "cost, freight and insurance" clause in a contract of sale imposes liability for loss upon him, see *Canada Hardware Co.* v. *Sureu Hartmann Co.* (1903), Q. R. 24 S. C. 430.

the two the consequences of a fraud practised upon both must fall, the Court is bound rigorously to apply settled and well-known principles of law.

General rule.

As regards the title to personal property the well established rules may be thus expressed: Alike by the law of England and of the Dominion, the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities of title. If he purchases the chattel in market overt he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, should it turn out that the chattel has been found or converted by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner (*qq*). If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. But, on the other hand, if it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the original owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

But where C., by reason of the fraud of a third party, is induced to believe that he has sold goods to A. B., and has delivered them as he supposes to A. B., and the person who has led him into that belief receives and carries off the goods and disposes of them to another, as there has not been a selling to the person who fraudulently represents himself to be a servant or agent of the supposed purchaser, A. B., he cannot confer a good title on any one else, the property never having vested in him; for, in such circumstances, it is impossible to imagine the existence of any valid contract of sale between the misled vendor, C., and a person of whom he knows nothing and with whom he has never intended to deal, there being, as between him and C., the true owner of the goods, no *consensus* of mind which could lead to any agreement or contract whatever: whilst as to A. B., there was, of course, no

(*qq*) Save in British Columbia the statutory provision as to market overt is not included in provincial Acts

contract at all, for to him the matter was entirely unknown, and therefore the endeavour to set up a contract with him must result in failure.

Such circumstances, therefore, do not constitute a case in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud, the facts rather indicate that no contract ever came into existence at all; and if this be so, it is evident the chattel remained throughout the property of C., and consequently the title which the fraudulent third party attempted to give to his customer was one which would not prevail so as to vest the property in him (*r*).

Seller or buyer in possession after sale.

**25.**—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer was expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Act.

## PART III.—PERFORMANCE OF THE CONTRACT.

Co-relative duties of seller and buyer.

**26.** It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale (*s*).

Chitty, 438.

Payment and delivery are concurrent conditions.

**27.** Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller

(*r*) *Cundy* v. *Lindsay* (1878), 3 A. C. 459, H. L. (E.).

(*s*) As to what will estop a buyer from disputing the place of delivery, see *Burton, Baldler & Co.* v. *London Street Rail Co.* (1904), 7 O. L. R. 717.

must be ready and willing to give possession of the goods to the buyer in exchange for the price; and the buyer must be ready and willing to pay the price in exchange for possession of the goods (*t*).

Rules as to delivery.

**28.** (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf: Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Delivery of wrong quantity.

**29.**—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them (*u*), but if the buyer accepts the goods so delivered he must pay for them at the contract rate (*v*).

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the

(*t*) It is not, however, an essential element of the contract of sale for the time of payment to be fixed (*Hurlburt v. Stewart* (1903), Q. R. 24 S. C. 19). As to an agreement to pay by instalments, see *Gaar Scott Co. v. Mitchell* (1912), 20 W. L. R. 6 (Man. L. R.).

(*u*) As to the rule when the goods are alike defective in quality and deficient in quantity, see *Arnold v. Peacock* (1902), 3 O. W. R. 273. As to insufficiency, see *Smith v. Gordon* (1901), 2 O. W. R. 960. A contract for the sale of 1,000 tons of coal to be carried by a specified ship is not satisfied by a delivery of 465 tons (*Robitaille v. Gunn* (1903), Q. R. 11 K. B. 552).

(*v*) *Muscat v. Montreal Hardware Manufacturing Co.* (1903), 5 Q. P. R. 197.

whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole (*w*).

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Instalment deliveries.

**30.**—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments (*x*).

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Delivery to carrier.

**31.**—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer (*y*).

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller

(*w*) Where there is an entire contract to accept goods of a specified kind, and some of the constituent parts differ therefrom, the buyer may reject the whole and recover all necessary disbursements made by him under the contract (*Tobey Furniture Co.* v. *Worcester* (1902), Q. R. 12 K. B. 34; see also *Allis-Chalmers Bullock, Ltd.* v. *Hutchings* (1912), 11 E. L. R. 350).

(*x*) *McPhail* v. *Clements* (1884), 1 Man. L. R. 165; *Dougall* v. *Chamilton* (1906), Q. R. 15 K. B. 300. But such goods as are accepted must be paid for by the purchaser as on *quantum meruit* (*Harquail Co., Ltd.* v. *Roy* (1912), 11 E. L. R. 190 (N. B.).

(*y*) As to what constitutes delivery within the meaning of this section, see *McGowan Cigar Co.* v. *O'Flynn* (1911), 19 W. L. R. 877 (Sask.); *Lachute Shuttle Co.* v. *Frothingham and Workman* (1912), Q. R. 22 K. B. 1.

to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Risk where goods are delivered at distant place. Chitty, 441.

**32.** Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit (z).

*Special Provision in Manitoba.*

Special provision in Manitoba.

It is provided by sect. 31 of the Sale of Goods Act, 1896 Manitoba (*a*), that "where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deteriorntion in the goods necessarily incident to the course of transit."

The above section is merely declaratory of the common law as laid down in the well-known case of *Bull* v. *Robison* (*b*), and apparently relates only to such deterioration as is necessarily incident or necessarily consequent to the course of transit, and does not apply to the risk of any extraordinary or unusual deterioration resulting from a desire on the part of a vendor, who has undertaken to pay freight, to forward the goods at a reduced rate regardless of enhanced risk; the rule in such cases being, in spite of the provision of the Act, that where there is a sale by sample, and the time for inspection is subsequent to delivery, then if the goods are found on such inspection not to be equal to sample, owing to extraordinary or unusual deterioration during transit, the purchaser has a right to reject them then and there (*c*).

Buyer's right of examining the goods. Chitty, 441.

**33.**—1. Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract (*e*).

(z) Any deterioration other than that incident to the transit must be borne by the vendor (*Winnipeg Fish Co.* v. *Whitman Fish Co.* (1909), XLI. S. C. R. 453). As to the effect of deterioration from accidental causes, see *Barnes* v. *Waugh* (1906), 41 N. S. Rep. 38.

(*a*) R. S. M., 1902, c. 152.

(*b*) (1854), 10 Ex. 342.

(*c*) As to place of inspection and duty of vendor, see *Lewis* v. *Barr* (1901), 14 Man. L. R. 32. *Laches* by a purchaser in rejecting goods may amount to an unqualified acceptance (*McCormick Harvesting Co.* v. *Bailey* (1903), 7 Terr. L. R. 125).

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract (*d*).

Acceptance. Chitty, 142

**34.** The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Buyer not bound to return rejected goods.

**35.** Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them (*e*).

Liability of buyer for neglecting or refusing delivery of goods.

**36.** When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

## PART IV.—RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Unpaid seller defined. Chitty, 412.

**37.**—(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

2. In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a

(*d*) A waiver of a right of inspection constitutes by implication an unqualified acceptance, and will subsequently preclude the buyer from claiming damages on the ground of inferior quality (*Labrecque* v. *Duckett* (1902), Q. R. 22 S. C. 135).

(*e*) Compare *Dominion Bag Co.* v. *Ball Produce Co.* (1902), 5 Q. P. R. 175, in which it was held in an action for the price of goods that a defendant who alleges the goods were not of the quality stipulated for must not only comply with the requirements of this section, but also must demand cancellation of the contract. See also *Tupkin* v. *Romak* (1901), 4 Q. P. R. 58.

consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights. Chitty, 443.

**38.**—(1) Subject to the provisions of this Act, and of any Act in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

*Unpaid Seller's Lien.*

Seller's lien. Chitty, 443.

**39.**—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery. Chitty, 444.

**40.** Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Termination of lien.

**41.**—(1) The unpaid seller of goods loses his lien or right of retention thereon—

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

*Stoppage* in transitu.

Right of stoppage *in transitu*. Chitty, 441.

**42.** Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Duration of transit. Chitty, 445.

**43.**—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee (*f*).

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may

(*f*) As to termination of *transitus*, see *Purity Manufacturing Co., In re* (1905), 6 O. W. R. 418; see also *Abinovitch* v. *Ehrenbach* (1911), Q. R. 41 S. C. 55. Where goods are sold F.O.B. at a particular place (apart from express stipulations to the contrary), the *transitus* continues until they actually arrive at the place specified (*Stephens* v. *Burch* (1908), 2 Alb. 68).

be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage *in transitu* is effected.
Chitty, 446.

**44.**—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

*Re-sale by Buyer or Seller.*

Effect of sub-sale or pledge by buyer.
Chitty, 446.

**45.** Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

Sale not generally rescinded by lien or stoppage *in transitu*.
Chitty, 447.

**46.**—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

Goods of a perishable nature.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the

original buyer damages for any loss occasioned by his breach of contract (*g*).

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

## PART V.—ACTIONS FOR BREACH OF THE CONTRACT.

### *Remedies of the Seller.*

Action for price. Chitty, 447.

**47.**—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods (*h*).

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

Right to interest.

(3) Nothing in this section shall prejudice the right of the seller to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

Damages for non-acceptance.

**48.**—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance (*i*).

Measure of damages.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract (*k*).

(3) Where there is an available market for the goods in ques-

(*g*) See in this connection, *Gordon v. Pinder* (1901), 4 Q. P. R. 321.

(*h*) A plea of non-delivery may not be coupled with an alternative plea of inferior quality (*Veilleux* v. *Atlantic and Lake Superior Rail. Co.* (1902), Q. R. 23 S. C. 217). Where an action for the price is rebutted by a plea of non-delivery, the initial burden of proof of delivery is on the seller (*Fraser* v. *McCurdy* (1903), 35 N. S. Rep. 467).

(*i*) *Watts* v. *Hausdoerfer* (No. 2) (1906), 1 W. L. R. 110. As to counterclaim for non-delivery in part, see *Delahey* v. *Reid* (1900), 1 O. W. R. 806. As to decisions in actions for non-acceptance, see *Graham Co.* v. *Canada Brokerage Co.* (1913), 24 O. W. R. 277. When goods are purchased by sample, the bulk must strictly accord therewith, or no action will lie for refusal to accept (*Lachute Shuttle Co.* v. *Featheringham and Workman* (1912), Q. R. 22 K. B. 1).

(*k*) *Greer* v. *Dennison* (1911), 18 W. L. R. 225 (Man.); *Sawyer Massey Co.* v. *Szlachetka* (1912), 21 W. L. R. 580 (Sask.).

tion the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

### *Remedies of the Buyer.*

Damages for non-delivery. Chitty 448.

**49.**—(1 Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery (*l* .

[Or, in other words, the expression of a firm determination on the part of the promisor never to perform his part of the contract, when communicated to the promisee and acted upon by him . . . gives him an immediate right of action, and he need not aver conditions precedent of any kind (*m*).]

(2) The measure of damages is the estimated loss directly and naturally resulting (*n*), in the ordinary course of events, from the seller's breach of contract (*o*).

(3) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current

(*l*) *Anglo-Newfoundland Fish Co.* v. *Smith* (1902), 35 N. S. Rep. 267; *Upton* v. *Eligh* (1901), 2 O. W. R. 629; *Delhi Fruit and Vegetable Canning Co.* v. *Poole* (1901), 2 O. W. R. 413. Refusal of vendor to deliver until payment, damages (*Phelps* v. *McLachlin* (1900), 1 O. W. R. 806). If a vendor undertakes to deliver the subject-matter of the contract of sale to an innocent purchaser at a destination where, to the seller's knowledge, such goods are contraband, and during the transit the goods are confiscated, he must indemnify the buyer against the loss which he has thereby sustained (*Quigley* v. *Desjardins* (1903), Q. R. 24 S. C. 434). For the converse of this decision see *Couch* v. *Desjardins* (1903), Q. R. 24 S. C. 543.

(*m*) *McCowan* v. *McKay* (1901), 13 Man. L. R. 590, at p. 595.

(*n*) As to the measure of damages naturally resulting from a vendor's breach of contract, see *Devlin* v. *Taylor* (1903), 6 O. L. R. 93.

(*o*) Where by the vendor's default the goods arrive too late for the market which was within the contemplation alike of buyer and seller when the order was given, the fair and reasonable measure of damages as against the defaulting vendor is to charge him with the difference between the value to the buyer of the goods in question if they had been delivered according to the contract, and their value for the purposes of resale at the time when they were actually delivered (*Centaur Cycle Co.* v. *Hill* (1903), 7 O. L. R. 110; *Edge* v. *Valiquet* (1907), 8 Q. P. R. 169). Where at the request of the seller the buyer extends the time of delivery of chattels and then fails to comply with his bargain, the measure of damages is the price of the chattels at the date of the final breach of contract (*Glenn* v. *Schaffer* (1911), 18 W. L. R. 671). For other decisions as to damages for total or partial breaches of contract to deliver, see *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301, P. C.; *Major* v. *Turner* (1911), 20 O. W. R. 570; 3 O. W. N. 369; *Thompson* v. *Wilson* (1911), 18 W. L. R. 606 (B. C.); *Checkik* v. *Price* (1911), 18 W. L. R. 253 (Man.). For further decisions as to measure of damages for delay in delivery, see *Brown* v. *Hope* (1912), 20 W. L. R. 907 (B. C.); *Leonard & Sons* v. *Kerr* (1912), 20 W. L. R. 147 (Alberta).

prices of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver (*p*).

Specific performance.

**50.** In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

Remedy for breach of warranty. Chitty, 449.

**51.**—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

(a) set up against the seller the breach of warranty in diminution or extinction of the price (*q*); or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty (*r*).

(3) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage (*s*).

(*p*) As to measure of damages for non-delivery of quantity contracted for, see *Moisan, In re* (1902), Q. R. 22 S. C. 423.

(*q*) Deduction from price for inferiority (*Webster* v. *McPherson* (1907), 11 O. W. R. 825).

(*r*) Therefore, if the defective article is a machine, the measure of damages is the amount which it would cost to put the chattel in such a condition as would comply with the warranty with which it was sold *plus* the profits lost during the period necessary for putting it into repair. But if there be *laches* on the part of the purchaser, he is entitled to no allowance for loss actually arising out of his delay (*Manchinney* v. *Porteous* (1907), 17 Man. L. R. 184; *Crompton* v. *Hoffman* (1903), 5 O. L. R. 554). And as a general proposition a buyer is bound to use due diligence in availing himself of his remedies against the seller as warrantor of the thing sold (*Trudeau* v. *Lafleur* (1907), Q. R. 32 S. C. 223; *McCormick Harvesting Machine Co.* v. *Hislop* (1903), 7 Terr. L. R. 112).

(*s*) *Dodge Manufacturing Co.* v. *Canadian Westinghouse Co.* (1907), 11 O. W. R. 914.

Interest and special damages. Chitty, 449.

**52.** Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed (*t*).

## PART VI.—SUPPLEMENTARY.

Exclusion of implied terms and conditions. Chitty, 449.

**53.** Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract (*u*).

Reasonable time a question of fact.

**54.** Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

Rights, &c. enforceable by action.

**55.** Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

Auction sales. Chitty, 450.

**56.** In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

Payment into Court when breach of warranty alleged. Chitty, 450.

**57.** Where a buyer has elected to accept goods which he might have rejected and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the

(*t*) As to when a right to interest accrues by usage of trade in the case of goods sold on credit, *Bannerman* v. *Fullerton* (1862), 5 N. S. 200.

(*u*) As to what constitutes an express agreement within this section, see *Reeves* v. *Chase* (1909), 2 Alb. 132.

price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

**58.**—(1) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation (*x*), duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods (*y*).

(2) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(*x*) As to the effect of mis-representation, see *Eisler* v. *Canadian Fairbanks Co.* (1912), 22 W. L. R. 888 (Sask.); *Ramage* v. *Deyoe* (1913), 23 W. L. R. 306 (Sask.).

(*y*) See as to fraud, *Ducharme* v. *Charest* (1902), Q. R. 23 S. C. 82; *Small* v. *Glasel* (1896), 28 N. S. Rep. 245. It may be laid down as a broad general principle of law applying *inter alia* to contracts of sale or purchase, that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it (*People's Bank of Halifax* v. *Estey* (1904), XXXIV. S. C. R. 429). A *bonâ fide* purchaser of stolen goods will not, however, be entitled to retain them against the true owner in the province of Quebec (*Lapointe Desautels* v. *Charlebois* (1912), Q. R. 42 S. C. 57).

## CHAPTER XIX.

### CONTRACTS OF MERCANTILE AGENTS.

IN British Columbia, Ontario, Saskatchewan, and the North-West Territories, the Factors Act, as enacted by the Imperial Parliament in 1889 (a), has been adopted by the respective provincial and territorial Legislatures subject to certain adaptations and alterations.

The text of the statute as enacted in Ontario in 1910 is as follows: —

### *The Factors Act.*

SECT.
2. Definitions.
3. Dispositions by mercantile agents.
(2) Effect of revocation of consent.
(4) Presumption that goods are in possession of agent with owner's consent.
4. Effect of pledges of documents of title.
5. Pledge of goods for antecedent debt.
6. Rights acquired by transfer of goods or documents of title.
7. Agreements made through clerks, &c.
8. Respective rights of consignors and consignees.
SECT.
9. Dispositions by sellers and buyers of goods.
9. Disposition by seller remaining in possession.
10. Disposition by buyer obtaining possession.
(2) Exceptions to operation of Act.
11. Effect of sub-pledge or pledge by buyer.
12. Method of transferring documents.
13. Saving for rights of true owner.
14. Saving for common law powers of agents.

CHAPTER 66, 10 EDW. VII. (1910).

An Act respecting Contracts in relation to Goods in the Possession of Agents and others.

Chitty, 280.

**1.** This Act may be cited as the "Factors Act."

Definitions.

**2.**—(1) In this Act—

(a) "Document of title" shall include any bill of lading and warehouse receipt, as defined by the Mercantile Law Amendment Act, any warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession

(a) 52 & 53 Vict. c. 45.

or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(b) "Goods" shall include wares and merchandise:

(c) "Mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(d) "Pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability.

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

[A person who has advanced money to the owner of chattels upon the security of the goods consigned to him for sale is not a pledgee but a factor, in cases where the power to sell does not depend upon a default on the part of the owner to repay the money advanced (*a*).]

*Dispositions by Mercantile Agents.*

Powers of mercantile agent with respect to disposition of goods.

Chitty, 280.

**3.**—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge (*b*), or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time thereof notice that the person making the disposition has not authority to make the same.

[An agent entrusted with and in possession of goods, within the meaning of this section, must be a person entrusted as agent for the sale, consequently one whose authority has been revoked cannot

(*a*) *Mitchell* v. *Sykes* (1883), 4 O. R. 501.

(*b*) A partner entrusted with goods belonging to his firm for the purposes of sale is a mercantile agent within the meaning of this section *Dingwall* v. *McBean* (1900), XXX. C. C. R. 441). A person who obtains goods by false pretences is not a mercantile agent within the meaning of this section (*Rush* v. *Fry* (1888), 15 O. R. 122). An agent who obtains the possession of chattels without the authority of the owner thereof is not a "mercantile agent" (*Moshier* v. *Keenan* (1900), 31 O. R. 658).

P.

make a valid pledge of the goods, although they may have been entrusted to him for sale, should he wrongly retain them after his authority is revoked.]

It is, however, provided by sub-sect. 2 of section 3 that

Revocation of consent. Chitty, 280, 281.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

Derivative document.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

Presumption.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title. Chitty, 281.

**4.** A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

**5.** Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

**6.** The consideration necessary for the validity of a sale, pledge, or other disposition of goods by a mercantile agent, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or of other valuable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, document, security, or other valuable security when so delivered or transferred in exchange.

Agreements through clerks, &c. Chitty, 281.

**7.** For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in

the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

**8.**—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

*Dispositions by Sellers and Buyers of Goods.*

Disposition by seller remaining in possession. Chitty, 437.

**9.** Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition by buyer obtaining possession. Chitty, 437.

**10.**—(1) Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Exception as to contracts under the Conditional Sales Act.

(2) This section shall not apply to goods the possession of which are obtained under a contract coming within the meaning of the Conditional Sales Act where the seller has complied with the provisions of that Act.

Effect of sub-sale or pledge by buyer. Chitty, 444.

**11.** Subject to the provisions of this Act the unpaid seller's right of lien or retention or stoppage *in transitu* shall not be affected by any sale or other disposition of the goods which the

buyer may have made unless the seller has assented thereto: Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the same in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* shall be defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

*Supplemental.*

Mode of transferring documents. Chitty, 282.

**12.** For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner. Chitty, 282.

**13.**—(1) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from his agent at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

Saving for common law powers of agent.

**14.** The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

## CHAPTER XX.

### [illegible] Chattel Mortgages Acts.

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Chitty, 660.

In British Columbia, by an Act passed in 1905 (*a*); in Manitoba, by an Act passed in 1900 (*b*), and since subjected to much revision; in New Brunswick, by c. 142 of the Revised Statutes of 1908; in the North-West Territory, by c. 43 of the Ordinances of 1905; in Nova Scotia, by c. 142 of the Revised Statutes of 1900; in Ontario, by an Act passed in 1910 (*c*); and in Saskatchewan, by c. 144 of the Revised Statutes of 1909, the provincial Legislatures have placed on the respective statute books of their provinces legislation dealing with the prevention of frauds on creditors by secret bills of sale.

General scope of Chattel Mortgages Acts.

These provincial Acts deal with the registration of chattel mortgages, by which term is meant mortgages unaccompanied by delivery and change of the possession of the goods, and provide, *inter alia*, that every mortgage or conveyance of goods and chattels not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, shall within a certain specified number of days from the execution thereof be registered as in the Act provided.

Statutory requirements in chattel mortgages.

The statutes further enact that the instrument of mortgage shall be accompanied by an affidavit to the effect that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum duly expressed and mentioned in the mortgage, and that

(*a*) 5 Edw. VII. c. 8.

(*b*) 63 & 64 Vict. c. 31.

(*c*) 10 Edw. VII. c. 65.

it was executed in good faith for the purpose of securing the payment of the debt, and not for the purpose of protecting the goods and chattels mentioned therein from attachment by other creditors of the mortgagor. It is further enacted that similar procedure as to registration and affidavit must be adopted in the case of every sale, assignment and transfer of goods not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold.

**Rules relating to hypothecation of growing or future crops.**

In the case of conveyances of growing or future crops, the general tendency of legislation is to enact that no mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer, or assignment, which is intended to operate and have effect as a security, shall apply to or affect any growing crop or crop to be grown in future, save as security for the purchase price of seed grain; and further, that no mortgage or incumbrance to secure the price of seed grain shall be given upon any crop which is not sown within one year of the date of the execution of the said mortgage or incumbrance.

**Decisions on chattel mortgages.**

The following decisions on chattel mortgages may be found helpful in elucidating the provisions of the Acts dealing therewith:—

Effect of leaving blank spaces in mortgage deed (*d*).

A chattel mortgage covering after-acquired property is not necessarily void on the ground of uncertainty (*e*).

Effect of registry without affidavit of *bona fides* and non-admission of oral evidence to vary the written document (*f*).

Variation between actual sum in which mortgagor was indebted to mortgagee and amount stated in affidavit of *bona fides* (*g*).

A mortgagee, like a pledgee, is bound to conduct a sale of the mortgaged property fairly, nor must he sell to himself, although if he act in good faith and without recklessly and improvidently sacrificing the goods the sale cannot be impeached (*h*).

Therefore, in a distress under a chattel mortgage an inadequate advertisement of the sale of the goods comprised therein will entitle the mortgagor to damages (*i*).

(*d*) *Wade* v. *Bell* (1910), 16 O. W. R. 636; *Coupland* v. *Paris Plow Co.* (1910), 14 W. L. R. 689.

(*e*) *Imperial Brewers, Ltd.* v. *Gelis* (1908), 18 Man. L. R. 283.

(*f*) *Collins* v. *Eaton* (1911), 19 W. L. R. 608 (Alberta).

(*g*) *Thomas, Ltd.* v. *Standard Bank* (1910), 15 O. W. R. 188; affd. 1 O. W. N. 548.

(*h*) *British Columbia Land and Investment Agency* v. *Ishitaka* (1911), XLV. S. C. R. 302; see also *Coupland* v. *Paris Plow Co.* (1910), 14 W. L. R. 689; *Wood* v. *Bethune* (1909), 11 O. W. R. 192.

(*i*) *Neal* v. *Rogers* (1911), 19 O. W. R. 873. As to the measure of damages to which a mortgagor is entitled for loss occasioned by reason of the mortgagee's negligent removal of the mortgaged property, see *Wolfson* v. *Union Bank of Canada*, [1913] A. C. 299, P. C.

And where in a chattel mortgage a bank is the mortgagee, the rate of interest stipulated for must not exceed that prescribed by statute.

In the case of the removal of goods comprised in chattel mortgage to a new district, the omission of the mortgagee to refile mortgage within the statutory time limit will enable a purchaser buying after the time has elapsed to obtain a good title, but a purchase within the time prescribed is not effectual against the mortgagee (*l*).

In order successfully to impeach a sale of mortgaged chattels upon the ground of the mortgagor having made an antecedent offer to redeem strict evidence of the tender is essential (*m*), although voluntary payments of an illegal rate of interest are not recoverable from the payee at the suit of the payer (*n*).

In the province of Ontario it is provided by the Bills of Sale and Chattel Mortgage Act (*o*), in relation to agreements whereby possession passes without ownership, that:—

**Transfers of merchandise for re-sale.**

In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of re-sale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall, as against creditors, mortgagees, or purchasers, be void, and the sale or transfer shall be deemed to have been absolute, unless—

(a) the agreement is in writing, signed by the parties to the agreement or their agents; and

(b) unless such writing or a duplicate or copy verified by oath is filed in the office of the county court clerk of the county

(*l*) *Hulbert* v. *Peterson* (1905), XXVI. S. C. R. 324 (N. W. T.).

(*m*) *British Columbia Land and Investment Agency* v. *Ishitaka* (1911), XLV. S. C. R. 302. As to the effect of a creditor refusing to accept the amount of his debt when actually tendered to him, together with the measure of damages, see *Desgroseillers* v. *Anderson* (1909), Q. R. 36, S. C. 234.

(*n*) *McHugh* v. *Union Bank of Canada*, (1913) A. C. 299, P. C. As to recent decisions on bills of sale, see *Saskatchewan Lumber Co.* v. *Michaud* 1909), 1 Sask. L. R. 412; 8 W. L. R. 946; *Robinson* v. *Lott* (1909), 9 W. L. R. 684; *Stewart* v. *Gates* (1881), 2 P. E. I. R. 432; *Traves* v. *Forrest* (1909), XLII. S. C. R. 514 (an assurance of goods which at the time of the execution of the assurance are incapable of complete transfer by delivery is not a bill of sale). As to when an equitable title to goods is subordinated to a *bonâ fide* legal title, see *Wynacht* v. *McGinty* (1912), 12 E. L. R. [illegible] (N. S.). As to when the real consideration for a bill of sale differs from that expressed therein, see *Henuenfest* v. *Malchose* (1906), 7 Terr. L. R. 404. As to the validity of an incomplete bill of sale as against a *bonâ fide* purchaser for value, see *Palmer* v. *May* (1911), 18 W. L. R. 676. For other cases, see *Conn* v. *Hawes* (1912), 23 W. L. R. 622 (Man.); *Brow* v. *Crabbe* (1911), 9 E. L. R. 336; *Robillard* v. *Chevalier* (1911), 17 R. de J. 432.

(*o*) R. S. O., 1897, c. 148, s. 41, sub-s. 1 (Ont.).

or union of counties or in the proper office in a district in which the goods are situate at the time of making the agreement, and also in the office of the county court clerk of the county or union of counties or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be within five days of the delivery of possession of any of the goods under the agreement.

**Certain agreements not within the Acts.**

It has, however, been held by the Supreme Court of Canada that a parol agreement whereby a manufacturer deposited with retail dealers certain of his goods upon an understanding that the latter were to exhibit them for sale, and that, if sold, the price was to be remitted to him within twenty-four hours of the sale, and that any enhanced sum obtained by the retailers for the goods above that marked upon them by the manufacturer should belong to the retailers as their profit, was not an agreement within sect. 41 of the above Act, and consequently, upon the retailers making an assignment of their goods for the benefit of creditors the chattels in question did not pass to the assignee, but remained the property of the manufacturers (*p*).

In the Bills of Sale Act of Nova Scotia (*q*) it is provided by sect. 5 thereof that:—

**Hiring and purchase agreements to be in writing.**

**Chitty, 478—480.**

(1) Every hiring, lease, or bargain for the sale of personal chattels, accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed—

(a) that the property in the personal chattels, or

(b) in case of a bargain for sale, a lien thereon for the price thereof or any portion thereof,

shall remain in the person letting to hire, the lessor, or the bargainor, until the payment in full of the hire, rental, or price agreed upon by future payments or otherwise, shall be by instrument in writing, and be signed by the parties thereto, or their duly authorised agents in writing, a copy of which authority shall be attached to such instrument.

**Instrument to set out terms and amount payable.**

(2) Such instrument shall set forth fully, by recital or otherwise, the terms, nature and effect of such hiring, lease, or bargain for sale, and the property or lien remaining in the person letting to hire, the lessor, or bargainor, and the amount payable thereunder, whether expressed as hire, rent, price, or otherwise.

(*p*) *Langley* v. *Kuhnert* (1905) XXXVI. S. C. R. 397.

(*q*) R. S., 1900, c. 142.

(3) It shall be accompanied by the affidavit of either of the parties thereto, or, if it is signed by an agent duly authorised as aforesaid, by the affidavit of such agent, stating— Instrument to be accompanied by affidavit.

(a) that such instrument truly sets forth the terms, nature and effect of such hiring, lease, or bargain for sale, and the property or lien remaining in the person letting to hire, the lessor, or bargainor, and the amount payable thereunder;

(b) that such instrument is executed in good faith and for the express purpose of securing to the person letting to hire, the lessor, or the bargainor, the payment of such amount at the times and under the terms set out in the instrument.

(4) Such instrument and affidavit shall be filed in the registry of deeds for the registration district in which the personal chattels are at the time the instrument is executed, otherwise the agreement that such property or such lien shall remain in such person shall, as against the creditors, purchasers and mortgagees of the person hiring, the lessee, or bargainee, be null and void. Regulations as to filing.

# CHAPTER XXI.

## AN ACT RELATING TO BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES.

### *Short Title.*

Short title.
Chitty, 535—565.

**1.** This Act may be cited as the Bills of Exchange A
53 Vict. c. 33, s. 1.

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## *Interpretation.*

Definitions

**2.** In this Act, unless the context otherwise requires:—

"Acceptance."

(a) "acceptance" means an acceptance completed by delivery or notification;

"Action"

(b) "action" includes counterclaim and set-off;

"Bank"

(c) "bank" means an incorporated bank or savings bank carrying on business in Canada;

"Bearer."

(d) "bearer" means the person in possession of a bill or note which is payable to bearer;

"Bill," "note."

(e) "bill" means bill of exchange, and "note" means promissory note;

"Delivery."

(f) "delivery" means transfer of possession, actual or constructive, from one person to another (*a*);

"Holder."

(g) "holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof (*b*);

"Endorsement."

(h) "endorsement" means an endorsement completed by delivery;

"Issue."

(i) "issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.

"Value."

(j) "value" means valuable consideration;

"Defence."

(k) "defence" includes counterclaim;

"Non-business days."

(l) "non-business days" means days directed by this Act to be observed as legal holidays or non-juridical days.

Business days.

(2) Any day other than as aforesaid is a business day. 53 Vict. c. 33, ss. 2 and 91.

(*a*) The fraudulent abstraction of a completed instrument from the desk of the maker without either his knowledge or acquiescence is not a delivery by or under the authority of the maker so as to render him liable to a holder in good faith (*McKenty* v. *Foxboro-back* (1911), 19 W. L. R. 184).

(*b*) As to what constitutes a holder in due course, see *Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 14 W. L. R. 175.

## PART I.—GENERAL.

Thing done in good faith.

**3.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not. 53 Vict. c. 33, s. 89.

Definition of reception in good faith and without notice.

[It may be conveniently stated here, as a general proposition of law, that a person taking a negotiable instrument in good faith and for value obtains a valid title, though he takes from one who has none; and the rule as to good faith may be thus stated: When a person of good repute for honesty offers negotiable securities to a bank or any other person, the only consideration likely to engage the attention of the recipient is whether or no the security thus offered is sufficient in amount to secure him against loss. Nor in such circumstances does the law lay upon him the obligation of making any inquiry into the title of the person whom he finds in possession of the securities. But, on the other hand, if there be anything calculated to arouse suspicion or to lead to a doubt as to whether or no the person purporting to transfer the securities is justified in entering into the contemplated transaction, the case is different, the existence of such suspicion or doubt being incompatible with good faith; and if, in such circumstances, no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, there should be no hesitation in holding that good faith was wanting in a person thus acting (*c*).]

Signature.

**4.** Where by this Act any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority (*cc*). 53 Vict. c. 33, s. 90.

What required of corporation.

**5.** In the case of a corporation, where, by this Act, any instrument or writing is required to be signed it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. 53 Vict. c. 33, s. 90.

Computation of time.

**6.** Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. 53 Vict. c. 33, s. 91.

Crossing dividend warrants.

**7.** The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend. 53 Vict. c. 33, s. 91.

(*c*) See *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, at p. 223; see also *Lockhart v. Wilson* (1907), XXXIX. S. C. R. 541.

(*cc*) See *Gibbons v. Bank* (1911), 17 R. de J. 123

The Bank Act not affected.

**8.** Nothing in this Act shall affect the provisions of the Bank Act. 53 Vict. c. 33, s. 95.

Imperial Acts 15 Geo. III. c. 51 and 17 Geo. III. c. 30.

**9.** The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend to or be in force in any province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders made or uttered therein. 53 Vict. c. 33, s. 95.

Common law of England.

**10.** The rules of the common law of England (*d*), including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques. 54 & 55 Vict. c. 17, s. 8.

Protest *primâ facie* evidence.

**11.** A protest of any bill or note within Canada, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *primâ facie* evidence of presentation and dishonour, and also of service of notice of such presentation and dishonour as stated in such protest or copy. 53 Vict. c. 33, s. 93.

Copy of protest, *primâ facie* evidence.

**12.** If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonour, and a notarial certificate of the service of such notice, shall be received in all courts, as *primâ facie* evidence of such protest, notice and service. 53 Vict. c. 33, s. 71.

Officer of bank not to act as notary.

**13.** No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed. 53 Vict. c. 33, s. 51.

Consideration, purchase money of patent.

**14.** Every bill or note, the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent

(*d*) Where the common law rule as to joint contracts has been superseded by a provincial statute, the statute prevails (*Cook* v. *Hobbs* (1903), 6 O. L. R. 608). Apart, however, from express provincial legislation, this section is declaratory of the law relating to bills of exchange throughout the Dominion of Canada (*Noble* v. *Forgrave* (1899), Q. R. 17 S. C. 23; see also the decision of the Privy Council in the case of *McDonald* v. *Whitfield* (1883), 8 A. C. 733 (on appeal from Canada)).

right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "Given for a patent right."

(2) Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration. 53 Vict. c. 33, s. 30 (*e*). Absence of necessary words.

**15.** The endorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties. 53 Vict. c. 33, s. 30. Transferee to take with equities.

**16.** Every one who issues, sells or transfers, by endorsement or delivery, any such instrument not having the words "Given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of an indictable offence and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. 53 Vict. c. 33, s. 30. Transferring defective note. Indictable offence. Penalty.

## PART II.—BILLS OF EXCHANGE.

### *Form of Bill and Interpretation.*

**17.** A bill of exchange (*f*) is an unconditional order in writing (*g*), addressed by one person to another, signed by the person giving it (*h*), requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a Bill of exchange defined. Ch. 119, 537.

(*e*) *Davey* v. *Sadler* (1901), 1 O. L. R. 626; *Craig* v. *Samuel* (1894), XXIV. S. C. R. 278.

(*f*) An instrument not containing the name of the drawee is not a bill *McPherson* v. *Johnston* (1894), 3 B. C. R. 465). An instrument in which the drawer and drawee represent the same person acting in different capacities is not a bill (*Charlebois* v. *La Cité de Montreal* (1898), Q. R. 15 S. C. 96). A government "letter of credit," the validity of which is dependent on a subsequent vote of the legislature, is not a negotiable instrument within the Bills of Exchange Act (*Jacques-Cartier Bank* v. *The Queen* (1895), XXV. S. C. R. 84).

(*g*) In the most general sense of the word "writing" denotes a document, whether manuscript or printed, as opposed to mere spoken words. In this section manuscript is apparently desiderated (compare the Interpretation Act, R. S. C., 1906, c. 1, s. 34, sub-s. 31).

(*h*) A signature by a marksman, that is by a cross, even though witnessed by a marksman, will suffice (*Remillard* v. *Maisan* (1899), Q. R. 15 S. C. 622).

sum certain in money to or to the order of a specified person, or to bearer.

Non-compliance with requisites.

(2) An instrument which does not comply with the requisites aforesaid, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange.

Unconditional order

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section (*i*): Provided that an unqualified order to pay, coupled with—

(a) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount; or,

(b) a statement of the transaction which gives rise to the bill (*k*),

is unconditional. 53 Vict. c. 33, s. 3.

Instrument payable on contingency.

**18.** An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (*l*).

Addressed to two or more drawees.

(2) A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange. 53 Vict. c. 33, ss. 6 and 11.

Payee, drawer or drawee.

Chitty, 537.

**19.** A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee (*m*).

Two or more payees.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees (*n*).

(*i*) As to what constitutes "a particular fund" within the meaning of this sub-section, see *Bank of British North America* v. *Gibson* (1892), 21 O. R. 61. A written order to a person to pay so much a month out of the salary of the drawer is not a bill of exchange (*Angers* v. *Dillon* (1893), Q. R. 15 S. C. 135). An order in writing addressed by a creditor to his debtor directing him to pay a certain sum out of the monies due to the drawer by the drawee, and to charge the same to the drawer is not a bill of exchange (*Ward* v. *Royal Canadian Ins. Co.* (1892), Q. R. 2 S. C. 229).

(*k*) As to what constitutes "a statement of the transaction," see *Prescott* v. *Garland* (1897), 34 N. B. R. 291; *Bank of Hamilton* v. *Gillies* (1899) 12 Man. R. 495; *Duchaine* v. *Maguire* (1882), 8 Q. L. R. 295.

(*l*) An instrument expressed to be "given as collateral security" is not a negotiable instrument (*Sutherland* v. *Patterson* (1884), 4 O. R. 565). Where an instrument is specially endorsed "this note is not negotiable and is to be held as security," it is not negotiable (*Davis* v. *Robertson* (1897), Q. R. 6 Q. B. 264).

(*m*) Where an instrument is made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or a promissory note, the holder may at his election (as against the maker of the instrument), treat it as either (*Edis* v. *Bury* (1827), 6 B. & C. 433; approved and followed in *Keeling* v. *Waterhouse* (1876), 16 N. B. R. 313).

(*n*) An instrument promising to pay a certain sum of money to the promisee or his heirs is apparently a promissory

(3) A bill may be made payable to the holder of an office for the time being. 53 Vict. c. 33, ss. 5 and 7 (*o*). Holder of office payee.

**20.** The drawee must be named or otherwise indicated in a bill with reasonable certainty. 53 Vict. c. 33, s. 6 (*p*). Drawee to be named. Chitty, 538.

**21.** When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable (*q*). Transfer words. Chitty, 539.

(2) A negotiable bill may be payable either to order or to bearer. Negotiable bill.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last endorsement is an endorsement in blank. When payable to bearer.

(4) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. Certainty of payee.

(5) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer (*r*). 53 Vict. c. 33, ss. 7 and 8. Fictitious payee.

**22.** A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable (*s*). Bill payable to order, when. Chitty, 539.

note (*Doak* v. *Robinson* (1868), 12 N. B. R. 279).

(*o*) An instrument promising to pay a specified person in his official capacity, and his successor duly appointed, is a promissory note which may be sued on by the administrator of the person specified (*Patton* v. *Melville* (1861), 21 U. C. Q. B. 263).

(*p*) When a drawee is not mentioned in an order to pay money, the instrument, though constituting a valid assignment of a debt, is not a bill of exchange (*McPherson* v. *Johnston* (1894), 3 B. C. R. 465, following *Johnson* v. *Braden* (1887), 1 B. C. R. 265 (Part 2)). In the more recent case of *Gardner* v. *Lecker*, 16 R. L. N. S. 14, it has been held that the maker of a note who leaves the name of the payee blank confers a mandate on the bearer to fill in the name of the payee. Such completion is not a material alteration without the consent of the maker within the meaning of sects. 145, 146. Misdescription of the drawee does not necessarily invalidate a bill where the intention of the parties is clear (*Wallace* v. *Souther* (1889), XVI. S. C. R. 717).

(*q*) A promissory note (or bill of exchange), if specially indorsed "this note is not negotiable, and is to be held as security," becomes thereby merely a contract of suretyship, and is no longer a note or bill (*Davis* v. *Robertson* (1897), Q. R. 6 Q. B. 264); nor can the holder recover the amount thereof from the endorsers (*Banque Nationale* v. *Lemaire* (1911), 41 Que. S. C. 37). As to when equity will decree that the holder of a non-negotiable note may recover thereon, see *Bank of Hamilton* v. *Harvey* (1885), 9 O. R. 655; affirmed (1888), XVI. S. C. R. 714.

(*r*) A bill may be treated as being payable to bearer within this sub-section where the person named therein as payee, and to whose order the bill is made payable (whether such person actually exists or no), is not and never was intended by the drawer to have any right upon it, or arising out of it. The meaning of the word "fictitious" when used in this sub-section being fictitious qua the transaction (*London Life Ins. Co.* v. *Molson's Bank* (1904), 8 O. L. R. 238, C. A.).

(*s*) This section applies to cheques. Where, therefore, a cheque, bill or note is made payable to a particular person and does not contain words prohibiting transfer, such cheque, bill or note is payable "to order" without

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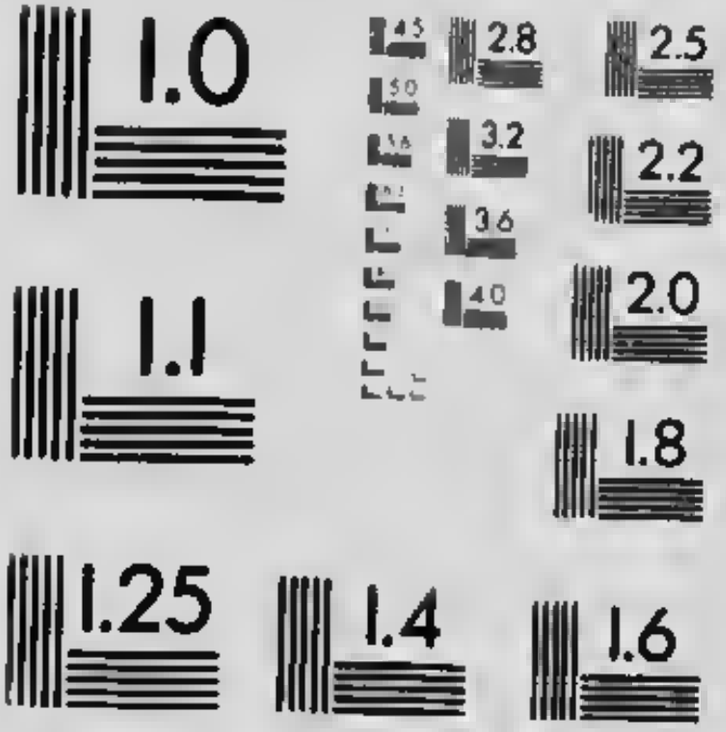


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When payable to person or order.

(2) Where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option (*t*). 53 Vict. c. 33, s. 8.

Payable on demand, when.

Chitty, 539.

**23.** A bill is payable on demand

(a) which is expressed to be payable on demand, or on presentation (*u*); or,

(b) in which no time for payment is expressed.

Endorsed when overdue.

(2) Where a bill is accepted or endorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any endorser who so endorses it, be deemed a bill payable on demand. 53 Vict. c. 33, s. 10.

Determinable future time.

Chitty, 540.

Sight.

Specified event.

**24.** A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable

(a) at sight or at a fixed period after date or sight (*v*);

(b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain (*y*). 53 Vict. c. 33, s. 11; 54 & 55 Vict. c. 17, s. 1.

Inland bill defined.

Chitty, 537.

**25.** An inland bill is a bill which is, or on the face of it purports to be—

(a) both drawn and payable within Canada; or,

(b) drawn within Canada upon some person resident therein.

Other bills.

(2) Any other bill is a foreign bill.

Presumption.

(3) Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill (*z*). 53 Vict. c. 33, s. 4.

Bill or note having fictitious drawee.

**26.** Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his

express words to that effect, and is consequently negotiable (*Bank of British N. America* v. *Warren* (1909), 19 O. L. R. 257, C. A.

(*t*) A note payable to a person or his order, or to the order of a person, are identical in meaning (*Myers* v. *Wilkins* (1849), 6 U. C. Q. B. 421).

(*u*) Bills payable on "presentation" or "demand" are not entitled to have the three days of grace provided for by sect. 42 of the Bills of Exchange Act added to the date on which presentment is made, but bills payable "at sight" are so entitled. Actual presentation in the case of bills payable on demand is, however, essential; nor will the fact of the note being overdue when it was endorsed to the plaintiff cure the omission (*Burns* v. *Dana* (1849), 6 U. C. Q. B. 327).

(*v*) An alternative date of maturity may constitute sufficient compliance with the requirements of this proviso (*Hogg* v. *Marsh* (1848), 5 U. C. Q. B. 319).

(*y*) For examples of promissory notes payable upon the happening of either a specified event or a contingency, see *Massey Manufacturing Co.* v. *Perrin* (1892), 8 Man. R. 457; *Elliott* v. *Brech* (1886), 3 Man. R. 213.

(*z*) Save in the province of Quebec, this avoids the necessity of noting or protesting an inland bill before proceeding against the drawer or endorsers (note sects. 113, 114, *post*).

option, either as a bill of exchange or as a promissory note (*a*). 53 Vict. c. 33, s. 5. Option. Chitty, 538.

**27.** A bill is not invalid by reason only— Valid bill. Chitty, 540.

(a) that it is not dated; Not dated.

(b) that it does not specify the value given, or that any value has been given therefor (*b*); Statement of value.

(c) that it does not specify the place where it is drawn or the place where it is payable; Statement of place.

(d) that it is ante-dated or post-dated, or that it bears date on a Sunday or other non-juridical day (*c*). 53 Vict. c. 33, ss. 3 and 13. Irregular date.

**28.** The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid— Sum certain.

(a) with interest (*d*); Interest.

(b) by stated instalments (*e*); Instalments.

(c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; Default.

(d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill (*f*). Exchange.

(*a*) Thus a bill of exchange drawn upon a bank by the manager of one of its branch banks may be regarded as a promissory note (*Miller* v. *Thomson* (1841), 3 Man. & G. 576 (an English case)).

(*b*) Parol evidence is admissible to deny the receipt of value for a bill or note, even if expressed, but not to vary the engagement to pay the amount at the time specified (*Davis* v. *McSherry* (1849), 7 U. C. Q. B. 190).

(*c*) Before the passing of the Act a note given on account of a sale made on Sunday was held not void in the hands of an innocent holder for value (*Crombie* v. *Overholtzer* (1853), 11 U. C. Q. B. 55; and see *Houliston* v. *Parsons* (1852), 9 U. C. Q. B. 681).

(*d*) The agreement between the parties fixes the proper rate of interest to be charged (*Young* v. *Hoke* (1865), 15 U. C. C. P. 360). But see as to the statutory limit of sale of interest to be charged in certain cases, the Money-lenders Act, 6 Edw. VII. c. 32 (R. S. C., 1906, c. 122). Where interest is contracted to be paid periodically during the currency of a promissory note, the note does not become overdue within the meaning of sects. 58 and 70 of the Act merely by default in the payment of such interest (*Union Investment Co.* v. *Wells* (1908), XXXIX. S. C. R. 625). Interest made payable by a promissory note or bill is an integral part of the instrument, and not merely damages for detaining the principal (*Crouse* v. *Park* (1846), 3 U. C. Q. B. 458).

(*e*) Extrinsic parol evidence is not admissible to vary the terms of a promissory note which provided for the payment of a sum certain "in yearly proportions" (*McQueen* v. *McQueen* (1852), 9 U. C. Q. B. 536). A bill of exchange for an amount payable by instalments is a valid instrument for the balance remaining due after one or more of the instalments has been paid (*Boston* v. *The Central Bank* (1863), 10 N. B. R. 493).

(*f*) Prior to the passing of the Bills of Exchange Act, a promissory note made in Canada and payable in the United States "and in the currency thereof," without words of restriction, was held a valid note (*Third National Bank of Chicago* v. *Cosby* (1878), 43 U. C. Q. B. 38; see also *Greenwood* v. *Foley* (1872), 22 U. C. C. P. 352; see also *Wallace* v. *Souther* (1889), XVI. S. C. R. 717, as to meaning of "currency").

Figures and words.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

With interest.

(3) Where a bill is expressed to be payable with interest unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof. 53 Vict. c. 33, s. 9.

True date presumption. Chitty, 540.

**29.** Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be. 53 Vict. c. 33, s. 13.

Undated bill payable after date. Chitty, 540.

**30.** Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at sight or at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly: Provided that

Inserting wrong date.

(a) where the holder in good faith and by mistake inserts a wrong date; and,

Liability of holder.

(b) in every other case where a wrong date is inserted; if the bill subsequently comes into the hands of a holder in due course the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date. 53 Vict. c. 33, s. 12; 54 & 55 Vict. c. 17, s. 2.

Perfecting bill. Chitty, 541.

**31.** Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. 53 Vict. c. 33, s. 20 (*g*).

Authority.

When to be complete. Chitty, 541.

**32.** In order that any such instrument when completed may be enforceable against any person who became a party thereto

(*g*) "It is settled law in favour of the negotiability of bills and notes, and to protect innocent holders for value, that when a person puts his name to or on a bill or note, and gives or entrusts the blank so signed to another, who other has a general authority to fill in the blanks as he may choose, and to unlimited amount, and, further, that the party so signing is liable, no matter or bill thus filled up in the hands of a *bonâ fide* holder for value, no matter upon what private understanding or terms the blank was signed or part with" (*M'Innes* v. *Milton* (1870), 30 U. C. Q. B. 189, at p. 493; see also *Burton* v. *Gaffin* (1897), 5 B. C. R. 434; *British Columbia Land and Investment Agency* v. *Ellis* (1898), 6 B. C. R. 82). Any *bonâ fide* holder of a bill in which a blank is left for the name of the payee may perfect the instrument by inserting his name in the blank space (*Mutual Safety Ins. Co.* v. *Fyler* (1851), 7 N. B. R. 230; but see *Gardner* v. *Lockey*, 16 R. L. N. S. 10, referred to under sect. 32).

prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given (*k*).

(2) Reasonable time within the meaning of this section is a question of fact (*l*). 53 Vict. c. 33, s. 20. Reasonable time.

**33.** The drawer of a bill and any endorser may insert therein the name of a person, who shall be called the referee in case of need, to whom the holder may resort in case the bill is dishonoured by non-acceptance or non-payment. Referee in case of need. Chitty, 540, at p.

(2) It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit. 53 Vict. c. 33, s. 15. Option.

**34.** The drawer of a bill, and any endorser, may insert therein an express stipulation: Stipulations.

(a) negativing or limiting his own liability to the holder; Limiting.

(b) waiving, as regards himself, some or all of the holder's duties (*k*). 53 Vict. c. 33, s. 16. Waiving rights.

### *Acceptance and Interpretation.*

**35.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (*l*). Acceptance defined.

(2) Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, Drawee's name wrong.

(*k*) To validity there must, however, be a delivery of the inchoate instrument in order that it may be converted into a bill or note, or in other words there must be *scienter* (*Hubbert* v. *Home Bank of Canada* (1910), 20 O. L. R. 491; see also *Ray* v. *Wilson* (1911), 19 O. W. R. 470). The mere fact of a person being induced by fraudulent misrepresentation as to the nature or character of a document to affix his name or mark thereto will not make the signatory liable therein even though a holder for value may have received the completed instrument in good faith (*Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704 (an English case)). And *à fortiori* this rule applies where subsequently to signature the nature of the document is fraudulently altered (*Banque Jacques-Cartier* v. *Lesperance* (1886), 13 Q. L. R. 39).

(*i*) Where a man signs a blank acceptance and issues it, authorising the holder to fill it up, he is liable thereon although he may have given secret instructions to the holder as to the amount, date, or some other particular qualifying the absolute authority of the holder to fill up the instrument as he pleases (*Merchants' Bank* v. *Good* (1890), 6 M. L. R. 339).

(*k*) As to the liability of an endorser who expressly stipulates "without any recourse to me whatever," see *Bank of Ottawa* v. *Hurty* (1906), 12 O. L. R. 218.

(*l*) An acceptance undertaking to pay by another bill is no acceptance (*Russell* v. *Phillips* (1850), 14 Q. B. 891 (an English case)).

adding, if he thinks fit, his proper signature, or he may accept by his proper signature (*m*). 53 Vict. c. 33, s. 17.

Acceptance.

**36.** An acceptance is invalid unless it complies with the following conditions, namely:—

On the bill.

(a) It must be written on the bill and be signed by the drawee (*n*);

For money.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Mere signature.

(2) The mere signature of the drawee written on the bill without additional words is a sufficient acceptance. 53 Vict. c. 33, s. 17.

Acceptance.

**37.** A bill may be accepted

Before completion.

(a) before it has been signed by the drawer, or while otherwise incomplete (*o*);

Overdue.

(b) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment (*p*).

Acceptance after dishonour.

(2) When a bill payable at sight or after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance (*q*). 53 Vict. c. 33, s. 18; 54 & 55 Vict. c. 17, s. 3.

Kinds.

**38.** An acceptance is either—

(a) general (*r*); or,

(b) qualified (*s*).

(*m*) Compare *Quebec Bank* v. *Miller* (1885), 3 M. L. R. 17.

(*n*) Although an acceptance to a bill, in order to be valid, must be in writing, there may be an extrinsic verbal agreement collateral thereto upon which one or other of the parties to the contract may maintain an action (*Bank of Montreal* v. *Thomas* (1888), 16 O. R. 503).

(*o*) In such circumstances, however, the instrument is inchoate, nor will subsequent completion relate back to the date when the imperfect instrument was made (*Hayward, Ex parte* (1871), L. R. 6 Ch. App. 546 (an English case)).

(*p*) A bill which is either accepted or endorsed after maturity is payable on demand (see sect. 23, sub-s. 2).

(*q*) That is to say, the actual date on a note or bill or the date of the acceptance or of any endorsement, is *primâ facie* the true date (see sect. 24). Moreover, as a general proposition, in the absence of proof to the contrary, a bill of exchange is presumed to have been presented within a reasonable time after its date, and before its maturity (*Roberts* v. *Bethell* (1857), 12 C. B. 778 (an English case)).

(*r*) A note expressed to be payable at a specified bank or at a particular place without more, is deemed to be generally accepted (*Hooker* v. *Leslie* (1868), 27 U. C. Q. B. 295). Consequently an averment that the note was "duly presented" for payment to the maker without specially stating either time or place of presentation is sufficient to charge an endorser (*Bank of Upper Canada* v. *Parsons* (1816), 3 U. C. Q. B. 383).

(*s*) Sect. 82 of the Act provides that "the holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance."

(2) A general acceptance assents without qualification to the order of the drawer. General.

(3) A qualified acceptance in express terms varies the effect of the bill as drawn and in particular, an acceptance is qualified which is— Qualified.

(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated (t); Conditional.

(b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn (u); Partial.

(c) qualified as to time; Time.

(d) the acceptance of some one or more of the drawees, but not of all. Drawees.

(4) An acceptance to pay at a particular specified place is not in that account conditional or qualified. 53 Vict. c. 33, s. 19. Specified place.

**39.** Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto (x); Provided that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. 53 Vict. c. 33, s. 21. When acceptance complete. Proviso.

## *Delivery.*

**40.** As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery— Requisites. Chitty, 542.

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be (y): Authority.

(t) For typical instances of "conditional acceptance," see *Potters* v. *Taylor* (1888), 20 N. S. R. 362; *Ontario Bank* v. *McArthur* (1889), 5 M. L. R. 381; *McLean* v. *Shields* (1884), 1 M. L. R. 278.

(u) Thus, if a drawee accept for 150*l.* a bill drawn for 200*l.*, this is a good acceptance for the sum specifically mentioned, but not for the whole amount of the bill.

(x) Or, in other words, until delivery of the instrument there is *locus pœnitentiæ* for the drawer. This section is almost identical in terms with sect. 21 (1) of the Imperial Act, which was based upon the decision of the Court in the case of *Cox* v. *Troy* (1822), 5 B. & Ald. 474; see also *Brown* v. *Howland* (1885), 9 O. R. 48.

(y) The fraudulent abstraction of a completed instrument from the desk of the maker without either his knowledge or acquiescence is not a delivery by or under the authority of the drawer (*McKenty* v. *Vanhorenback* (1911), 19 W. L. R. 184). Where the making of the instrument purporting to be a note is induced by an initial fraud or duress, a holder in due course cannot recover thereon, upon the ground that the deceit relates back so as to prevent the signed paper becoming a note at all (*Graham* v. *Driver* (1910), 17 O. W. R. 66; *Home Life Ins. Co.* v. *Matthews* (1910), 17 O. W. R. 328; *Lewis Furnishing Co.* v. *Campbell* (1911), 19 W. L. R. 465; but compare *Gayand* v. *West* (1911), 10 Que. S. C. 323).

Conditional.

(b) may be shown to have been conditional or for a special purpose only (z), and not for the purpose of transferring the property in the bill.

Presumption.

(2) If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. 53 Vict. c. 33, s. 21.

Parting with possession.

**41.** Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved. 53 Vict. c. 33, s. 21.

*Computation of Time, non-juridical days and days of grace.*

Computation of time.

**42.** Where a bill is not payable on demand, three days, called days of grace, are, in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that whenever the last day of grace falls on a legal holiday or non-juridical day in the province where any such bill is payable, then the day next following, not being a legal holiday or non-juridical day in such province, shall be the last day of grace. 53 Vict. c. 33, s. 14.

Last day of grace.

Non-juridical days.

**43.** In all matters relating to bills of exchange, the following and no other days shall be observed as legal holidays or non-juridical days:—

General.

(a) In all the provinces of Canada—

Sundays,
New Year's Day,
Good Friday,
Easter Monday,
Victoria Day,
Dominion Day,
Labour Day,
Christmas Day,
The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning sovereign,
Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada,

(z) Thus, a promissory note endorsed upon the express understanding that it should only be available upon the happening of a specified contingency, or for a particular purpose (*Banque Nationale* v. *Lemaire* (1911), 41 Que. S. C. 37; *McArthur* v. *McPhee* (1893), XXXIII. S. C. R. 571), is not binding upon the endorser until the happening of the event (*Commercial Bank of Windsor* v. *Morrison* (1905), XXXII. S. C. R. 93).

The day next following New Year's Day, Christmas Day, Victoria Day, Dominion Day, and the birthday of the reigning sovereign when such days respectively fall on Sunday;

(b) In the province of Quebec in addition to the said days— Quebec.

The Epiphany,
The Ascension,
All Saints' Day,
Conception Day;

(c) In any one of the provinces of Canada, any day appointed by proclamation of the Lieutenant-Governor of such province for a public holiday, or for a fast or thanksgiving within the same, and any non-juridical day by virtue of a statute of such province. 53 Vict. c. 33, s. 14; 56 Vict. c. 30, s. 1; 57 & 58 Vict. c. 55, s. 2; 1 Edw. VII. c. 12, ss. 2 and 4. Provincial proclamation.

**44.** Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. 53 Vict. c. 33, s. 14 (*a*). Time of payment.

**45.** Where a bill is payable at sight (*b*) or at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery. 53 Vict. c. 33, s. 14. Sight bill.

**46.** Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated, unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month, with the addition, in all cases, of the days of grace. Due date.

(2) The term "month" in a bill means the calendar month. 53 Vict. c. 33, s. 14. "Month."

(*a*) When a bill is dated on a particular day in a month, and is expressed to mature on a subsequent day in the month specified, with the word "next" appended thereto, it becomes due on the date mentioned in the year following that in which it was made (*Desgeau* v. *Pominville* (1897), Q. R. 11 S. C. 326).

(*b*) The maker of a bill payable "at sight" is entitled to three days' grace (see sect. 42). Seizure of collateral security at 3 o'clock on the last day of grace is premature, and entitles the party damnified to damages (*Westaway* v. *Stewart* (1909), 10 W. L. R. 623).

*Capacity and Authority of Parties.*

Capacity of parties.
Chitty, 542.
Corporations.

**47.** Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (*e*): Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser, of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation. 53 Vict., c. 33, s. 22.

Effect of disability on holder.

**48.** Where a bill is drawn or endorsed by an infant, minor or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto (*d*). 53 Vict., c. 33, s. 22.

Forgery
Chitty, 543.

**49.** Subject to the provisions of this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be (*e*), the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature (*f*), unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (*g*): Provided that—

Estoppel.

Ratification.

(a) nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery (*h*)

(*c*) An executor cannot charge the estate by endorsing accommodation notes unless the will gives him express power to do so (*Lionais* v. *Molson's Bank* (1883), N. S. C. R. 526).

(*d*) *Merchants' Bank* v. *McLeod* (1910), 14 W. L. R. 161; *Hammond* v. *Small* (1858), 16 U. C. Q. B. 371.

(*e*) See *Ray* v. *Wilson* (1911), XLV. S. C. R. 401.

(*f*) Although fraud or breach of trust is capable of ratification, forgery is not, apparently upon the ground that no subsequent adoption can validate or give efficacy to that which never had existence (*Merchants' Bank of Canada* v. *Lucas* (1890), XVIII. S. C. R. 704; *Shaw* v. *McConnel* (1909), 7 E. L. R. 165; *Quebec Bank* v. *Frechette* (1911), 20 Que. K. B. 558). Alteration of a bill after signature by the insertion of material words without the authority of the drawer is a forgery, and cannot be subsequently ratified by the drawer (*Bickerton* v. *La Banque Nationale* (19[illegible]), XL. S. C. R. 458).

(*g*) A party may by his [illegible] render himself liable to the holder of a forged note received for value and in good faith upon the ground of estoppel. The doctrine of estoppel is based upon change of position, and is limited to cases in which the position is altered, or, in other words, estoppel shuts out truth in order to do justice. Ordinarily, therefore, it will not be applied further than is necessary to re-establish the *status quo ante* (*Ewart* v. *Dominion Bank* (1904), XXV. S. C. R. 133; see also *Permanent Building Society* v. *Langton* (1917), 40 Que. S. C. 55). There is, however, no estoppel in the case of the Crown (*Bank of Montreal* v. *The King* (1907), XXXVIII. S. C. R. 258).

(*h*) Acquiescence and ratification must be founded on a full knowledge

Recovery of amount paid on forged cheque.

(b) if a cheque payable to order is paid by the drawee upon a forged endorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid, nor any defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery.

Default of notice.

2. In case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein, who has not previously instituted proceedings for the protection of his rights. 53 Vict., c. 33, s. 2.

Recovery of amount paid on forged endorsement.

**50.** If a bill bearing a forged or unauthorised endorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged or unauthorised endorsement if notice of the endorsement being a forged or unauthorised endorsement is given to each such subsequent endorser within the time and in the manner in this section mentioned.

Rights over.

2. Any such person or endorser from whom said amount has been recovered shall have the like right of recovery against any prior endorser subsequent to the forged or unauthorised endorsement.

Notice of forgery.

3. Such notice of the endorsement being a forged or unauthorised endorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorised, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonor of a bill may be given or addressed under this Act. 60 & 61 Vict., c. 10, s. 1.

Procuration signatures. Chitty, 543.

**51.** A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is

of the facts, and further, must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction (*La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cité et du District de Montreal* (1887), 13 A. C. 111, P. C. at p. 118).

bound by such signature only if the agent in so signing is acting within the actual limits of his authority. 53 Vict. c. 33, s. 25 (*i*).

Signing in representative capacity. Chitty, 343.

**52.** Where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon (*k*); but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability (*l*).

Rule for determining capacity.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted. 53 Vict. c. 33, s. 26.

*Consideration.*

Valuable. Clarke, 343.

**53.** Valuable consideration for a bill may be constituted by:

Sufficiency.

(a) any consideration sufficient to support a simple contract (*m*);

Antecedent debt.

(b) an antecedent debt or liability (*n*).

(*i*) *Bryant* v. *La Banque du Peuple*, [1893] A. C. 170, P. C.

(*k*) *Union Bank* v. *Cross* (1909), 2 Alt. L. R. 3; *Fairchild* v. *Ferguson* (1892), XXI. S. C. R. 484; *Bridgewater Cheese Factory Co.* v. *Murphy* (1896), XXVI. S. C. R. 443.

(*l*) *Madden* v. *Cox* (1879), 44 U. C. Q. B. 542. Where notes purporting to be signed on behalf of a company are negotiated before its incorporation, the makers thereof, although signing in a representative capacity, are personally liable for the breach of the implied warranty that a principal exists (*Crane* v. *Lavoie* (1912), 21 W. L. R. 343).

(*m*) A partial failure of consideration is no defence (*Mercantile Bank* v. *Thompson* (1912), 21 O. W. R. 740; *Primeau* v. *Pontet* (1905), 11 Man. L. R. 71; *Gaddie and McCulloch Co.* v. *Harper* (1899), 31 O. R. 280), but a complete failure would be (*Buffalo Mining Co.* v. *Cartwright* (1905), 10 O. L. R. 438). A payee cannot enforce a note given to him under a mistake as to the legal position of the maker (*Cie. d'Assurance Mutuelle* v. *L. U.* (1890), 12 S. C. 232). Promissory notes given in payment for a deed of sale which is subsequently revoked by mutual agreement owing to the failure of one of the parties are void for total failure of consideration (*Fau* v. *Cassidy* (1891), XVIII. S. C. R. 713). Notes are void for illegality of consideration where they are given in connection with a smuggling transaction (*Rose* v. *Gerrard* (1898), XXXIX. S. C. R. 653), or an election in Quebec contrary to R. S. Q. art. 5 (*Dansereau* v. *St. Louis* (1890), XVIII. S. C. R. 587). But where the housekeeper of a deceased man sought to recover on a note which he had given her on condition that she remained single during his life, the Court held that the contract was not in restraint of marriage for such a period as to be contrary to public policy, and that she could recover (*Crandell-Jones* v. *Sweet* (1904), 9 O. L. R. 27; 4 O. W. R. 397; 25 Occ. N. 31). (N.B.—The decision in this case is not in accord with English law.)

(*n*) A note to secure the amount of a fraudulent preference in insolvency is altogether void (*Brigham* v. *La Banque Jacques-Cartier* (1900), XXX. S. C. R. 429). A note for an antecedent debt, though void for illegality as between the maker and payee, is nevertheless valid in the hands of a *bonâ fide* holder without notice (*Canadian Bank of Commerce* v. *Gow* (1880), 30 U. C. C. P. 553).

(2) Such a debt or liability is deemed valuable consideration, Form of bill
whether the bill is payable on demand or at a future time.
53 Vict., c. 33, s. 27.

**54.** Where value has, at any time, been given for a bill, the Holder for
holder is deemed to be a holder for value as regards the value.
acceptor and all parties to the bill who became parties prior to Chitty, 344.
such time.

2. Where the holder of a bill has a lien on it, arising either Lien as
from contract or by implication of law, he is deemed to be a holder
holder for value to the extent of the sum for which he has a lien.
53 Vict., c. 33, s. 27 (*a*).

**55.** An accommodation party to a bill is a person who has Accommo-
signed a bill as drawer, acceptor or endorser, without receiving dation bill.
value therefor, and for the purpose of lending his name to some Chitty, 344.
other person.

2. An accommodation party is liable on a bill to a holder Liability of
for value; and it is immaterial whether, when such holder took party.
the bill, he knew such party to be an accommodation party or
not.
53 Vict., c. 33, s. 28.

**56.** A holder in due course (*q*) is a holder who has taken Holder in
a bill, complete and regular on the face of it, under the following due course.
conditions, namely:— Chitty, 344.

(a) That he became the holder of it before it was overdue and Notice.
without notice that it had been previously dishonoured,
if such was the fact (*r*);

(b) That he took the bill in good faith and for value, and Good faith.
that at the time the bill was negotiated to him he had
no notice of any defect in the title of the person who
negotiated it (*s*).

(*n*) As to the rights of parties with ... see *Merchants' Bank* v. *Thompson* (1912), 21 O. W. R. 740.

(*o*) As to what will constitute "a holder for value" in the case of an accommodation bill, see *Cox* v. *Canadian Bank of Commerce* (1911), 18 W. L. R. 56. As to circumstances which will raise a presumption that a note was given without consideration and to a common or a person ... *Re* ... v. *Cox* (1892), 13 Que. K. B. 97. As to circumstances which will affect ... accommodation maker, see *Hough* v. *Ames* (1910), 15 W. L. R. 671; as ... *Ecclesiastical* (1897), 24 Ont. A. R. 302. As against the payee, the ... maker of a bill or note is entitled to adduce parol evidence to show that he ... it for accommodation only (*Hebert* v. *Poirier* (1911), 10 Que. S. C. 105).

(*p*) The definition in this section ... (*q*).

(*q*) The definition in this section does not ... (*r*).

(*r*) As to when a cheque is not overdue within this section, see *Bank of British North America* v. *Moore* (1909), 19 O. L. R. 257.

(*s*) Under the provisions of this section, a person who endorses a promissory note unendorsed by the payee may be liable as an endorsee to the latter. And in Ontario the provision of the provincial Chattel Mortgage Act, requiring

Title defective.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (*t*). 53 Vict. c. 33, s. 29.

Right of subsequent holder.

**57.** A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (*u*). 53 Vict. c. 33, s. 29.

Presumption of value.

Chitty, 545.

Due course.

**58.** Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *primâ facie* deemed to be a holder in due course (*x*); but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear (*y*), or illegality (*z*), the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course. 53 Vict. c. 33, s. 30.

Burden of proof.

Usurious consideration

**59.** No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration or upon a usurious contract (*a*). 53 Vict. c. 33, s. 30.

that the consideration for a mortgage should be expressed therein, is sufficiently satisfied when the mortgage deed recites that the indorsement of a note is the consideration, and then sets out the note (*Robinson* v. *Mann* (1901), XXXI. S. C. R. 484; *Lockhart* v. *Wilson* (1907), XXXIX. S. C. R. 541).

(*t*) Actual *mala fides* is essential in order to deprive a holder of his rights under this section: *crassa negligentia* is not enough (*Cross* v. *Currie* (1880), 5 O. A. R. 31, following the judgment of Denman, C. J., in *Goodman* v. *Harvey* (1836), 4 A. & E. 870). To induce a person to sign a bill under the belief that he is signing an order for goods is fraud within the meaning of this section (*Jacques Cartier Bank* v. *Lalonde* (1901), Q. R. 20 S. C. 13).

(*u*) *Clarkson* v. *Lawson* (1856), 14 U. C. Q. B. 67; *Cross* v. *Currie* (1880), 5 O. A. R. 31; but see *Alloway* v. *Hrabi* (1904), 14 Man. R. 627.

(*x*) *Guyard* v. *West* (1911), 40 Que. S. C. 323.

(*y*) As to what will constitute duress or force and fear within the meaning of this section, see *Western Bank of Canada* v. *McGill* (1902), XXXII. S. C. R. 581.

(*z*) Illegality. An insurance company, although it may have no statutory borrowing powers, may, under the provisions of sect. 18 of the Act (which see), endorse a note over to a third party so as to give the endorsee power to recover on the note (*Merchants' Bank* v. *McLeod* (1890), 14 W. L. R. 461).

(*a*) A commission of 5 per cent. on all advances besides interest has been in certain circumstances, held not usurious within the meaning of this section (*Pollak* v. *Bradbury* (1854), C. R. 2 A. C. 46). There are now no usury laws in Canada.

*Negotiation.*

By transfer. **60.** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

By delivery. (2) A bill payable to bearer is negotiated by delivery.

By endorsement. (3) A bill payable to order is negotiated by the endorsement of the holder completed by delivery. 53 Vict. c. 33, s. 31.

Without endorsement. **61.** Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferrer.

Representative capacity. (2) Where any person is under obligation to endorse a bill in a representative capacity, he may endorse the bill in such terms as to negative personal liability. 53 Vict. c. 33, s. 31.

Endorsing. **62.** An endorsement in order to operate as a negotiation—

Writing. (a) must be written on the bill itself and be signed by the endorser (*b*);

Entire bill. (b) must be an endorsement of the entire bill.

Allonge. (2) An endorsement written on an allonge, or on a *copy* of a bill issued or negotiated in a country where *copies* are recognised, is deemed to be written on the bill itself.

Partial endorsement. (3) A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill. 53 Vict. c. 33, s. 32.

Signature sufficient. **63.** The simple signature of the endorser on the bill, without additional words, is a sufficient endorsement.

Two or more payees. (2) Where a bill is payable to the order of two or more payees or endorsees who are not partners, all must endorse, unless the one endorsing has authority to endorse for the others. 53 Vict. c. 33, s. 32.

Misspelling payee's name. **64.** Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature. 53 Vict. c. 33, s. 32.

(*b*) The signature, in order to be effective as an endorsement, must be made *qua* endorsement, that is, for the specific purpose of warranty or representation (*Rex* v. *Bank of Montreal* (1905), 10 O. L. R. 117, at p. 135).

Presumption as to order of endorsement.

**65.** Where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. 53 Vict. c. 33, s. 32 (*c*).

Disregarding condition.

**66.** Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid, whether the condition has been fulfilled or not. 53 Vict. c. 33, s. 33 (*d*).

Endorsement in blank.

**67.** An endorsement may be made in blank or special.

(2) An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer.

Special endorsement.

(3) A special endorsement specifies the person to whom, or to whose order, the bill is to be payable.

Application of Act to a payee.

(4) The provisions of this Act relating to a payee apply, with the necessary modifications, to an endorsee under a special endorsement.

Conversion of blank endorsement.

(5) Where a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to or to the order of himself or some other person. 53 Vict. c. 33, ss. 32 and 34.

Restrictive endorsement.

**68.** An endorsement may also contain terms making it restrictive.

What is.

(2) An endorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is endorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D., or order, for collection" (*e*).

Rights of endorsee.

(3) A restrictive endorsement gives the endorsee the right to receive payment of the bill and to sue any party thereto that

(*c*) *Elder* v. *Kelly* (1850), 8 U. C. Q. B. 240. In the case of accommodation endorsers, the Court will enforce the right of contribution in the same manner as between other co-sureties (*Clipperton* v. *Spettigue* (1868), 15 Gr. 269; *Steacy* v. *Stayner* (1903), 7 O. L. R. 681).

(*d*) But on the other hand, a promissory note is restrictively indorsed "for collection" is the agent, for that purpose, of the endorser, and is bound to account to him for the proceeds when collected (*Perreault* v. *Merchants' Bank* (1901), Q. R. 27 S. C. 149). The endorser of a note to another for valuable consideration is not entitled to show by parol evidence that he stipulated he was not to be liable on the endorsement (*Smith* v. *Squires* (1901), 21 Occ. N. 213; 13 Man. L. R. 360).

missory note or bill endorsed upon the express understanding that it should be available only upon the happening of a specified condition is not binding upon the endorser until the fulfilment of the proviso (*Commercial Bank of Windsor* v. *Morrison* (1902), XXXII. S. C. R. 98).

his endorser could have sued, but gives him no power to transfer his rights as endorsee unless it expressly authorises him to do so.

If further transfer is authorised.

(4) Where a restrictive endorsement authorises further transfer, all subsequent endorsees take the bill with the same rights and subject to the same liabilities as the first endorsee under the restrictive endorsement. 53 Vict. c. 33, ss. 32 and 35.

When negotiability ceases.

**69.** Where a bill is negotiable in its origin, it continues to be negotiable until it has been—

(a) restrictively endorsed; or,

(b) discharged by payment or otherwise. 53 Vict. c. 33, s. 36.

Overdue bill.

Equities.

**70.** Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it (*f*).

[The doctrine of constructive notice does not apply to bills and notes transferred for value; or, in other words, the holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee, for an assignee must take the thing assigned subject to all the equity to which the original party was subject; and were this rule applied to bills and notes it would materially affect their currency.

Where, however, the bill or note is "overdue," that is to say, where the date has elapsed when it should have been redeemed by payment, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person had from whom he took it. *Cc*, in other words, there is this distinction between bills endorsed before and after they become due, if a note *endorsed be not due* at the time of transfer it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit; but if it is overdue, although it is not necessarily rendered thereby untransferable, yet certainly it is out of the common course of dealing, and does give rise to so much suspicion, that, as a rule of law, based on the custom of merchants, the endorsee must take it on the credit of and can stand in no better position than the endorser (*g*); but, apparently,

(*f*) Where parties were endorsees and innocent holders after maturity of a note given by defendants in blank for a certain indebtedness, and by mistake the note was filled up for an amount larger than the actual sum due, it was held an equity attached to the note, and consequently that the holder could not recover an amount larger than the actual indebtedness of the defendants (*Fraser* v. *Elstrom* (1899), 6 Terr. L. R. 464; and see *Merchants' Bank* v. *Thompson* (1912), 21 O. W. R. 740).

(*g*) *Brown* v. *Davis* (1789), 3 T. R. 80.

no such rule is applicable to cheques (*h*), which may legitimately, within reasonable limits, be cashed after date.

Again, the negotiability of a bill or note is not affected during its currency by any breach of contract *dehors* the instrument itself, for although it has been held that a note, the principal of which is payable by instalments, is overdue when the first instalment is overdue and unpaid, and is thereby subject to all equities between the original parties, it has nevertheless been stated (*i*), as a general proposition of law, that failure to pay interest, standing alone, is not to be regarded as being sufficient in law to throw such discredit upon the principal security on which it is due as to subject the holder, to the full extent of the security, to antecedent equities (*k*).]

**Demand bill, when.**

(2) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time (*l*).

**Time.**

(3) What is an unreasonable length of time for such purpose is a question of fact (*m*). 53 Vict. c. 33, s. 36.

**Presumption as to.**

**71.** Except where an endorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue. 53 Vict. c. 33, s. 36.

**Taking bill with notice of dishonour.**

**72.** Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour; but nothing in this section shall affect the rights of a holder in due course. 53 Vict. c. 33, s. 36.

**Re-issue of bill.**

**73.** Where a bill is negotiated back to the drawer, or to a prior endorser, or to the accepter, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable (*n*). 53 Vict. c. 33, s. 37.

(*h*) *Serrell* v. *Derbyshire Rail. Co.* (1850), 9 C. B. 811, at p. 821.

(*i*) *National Bank of North America* v. *Kirby* (1871), 108 Mass. R. 497, note especially p. 501.

(*k*) *Union Investment Co.* v. *Wells* (1908), XXXIX. S. C. R. 625; see also sects. 56 and 70, c. 119, R. S. C., 1906.

(*l*) Sects. 22 and 70 of the code apply to cheques (*Bank of British North America* v. *Warren* (1909), 19 O. L. R. 257).

(*m*) An interval of seven days between the dating of a cheque and the time of its despatch to the plaintiffs is not an unreasonable length of time within the meaning of this section (*Bank of British North America* v. *Warren* (1909), 19 O. L. R. 257).

(*n*) "A promissory note which is made payable to the bearer or to order is intended to circulate and pass from hand to hand without it being necessary to signify the transfer to the maker and endorsers, and until its maturity, its

**74.** The rights and powers of the holder of a bill are as follows:— Rights of holder.

(a) He may sue on the bill in his own name (*o*); May sue.

(b) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill; Prior defects.

(c) Where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and, Title from him.

(d) Where his title is defective, if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill. 53 Vict. c. 33, s. 38. Discharge from him.

*Presentment for Acceptance.*

**75.** Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument. When necessary.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. Express stipulation.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill. 53 Vict. c. 33, s. 39. Other cases.

**76.** Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and endorsers. 53 Vict. c. 33, s. 39. Presentment excused.

whereabouts is generally unknown to them; it is only at its maturity that the holder is known for a certainty, and can be forced to receive its amount." Or in other words, until maturity, the payment of a bill or note is not a discharge of the instrument, but a mere purchase of a chose in action (*Fanier* v. *Ernst* (1902), Q. B., 11 K. B. 373).

(*o*) A person who has neither possession of nor interest in a bill cannot maintain an action thereon in his own name, although he may be authorised so to do by the holder (*Emmett* v. *Tottenham* (1853), 8 Ex. Rep. 884 (an English case)). But where a note is endorsed and delivered to a person professing to act as the agent of one who has neither interest in nor possession of the negotiable interest, the latter may subsequently adopt and ratify the act of the assumed agent and sue thereon (*Ancona* v. *Marks* (1862), 31 L. J. Exch. 163 (an English case)).

Sight bill.

**77.** Subject to the provisions of this Act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

If not presented.

(2) If he does not do so, the drawer and all endorsers prior to that holder are discharged.

Reasonable time.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (*p*). 53 Vict. c. 33, s. 40; 54 & 55 Vict. c. 17, s. 5.

Rules.

**78.** A bill is duly presented for acceptance which is presented in accordance with the following rules, namely:

By holder to drawee.

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;

To all drawees.

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only;

To personal representative.

(c) Where the drawee is dead, presentment may be made to his personal representative;

Post office.

(d) Where authorised by agreement or usage, a presentment through the post office is sufficient. 53 Vict. c. 33, s. 41.

Excuses.

**79.** Presentment in accordance with the aforesaid rules is excused, and a bill may be treated as dishonoured by non-acceptance—

Drawee dead.

(a) where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill;

Impracticability.

(b) where, after the exercise of reasonable diligence, such presentment cannot be effected;

Waiver.

(c) where, although the presentment has been irregular, acceptance has been refused on some other ground.

Excuse.

(2) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (*q*). 53 Vict. c. 33, s. 41; 54 & 55 Vict. c. 17, s. 6.

(*p*) According to Lord Tenterden, C. J., what is reasonable time is a mixed question of law and fact, though in expressing his opinion he added "he did not wish at all to withdraw the case from the jury" (*Shute* v. *Robins* (1827), Moo. & Mal. 133, at p. 136; see also *Perley* v. *Howard* (1844), 4 N. B. 518).

(*q*) "The custom of merchants that if one upon whom a bill of exchange is drawn absconds before the day of payment, the man to whom it is payable may protest it" (*Jones* (1695), 1 Lord Raym. 743).

Time for acceptance.

**80.** The drawee may accept a bill on the day of its due presentment to him for acceptance, or at any time within two days thereafter (*r*).

Dishonour.

(2) When a bill is so duly presented for acceptance and is not accepted within the time aforesaid, the person presenting it must treat it as dishonoured by non-acceptance.

Loss of rights.

(3) If he does not so treat the bill as dishonoured, the holder shall lose his right of recourse against the drawer and endorsers.

Date of acceptance.

(4) In the case of a bill payable at sight or after sight, the acceptor may date his acceptance thereon as of any of the days aforesaid but not later than the day of his actual acceptance of the bill.

Refusing acceptance.

(5) If the acceptance is not so dated, the holder may refuse to take the acceptance and may treat the bill as dishonoured by non-acceptance. 2 Edw. VII, c. 2, s. 1.

Dishonour.

**81.** A bill is dishonoured by non-acceptance—

Presentment.

(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or,

Excuse.

(b) when presentment for acceptance is excused and the bill is not accepted. 53 Vict. c. 33, s. 43.

Recourse in such case.

**82.** Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary. 53 Vict. c. 33, s. 43.

Qualified acceptance.

**83.** The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

Assent.

(2) When the drawer or endorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto. 53 Vict. c. 33, s. 44.

Qualified acceptance without authority.

**84.** Where a qualified acceptance is taken, and the drawer or an endorser has not expressedly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or endorser is discharged from his liability on the bill: Provided that this section shall not apply to a partial acceptance, whereof due notice has been given. 53 Vict. c. 33, s. 44.

Partial acceptance.

(*r*) The customary period under the law merchant is twenty-four hours (see *Bank of Van Diemen's Land* v. *Bank of Victoria* (1871), L. R. 3 P. C. at p. 543).

### *Presentment for Payment.*

Necessity.

**85.** Subject to the provisions of this Act, a bill must be duly presented for payment (*s*).

Result of none.

(2) If it is not so presented, the drawer and endorsers shall be discharged (*t*).

Manner of.

(3) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment (*u*). 53 Vict. c. 33, ss. 45 and 52.

Time for.

**86.** A bill is duly presented for payment which is presented—

Due date.

(a) when the bill is not payable on demand, on the day it falls due (*x*);

Demand bill.

(b) when the bill is payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable.

Reasonable time.

(2) In determining what is a reasonable time within the meaning of this section regard shall be had to the nature of the bill, the usage of trade with regard to similar bills and the facts of the particular case. 53 Vict. c. 33, s. 45.

By and to whom.

**87.** Presentment must be made by the holder or by some person authorised to receive payment on his behalf, at the proper place as hereinafter defined, and either to the person designated by the bill as payer or to his representative or some person authorised to pay or to refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found (*y*).

Two acceptors.

(2) When a bill is drawn upon, or accepted by two or more

(*s*) The provisions of the code respecting presentment, protest and notice of protest are applicable to a note becoming due by reason of the insolvency of the parties thereto (*La Banque Nationale* v. *Martel* (1899), Q. R. 17 S. C. 97).

(*t*) Not only on the bill, but also in respect of the consideration for which it was given. The rule being that if the creditor, when the bill becomes due, is guilty of *laches* whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment (*Hart* v. *McDougall* (1892), 25 N. S. 38).

(*u*) As to what will constitute a presentation by implication, see *Southee* v. *Wallace* (1888), 20 N. S. 509).

(*x*) It is provided by sect. 14 (5) that "whenever the last day of grace falls on a legal holiday or non-juridical day in the province where any such bill is payable, then the next day following, not being a legal holiday or non-juridical day in such province, shall be the last day of grace."

(*y*) If no question is raised at the trial of the action as to the hour of presentment, and it is proved to have been made upon the day the note falls due, a presumption is raised that presentment was made at a proper hour (*Patterson* v. *Tupley* (1859), 4 Allen. 292 (N. B.); *Read* v. *Ravenagh* (1860), 4 Allen, 157 (N. B.))

persons who are not partners, and no place of payment is specified, presentment must be made to them all.

Personal representation.

(3) When the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative if such there is, and, with the exercise of reasonable diligence, he can be found (*z*). 53 Vict. c. 33, s. 45.

Place of.

**88.** A bill is presented at the proper place—

When specified.

(a) where a place of payment is specified in the bill or acceptance, and the bill is there presented (*a*);

When not specified.

(b) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;

When no address is given.

(c) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not at his ordinary residence, if known;

Other cases.

(d) in any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence. 53 Vict. c. 33, s. 45.

Sufficient presentment.

**89.** Where a bill is presented at the proper place as aforesaid, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can there be found, no further presentment to the drawee or acceptor is required (*b*). 53 Vict. c. 33, s. 45.

Presentment to post office.

**90.** Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business or known ordinary residence therein,

(*z*) Presentment being a condition precedent to liability to pay, it is clear law that it must be made before a defendant can be charged, unless, with full knowledge of all the facts, he has himself discharged the condition or dispensed with its performance (*Dana* v. *Bradley* (1862), 5 Allen, 292 (N. B.).

(*a*) Actual presentment is necessary (*Clayton* v. *McDonald* (1893), 25 N. S. R. 446; *Biggs* v. *Wood* (1885), 2 Man. 272). In England the customary law merchant required actual presentment at the place specified in a bill or note as a condition precedent to action (*Merchants' Bank of Canada* v. *Henderson* (1897), 28 O. R. at p. 364). Apparently, however, presentment for payment to any person at the door of the house where the drawee is expressed to reside will suffice (*Buxton* v. *Jones* (1840), 1 M. & G. 83 (an English case); but see *Browne* v. *Boulton* (1852), 9 U. C. Q. B. 64). See also as to what will constitute sufficient presentment, *Merchants' Bank* v. *Mulvey* (1890), 6 Man. L. R. 467.

(*b*) An attendance by the holder at an empty house, and subsequent notice to the drawer on the day when the note or bill becomes due will apparently suffice (*Hine* v. *Alley* (1833), 4 B. & Ad. 624 (an English case)). As to what will constitute "reasonable diligence," see *Robinson* v. *Taylor* (1843), 2 Kerr. 195 (N. B.); *Browne* v. *Boulton* (1852), 9 U. C. Q. B. 64).

and if there is no such place of business or residence, the bill is presented at the post office, or principal post office in such city, town or village, such presentment is sufficient.

Through post office.

(2) Where authorised by agreement or usage, a presentment through the post office is sufficient. 53 Vict. c. 33, s. 45.

Delay in presentment.

**91.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence (*e*).

Diligence.

(2) When the cause of delay ceases to operate, presentment must be made with reasonable diligence. 53 Vict. c. 33, s. 46.

Dispensed with.

**92.** Presentment for payment is dispensed with

Impracticable.

(a) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;

Fictitious drawee.

(b) where the drawee is a fictitious person;

Useless.

(c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;

Accommodation bill.

(d) as regards an endorser, where the bill was accepted or made for the accommodation of that endorser, and he has no reason to expect that the bill would be paid if presented;

Waiver.

(e) by waiver of presentment, express or implied (*d*).

Not dispensed with.

(2) The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment (*e*). 53 Vict. c. 33, s. 46.

When no place specified.

**93.** When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable.

If place specified. Neglect.

(2) When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court.

(*c*) For a typical instance, see *Patience* v. *Towsley* (1805), 2 Smith, 223 (an English case), in which presentment was excused owing to the place specified in the instrument being in the hands of an alien enemy (see also *Union Bank* v. *McKilligan* (1887), 4 Man. L. R. 29).

(*d*) As to what will amount to a waiver of presentment, see *Whitehouse* v. *Bedell* (1886), 26 N. B. R. 46, at pp. 50 *et seq.*

(*e*) But the closing of a bank on the ground of insolvency is notice to all the world of a refusal to pay the notes issued therefrom, and avoids further necessity for presentment (*Howe* v. *Bowes* (1812), 16 East, 112 (an English case)).

3. When a bill is paid the holder shall forthwith deliver it up to the party paying it. 53 Vict., c. 33, s. 52. Delivery on payment.

**94.** Where the address of the acceptor for honour of a bill is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity. Time for presentment.

(2) Where the address of the acceptor for honour is in some place other than the place where it is protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him. Parties in different places.

3. Delay in presentment or non-presentment is excused by any circumstance which would in case of acceptance by a drawee excuse delay in presentment for payment or non-presentment for payment. 53 Vict., c. 33, s. 66. Excuses for delay.

### *Dishonour.*

**95.** A bill is dishonoured by non-payment Non-payment on presentment.

(a) when it is duly presented for payment and payment is refused or cannot be obtained; or,

(b) when presentment is excused and the bill is overdue and unpaid (*f*). Excuse.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor and endorsers accrues to the holder (*g*). 53 Vict., c. 33, s. 47. Recourse.

**96.** Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer, and each endorser, and any drawer or endorser to whom such notice is not given is discharged: Provided that— Notice of dishonour.

(a) where a bill is dishonoured by non-acceptance, and notice Subsequent holder.

(f) Although it is undoubted law that a note, the principal of which is payable by instalments, is overdue when the first instalment is overdue and unpaid, and is therefore subject to all equities between the original parties, the same rule does not apply to arrears of interest, as distinguished from principal, and consequently a note or bill is not dishonoured merely by reason of the fact that default has been made in payment of an instalment of interest (*Union Investment Co.* v. *Wells* (1908), XXXIX. S. C. R. 625).

(g) Apparently the right of recourse here specified "means only that the holder of the bill may, immediately upon payment being refused by the acceptor, give notice to the drawer and endorsers, telling them that he shall hold them liable upon it. But they, as well as the acceptors, shall have the whole of the last day of grace in which to pay the bill, and if it is not paid before the end of that day, the holder's right of action against them becomes complete. It is for the benefit of the holder that he should be able to give notice of dishonour on the last day of grace, because by so doing he obtains a right of action against the drawer and the endorsees earlier than he otherwise would" Davey, L. J., in *Kennedy* v. *Thomas*, (1894) 2 Q. B. at *p.* 765 (an English case, but applicable to the Dominion statute)).

of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission (*h*);

Notice of non-payment.

(b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill shall in the meantime have been accepted.

Notice to acceptor.

(2) In order to render the acceptor of a bill liable it is not necessary that notice of dishonour should be given to him. 53 Vict. c. 33, ss. 48 and 52.

Notice.

**97.** Notice of dishonour in order to be valid and effectual must be given (*i*)—

Time for.

(a) not later than the juridical or business day next following the dishonour of the bill:

By holder or endorser.

(b) by or on behalf of the holder, or by or on behalf of an endorser, who, at the time of giving it, is himself liable on the bill;

Personal representative.

(c) in the case of the death, if known to the party giving notice, of the drawer or endorser, to a personal representative, if such there is and with the exercise of reasonable diligence he can be found;

Two drawees.

(d) in case of two or more drawers or endorsers who are not partners, to each of them, unless one of them has authority to receive notice for the others. 53 Vict. c. 33, s. 49.

Notice.

**98.** Notice of dishonour may be given—

Earliest time.

(a) as soon as the bill is dishonoured:

To whom.

(b) to the party to whom the same is required to be given, or to his agent in that behalf;

By agent.

(c) by an agent either in his own name or in the name of any party entitled to give notice whether that party is his principal or not;

Manner.

(d) in writing or by personal communication and in any terms which identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(*h*) Although it is not necessary save by express stipulation to present a bill for acceptance (see sect. 39, sub-sect. 3), nevertheless, if it be presented and acceptance is refused, notice of dishonour must be given.

(*i*) Where a note payable at a bank is sent there for collection the protest and notice may properly be given by them. Notice of dishonour may be mailed by post (*Wilson* v. *Pringle* (1856), 15 U. C. Q. B. 230; see also *Merchants' Bank of Halifax* v. *McNutt* (1883), XI. S. C. R. 126, and *The Queen* v. *Bank of Montreal* (1886), 1 Ex. C. R. 154). As to evidence required to prove a despatch of notice by telegram, see *McLean* v. *Gurnies* (1882), 15 N. S. 276.

(2) A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. 53 Vict. c. 33, s. 49. Misdescription.

**99.** In point of form— Form.

(a) the return of a dishonoured bill to the drawer or an endorser is a sufficient notice of dishonour; Return of bill.

(b) a written notice need not be signed. Signature.

2 An insufficient written notice may be supplemented and validated by verbal communication (*b*). 53 Vict. c. 33, s. 49. Verbal supplement.

(*b*) Although no specific form of words is necessary, provided the notice contains a sufficient identification of the bill and an intimation that it has been dishonoured by non-acceptance or non-payment, the subjoined forms are contained in the schedule to the Act.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT OF A BILL.

*(Place and Date of Noting or of Protest.)*

1st. To P. Q. *(the drawer)*

at

Sir,

Your bill of exchange for $ , dated at , the day of upon E. F., in favour of C. D., payable days after { sight / date } was this day, at the request of , duly { noted / protested } by me for { non-acceptance / non-payment }

A. P.
*Notary Public.*

2nd. *(Place and Date of Noting or of Protest.)*

To C. D. *(endorser)*, *(or F. G.)*,

at

Sir,

Mr. P. Q.'s bill of exchange for $ , dated at , the day of , upon E. F., in your favour (or in favour of C. D.), payable days after { sight, / date, } and by you endorsed, was this day, at the request of , duly { noted / protested } by me for { non-acceptance / non-payment }

A. B.,
*Notary Public.*

53 Vict. c. 33, sched., Form G.

FORM H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

*(Place and Date of Protest.)*

To

at

Sir,

Mr. P. Q.'s promissory note for $ , dated at , the day , payable { days / months / on ——— } after date to { you / E. F. } or order, and endorsed by you, was this day, at the request of , duly protested by me for non-payment.

A. B.,
*Notary Public.*

53 Vict. c. 33, sched., Form H

Notice to agent.

Effect on principal.

**100.** Where a bill when dishonoured is in the hands of an agent he may himself give notice to the parties liable on the bill, or he may give notice to his principal, in which case the principal upon receipt of the notice shall have the same time for giving notice as if the agent had been an independent holder.

Time for.

(2) If the agent gives notice to his principal he must do so within the same time as if he were an independent holder. 53 Vict. c. 33, s. 49.

Notice to antecedent parties.

**101.** Where a party to a bill receives due notice of dishonour he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that a holder has after dishonour (*l*). 53 Vict. c. 33, s. 49.

Benefit enures.

**102.** A notice of dishonour enures for the benefit—

(a) of all subsequent holders and of all prior endorsers who have a right of recourse against the party to whom it is given, where given on behalf of the holder;

Parties to whom.

(b) of the holder and of all endorsers subsequent to the party to whom notice is given, where given by or on behalf of an endorser entitled under this Part to give notice. 53 Vict. c. 33, s. 49.

Sufficiency of giving.

**103.** Notice of the dishonour of any bill payable in Canada shall, notwithstanding anything in this Act contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice (*m*), at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place, in which case such notice shall be sufficiently given if addressed to him in due time at such other place (*n*).

Sufficiency of notice.

(2) Such notice so addressed shall be sufficient, although the place of residence of such party is other than either of the places aforesaid, and shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on

(*l*) Although a collecting bank cannot enlarge the time for presentment by circulating a bill among its branches, nevertheless, the different branches or agencies of a bank are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonour (*The Queen* v. *Bank of Montreal* (1886), 1 L. C. R. 154).

(*m*) A holder of a bill who is uncertain of the proper address of the endorser may send him notice through an agent in the neighbourhood, and is not bound also to send his notice by post to what he believes to be his address (*Fleming* v. *McLeod* (1897), XXXIX. S. C. R. 290). Where husband and wife both endorse a note, if the husband acts as the wife's agent, notice of dishonour need only be sent to him (*Counsell* v. *Livingston* (1902), 4 O. L. R. 340; 22 Occ. N. 360; 1 O. W. R. 444).

(*n*) See note to sect. 97.

which presentment has been made, or on the next following juridical or business day.

(3) Such notice shall not be invalid by reason only of the fact that the party to whom it is addressed is dead (*o*). 53 Vict. c. 33, s. 49. Death of party.

**104.** Where a notice of dishonour is duly addressed and posted, as provided in the last preceding section, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office (*p*). 53 Vict. c. 33, s. 49. Miscarriage in post service.

**105.** Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence. Excuse for delay.

(2) When the cause of delay ceases to operate the notice must be given with reasonable diligence. 53 Vict. c. 33, s. 50. Diligence.

**106.** Notice of dishonour is dispensed with— Dispensed with.

(a) when after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or endorser sought to be charged (*q*); Reasonable diligence.

(b) by waiver express or implied (*r*). Waiver.

(2) Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice (*s*). 53 Vict. c. 33, s. 50. Time of.

(*o*) See *Cosgrave* v. *Bagle* (1881), VI. S. C. R. 165.

(*p*) Apparently notice of dishonour sent to an endorser at an incorrect address may suffice if the latter be not injured by the mistake (*Vaughan* v. *Ross* (1851), 8 U. C. Q. B. 506; *McMurrich* v. *Powers* (1853), 10 U. C. Q. B. 481); *Merchants' Bank of Halifax* v. *McNutt* (1883), XI. S. C. R. 126).

(*q*) "When the holder of a bill of exchange does not know where the endorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonour of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the endorser, I conceive that notice given as soon as this is discovered is due notice of the dishonour of the bill within the usage and custom of merchants" (Lord Ellenborough in *Bateman* v. *Joseph* (1810), 2 Camp. at p. 462).

(*r*) An averment of presentment and notice is supported by proof of a subsequent promise to pay, although, in fact, there may be no proper presentment or notice (*McCarthy* v. *Phelps* (1870), 30 U. C. Q. B. 57). But a request for time, unless such request is supported by strict evidence, will not suffice, "it being a slovenly way of doing business to leave to inference that of which direct proof may easily be had" (*Bank of Montreal* v. *Scott* (1864), 24 U. C. Q. B. at p. 119).

(*s*) Notice of dishonour is not dispensed with because presentment is dispensed with, or because the drawer or endorser has reason to believe the bill will not be paid, or because the acceptor is dead, or because before maturity both maker and endorser are insolvent (*La Banque Nationale* v. *Marcil* (1899), Q. R. 17 S. C. 97).

Dispensed with.

**107.** Notice of dishonour is dispensed with as regards the drawer, where—

Same person.

(a) the drawer and drawee are the same person;

Fictitious person.

(b) the drawee is a fictitious person or a person not having capacity to contract;

Presented to drawer.

(c) the drawer is the person to whom the bill is presented for payment;

No obligation.

(d) the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill;

Countermand.

(e) the drawer has countermanded payment. 53 Vict. c. 33, s. 50.

Dispensed with.

**108.** Notice of dishonour is dispensed with as regards the endorser where—

Fictitious person.

(a) the drawee is a fictitious person or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill;

Presented to endorser.

(b) the endorser is the person to whom the bill is presented for payment;

Accommodation.

(c) the bill was accepted or made for his accommodation. 53 Vict. c. 33, s. 50.

### *Protest.*

Necessity of.

**109.** In order to render the acceptor of a bill liable it is not necessary to protest it. 53 Vict. c. 33, s. 52.

Dispensed with.

**110.** Protest is dispensed with by any circumstances which would dispense with notice of dishonour (*t*). 53 Vict. c. 33, s. 51.

Delay excused.

**111.** Delay in noting or protesting is excused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.

Diligence.

(2) When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. 53 Vict. c. 33, s. 51.

(*t*) See notes to sect. 106. In the province of Quebec the curator appointed upon an abandonment of goods has no authority to waive protest of a bill of which the insolvent is an endorser, unless he has obtained the leave of the Court, or is authorised so to do by the creditors, nor will his waiver bind the endorser (*Molson's Bank* v. *Steel* (1903), Q. R. 23 S. C. 316; *Denenberg* v. *Mendelsohn* (1903), Q. R. 23 S. C. 128). Where an endorser on the day following that on which a promissory note became due agreed in writing that he would be responsible for the amount of the note, with interest, protest was held dispensed with (*McLaurin* v. *Seguin* (1896), Q. R. 12 S. C. 63). An endorser may waive notice of protest by offering a renewal note with a request for time to pay (*Smith* v. *Leon*, 22 Occ. N. 418), or by writing across the face of the note "I hold myself responsible for this note" (*Ranger* v. *Lavois* (1881), 5 Q. P. R. 184).

**112.** Where a foreign bill appearing on the face of it to be such has been dishonoured by non-acceptance it must be duly protested for non-acceptance (*u*). Foreign bill, non-acceptance.

(2) Where a foreign bill which has not been previously dishonoured by non-acceptance is dishonoured by non-payment, it must be duly protested for non-payment. Non-payment.

(3) Where a foreign bill has been accepted only as to part it must be protested as to the balance. Balance.

(4) If a foreign bill is not protested as by this section required the drawer and endorsers are discharged. 53 Vict. c. 33, ss. 44 and 51. Discharge.

**113.** Where an inland bill (*x*) has been dishonoured, it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment as the case may be; but it shall not, except in the province of Quebec, be necessary to note or protest an inland bill in order to have recourse against the drawer or endorsers. 53 Vict. c. 33, s. 51. Protest of inland bill. Quebec.

**114.** In the case of an inland bill drawn upon any person in the province of Quebec or payable or accepted at any place in the said province the parties liable on the said bill other than the acceptor are, in default of protest for non-acceptance or non-payment, as the case may be, and of notice thereof, discharged (*y*), except in cases where the circumstances are such as would dispense with notice of dishonour. Discharge in default of protest.

(2) Except as in this section provided, where a bill does not on the face of it appear to be a foreign bill, protest thereof in case of dishonour is unnecessary. 53 Vict. c. 33, s. 51. Protest unnecessary.

**115.** A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment. 53 Vict. c. 33, s. 51. Subsequent protest for non-payment.

**116.** Where the acceptor of a bill suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and endorsers. 53 Vict. c. 33, s. 51; 54 & 55 Vict. c. 17, s. 7 (*z*). Protest for better security.

(*u*) For definition of a foreign bill, see sect. 25, *ante*.

(*x*) An inland bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within Canada, or (b) drawn within Canada upon some person resident therein (sect. 25, *ante*).

(*y*) Compliance with the provisions of this section in the province of Quebec is imperative (*Denenberg* v. *Mendelsohn* (1903), Q. R. 23 S. C. 128).

(*z*) In the province of Quebec the fact that a note has become exigible before maturity, by reason of the insolvency of both the maker and the endorser, does not avoid the necessity for presentment and protest (*La Banque Nationale* v. *Martel* (1899), Q. R. 17 S. C. 97).

Acceptance for honour.

**117.** Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

Protest for non-payment.

(2) When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him. 53 Vict. c. 33, s. 66.

Noting equivalent to protest.

**118.** For the purposes of this Act, where a bill is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding. 53 Vict. c. 33, s. 92.

Noting or protest.

**119.** Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonour.

Extending protest.

(2) When a bill has been duly noted, the formal protest may be extended thereafter at any time as of the date of the noting. 53 Vict. c. 33, ss. 51 and 92.

Protest on copy or particulars.

**120.** Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof. 53 Vict. c. 33, s. 51.

Place of protest.

**121.** A bill must be protested at the place where it is dishonoured, or at some other place in Canada situate within five miles of the place of presentment and dishonour of such bill: Provided that—

Where bill returned.

(a) when a bill is presented through the post office and returned by post dishonoured, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day;

Time when.

(b) every protest for dishonour, either for non-acceptance or non-payment, may be made on the day of such dishonour, and in case of non-acceptance at any time after non-acceptance, and in case of non-payment at any time after three o'clock in the afternoon (*a*). 53 Vict. c. 33, s. 51.

Contents of protest.

**122.** A protest must contain a copy of the bill, or the origi

(*a*) For meaning of this proviso, see *Westaway* v. *Stewart* (1908), 8 W. L. R. 907; affirmed (1908), W. L. R. 623.

nal bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify—

(a) the person at whose request the bill is protested; Person.

(b) the place and date of protest; Place.

(c) the cause or reason for protesting the bill; Reason.

(d) the demand made and the answer given, if any; or, Proceeding.

(e) the fact that the drawee or acceptor could not be found (*b*). Excuse.

53 Vict. c. 33, s. 51.

**123.** Where a dishonoured bill is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any justice of the peace resident in the place may present and protest such bill and give all necessary notices and shall have all the necessary powers of a notary in respect thereto (*c*). 53 Vict. c. 33, s. 93. Official when notary is not accessible.

**124.** The expense of noting and protesting any bill and the postages thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon. Expenses.

(2) Notaries may charge the fees in each province heretofore allowed them. 53 Vict. c. 33, s. 93. Fees.

**125.** The forms in the schedule to this Act may be used in noting or protesting any bill and in giving notice thereof. Forms.

(2) A copy of the bill and endorsement may be included in the forms, or the original bill may be annexed and the necessary changes in that behalf made in the forms. 53 Vict. c. 33, s. 93. Contents.

**126.** Notice of the protest of any bill payable in Canada shall be sufficiently given and shall be sufficient and deemed to have been duly given and served, if given during the day on which protest has been made or on the next following juridical or business day, to the same parties and in the same manner and addressed in the same way as is provided by this Part for notice of dishonour. 53 Vict. c. 33, s. 49. When notice of protest shall be given.

### *Liabilities of Parties.*

**127.** A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment Equitable assignment. Chitty, 545.

(*a*) A statement of the exact hour o'clock in the afternoon (see preceding when protest is made is apparently not section). essential, though it must be after three

(*b*) The appropriate form to be used in such case is contained in the First Schedule to the Act (J.). In the United States of America it is provided by sect. 262 of the Negotiable Instrument Law that a protest may be made by (1) a notary public, or (2) a respectable resident of the place where the bill has been dishonoured, in the presence of two or more credible witnesses. Apparently, therefore, in no case in the United States of America are the services of a notary obligatory.

thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument (*d*). 53 Vict. c. 33, s. 53.

Engagement by acceptance. Chitty, 545.

**128.** The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance (*e*). 53 Vict. c. 33, s. 54.

Estoppel. Chitty, 546.

**129.** The acceptor of a bill by accepting it is precluded from denying to a holder in due course—

Genuineness and authority. Capacity of drawer.

(a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill.

(b) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement (*f*);

Payee and capacity.

(c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement (*g*). 53 Vict. c. 33, s. 54.

Drawer. Chitty, 546. Engages acceptance and compensation.

**130.** The drawer of a bill, by drawing it—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken (*h*):

(*d*) An unaccepted cheque is not in any sense an assignment of money in the hands of a banker (*Commercial Bank of Manitoba, In re* (1894), 10 Man. L. R. 171). But *e converso* when an instrument, whether it be in the form of a bill or no, constitutes either an equitable assignment of a sum certain, or a trust to pay over an ascertained amount to the person therein specified, such equitable assignment or trust becomes irrevocable as soon as it is communicated to the parties for whose benefit it was created and assented to by them (*Trunkfield* v. *Proctor* (1901), 2 O. L. R. 326; see also *Lane* v. *Dungannon Agricultural Association* (1891), 22 O. R. 264).

(*e*) Although a drawee as such incurs no liability to the holder, and there is no privity of contract between them, nevertheless, privity may be created by an agreement *dehors* the bill, and the relations of the parties are then regulated by the terms of the agreement (*Bank of Montreal* v. *Thomas* (1888), 16 O. R. 503).

(*f*) The endorsers of a promissory note purporting to be made by a corporation are estopped from alleging that the note was *ultra vires* of the makers (*Merchants' Bank* v. *Empire Club Co.* (1879), 44 U. C. Q. R. 468).

(*g*) See, as to the last paragraph in clause (c), the case of *Ryan* v. *Bank of Montreal* (1887), 14 O. A. R. 353, in which it was held that the drawee of a note by accepting or paying without acceptance is not thereby estopped from denying the genuineness of an endorsement.

(*h*) Where the character in which a person becomes a party to a bill is alike in fact and in law that of an endorser, the circumstance that his endorsement is written while the document is still in an inchoate condition will not alter his position of endorsee so as to make him a joint maker (*Lyr American Plough Co.* v. *Wallace* (1892), XXI. S. C. R. 256). The right of an endorsee to compensation by the maker is conditional on the requisite proceedings on dishonour being duly taken (*Trottier* v. *Rivard* (1903), Q. R. 23 S. C. 526).

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse. 53 Vict. c. 33, s. 55. Estoppel as to payee.

**131.** No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: Provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers (*i*). 53 Vict. c. 33, ss. 23 and 56. Liability by signature. Irregular endorsement.

**132.** Where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name. Trade or assumed name.

(2) The signature of the name of a firm is equivalent to the signature, by the person so signing, of the names of all persons liable as partners in that firm (*k*). 53 Vict. c. 33, s. 23. Firm name.

**133.** The endorser of a bill, by endorsing it, subject to the effect of any express stipulation hereinbefore authorised— Endorser. Chitty, 546.

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; Engages acceptance or compensation.

(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements (*l*); Genuineness and regularity.

(c) is precluded from denying to his immediate or a subsequent endorsee (*m*) that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto. 53 Vict. c. 33, s. 55. Validity.

(*i*) The directors of a company endorsing a note made by the company are liable therefor (*Knechtel Furniture Co.* v. *Ideal House Furnishers* (1910), 14 W. L. R. 175; see also *Robinson* v. *Mann* (1901), XXXI. S. C. R. 484).

(*k*) See, on this point, *Mason* v. *Rumsey* (1808), 1 Camp. 384 (an English case). But where a partner accustomed to issue notes on behalf of the firm endorses a particular note in a name differing from that of the partnership, and not previously used by them, which note is objected to on that account in an action brought upon it by the indorsee the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the endorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner (*Faith* v. *Richmond* (1840), 11 Ad. & E. 339 (an English case)).

(*l*) Payment to the cashier of a bank who endorsed a note subsequently to may, by a fair inference, be taken as set up as a defence that the signature payment to the bank (*Cox* v. *Seeley* of the maker is forged (*McLeod* v. (1896), 28 N. S. Rep. 210; affirmed *Carman* (1869), 1 Hann. N. B. Rep. by Supreme Court, May 6th, 1896). 592). And a like rule applies to an endorser for accommodation (*Choquette* v. *Leclaire* (1900), Q. R. 19 S. C. 521).

(*m*) Amended by 7 & 8 Edw. VII. c. 8. It is not competent for a party

Measure of damages. Chitty, 546.

**134.** Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages shall be—

Amount of bill.

(a) the amount of the bill:

Interest.

(b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case (*n*);

Expense.

(c) the expenses of noting and protest. 53 Vict. c. 33, s. 57.

Recovery of same.

**135.** In case of the dishonour of a bill the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages aforesaid. 53 Vict. c. 33, s. 57.

Re-exchange and interest. Chitty, 547.

**136.** In the case of a bill which has been dishonoured abroad in addition to the damages aforesaid, the holder may recover from the drawer or any endorser, and the drawer or an endorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. 53 Vict. c. 33, s. 57.

Transferrer by delivery. Chitty, 547.

**137.** Where the holder of a bill payable to bearer negotiates it by delivery without endorsing it, he is called a "transferrer by delivery."

Liability of.

(2) A transferrer by delivery is not liable on the instrument. 53 Vict. c. 33, s. 58.

Warranty by.

**138.** A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value—

Genuineness.

(a) that the bill is what it purports to be;

Right to transfer.

(b) that he has a right to transfer it; and,

*Bona fides.*

(c) that at the time of transfer he is not aware of any fact which renders it valueless (*o*). 53 Vict. c. 33, s. 58.

(*n*) It has been held (apart from special contract, as to which see *Young* v. *Fluke* (1865), 15 U. C. C. P. 360), that the rate per cent. provided for in a bill of exchange applies only until the instrument matures, after which date such rate may be varied and reduced (see *People's Loan and Deposit Co.* v. *Grant* (1890), XVIII S. C. R. 262).

(*o*) Although an innocent misrepresentation does not constitute ground for an action, nevertheless if a person professing to have authority as agent induces another to act in a matter of business on the faith of his having that authority he is responsible for any loss which may immediately result from the representation (*Bank of Ottawa* v. *Harty* (1905), 12 O. L. R. 218). Moreover, where the note of a third party is given in payment of goods purchased and the note is not endorsed by the transferor, a warranty is implied that the maker is solvent to the knowledge of the transferor (*Lewis* v. *Jeffery* (1815), Ireal L. R. 7 Q. B. 141 (affirmed in Supreme Court)).

*Discharge of Bill.*

Payment, Chitty, 547.

**139.** A bill is discharged by payment in due course by or on behalf of the drawee or acceptor (*p*).

Payment in due course, Chitty, 548.

(2) Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

Accommodation bill.

(3) Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. 53 Vict. c. 33, s. 59.

Payment by drawer or endorser, Chitty, 548.

**140.** Subject to the provisions aforesaid as to an accommodation bill, when a bill is paid by the drawer or an endorser, it is not discharged; but—

Gives rights.

(a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill;

Second negotiation.

(b) where a bill is paid by an endorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsements, and again negotiate the bill (*q*). 53 Vict. c. 33, s. 59.

Acceptor holding at maturity, Chitty, 548.

**141.** When the acceptor of a bill is or becomes the holder of it, at or after its maturity, in his own right, the bill is discharged (*r*). 53 Vict. c. 33, s. 60.

Renouncing rights, Chitty, 548.

**142.** When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged.

(*p*) A creditor who takes a fresh note or bill from a new obligor in lieu of one drawn by the original maker thereby discharges the earlier obligation (*Watts* v. *Robinson* (1872), 32 U. C. Q. B. 362). A renewal note operates only as a conditional discharge; consequently the holder's rights on the original bill are revived by dishonour of the renewal (*St. Arnaud* v. *Gaillhoult* (1910), Q. R. 39 S. C. 481; compare *Murray* v. *Gastonguay* (1889), 13 N. S. L. R. 319).

(*q*) Payment to operate as a discharge must be made at or after maturity, and if made before it operates as a mere purchase of the note, which may be then anew negotiated and re-issued. Where, therefore, payment is made by the maker of a note at or after maturity, it is discharged, and all rights of action are extinguished, but on the other hand, payment by an endorser merely discharges him and all subsequent endorsers, and at the same time confers on him all rights against antecedent parties (*Vanier* v. *Kent* (1902), Q. R. 11 K. B. 373, at p. 383), provided all requisite formalities have been duly complied with. Where, therefore, neither proof of protest nor of the waiver of protest is made, the endorser of a bill or note who pays cannot recover, as in such circumstances he must be held to have paid without any obligation to do so (*Savaria* v. *Paquette* (1899), Q. R. 20 S. C. 314).

(*r*) See, on this point, *Tessier* v. *La Banque Nationale* (1905), Q. R. 28 S. C. 140. The decision in this case (which refers to a draft) is applicable to a bill or note.

Against one party.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity.

Writing.

(3) A renunciation must be in writing, unless the bill is delivered up to the acceptor (*s*).

Holder in due course.

(4) Nothing in this section shall affect the rights of a holder in due course without notice of renunciation (*t*). 53 Vict. c. 33, s. 61.

Cancellation of bill. Chitty, 548.

**143.** Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

Of any signature.

(2) In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent.

Discharge of endorser.

(3) In such case, any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. 53 Vict. c. 33, s. 62.

Unintentional cancellation. Chitty, 549. Burden of proof.

**144.** A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative: Provided that where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority (*u*). 53 Vict. c. 33, s. 62.

Alteration of bill. Chitty, 549.

**145.** Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorised, or assented to the alteration and subsequent endorsers (*v* : Provided that where a bill has been materially altered, but the alteration is not apparent (*w*), and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. 53 Vict. c. 33, s. 63.

Holder in due course.

(*s*) In certain provinces of the Dominion (notably Manitoba, New Brunswick, Quebec and Ontario), a parol renunciation or a variation of a bill or note, in cases where such variation amounts to renunciation, will discharge the maker of a negotiable instrument (*McQuarrie* v. *Brand* (1896), 28 O. R. 69; *Clanbrack Steam Boiler Co.* v. *Browne* (1900), Q. R. 18 S. C. 375; *McLeod* v. *Carman* (1869), 1 Han. 592 (N. B. R.).

(*t*) As to an agreement to extend time with reservation of rights against subsequent endorsers, see *Canadian Bank of Commerce* v. *Northcote* (1887), 14 O. R. 207.

(*u*) See, in this connection, *Isaacs* v. *Grothe* (1890), 29 N. B. R. 420.

(*v*) The insertion of words in a negotiable instrument after signature, even if the interpolated expressions be subsequently deleted, is "a material alteration" within the meaning of this section (*Banque Provinciale* v. *Arnold* (1901), 2 O. L. R. 624; see also *People's Bank* v. *Wharton* (1894), N. S. L. R. 67; and see *Halcrow* v. *Kelly* (1878), 28 U. C. C. P. 53 (agreement for interest added after signature); see also *Hébert* v. *La Banque Nationale* (1908), XL. S.C.R. 458).

(*w*) *Cunnington* v. *Peterson* (1898), 29 O. R. 316.

**146.** In particular any alteration (*x*)— **Material alterations.**

(a) of the date, **Date.**

(b) of the sum payable, **Sum.**

(c) of the time of payment, **Time.**

(d) of the place of payment, **Place.**

(e) by the addition of a place of payment without the acceptor's assent where a bill has been accepted generally, **Adding places.**

is a material alteration (*y*). 53 Vict. c. 33, s. 63.

*Acceptance and Payment for Honour.*

**147.** Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. 53 Vict. c. 33, s. 64. **Acceptance for honour *supra* protest.** Chitty, 549.

**148.** A bill may be accepted for honour for part only of the sum for which it is drawn. 53 Vict. c. 33, s. 64. **In part.**

**149.** Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. 53 Vict. c. 33, s. 64. **Deemed to be for honour of drawer.** Chitty, 550.

**150.** Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honour. 53 Vict. c. 33, s. 64. **Maturity of after sight bill.**

(*x*) "Wherever a doubt exists whether an alteration has taken place there is nothing to be presumed one way or the other; it is for the jury to decide, and for this purpose they may inspect the writing" (*Domville* v. *Davis* (1879), 13 N. S. L. R. 159, at p. 165). The question of the materiality of the alteration of a bill is a question of law, and therefore for the Court (*Commercial Bank of Manitoba, In re* (1894), 10 Man. 171).

(*y*) The following alterations, *inter alia*, have been held material:—Alteration of date (*Boulton* v. *Langmuir* (1897), 24 O. A. R. 618); but mere correction of a clerical error is not (*McLaren* v. *Miller* (1900), 26 C. L. J. 680). Adding the words "*avec intérêt à sept par cent par an*" after signature (*Hébert* v. *La Banque Nationale* (1908), XL. S. C. R. 458). Alteration in time of payment, even if it benefit maker (*Boulton* v. *Langmuir*, *supra*). Making a "joint" note "joint and several" (*People's Bank* v. *Wharton* (1894), 27 N. S. L. R. 67; see also *Banque provinciale* v. *Arnoldi*, *supra*). Adding words implying negotiability (*Law* v. *Millidge* (1844), 4 N. B. L. R. 520). Deleting word (*Moron* v. *Irwin* (1907), 15 O. L. R. 81; see also *Swaisland* v. *Davidson* (1883), 3 O. R. 320). But the mere correction of an error, or the fact that a surety has signed his name in the wrong place, are *not* material alterations (*Kinnard* v. *Tousley* (1896), 27 O. R. 398; *Merchants' Bank* v. *Stirling* (1899), 13 N. S. L. R. 439; *Abbott* v. *Wurtele* (1894), Q. R. 6 S. C. 204).

Requirements.

**151.** An acceptance for honour *supra* protest, in order to be valid must —

Writing.

(a) be written on the bill, and indicate that it is an acceptance for honour; and,

Signature.

(b) be signed by the acceptor for honour. 53 Vict. c. 33, s. 64.

Liability of acceptor for honour.

**152.** The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts.

To holder as others.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted. 53 Vict. c. 33, s. 65.

Payment for honour *supra* protest. Chitty, 550.

**153.** Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

If more than one offer.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

Refusal to receive payment.

(3) Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right of recourse against any party who would have been discharged by such payment.

Entitled to bill.

(4) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.

Liability for refusing.

(5) If the holder does not on demand in such case deliver up the bill and protest, he shall be liable to the payer for honour in damages. 53 Vict. c. 33, s. 67.

Attestation of payment for honour.

**154.** Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it.

Declaration.

(2) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays. 53 Vict. c. 33, s. 67.

Discharge.

**155.** Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged.

Subrogation.

but the payer for honour is subrogated for, and succeeds to both the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party. 53 Vict. c. 33, s. 67.

*Lost Instruments.*

Holder to have duplicate of lost bill. Chitty, 551.

**156.** Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again (*a*).

Refusal. Compulsion.

2 If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. 53 Vict. c. 33, s. 68.

Action on lost bill. Indemnity

**157.** In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question (*b*). 53 Vict. c. 33, s. 69.

*Bill in a Set.*

Bills in a set.

**158.** Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

Acceptance.

2 The acceptance may be written on any part, and it must be written on one part only. 53 Vict. c. 33, s. 70.

Endorsing more than one part.

**159.** Where the holder of a set endorses two or more parts to different persons, he is liable on every such part, and every endorser subsequent to him is liable on the part he has himself endorsed as if the said parts were separate bills.

Negotiation to different holders.

2 Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill: Provided that nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

Acceptance in due course.

More than one part accepted.

3 If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due

(*a*) The offer of a holder (or his agent for collection) to give security to the makers and endorsers of a negotiable instrument that they would never be troubled if they paid the note or issued another in place of that which was lost is a sufficient offer of security within the meaning of this section, but anything short of such assurance will not suffice (*Litman* v. *Montreal C. & D. Savings Bank* (1897), Q. R. 13 S. C. 262; see also *The Pillow and Hersey Co.* v. *L'Espérance* (1902), Q. R. 22 S. C. 213).

(*b*) Where security is given by a plaintiff in an action on a lost bill, such security is a commercial matter (*Pittsburg Steel Co.* v. *Leprohon*, 16 R. de J. 64).

course, he is liable on every such part as if it were a separate bill.

**Part accepted.** **Payments without delivery.** (4) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

**Discharge.** (5) Subject to the provisions of this section, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. 53 Vict. c. 33, s. 70.

*Conflict of Laws.*

**Requisites of form.** **160.** Where a bill drawn in one country is negotiated, accepted or payable in another, the validity of the bill as regards requisites in form is determined by the law of the place of issue (*c*), and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance *supra* protest, is determined by the law of the place where the contract was made (*d*): Provided that—

**Unstamped bills.** (a) where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

**Conforming to the law of Canada.** (b) where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canada. 53 Vict. c. 33, s. 71.

***Lex loci.*** **161.** Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill, drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where such contract is made (*e*): Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards

(*c*) The question to be determined in each case is where the contract between the maker and the payee is actually made, for the agreement for payment contained in a negotiable instrument is not completed by signature, but continues inchoate until it is perfected by delivery of the note (*Chapman* v. *Cottrell* (1865), 34 L. J. Exch. 186; see also *Wallace* v. *Souther* (1878), 11 S. C. R. 598).

(*d*) "As the Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains . . . these consequences . . . fall to be determined according to the law of the province in which the liability is sought to be enforced" (*Cook* v. *Dodds* (1903), [illegible] L. R. 608, Meredith, C. J., at p. 613).

(*e*) If a party desires to show that a note is governed by foreign law, he must set out such law and prove it, like any other matter of fact (*Hope* v. *Caldwell* (1871), 21 U. C. C. P. 241; *Robertson* v. *Caldwell* (1871), 31 U. C. Q. B. 402).

the payer, be interpreted according to the law of Canada. 53 Vict. c. 33, s. 71. Law of Canada.

**162.** The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured. 53 Vict. c. 33, s. 71. Law as to duties of holder.

**163.** Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. 53 Vict. c. 33, s. 71. Currency.

**164.** Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. 53 Vict. c. 33, s. 71. Due date.

## PART III.—CHEQUES ON A BANK.

**165.** A cheque is a bill of exchange drawn on a bank, payable on demand (*f*). Cheque defined. Chitty, 551.

(2) Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque (*g*). 53 Vict. c. 33, s. 72. Provisions as to bills apply.

**166.** Subject to the provisions of this Act— Presentment for payment. Chitty, 552.

(a) where a cheque is not presented for payment within a reasonable time of its issue (*h*), and the drawer or

(*f*) The effect of "marking" or "certifying" a cheque is to give the instrument additional currency, by showing on its face that it is drawn in good faith on funds sufficient to meet its payment, and adds to the credit of the drawer the credit of the payee (*Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, P. C., see p. 54).

(*g*) Apparently a banker does not owe to the holder of a cheque the duty of knowing his customer's signature (*Rex* v. *Bank of Montreal* (1905), 10 O. L. R. 117). The reception, retention and cashing of a cheque bearing on the back thereof a statement drawn up by the payer that it is accepted in full discharge of a larger sum than that for which it is drawn, is not necessarily conclusive evidence of such an accord and satisfaction as will estop the payee from suing for the balance (see *Day* v. *McLea* (1889), 22 Q. B. D. 610, C. A. (an English case); see also *La Compagnie Paquet* v. *Paquin* (1910), Q. R. 39 S. C. 53); and see *Nathan* v. *Ogdens* (1906), 94 L. T. 126; 22 T. L. R. 57, C. A. (an English case).

(*h*) As to what is reasonable time, see, *inter alia*, *Owens* v. *Quebec Bank* (1870), 30 U. C. Q. B. 382; *Bank of British North America* v. *Warren* (1909), 19 O. L. R. 257. As to effect of presenting a cheque to payee bank and taking it away again without demanding payment, see *Boyd* v. *Nasmith* (1888), 17 O. R. 40; see also *Banque Jacques-Cartier* v. *La Corporation de Limoilou* (1899), Q. R. 17 S. C. 211, in which it was held that an alleged usage or custom of banks to defer presentation of cheques sent to them for collection from other banks would not excuse them should the *laches* result in prejudice to the payees.

the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid;

Measure of damage.

Holder becomes creditor.

(b) the holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

Reasonable time.

(2) In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case. 53 Vict. c. 33, s. 73.

Authority to pay.

**167.** The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by—

Countermand.

(a) countermand of payment;

Death.

(b) notice of the customer's death. 53 Vict. c. 33, s. 74.

*Crossed Cheques.*

Definition.

**168.** Where a cheque bears across its face an addition of—

(a) the word "bank" between two parallel transverse lines, either with or without the words "not negotiable," or

(b) two parallel transverse lines simply, either with or without the words "not negotiable,"

General.

such addition constitutes a crossing, and the cheque is crossed generally.

Special.

(2) Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank. 53 Vict. c. 33, s. 75.

By drawer.

**169.** A cheque may be crossed generally or specially by the drawer.

(i) See note to sub-sect. (a), *ante*; and see *Campbell* v. *Bisaillon* (1832), Q. R. 2 Q. B. 504, in which a period of eight days was held a reasonable time and in accordance with the usage of banks; see also *Légaré* v. *Arcand* (1895), Q. R. 9 S. C. 122, in which a cheque presented for payment the day after making was held, under the circumstances, *not* to have been presented "in reasonable time." And as a general proposition, if a bank has moneys of a customer, it is bound to honour his cheques so long as the account is in credit, though under special circumstances it may take a reasonable time to make enquiries essential for its own security (*Todd* v. *Union Bank* (1887), 4 Man. L. R. 204; see also *Perreault* v. *Merchants' Bank* (1905), Q. R. 27 S. C. 149).

(2) Where a cheque is uncrossed, the holder may cross it generally or specially. By holder

(3) Where a cheque is crossed generally, the holder may cross it specially. Varying.

(4) Where a cheque is crossed generally or specially, the holder may add the words "Not negotiable." Words may be added.

(5) Where a cheque is crossed specially the bank to which it is crossed may again cross it specially to another bank for collection. By bank for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself. Changing crossing.

(7) A crossed cheque may be re-opened or uncrossed by the drawer writing between the transverse lines the words "Pay cash," and initialling the same. 53 Vict. c. 33, s. 76. Uncrossing.

**170.** A crossing authorised by this Act is a material part of the cheque. Materially.

(2) It shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing. 53 Vict. c. 33, s. 78. Altering crossing.

**171.** Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof. 53 Vict. c. 33, s. 78. Crossed to more than one bank.

**172.** Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid: Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be. 53 Vict. c. 33, s. 78. Liability for improper payment. *Bona fides.*

Protection in such case. Chitty, 552.

**173.** Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. 53 Vict. c. 33, s. 79.

"Not negotiable" cross. Chitty, 553.

**174.** Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. 53 Vict. c. 33, s. 80.

Customer without title. Chitty, 553.

Bank paying. *Bona fides.*

**175.** Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment (*j*). 53 Vict. c. 33, s. 81.

## PART IV.—PROMISSORY NOTES.

Definition. Chitty, 553.

**176.** 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, to, or to the order of, a specified person, or to bearer.

Endorsed by maker.

(2) An instrument in the form of a note payable to the maker's order is not a note within the meaning of this section, unless it is endorsed by the maker.

Pledge. Invalidity.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof (*k*). 53 Vict. c. 33, s. 82.

[Although not conforming strictly to the above definition, it has been held that an instrument, signed by the party to be charged, admitting the receipt of a sum of money certain and agreeing to be responsible for the same with interest thereon at a

(*j*) Banks are protected by sect. 175 of the Bills of Exchange Act only where they receive payment of a crossed cheque as agents for collection for a customer. They are not so protected when they receive payment as holders of the cheque on their own account (*Capital and Counties Bank* v. *Gordon*, [1903] A. C. 240, H. L. (E.).

(*k*) Though the remedy of a creditor to recover a debt may be barred by prescription, he is entitled to hold any collateral security until his claim is satisfied (*Wiley* v. *Ledyard* (1888), 10 O. P. R. 182).

specified rate per annum, upon production of the receipt and after three months' notice, may be sued upon as a promissory note; and a demand for immediate payment made more than three months before the commencement of the action is sufficient proof that the notice required by the terms contained in the receipt has in fact been given (*l*).]

**Inland note.**

**177.** A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note.

**Foreign note.**

(2) Any other note is a foreign note. 53 Vict. c. 33, s. 82.

**Delivery.**

**178.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer. 53 Vict. c. 33, s. 83.

**Joint and several note.**

**179.** A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

**Individual promise.**

(2) Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note. 53 Vict. c. 33, s. 84.

**Demand note presentment.**

**180.** Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement.

**Reasonable time.**

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. 53 Vict. c. 33, s. 85.

**Endorser discharged.**

**181.** If a promissory note payable on demand, which has been endorsed, is not presented for payment within a reasonable time the endorser is discharged (*m*): Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security. 53 Vict. c. 33, s. 85.

**Security.**

**Not deemed overdue.**

**182.** Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that

(*l*) *La Forest* v. *Rabineau* (1906), XXXVII. S. C. R. 521. An instrument conceived in the following terms has also been held a negotiable promissory note:—"Received from A. B. the sum of five hundred dollars advance, to be repaid at expiration of nine months" (*Halsted* v. *Herschmann* (1908), 18 Man. R. 103; see also *Commercial Bank* v. *Allen* (1894), 10 Man. R. 339). As to conflicting decisions respecting "Bon" in Quebec and "Good" in Ontario, see *Dow* v. *Daly* (1897), Q. R. 12 S. C. 183; and *Palmer* v. *McLennan* (1873), 22 U. C. C. P. 563.

(*m*) Where a promissory note is payable on demand, prescription runs from the date of the note, and not from the date of demand (*Bachand* v. *Lalumière* (1902), Q. R. 21 S. C. 449).

it appears that a reasonable time for presenting it for payment has elapsed since its issue (*n*). 53 Vict. c. 33, s. 85.

Presentment, where. Chitty, 554.

**183.** Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place (*o*).

Liability of maker.

(2) In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the Court (*p*).

Note payable generally.

(3) If no place of payment is specified in the body of the note presentment for payment is not necessary in order to render the maker liable. 53 Vict. c. 33, s. 86.

As to endorser.

**184.** Presentment for payment is necessary in order to render the endorser of a note liable.

Place where.

(2) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable.

What sufficient.

(3) When a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the endorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice. 53 Vict. c. 33, s. 86.

Maker. Chitty, 555. Engagement. Estoppel.

**185.** The maker of a promissory note, by making it—

(a) engages that he will pay it according to its tenor;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse (*q*). 53 Vict. c. 33, s. 87.

Application of Act to notes. Chitty, 555.

**186.** Subject to the provisions of this Part, and except as by this section provided, the provisions of this Act relating to

(*n*) See *Northern Crown Bank* v. *International Electric Co.* (1910), 22 O. L. R. 339.

(*o*) It is not essential, however, that a bill or promissory note should be presented at the place designated therein at maturity in order to charge the maker, it being the duty of the maker not only to have sufficient funds at the place of payment at maturity, but also to keep them there until presentment (*Merchants' Bank of Canada* v. *Henderson* (1897), 28 O. R. 360; *Robertson* v. *North-Western Register Co.* (1910), 13 W. L. R. 613).

(*p*) Apparently, the only effect of non-presentation before action where sufficient funds to meet a bill have been kept at the place of payment is to disentitle the payee to costs (*Merchants' Bank of Canada* v. *Henderson*, *supra*).

(*q*) Capacity to endorse is to be presumed (*Canadian Bank of Commerce* v. *Rogers* (1911), 23 O. L. R. 109). The maker of a note to an insolvent is presumed to guarantee his capacity to endorse it over, and in an action on the note by such endorsee (in the absence of intervention by the assignee) is estopped from denying his right to do so, nor will the endorsee's knowledge of the insolvency prevent such estoppel from applying (*Perkins* v. *Beckett* (1853), 29 U. C. C. P. 395; see also *Kinnard* v. *Tewsley* (1896), 27 O. R. 398).

bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In the application of such provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. Terms corresponding.

(3) The provisions of this Act as to bills relating to— Provisions inapplicable.

(a) presentment for acceptance,

(b) acceptance,

(c) acceptance *supra* protest,

(d) bills in a set,

do not apply to notes. 53 Vict. c. 33, s. 88.

**187.** Where a foreign note is dishonoured, protest thereof is unnecessary, except for the preservation of the liabilities of endorsers. 53 Vict. c. 33, s. 88. Protest of foreign notes.

Chitty, 555.

# CHAPTER XXII.

## BANKS AND CUSTOMERS.

Chitty, 647—650.


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Nature of contract. Chitty, 647.

THE exact nature of the contract existing between a bank and its customer seems to be merely that of debtor and creditor on a simple contract debt, to which, in the case of a dormant account, after six years the Statute of Limitations would apply.

Duty of bank to honour cheques of customer. Chitty, 647.

But to this contract there is the superadded obligation that so long as the customer's account is in credit the bank shall, upon receipt of the customer's written order to pay, as evidenced by a document called a cheque, deliver to the payee the amount specified in such written order, and may thereupon debit the customer's account with the amount which it has thus paid on his behalf; but the actual authority of the customer is a condition precedent to the right of the bank to debit his account with any amount which it may have paid for him, or, in other words, banks are entitled

to debit customers only with such cheques as they draw (*a*). The meaning of which is that the bank takes upon itself the risk of paying a forged cheque, and should it pay upon the faith of a simulated signature a cheque not in fact drawn by the customer, it is the bank, and not the customer, who must bear the loss: and a like rule has been held to apply to forged endorsements (*b*) in cases where there is an actual payee (*c*). It may be said that this is hard upon the bank, but such an institution must be supposed to know its own business, and, on that basis, to make its own bargains. The real question in all such cases is, has the bank been misled by the customer's conduct, and has the customer by his conduct disentitled himself to repudiate the forgery and thereby throw the loss upon the bank.

**Bank liable for payment of forged cheque.**

In the very numerous cases which have turned upon the question as to whether or no a customer by negligence or *laches* has estopped himself from recovering from a bank the amount with which the latter has debited his account in respect of a forged cheque, the following points may be regarded as having been practically decided by British law in the customer's favour:—

**Negligence of customer.**

a. In the case of a current account between a bank and its customer there is no contractual obligation on the part of the customer to examine his pass-book.

b. Even if, as a result of the method in which a customer conducts his business, the bank succeeds in proving that it was misled, it does not thereby entitle the bank to say that the customer has done anything wrong because he chooses to transact his affairs in his own way, for people in business are not to be supposed to be always guarding against fraud in connection with their banking accounts.

But, on the other hand, in case of litigation, it is clearly a question for a jury whether or no a customer did so act as to lead his bankers to believe they might honour cheques, since admitted to be forgeries, and if so, did the bank in fact do

(*a*) A bank is not entitled to appropriate a customer's balance in payment of an immature bill drawn by the customer in favour of the bank *McCready Co.* v. *Alberta Clothing Co.* (1910), 3 A. L. R. 67; 13 W. L. R. 680).

(*b*) *Can. Pac. Rly.* v. *Hochelaga* (1907), 5 E. L. R. 567.

(*c*) The converse of this rule was held to apply in the following circumstances:—An insurance agent sent applications from fictitious persons to the head office and obtained policies. He subsequently made claims upon these policies in the names of the fictitious persons, and received cheques to hand over to them. He forged the endorsements on the cheques, which were subsequently honoured by the bank. Held, that the cheques must be regarded as payable to fictitious or non-existent persons under sub-sect. 3 of sect. 7 of the Bills of Exchange Act, 1890, and therefore payable to bearer, and so the bank was not liable (*London Life Insce. Co.* v. *Molson's Bank* (1904), 24 Occ. N. 220; 8 O. L. R. 238; 3 O. W. R. 933).

so because of the actual or implied representation of the customer? (*d*).

*Montreal Bank v. The King.*

In the case of the *Montreal Bank* v. *The King* (*e*) the following facts were elicited in evidence, and upon these a decision was given in favour of the Crown upon the general ground that it is incumbent upon the payer of a bill or note to satisfy himself that the signature of the drawer is genuine, and if he accepts or pays a note or bill to which the drawer's name has been forged he is bound by the act, and can neither repudiate the transaction nor recover the money paid:—

One Martineau, a clerk in the Department of Militia and Defence, whose duty it was to examine and check the Government account with its bankers, forged departmental cheques and paid them in to the credit of a fictitious payee in certain of the banks, with whom he opened a drawing account in a false name for the purpose of realising the proceeds of his defalcations. The cheques thus paid in by him were sent in due course of business by the respective bankers to whom they had been consigned, and were duly honoured by the Montreal Bank, the amounts being then debited by them to the Receiver-General's account. By manipulating the books, to which in the course of his duties as examining and checking clerk he had legitimate access, Martineau induced the head of the department to acknowledge the correctness of the accounts as stated between the Government and its bankers, and thus postponed detection for a considerable time.

When the forgeries were at length discovered, the department claimed a rectification of the account between themselves and their bankers and a return of the moneys with which the bank had debited them, upon the ground that as an accord and satisfaction induced by the forgery of a third party could not operate as an estoppel against a private customer of a bank, *à fortiori* it could not be invoked against the Crown, the doctrines of estoppel and *laches* being alike inapplicable to the Sovereign (*f*); and this view was upheld by the Court.

It was further held, as regards the claim set up by the Montreal Bank against those banks with whom Martineau had opened accounts in a fictitious name, that as they had relied upon the implied representation made to them by the Montreal Bank that the cheques were genuine by reason of the fact of their being duly honoured upon presentation, and in consequence of such representation and payment had thereafter paid out the pro-

(*d*) *Chatterton* v. *London and County Bank*, Times Newspaper, Jan. 21, 1891.

(*e*) (1907), XXXVIII. S.C.R. 38.

(*f*) Vin. Abr. Estop. (E.), Bla. Com., vol. 1, 21st ed., p. 245.

cards to their customer or his order, the ultimate payer (the Montreal Bank was estopped from thereafter denying its responsibility, and consequently could not recover from them the amounts which they had so paid out.

Limitations on liability of bank.

But although a bank on which a cheque is drawn is bound to know the signature of a customer, it is under no similar obligation with regard to the genuineness of writing contained in the body of a cheque. Where, therefore, a cheque, which had been fraudulently altered from a small amount into a much larger one was paid in by the forger to a second bank, which thereupon credited him with the amount as altered, and subsequently collected it from the first bank on their own behalf, and not merely as agents for the payee (*g*), it was held that the first bank was not estopped from repudiating the writing in the body of the cheque, but could recover back from the second bank the money which it had thus paid under a mistake of fact (*h*).

"Marked" and "certified" cheques.

And a somewhat similar rule has been held applicable in the case of a "marked" or "certified" cheque, that is, a cheque to which additional currency is given by reason of the drawee bank certifying upon the face thereof that it is drawn in good faith on funds sufficient to meet its payment on presentation (*i*). Apparently, however, the effect of certification is limited to the actual amount appearing upon the cheque at the time when it is presented for verification to the certifying bank. Where, therefore, a "marked" cheque for a small amount was altered by the drawer, subsequently to certification, into a much larger one, it was decided by the Privy Council that the certifying bank was liable only for the sum originally written on the cheque, and not for the larger amount afterwards substituted therefor (*k*). This decision is apparently based upon the ruling of the House of

(*g*) A bank acting merely as the agent of a payee for collection is not responsible for the failure of another bank on which the cheques entrusted to it for collection are drawn. If, therefore, the collecting bank has credited the payee with the amount of the cheques, it can, upon their dishonour, debit the payee with the sum for which it had given credit (*The Queen* v. *Bank of Montreal* (1886), 1 Ex. C. R. 154).

(*h*) *Dominion Bank* v. *Union Bank of Canada* (1908), 41 S. C. R. 366.

(*i*) *Gadra* v. *Newfoundland Savings Bank*, [1899] A. C. 281, P. C. The following are recent decisions on "initialled" or "certified" cheques. Where a customer, for the purpose of opening an account, gave a bank a "marked" cheque on another bank which the first accepted, it was held, upon the second bank failing before this cheque was cleared, that as the first bank had accepted the second as its debtor, the customer was not liable (*Johns* v. *Standard Bank* (1911), 18 O. W. R. 650; 2 O. W. N. 514). But if the local manager of a bank initials a cheque he merely by so doing authorises the ledger keeper to certify it, and it is for the latter to perfect the certification; consequently, if the latter fails to do so the bank is not liable (*Scott* v. *Merchants' Bank* (1911), 17 O. W. R. 949; 2 O. W. N. 514).

(*k*) *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, P. C.

Chitty, 849, 815.

Lords in the case of *Schofield* v. *Londesborough* (*Earl of*) in which it was held that the acceptor of a bill of exchange is under no duty to take precautions against fraudulent alterations in the bill after acceptance. Somewhat in amplification of the principle of law above stated, it has been held by the Supreme Court of Canada, in the case of the *Dominion Bank* v. *The Union Bank of Canada* (*m*), that the payee of a cheque drawn on a bank, although bound to know the signature of his customer, is not under a similar obligation in regard to the writing in the body of the instrument. If, therefore, a bank honour a cheque which has been fraudulently altered subsequently to its being signed and certified, it seems that so much of the payment as is made in excess of the amount appearing on the face of the cheque when it was certified is recoverable by the bank as money paid under a mistake of fact.

**Liability of Bank unaffected by carelessness of customer.**

The above and cognate decisions may also be supported upon the ground that there is no duty obliging a man who is dealing with others to take precautions to prevent loss to them by the criminal acts of third persons, and the omission to do so does not in the absence of some special and exceptional relationship, amount to negligence in law. Thus, a man does not lose his right to his property if he has unnecessarily exposed his goods or allowed his pocket handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt can be retained by a *bonâ fide* purchaser for value notwithstanding that they may have been previously stolen, but this exception may be regarded as an anomalous adaptation of the common law to the exigencies of the law merchant, and does not alter the general rule of law as stated above.

Applying the above-stated doctrine to the case of a cheque, it may be taken as an accepted proposition of law that a customer of a bank drawing a cheque in such a manner as to enable the payee fraudulently to insert additional words and figures is not thereby estopped from showing the disparity between the original amount for which such cheque was drawn and the actual amount appearing on the cheque upon presentation, nor is he liable to the bank, should they honour the draft as altered, for the difference between the original amount and the amount represented by the fraudulently added words and figures. Or, in other words, with regard to cheques, the well-known course of

**Duty of bank to honour customer's cheques.**

(*l*) [1896] A. C. 514, H. L. (E.). (*m*) (1908), XL. S. C. R. 46.

business is this: when a cheque is presented at the counter of a bank the bank has authority on the part of its customer to pay the amount therein specified on his account and debit him with the amount so paid, and it is liable in damages to a customer whose account is in credit should it fail to honour the cheque. But the actual money with which the cheque is paid is the bank's money, and on the presentment of the cheque it is for the bank to consider whether the state of the account between it and its customer will justify it in passing the property in the money to the holder of the cheque, and if in such circumstances the bank is deceived by a fraudulent alteration in the words and figures appearing on the face of the instrument, and pays a larger sum than that for which the cheque was originally drawn, the bank is the loser, without remedy over against the customer; and a cheque certified before delivery is subject as regards its subsequent negotiation to all the rules applicable to uncertified cheques (*n*).

Bank bound to use diligence in collecting.

Again, there is a positive duty laid upon a bank to whom a cheque is delivered for collection to use all due and reasonable despatch in presentation (*o*). Where, therefore, a draft was endorsed by the payee to a specified bank, and that bank, instead of directly collecting it, sent it to the Clearing House, where it was accepted by the bank on which it was drawn, upon the failure of the latter it was held that the payee (not being subject to the rules of the Clearing House) was not liable for the loss (*p*).

But, apparently, it is not sufficient presentment to justify an action against a banker for wrongfully dishonouring the cheque of a customer whose account is in credit, for the agent of the collecting bank to present the cheque at the banking house; he must present it to the cashier or ledger keeper who is actually in charge of the particulars of the drawer's account (*q*).

## THE BANK ACT, 1913 (3 & 4 GEO. V. c. 9).

Bank must take its own notes.

**71.** The bank shall always receive in payment its own notes at par at any of its branches, agencies or offices, and whether they are made payable there or not (*r*).

(*n*) *Imperial Bank of Canada* v. *Bank of Hamilton* (1901), XXXI. S. C. R. 311; affirmed, [1903] A. C. 49, P. C.

(*o*) *Wheeler* v. *Young* (1897), 13 T. L. R. 468 (an English case). As to what is "reasonable time," see R. S. C., 1906, c. 119, s. 166 (2).

(*p*) *Sterling Bank* v. *McLaughlin* (1912), 21 O. W. R. 221; 3 O. W. N. 643.

(*q*) *Rear* v. *Imperial Bank of Canada* (1908), XLII. S. C. R. 222.

(*r*) *Exchange Bank of Canada* v. *People's Bank*, 23 C. L. J. 391; Cass. 2nd ed., 79; and compare sect. 6, of England Act, 1833 (Imp.).

Payment in Dominion notes.

**72.** The bank, when making any payment shall, on the request of the person to whom the payment is to be made, pay the same, or such part thereof, not exceeding one hundred dollars, as such person requests, in Dominion notes for one, two, or five dollars each, at the option of such person.

No torn or defaced notes.

(2) No payment, whether in Dominion notes or bank notes, shall be made by the bank in bills that are unclean or torn or partially defaced by excessive handling.

Disinfection of notes.

(3) The Treasury Board may make regulations providing for the disinfection and sterilisation by the several banks of all bank notes and Dominion notes which have come into the bank's possession before a re-issue thereof to the public; and the bank, its officers, clerks and servants, shall carry out and execute the regulations made under the authority of this section. 53 Vict. c. 31, s. 57 (Am.).

*Business and Powers of a Bank.*

Business and powers of bank.

**76.** The bank may—

(a) open branches, agencies and offices;

(b) engage in and carry on business as a dealer in gold and silver coin and bullion;

(c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities (*s*), or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign, and other public securities; and,

(d) engage in and carry on such business generally as appertains to the business of banking (*t*).

Exceptions.

(2) Except as authorised by this Act, the bank shall not, either directly or indirectly—

(a) deal in the buying or selling, or bartering of goods, wares

(*s*) A bank is liable for acceptances by its president and manager of cheques discounted by another bank in good faith and in due course of business (*Exchange Bank of Canada* v. *People's Bank*, 23 C. L. J. 391; Cass. Dig., 2nd ed., 79).

(*t*) Under this sub-section a bank by its duly authorised agent may lawfully receive moneys in trust for a specific purpose, when such purpose is *intra vires* of its articles of association. Nor is it necessary, in order to make the bank a trustee of the moneys, for the transaction to take place upon the bank premises (*Hoops* v. *Eastern Townships Bank* (1908), Q. R. 35 S. C. 221).

and merchandise, or engage or be engaged in any trade or business whatsoever (*w*);

(b) purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank (*x*); or,

(c) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise (*y*).

Bank to have lien upon the stock of its debtors.

**77.** The bank shall have a privileged lien, for any debt or liability for any debt to the bank, on the shares of its own capital stock, and on any unpaid dividends of the debtor or person liable, and may decline to allow any transfer of the shares of such debtor or person until the debt is paid.

Sale of shares.

(2) The bank shall, within twelve months after the debt has accrued and become payable, sell such shares: Provided that

Notice.

notice shall be given to the holder of the shares of the intention of the bank to sell the same, by mailing the notice, in the post office, post paid, to the last known address of the holder, as shown by the records of the bank, at least thirty days prior to the sale.

Transfer.

(3) Upon the sale being made the president, a vice-president or the general manager shall execute a transfer of the shares to the purchaser thereof in the usual transfer book of the bank.

Effect of transfer.

(4) Such transfer shall vest in the purchaser all the rights in or to the said shares which were possessed by the holder thereof, with the same obligation of warranty on his part as if he were the vendor thereof, but without any warranty from the bank or by the officer of the bank executing the transfer. 53 Vict. c. 31, s. 65 (Am.).

Collateral securities may be sold.

**78.** The stock, bonds, debentures or securities, acquired and held by the bank as collateral security, may, in case of default in the payment of the debt, for the securing of which they were

(*w*) A bank may take an assignment of a lease of business premises either as security for an overdraft or in payment of a debt, and carry on the business of the assignors thereon if the ultimate object of the transaction is the sale of the business as a going concern (*Ontario Bank* v. *McAllister* (1910), XLIII. S. C. R. 338). Where a bank lends money on a "lien note," which is an instrument charging specified goods (the property, title and possession to which remains in the lienor), it does not thereby contravene the provisions of this section, and may, in case of non-payment, seize the goods (*Thieu* v. *Bank of British North America* (1911), 19 W. L. R. 549).

(*x*) A bank is incapable of acquiring any legal title to its own shares by purchase (*Stavert* v. *McMillan* (1910), 22 O. L. R. 245; 16 O. W. R. 125).

(*y*) A mortgage of land to secure a present advance is illegal and void (*Canadian Bank of Commerce* v. *Wilson* (1909), 11 W. L. R. 535).

so acquired and held, be dealt with, sold and conveyed, either in like manner and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act, or in like manner as and subject to the restrictions under which a private individual might in like circumstances deal with, sell and convey the same: Provided that the bank shall not be obliged to sell within twelve months (z).

Right of sale may be waived.

(2) The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of the stock, bonds, debentures or securities. 53 Vict. c. 31, s. 66 (Am.).

Acquisition of real estate.

**79.** The bank may acquire and hold real and immovable property for its actual use and occupation and the management of its business, and may sell or dispose of the same, and acquire other property in its stead for the same purpose.

Return to Minister.

(2) The bank shall annually, during the month of January, make to the Minister a return showing in detail the fair market value of its real and immovable property held under this section. 53 Vict. c. 31, s. 67.

Mortgages and *hypothèques* of realty.

**80.** The bank may take, hold and dispose of mortgages and *hypothèques* upon real or personal, immovable or movable property, by way of additional security for debts contracted to the bank in the course of its business.

As to personalty.

(2) The rights, powers and privileges which the bank is by this Act declared to have, or to have had, in respect of real or immovable property mortgaged to it, shall be held and possessed by it in respect of any personal or movable property which is mortgaged or hypothecated to the bank. 53 Vict. c. 31, s. 68.

Purchases of realty.

**81.** The bank may purchase any lands or real or immovable property offered for sale—

(a) under execution, or in insolvency, or under the order or decree of a Court, as belonging to any debtor to the bank; or,

(b) by a mortgagee or other encumbrancer, having priority over a mortgage or other encumbrance held by the bank; or,

(c) by the bank under a power of sale given to it for that purpose, notice of such sale by auction to the highest bidder having been first given by advertisement for four weeks in a newspaper published in the county or

(z) Where a customer deposits securities with a bank to cover advances and makes default in payment, the bank, on giving the requisite notice, is entitled to sell the securities (*Healy* v. *Home Bank*, 18 O. W. R. 71; 20 W. N. 550).

electoral district in which such lands or property is situate,

in cases in which, under similar circumstances, an individual could so purchase, without any restriction as to the value of the property which it may so purchase, and may acquire a title thereto as any individual, purchasing at sheriff's sale, or under a power of sale, in like circumstances could do, and may take, have, hold and dispose of the same at pleasure. 53 Vict. c. 31, s. 69 Am.).

Bank may acquire absolute title to mortgaged premises.

**82.** The bank may acquire and hold an absolute title in or to real or immovable property mortgaged to it as security for a debt due or owing to it, either by the obtaining of a release of the equity of redemption in the mortgaged property, or by pro-curing a foreclosure, or by other means whereby, as between individuals, an equity of redemption can, by law, be barred, or a transfer of title to real or immovable property can, by law, be effected, and may purchase and acquire any prior mortgage or charge on such property.

No Act or law to prevent.

(2) Nothing in any charter, Act or law shall be construed as ever having been intended to prevent or as preventing the bank from acquiring and holding an absolute title to and in any such mortgaged real or immovable property, whatever the value thereof, or from exercising or acting upon any power of sale contained in any mortgage given to or held by the bank, authorising or enabling it to sell or convey any property so mortgaged. 53 Vict. c. 31, s. 71; 63 & 64 Vict. c. 26, s. 14.

Property to be sold within certain time.

**83.** No bank shall hold any real or immovable property, however acquired, except such as is required for its own use, for any period exceeding seven years from the date of the acquisition thereof, or any extension of such period as in this section provided, and such property shall be absolutely sold or disposed of, within such period or extended period, as the case may be, so that the bank shall no longer retain any interest therein unless by way of security (*a*).

Extension of time.

(2) The Treasury Board may direct that the time for the sale or disposal of any such real or immovable property shall be extended for a further period or periods, not to exceed five years.

Twelve years.

(3) The whole period during which the bank may so hold such

(*a*) By the law of Ontario, where a corporation is empowered by statute to hold lands for a limited period only, and in fact holds beyond that period, the Crown only can take advantage of the illegality (*McDiarmid v. Hughes* (1888), 16 O. R. 570). As to the general proposition and conflict of Dominion and provincial laws, see *The Colonial Building Association v. Att.-Gen.* (1883), 9 A. C. 157, P. C.

property under the foregoing provisions of this section shall not exceed twelve years from the date of the acquisition thereof.

Property not sold liable to forfeiture.

(4) Any real or immovable property, not required by the bank for its own use, held by the bank for a longer period than authorised by the foregoing provisions of this section shall be liable to be forfeited to His Majesty for the use of the Dominion of Canada: Provided that

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(a) no such forfeiture shall take effect until the expiration of at least six calendar months after notice in writing to the bank by the Minister of the intention of His Majesty to claim the forfeiture; and,

(b) the bank may, notwithstanding such notice, before the forfeiture is effected sell or dispose of the property free from liability to forfeiture.

Provisions apply to realty now held.

(5) The provisions of this section shall apply to any real or immovable property heretofore acquired by the bank and held by it at the time of the coming into force of this Act. 63 & 64 Vict. c. 26, s. 14.

Loans on standing timber.

**84.** The bank may lend money upon the security of standing timber, and the rights or licenses held by persons to cut or remove such timber.

Loans to receiver or liquidator under Winding-up Acts.

**84a.** The bank may lend money to a receiver, to a receiver and manager, or to a liquidator appointed under any winding-up Act, provided such receiver, receiver and manager or liquidator has been duly authorised or empowered to borrow; and, in respect of any money so lent, the bank may take security, with or without personal liability, from such receiver, receiver and manager, or liquidator, to such an amount, and upon such property and assets, as may be directed or authorised by any Court of competent jurisdiction. 63 & 64 Vict. c. 26, s. 16 (Am.).

Security fixed by Court.

Advances for building ships.

**85.** Every bank advancing money in aid of the building of any ship or vessel shall have the same right of acquiring and holding security upon such ship or vessel, while building and when completed, either by way of mortgage, *hypothèque*, hypothecation, privilege or lien thereon, or purchase or transfer thereof, as individuals have in the province wherein the ship or vessel is being built.

Rights and obligations.

(2) The bank may, for the purpose of obtaining and enforcing such security, avail itself of all such rights and means, and shall be subject to all such obligations, limitations and conditions, as are, by the law of such province, conferred or imposed upon individuals making such advances. 53 Vict. c. 31, s. 72.

Warehouse receipts and bills of lading.

**86.** The bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person, in the course of its banking business (*b*).

Effect of taking.

(2) Any warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof—

(a) all the right and title to such warehouse receipt or bill of lading and to the goods covered thereby of the previous holder or owner thereof; or,

(b) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom such goods, wares and merchandise were received or acquired by the bank, if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise. 53 Vict. c. 31, s. 73; 63 & 64 Vict. c. 26, s. 15 (Am.).

When previous holder is an agent.

**87.** If the previous holder of such warehouse receipt or bill of lading is any person—

(a) entrusted with the possession of the goods, wares and merchandise mentioned therein, by or by the authority of the owner thereof; or,

(b) to whom such goods, wares and merchandise are, by or by the authority of the owner thereof, consigned; or,

(c) who, by or by the authority of the owner of such goods, wares and merchandise, is possessed of any bill of lading, receipt, order or other document covering the same, such as is used in the course of business as proof of the possession or control of goods, wares and merchandise, or as authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such a document to transfer or receive the goods, wares and merchandise thereby represented,

the bank shall be, upon the acquisition of such warehouse receipt or bill of lading, vested with all the right and title of the owner of such goods, wares and merchandise, subject to the

(b) Where a warehouse receipt has been given to a bank as collateral security for commercial paper, a parol agreement between the depositor and the bank that the latter shall apply any surplus resulting from the sale of the goods to the discharge of the former's indebtedness is not contrary to the provisions of this section (*Thompson* v. *Molson's Bank* (1889), XVI. S. C. R. 664). A warehouseman *qua* warehouseman cannot give a valid warehouse receipt for the purpose of raising money thereon, unless he has actual possession or control of the goods comprised therein (*Milloy* v. *Kerr* (1879), VIII. S. C. R. 474).

right of the owner to have the same retransferred to him if the debt or liability, as security for which such warehouse receipt or bill of lading is held by the bank, is paid.

Presumption of possession. Chitty, 280—281.

(2) Any person shall be deemed to be the possessor of such goods, wares and merchandise, bill of lading, receipt, order or other document as aforesaid—

(a) who is in actual possession thereof; or,

(b) for whom, or subject to whose control such goods, wares and merchandise are, or bill of lading, receipt, order, or other document is held by any other person. 53 Vict. c. 31, s. 73; 63 & 64 Vict. c. 26, s. 15 (Am.).

Loans upon live or dead stock.

**88.** The bank may lend money to any wholesale purchaser or shipper of or dealer (*c*) in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealor in live stock or dead stock or the products thereof (*d*), upon the security of such products, or of such live stock or dead stock or the products thereof.

Grain.

(2) The bank may lend money to a farmer upon the security of his threshed grain grown upon the farm.

Loans to wholesale manufacturers.

(3) The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture.

Removal of goods.

(4) If, with the consent of the bank, the products, goods, wares and merchandise, live stock or dead stock or the products thereof, upon the security of which money has been loaned under the authority of this section, are removed and other products, goods, wares and merchandise, live stock or dead stock or the products thereof of substantially the same character are respectively substituted therefor, then to the extent of the value of the products, goods, wares and merchandise, or live stock or dead stock or the products thereof so removed the products, goods, wares and merchandise, live stock or dead stock or the products thereof so substituted shall be covered by such security as if originally covered thereby; but failure to obtain the consent of the bank to any such substitution shall not affect the validity of the security either as respects any products, goods, wares and merchandise,

Substitution.

Security.

(*c*) A "rancher" is not "a wholesale purchaser, or shipper of, or dealer in" within the meaning of this section (*Hatfield* v. *Imperial Bank*, 6 Terr. L. R. 296).

(*d*) The words "the products thereof" as used in this section apply to all the articles mentioned therein. "Sawn timber" is a product of the forest within the meaning of the section (*Townshedd* v. *Northern Crown Bank* (1912), 21 O. W. R. 961; 3 O. W. N. 1105).

or live stock or dead stock or the products thereof actually substituted as aforesaid or in any other particular.

(5) Any such security, as mentioned in the foregoing provisions of this section, may be given by the owner of the said products, goods, wares and merchandise, stock or products thereof, or grain. Owner may give the security.

(6) The security may be taken in the form set forth in Schedule C to this Act, or to the like effect. Form of security.

(7) The bank shall, by virtue of such security, acquire the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt: Provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer, or by any farmer in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby. 53 Vict. c. 31, s. 74; 63 & 64 Vict. c. 26, s. 17 (Am.). Same rights as upon warehouse receipts. Subject to wage-lien.

**89.** If goods, wares and merchandise are manufactured or produced from the goods, wares and merchandise, or any of them, included in or covered by any warehouse receipt, or included in or covered by any security given under the last preceding section, while so covered, the bank holding such warehouse receipt or security shall hold or continue to hold such goods, wares and merchandise, during the process and after the completion of such manufacture or production, with the same right and title, and for the same purposes and upon the same conditions, as it held or could have held the original goods, wares and merchandise. Goods manufactured from articles pledged.

(2) All advances made on the security of any bill of lading or warehouse receipt, or of any security given under the last preceding section, shall give to the bank making the advances a claim for the repayment of the advances on the products or stock, goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor: Provided that such preference shall not be given over the claim of any unpaid vendor who had a lien upon the products or stock, goods, wares and merchandise at the Prior claim of bank over unpaid vendor. Proviso.

time of the acquisition by the bank of such warehouse receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lien.

Sale of goods on non-payment of debt.

(3 In the event of the non-payment at maturity of any debt or liability secured by a warehouse receipt or bill of lading secured by any security given under the last preceding section, the bank may sell the products or stock, goods, wares and merchandise or grain, mentioned therein, or so much thereof as will suffice to pay such debt or liability with interest and expenses, returning the surplus, if any, to the person from whom the warehouse receipt, bill of lading, or security, or the products or stock goods, wares and merchandise or grain mentioned therein, as the case may be, were acquired: Provided that such power of sale shall be exercised subject to the following provisions, namely

Proviso.

Notice of sale of saw-logs, railway ties and lumber.

(a) No sale, without the consent in writing of the owner, of any products of the forest shall be made under this Act until notice of the time and place of such sale has been given by a registered letter, mailed in the post office post paid, to the last known address of the pledgor thereof, at least thirty days prior to the sale thereof;

Notice of sale of goods.

(b) No such products or stock, other than products of the forest, and no goods, wares and merchandise, and no grain, shall be sold by the bank under this Act without the consent of the owner, until notice of the time and place of sale has been given by a registered letter, mailed in the post office, post paid, to the last known address of the pledgor thereof, at least ten days prior to the sale thereof (*c*);

Sale by auction.

(c) Every sale, under such power of sale, without the consent of the owner, shall be made by public auction, after notice thereof by advertisement, in at least two newspapers published in or nearest to the place where the sale is to be made, stating the time and place thereof; and, if the sale is in the province of Quebec, then at least one of such newspapers shall be a newspaper published in the English language, and one other such newspaper shall be a newspaper published in the French language. 53 Vict. c. 31, ss. 76, 77 and 78. 63 & 64 Vict. c. 26, s. 19 (Am.).

(*c*) If a customer pledges grain with a bank as security, and the bank sells the grain without giving notice to the customer, should the customer subsequently make a release note in favour of the bank, he cannot thereafter claim an account in respect of the grain, the release note amounting to an accord and satisfaction (*Graves* v. *Home Bank* (1910), 14 W. L. R. 291).

Duty of bank towards customers.

It is, moreover, the duty of a banking company with whom a customer has deposited deeds as security for an overdraft, if they realise the securities for the purpose of paying themselves, to furnish the customer with the fullest information as to the results of the realisation, and generally as to the course of procedure which they have adopted, a bank in such circumstances being in the position of a *quasi*-trustee to the customer as regards any surplus which may be in their hands after repaying themselves. Where, therefore, a banking company, by virtue of the power given to it by a customer to whom it had advanced money, dealt with securities belonging to him to repay themselves, and subsequently refused to furnish accounts, it was held by the Supreme Court of Canada that the settlement having been made only for the benefit of themselves and in sacrifice of their customer's interests, they had been guilty of a violation of duty, and had not discharged the *onus* which lay on them to show that the transaction was for the customer's advantage as well as their own (*f*).

Conditions under which bank may take security.

**90.** The bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to secure the payment of any bill, note, debt, or liability, unless such bill, note, debt or liability is negotiated or contracted (*g*)—

(a) at the time of the acquisition thereof by the bank; or,

(b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank:

Proviso.

Provided that such bill, note, debt or liability may be renewed, or the time for the payment thereof extended, without affecting any such security.

(2) The bank may—

Exchanging of warehouse receipt for bill of lading, and *vice versâ*.

(a) on the shipment of any products or stock, goods, wares and merchandise, or grain, for which it holds a warehouse receipt, or any such security as aforesaid, surrender such receipt or security and receive a bill of lading in exchange therefor; or,

(*f*) *Canadian Bank of Commerce* v. *Barrette* (1909), XLI. S. C. R. 561.

(*g*) An assignment made to secure payment of a bill or note given in renewal of an overdue negotiable instrument of a like character is not a valid security (*Bank of Hamilton* v. *Halstead* (1897), XXVIII. S. C. R. 235). Where, however, an initial irregularity under this section is compromised by the borrower, he cannot subsequently set up the illegality to which he was privy (*Armstrong* v. *Buchanan* (1903), 35 N. S. R. 559; see also *Bank of Hamilton* v. *Donaldson* (1901), 13 Man. L. R. 378). As to the effect upon the rights of a bank (lending money under this section), of a prohibitive clause in an earlier mortgage granted by the borrowing corporation to third parties, see *Indian and General Investment Trust* v. *Union Bank* (1908), 42 S. S. Rep. 353.

P.

(b) on the receipt of any products or stock, goods, wares and merchandise, or grain, for which it holds a bill of lading, or any such security as aforesaid, surrender such bill of lading or security, store the products or stock, goods, wares and merchandise, or grain, and take a warehouse receipt therefor, or ship the products or stock, goods, wares and merchandise, or grain, or part of them, and take another bill of lading therefor (*h*). 53 Vict. c. 31, s. 75; 63 & 64 Vict. c. 26, s. 18.

Interest at 7 per cent. may be charged.

**91.** The bank may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank (*i*).

Return to Minister.

(2) The bank shall make a quarterly return to the Minister, as of the last juridical day of the months of March, June, September and December in each year, giving such particulars as may be prescribed by regulations made by the Treasury Board of the interest and discount rates charged by the bank.

Signature to returns.

(3) Such returns shall be made up and sent in within the first thirty days after the respective juridical days aforesaid, and shall be signed by the same persons as are required to sign the monthly returns made to the Minister under section 112 of this Act. 53 Vict. c. 31, s. 80 (Am.).

Any rate may be allowed.

**92.** The bank may allow any rate of interest whatever upon money deposited with it.

Liability of bank on deposits.

(2) The liability of the bank, under any law, custom or agreement to repay moneys heretofore or hereafter deposited with it and interest, if any, shall continue, notwithstanding any statute of limitations, or any enactment or law relating to prescription. 53 Vict. c. 31, s. 90; R. S. c. 29, s. 126.

(*h*) A bank may follow, although transferred into the hands of a third party, the proceeds of a clandestine sale of the subject-matter of an assignment note given to them as collateral security, upon the ground that where one takes from another, in payment of his debt, moneys which he knows equitably belong to a third party, to whom the person from whom he takes them stands in a fiduciary position, justice forbids the upholding of such a transaction, and demands that the recipient of the moneys shall account for them to the person equitably entitled to their possession (*Union Bank of Halifax v. Spinney* (1906), XXXVIII. S. C. R. 187).

(*i*) Where a borrower from a bank knows at the time of borrowing that he is to be charged interest on the loan, an implied contract to pay such interest is to be presumed. If, however, in defiance of the provisions of the Bank Act the bank stipulates for an illegally high rate of interest, it seems probable, upon the ground that the initial illegality avoids the contract altogether, it cannot recover any interest at all by action. If, however, the customer acquiesces in the illegality, and actually pays to the bank an exorbitant rate of interest, he cannot subsequently recover it back (*Bank of British North America v. Bossuyt* (1903), 15 Man. L. R. 266; 23 Occ. N. 338).

Percentage chargeable for collection.

**93.** When any note, bill, or other negotiable security or paper, payable at any of the bank's places or seats of business, branches, agencies or offices of discount and deposit in Canada, is discounted at any other of the bank's places or seats of business, branches, agencies or offices of discount and deposit, the bank may, in order to defray the expenses attending the collection thereof, receive or retain, in addition to the discount thereon, a percentage calculated upon the amount of such note, bill, or other negotiable security or paper, not exceeding one-eighth of one per cent.: Provided that the bank may make a minimum charge of fifteen cents. 53 Vict. c. 31, s. 82.

Agency charges.

**94.** The bank may, in discounting any note, bill or other negotiable security or paper, *bonâ fide* payable at any place in Canada, other than that at which it is discounted, and other than one of its own places or seats of business, branches, agencies or offices of discount and deposit in Canada, receive and retain, in addition to the discount thereon, a sum not exceeding one-fourth of one per cent. on the amount thereof: Provided that the bank may make a minimum charge of twenty-five cents. 53 Vict. c. 31, s. 83.

Deposits may be received from persons unable to contract.

**95.** The bank may, subject to the provisions of this section, without the authority, aid, assistance or intervention of any other person or official being required—

(a) receive deposits from any person whomsoever, whatever his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not; and,

(b) from time to time repay any or all of the principal thereof, and pay the whole or any part of the interest thereon to such person, unless before such repayment the money so deposited in the bank is lawfully claimed as the property of some other person.

Payments by consent.

(2) In the case of any such lawful claim the money so deposited may be paid to the depositor with the consent of the claimant, or to the claimant with the consent of the depositor.

Deposit limited to $500.

(3) If the person making any such deposit could not, under the law of the province where the deposit is made, deposit and withdraw money in and from a bank without this section, the total amount to be received from such person on deposit shall not, at any time, exceed the sum of five hundred dollars. 53 Vict. c. 31, s. 84; 53 Vict. c. 31, s. 80 (Am.).

Bank not bound to see to trust in deposits.

**96.** The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this Act is subject.

Receipt of one of two joint depositors sufficient.

Or of a majority.

(2) Except only in the case of a lawful claim, by some other person, before repayment the receipt of the person in whose name any such deposit stands, or, if it stands in the names of two persons, the receipt of one, or, if it stands in the names of more than two persons, the receipt of a majority of such persons, shall, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made had notice thereof, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

Application.

(3) The bank shall not be bound to see to the application of the money paid upon such receipt. 53 Vict. c. 31, s. 84.

If depositor dies, claim not exceeding $500, how proved

**97.** If a person dies, having a deposit with the bank not exceeding the sum of five hundred dollars, the production to the bank of—

(a) any authenticated copy of the probate of the will of the deceased depositor, or of letters of administration of his estate, or of letters of verification of heirship, or of the act of curatorship or tutorship, granted by any Court in Canada having power to grant the same, or by any Court or authority in England, Wales, Ireland or any British colony, or of any testament, testamentary or testament dative expede in Scotland; or,

(b) an authentic notarial copy of the will of the deceased depositor, if such will is in notarial form, according to the law of the province of Quebec; or,

(c) if the deceased depositor died out of His Majesty's dominions, any authenticated copy of the probate of his will, or letters of administration of his property, or other document of like import, granted by any Court or authority having the requisite power in such matters;

shall be sufficient justification and authority to the directors for paying such deposit, in pursuance of and in conformity to such probate, letters of administration, or other documents as aforesaid.

Deposit of copy of document.

(2) When the authenticated copy or other document of like import is produced to the bank under sub-section (1) of this

section, there shall be deposited with the bank a true copy thereof. 63 & 64 Vict. c. 26, s. 20.

*Dominion Government Cheques.*

Rule as to Dominion Government cheques.

**96.** The bank shall not charge any discount or commission for the cashing of any official cheque of the Government of Canada or of any department thereof, whether drawn on the bank cashing the cheque or on any other bank.

Chitty, 532—534.

# CHAPTER XXIII.

## BILLS OF LADING.


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Definitions.

A CONTRACT of sale of goods may by British law be modified, as between buyer and seller, in any manner whatsoever if the parties thereto so agree, and, in particular, it is open to them to suspend the general effect of such a contract as regards the vesting of the property in the vendee, and to provide that it shall not pass until the price is fully paid.

But although such an agreement is possible, it is unusual, the general principle being that where a contract for the sale of goods is consummated by delivery to the purchaser, the property therein passes from the vendor and vests in the buyer, who can subsequently deal with them and give a good title to any third party who, in good faith, either advances money upon the security of the goods or by buying them outright, becomes entitled to delivery. And this delivery, though effectual to transfer the property in the goods, may in certain cases be symbolic, and not actual. Thus, delivery to a purchaser of the key of the warehouse in which the goods are stored may be symbolic delivery of the goods contained therein. Or, again, where goods are shipped for transit by sea, as during the voyage they are necessarily incapable of physical transfer or delivery, they are represented by a document, generally drawn in sets of three, denominated a bill of lading, and should the goods be sold during the transit, a transfer by endorsement of this instrument to a purchaser will amount to a transfer to him of the goods represented thereby.

Nature of bill of lading.

Freed from technicalities of language, the law relating to the transfer of property in goods by endorsement of a bill of lading, which is practically a receipt for the goods given by the shipowner to a shipper, is as follows:—

During the period of transit and voyage the bill of lading,

by the law merchant, is universally recognised as a symbol of the goods which it represents, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.

Property in the goods passes by such endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under analogous circumstances the property would pass by an actual delivery of the goods; and for the purpose of passing such property in the goods and completing the title of the endorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the endorsee, the other originals of the set are, as against it, perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit.

Bills of lading in sets.

By inveterate practice among most commercial nations, bills of lading have long been drawn by the shipowner in sets of three or more. Sometimes one of the set is retained by the shipmaster, the others being transferred by him to the shipper. Sometimes the whole of the set are handed, upon shipment, to the merchant, the shipmaster retaining a copy only.

This practice of drawing bills of lading in triplicate may be at the present day, and under the altered conditions of communication between one part of the world and another, less valuable than it was when originally introduced, but it certainly had its distinct uses in the early stages of commerce, and it still survives. If it survives, it is probably that the commercial world still finds it more convenient or less troublesome to preserve it than to change it.

And it is plain that the purpose and idea of drawing bills of lading in sets, whatever the present advantage or disadvantage of the plan, is that the whole set should not remain always in the same hands. The possibility of its separation is intentionally devised not for the purpose of fraud, but for the protection of honest dealing. The separation may conceivably afford opportunities of fraud if the holders choose to be dishonest, but, on the

whole, the commercial world is apparently satisfied to run the risk of this contingency for the sake of the compensating advantages and conveniences which merchants, rightly or wrongly, have, even till present times, believed to be afforded by the system of triplicate or quadruplicate parts.

The shipper or his vendees may prefer to retain one of the originals for their own protection against loss, or in order to transfer it to their correspondents or agents. In such cases they are in the habit of treating the remainder of the set as the effective documents and as sufficient for all purposes of negotiating the goods.

**Endorsement of bill of lading condition precedent to property passing.**

It should, however, be remarked that endorsement of a bill of lading by the consignee, therein designated, is a condition precedent to passing the property in the goods of which it is the symbol or representation. Where, therefore, there is an endeavour to negotiate an unendorsed bill of lading or to effect a loan on the goods represented thereby, the fact of the absence of endorsement has been held to amount to constructive notice of some outstanding interest in the goods represented by the bill sufficient to place any persons proposing to make advances upon the security of the bill upon inquiry, and upon their failure to take proper measures to ascertain the facts and obtain a clear title to the bill and goods any pledge of the bill must be assumed to be made subject to all the prior rights of the consignee or of any other persons legitimately claiming under him (*a*); for although the object of mercantile usages is to prevent the risk of insolvency, not of fraud, nevertheless any patent dereliction from customary usage is sufficient to demand exceptional precaution and inquiry on the part of those who contemplate dealing upon the security of commercial documents presented to them in an unusual or inchoate form.

Alike in Great Britain and in the Dominion of Canada (including in the latter case certain provincial Acts), bills of lading are the subjects of statutory enactments practically embodying the principles of the law merchant, which in its original resembles the common law in that it follows precedent. Of this customary law merchant it has been said: "This custom of merchants is the general law of the kingdom, part of the common law, and, therefore, ought not to be left to a jury after it has been already settled by judicial determination" (*b*).

(*a*) *Gosselin* v. *Ontario Bank* (1905), XXXVI. S. C. R. 406.

(*b*) *Edie* v. *East India Co.* (1761), 2 Burr. 1216, Lord Mansfield, at p. 1226.

THE BILLS OF LADING ACT (*bb*).

Statutory rights of consignee or endorsee.

**2.** Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action, and be subject to all such rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

[Any person who makes an advance on a bill of lading not endorsed by the consignee is held to have notice of any outstanding interest on the goods and to be placed on inquiry (*c*). Moreover, where shippers delivered goods to a consignee without producing the bill of lading therefor, and the latter subsequently made away with the goods, they were held liable for their value, although they were unaware that the consignee was not in possession of the documents of title until the plaintiffs demanded the goods from them (*d*).]

Preservation of certain rights.

Chitty, 444—446.

**3.** Nothing in this Act contained shall prejudice or affect—

(a) any right of stoppage *in transitu* (*e*); or

(b) any right of an unpaid vendor under the Civil Code of Lower Canada; or

(c) any right to claim freight against the original shipper or owner; or

(d) any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Evidence by bill of lading.

**4.** Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary (*f*): Provided that the master or

(*bb*) R. S. C. 1906, c. 118 (52 Vict. c. 30).

(*c*) *Gosselin* v. *Ontario Bank* (1905), XXXVI. S. C. R. 406.

(*d*) *Stewart* v. *People's National Bank of Charleston* (1875), Cass. Dig., 2nd ed., 81.

(*e*) As to when a sale *in transitu* for non-payment of freight amounts to a wrongful conversion, see *Wilson* v. *Canadian Development Co.* (1903), XXXIII. S. C. R. 432.

(*f*) A shipper who accepts a bill of lading cannot usually (apart from fraud or mistake) escape from its binding operation merely upon the ground that he has not read it. But the result does not necessarily follow

other person so signing, may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims.

[Moreover, where the terms contained in the bill of lading and the custom of the port to which the goods are consigned are antagonistic, the terms contained in the bill of lading must prevail (*g*); and where there is diversity of standard at the *terminus a quo* and the *terminus ad quem* between the weight and capacity of a measure bearing a common appellation at both places, the capacity of the specified measure at the place where the contract is made must determine the question of freight (*h*).]

### PROVINCIAL BILLS OF LADING ACTS.

In addition to the above-cited Dominion Act (*i*), intituled "An Act respecting Bills of Lading," the following statutes dealing with the like subject have been enacted by the Legislatures of certain provinces of the Dominion, viz.:—

*Nova Scotia:* Revised Statutes, 1900, c. 148.

*Ontario:* The Mercantile Law Amendment Act, 1910 (10 Edw. VII. c. 63).

*Prince Edward Island:* 23 Vict. c. 23, intituled "An Act to amend the Laws relating to Bills of Lading." This statute is identical in terms with the Imperial Act (18 & 19 Vict. c. 111).

*Quebec:* Civil Code, arts. 2407—2460, supplemented by arts. 7457—7464, which latter are set out in Revised Statutes of Quebec, 1909.

The general trend of this local legislation is, within the boundaries of the jurisdiction in which it is operative, to impose restrictions similar to those contained in the Dominion Act upon the otherwise apparently unlimited capacity of a common carrier of goods by land or water to contract himself, by special agreement with the consignor of the goods, out of his common law liability for any loss or damage thereto which may be occasioned during the transit by reason of the gross negligence or fraud of his servants (*k*).

where the document is not given in the usual course of business (*North West Transportation Co.* v. *McKenzie* (1895), XXV. S. C. R. 38).

(*g*) *Parsons* v. *Hart* (1900), XXX. S. C. R. 473.

(*h*) See *Melady* v. *Jenkins' Steamship Co.* (1909), 18 O. L. R. 251; 13 O. W. R. 439.

(*i*) R. S. C., 1906, c. 118.

(*k*) See *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. C. 473, at p. 494 (cited in *Hudson* v. *Grand Trunk Railway* (1871), 8 N. S. 405).

# CHAPTER XXIV.

## Contracts of Insurance.

Chitty, 665—671.


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The general law of insurance throughout the Dominion of Canada is codified by the Insurance Act, 1910 (*a*). Sect. 2 of the statute, *inter alia*, sets out the various forms of insurance to which the Act applies (*b*); these are:—

(a) *Fire insurance*, which term signifies the risks covered by a policy of insurance on any property (within Canada) issued by any company licensed under the provisions of the Act to transact the business of fire insurance (*c*); and

Fire insurance.

(b) *Life insurance*, by which term is signified any policy or annuity contract issued by any company licensed under the provisions of the Act to transact the business of life insurance in

Life insurance.

(*a*) 9 & 10 Edw. VII. c. 32.

(*b*) The provisions of the Act do not apply (1) to any contract of *marine insurance* effected in Canada by any company authorised to carry on within Canada the said business; (2) to policies of life insurance issued prior to the 22nd day of May, 1868; (3) to companies incorporated under Provincial Acts transacting business only within the limits of the province by the Legislature of which it was incorporated; (4) to societies or associations of persons established for fraternal, benevolent, industrial or religious purposes, among which purposes is the insurance on the "assessment system" only of the lives of the members thereof exclusively; (5) to any association for the purpose of life insurance on the "assessment system" formed in connection with any society or association, and exclusively consisting of its members; (6) to any society or organization exempted . . . by the Treasury Board from the provisions of the Act.

(*c*) It is provided by sect. 133 of the Act that "no fire policy shall be issued for or extend over a longer period than three years."

Canada (in favour of any person or persons resident in Canada at the time when such policy was issued).

Beside the above-mentioned forms of insurance, there are various subsidiary risks covered by insurance, in companies specially established for such classes of business, to which the provisions of the Act also apply; these are as follows:—

Accident insurance.

(1) *Accident insurance*, which means insurance against bodily injury and death by accident, including loss or damage from accident or injury suffered by an employé or other person for which the person insured is liable, and the insurance of personal property, other than plate or other glass, against accidental damage or loss by reason of any cause except fire or perils of navigation.

Automobile insurance.

(2) *Automobile insurance*, which means insurance against bodily injury or death to its driver, including insurance against loss or damage from accident to or injury suffered by an employé or other person caused by an automobile for which the owner is liable, and insurance against loss or damage to property from an accident caused by an automobile, except by fire, and insurance against loss or damage to an automobile by accident, burglary or theft.

Bond insurance.

(3) *Bond insurance*, which means guaranteeing the validity and legality of bonds issued by any province of Canada, or by any city, county, town, village, school district, municipality, or other civil division of any such province, or by any private or public corporation.

Burglary insurance.

(4) *Burglary insurance*, which means insurance against loss or damage by burglary, theft or housebreaking.

Explosion insurance.

(5) *Explosion insurance*, which means insurance against damage to property of any kind caused by the explosion of natural or other gas.

Guarantee insurance.

(6) *Guarantee insurance*, which means the guaranteeing of the fidelity of persons in positions of trust, public or private, guaranteeing and becoming security for the due performance of any contract or agreement or of the duties of any office, and executing bonds in legal actions and proceedings.

Industrial insurance.

(7) *Industrial insurance*, which means life insurance, the premiums for which are payable at shorter intervals than quarterly; and *industrial policies*, which term signifies policies of life insurance whereon the premiums are so payable (but this paragraph is not applicable to life insurance undertaken by companies licensed under sect. 113 of this Act, which section provides, *inter alia*, that no company, other than the particular associations

therein specified, shall be licensed or registered to carry on within Canada any business of life insurance, such license and registration being, in all cases save where expressly excepted, conditions precedent to the commencement of business).

(8) *Inland marine insurance*, which means marine insurance in respect to subjects of insurance at risk upon the waters of Canada above the harbour of Montreal. Inland marine insurance.

(9) *Inland transportation insurance*, which means insurance against loss or damage to goods, wares, merchandise or property of any kind, including matter transmitted by mail in transit otherwise than by water from place to place in Canada. Inland transportation insurance.

(10) *Plate glass insurance*, which means insurance against the breakage of plate or other glass, either local or in transit. Plate glass insurance.

(11) *Sickness insurance*, which means insurance against loss through illness not ending in death, or disability not arising from accident or old age. Sickness insurance.

(12) *Sprinkler leakage insurance*, which means the insuring of any goods or premises against loss or damage by water caused by the breakage or leakage of sprinklers, pumps, water-pipes, or plumbing and its fixtures. Sprinkler leakage insurance.

(13) *Steam boiler insurance*, which means insurance upon steam boilers and pipes, engines and machinery connected therewith or operated thereby, against explosion, rupture and accident, and against personal injury or loss of life, and against destruction of or damage to property resulting therefrom. Steam boiler insurance.

Under the provisions of the Act no one insurance company may engage indiscriminately in all classes of business, although a license may be granted to an insurance company to carry on business in certain combined classes; these are as follows:— Statutory limitations on general business.

(a) Fire insurance, explosion insurance, cyclone or tornado insurance, and inland transportation insurance; or Classes of insurance.

(b) Fire insurance, cyclone or tornado insurance, sprinkler leakage insurance (in connection only with fire contracts made by the company), weather insurance and hail insurance; or

(c) Accident insurance, sickness insurance, plate glass insurance, steam boiler insurance and hail insurance; or

(d) Guarantee insurance, bond insurance, credit insurance and burglary insurance.

Certain other combinations of classes are also permissible, but no license will be granted to a company tu carry on the business of life insurance in combination with any other branch of insurance saving only accident or sickness.

License condition precedent to commencing business.

The Insurance Act further enacts, as a condition precedent to any insurance company commencing business or issuing policies covering any of the above specified risks, that it shall be licensed annually (*d*) by the Minister of Finance to carry on the particular class of insurance business which it professes to transact. But no license will be granted to a company to carry on the business of life insurance in combination with any other branch of insurance, except accident or sickness (*dd*).

Conditions precedent to grant license.

Chitty, 665—666.

Sects. 12, 13, 14 and 15 of the statute provide that every company carrying on the business of *life insurance* and every company carrying on the business of *fire insurance* shall, before the issue of such license, deposit with the Minister of Finance sums of $50,000 and $100,000 respectively in securities (to be estimated at their market value not exceeding par) of or guaranteed by the Dominion of Canada, or in securities of or guaranteed by any province of Canada, or in securities of or guaranteed by the United Kingdom or any British colony; or if such company is incorporated in any foreign country, in securities of or guaranteed by the government of such country.

The only exception to the above-stated requirement of deposit is in the case of a company incorporated elsewhere than in Canada, whose stock is at a premium of twenty per cent., and which, having been successfully established for at least five years, has a paid-up capital of at least $300,000 if authorised, among other classes of business, to transact the business of fire insurance, and of at least $100,000 if not so authorised, and in either case also holds over and above all liabilities . . . a rest or surplus fund of at least twenty per cent. of such paid-up capital (*e*).

Primary object of insurance legislation.

As the initial object of insurance legislation throughout the Dominion is the protection of the assured, the Act, in furtherance of this policy, also provides (*f*) for an annual statement of the company's accounts made up to the 31st of December in each year, and in the case of life insurance companies, whether Canadian or foreign (*g*), for a half-yearly statement of securities, and also once in five years for a valuation of all the life policies issued by the company (*h*). The statute also enacts (*i*) that in the event of the assets of an insurance company becoming insufficient to justify its continuance in business, the Governor in Council may suspend or cancel the license of such company, and thereupon

(*d*) The license expires on the 31st of March in each year.

(*dd*) Sect. 8.

(*e*) If the company has been established for a lesser period than five years, it must have been successful in its business, and have a paid-up capital of at least $500,000

(*f*) Sect. 30.

(*g*) Sect. 31.

(*h*) Sect. 42.

(*i*) Sect. 41.

"such company shall, during such suspension or cancellation, be held to be unlicensed and unauthorised to do further business."

Clauses to be inserted in life policies.

It is further enacted by sect. 95 of the Insurance Act, 1910, in the case of life policies, that:—

On and after the first day of January, 1911, no policy of life insurance shall be delivered in Canada by any company licensed under this Act until a copy of the form has been mailed by prepaid registered letter to the Superintendent (of Insurance), and unless it contains in substance the following provisions:—

Days of grace for payment of premiums.

(a) That the insured is entitled to a grace of thirty days within which the payment of any premium, other than that of the first year, may be made, subject at the option of the company to an interest charge not in excess of six per cent. per annum for the number of days of grace elapsing before payment of the premium, during which period of grace the policy shall continue in full force; but in the event of the policy becoming a claim during the said period of grace, and before the overdue premium or the deferred premiums, if any, of the current policy year are paid, the amount of such premiums with interest on any overdue premium may in settlement of the claim be deducted from the sum insured.

Active service in militia.

Notice.

(b) That the insured may, without the consent of the company, engage in the active service of the militia of Canada, *notice* thereof, however, to be given by or on behalf of the insured to the company within ninety days after the date of his so engaging in such service, and such extra premium to be paid during the continuance of such service as the company shall fix in pursuance of the terms of the policy.

Incontestability after two years.

(c) That, subject to the provision of paragraph (e) (*infra*) of this sub-section, the policy shall be incontestable after not later than two years from its date, except for fraud, non-payment of premiums, or for violation of the condition of the policy relating to engaging in military service (other than such as mentioned in the next preceding paragraph) or naval service in time of war without the consent in writing of a duly authorised officer of the company.

Policy and indorsement to constitute entire contract.

(d) That the policy and endorsement thereon shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of

fraud, be deemed representations and not warranties (*j*), and that no such statement shall be used in defence to a claim under the policy unless it is contained in a written application and a copy of such application, or such parts thereof as are material to the contract, shall be endorsed upon or attached to the policy when issued

Age inaccurately stated.

(e) That if the age of the insured has been understated, the amount payable under the policy shall be such as the premium would have purchased at the correct age.

Surrender values.

(f) The options as to surrender values, or paid-up insurance, or extended insurance, to which the policy-holder is entitled in the event of default in a premium payment after three full annual premiums have been paid

Rate of annual interest and amount of loan to be granted by company on security of policy.

(g) That after three full annual payments, or their equivalent half-yearly or quarterly premiums, have been paid on a policy the company shall loan on the sole security thereof, at a rate of interest not exceeding seven per cent. per annum, a sum not exceeding ninety-five per cent of the surrender value of such policy, less any indebtedness to the company in respect thereof; such policy being first deposited with and assigned to the company by an assignment executed by all proper parties . . .

Proviso.

Provided, however, that such loan may, at the option of the company, be deferred for a period not exceeding three months from the time the policy-holder applies therefor.

Table of surrender and loan values.

(h) A table showing in figures the surrender and loan values, and the options available under the policy each year upon default in premium payments, until the end of the twentieth year at least of the policy, beginning with the year in which such values and options first became available; the surrender and loan values may be shown on the basis of $1,000 of insurance, and the loan values may be shown as a percentage of the surrender values.

Table of instalments.

(i) In case the proceeds of a policy are payable in instalments or as an annuity, a table showing the amounts of the instalment and annuity payments.

Proviso for renewal of policy.

(j) A provision that the holder of the policy shall be entitled to have the policy reinstated at any time within two years from date of lapse, unless the cash value has been

(*j*) As to the difference between "representations" and "warranties," see *ante*, p. 67.

duly paid, paid-up insurance granted, or the extension period expired, upon production of evidence of insurability satisfactory to the company (*k*), and the payment of all overdue premiums and any other indebtedness to the company upon the said policy with interest at the rate of not exceeding six per cent. per annum, compounded annually from the date of lapse.

Any of the foregoing provisions or portions thereof not applicable to single premium, or non-participating, or term, or annuity policies shall to that extent not be incorporated therein. Cases in which the above provisions may be varied or excluded.

(2) This section (95) shall not, except as relates to the filing with the Superintendent (of Insurance) of copies of forms of policies, apply to assessment companies, nor to policies of industrial insurance.

The following decisions relative to insurance business have been selected as illustrating certain general principles relating to this particular class of contractual obligations:—

### *Insurance.*

The contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (save when bonuses are given) the same on the other. This species of insurance in no way resembles a contract of indemnity. But, on the other hand, policies of assurance against fire and against marine risks are both properly contracts of indemnity—the insurer undertaking to make good, within certain limited amounts, the losses sustained by the assured by reason of the partial or total destruction of their buildings, ships and effects (*l*). Nature of contract of life insurance Chitty, 669.

In all contracts of insurance good faith on the part of the assured and full disclosure by him of all facts material to the risk are conditions precedent to the liability of the insurer attaching. And, *à fortiori*, this is the case in a contract of life insurance.

(*k*) The company is bound to exercise this discretion in a judicial manner. P.

(*l*) *Dalby* v. *India and London Life Assurance Co.* (1854), 15 C. B. at p. 387 (an English case).

*Uberrima fides* essential. Chitty, 669.

But although *uberrima fides* is a fundamental principle of the contract of life insurance, nevertheless the rule of construction is that the language of the warranty being framed by the insurers themselves, the warranty must be read in the sense in which the person who was required to sign would reasonably understand it. Where, therefore, in a proposal for a policy of life assurance the applicant truly stated the number of existing policies of life assurance upon his life, but omitted from the list two policies of accident insurance, it was held that the omission was not such as to avoid the policy, there being a fundamental difference between an absolute life policy and a conditional policy which could only become operative and usable upon should the assured die by accident (*m*).

Insurable interest. Chitty, 669.

It is, however, a necessary condition to the validity of a policy of insurance that the person effecting the same should have an insurable interest in the person or thing insured. And where an insurance company asks the cancellation of a policy on the ground of lack of insurable interest or of fraud or misrepresentation by the insured, the equitable rule that they cannot get relief without returning the premiums paid by the insured is of general application. But where, in the absence of guilty participation by the company, a policy is cancelled upon the ground that it constitutes an immoral agreement contrary to public policy a distinction should be made, and the company should not be ordered to return the premiums, as in such case the insurance company is acting in the public interest as well as in its own (*n*).

There is, moreover, an implied condition in the case of life insurance that if an assured person voluntarily places himself in a position where, from the surrounding circumstances, a person of ordinary prudence would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such an act.

But the above general proposition is subject to certain limitations, as, for instance, an attempt on the part of the assured to save life would not avoid the policy, because voluntarily to assist in the rescue of a ship's crew in a stormy sea, or to endeavour to save the lives of passengers on a burning ship is not so much a voluntary exposure to unnecessary danger as the performance of an obligation arising out of the duty which an individual owes to that human race of which he is a unit (*o*).

(*m*) *Metropolitan Life Ins. Co.* v. *Montreal Coal and Towing Co.* (1904), XXXV. S. C. R. 266.

(*n*) *Brophy* v. *N. American Life Ins. Co.* (1902), XXXII. S. C. R. 261.

(*o*) See *Canadian Railway Accident Co.* v. *McNevin* (1902), XXXII. S. C. R. 194, at p. 206.

Effect of incontestable clause in policy.

And where a clause in an insurance policy provides that "after being in force three years the only conditions which shall be binding upon the holder of the policy are that he shall make the payments hereon as herein provided, and that the provisions as to military and naval service, proofs of age and death, and limitation of time for action or suit shall be observed. In all other respects after the expiration of the said three y[illegible] the liability of the company under this policy shall not b[illegible]ted," it has been held that the effect of such an "incontes[illegible]" [illegible] to provide an automatic cutting off at the end [illegible] all defences arising after the coming in[illegible] except such as are reserved in the cl[illegible] probably, of all defences arising out o[illegible] material statement made in the applic[illegible].

Effect of payment of renewal premium.

Where the receipt for a renewal premi[illegible] handed over to the assured by a duly authorised ag[illegible] upon the assured paying him part of the premium [illegible] and giving a note for the balance, there is evidence [illegible] the jury as to whether or no the premium was in fact paid by the assured (*q*). But where upon the renewal premium becoming due the assured, without receiving a formal receipt, gave the agent of the insurance company a note therefor, with interest, which note, upon maturity, was not paid in full, but was as to part replaced by a second note which remained unpaid at the death of the assured, and the agent, with the privity of the assured, at no time remitted the amount of the premium to the company of which he was the representative, but paid it in to his own banking account, it was held that the transactions between the assured and the agent did not constitute a payment of the premium, and the policy lapsed on default to meet the first note when it became due (*r*).

Death of assured within days of grace.

Where, however, it is one of the conditions of a policy of life assurance, the annual premiums for the renewal of which are payable by instalments, that the assured shall be allowed thirty days of grace for the payment of such renewal premiums if he be unable to pay them when due, the fact that the assured dies after the premium becomes due, but before the days of grace have expired, does not avoid the policy, provided the premium be paid by his personal representative within the days of grace, and the insurer

(*p*) *North American Life Assurance Co.* v. *Elson* (1903), XXXIII. S. C. R. 383.

(*q*) *Manufacturers' Accident Ins. Co.* v. *Pudney* (1897), XXVII. S. C. R. 374.

(*r*) *Hutchings* v. *National Life Ins. Co.* (1905), XXXVII. S. C. R. 124.

is estopped from setting up the plea of non-payment of premium as a defence to the claim under the policy (*s*).

Where, however, conditions endorsed upon a policy of life insurance make such policy not simply a covenant to pay the sum insured thereby upon the death of the person assured, but merely a covenant to pay upon proof being tendered of a valid claim under the conditions endorsed on the policy, strict proof not only of the death of the insured person, but also of compliance with the terms endorsed on the policy, is a condition precedent to recovery of the sum assured (*t*).

**Devolution of proceeds of life insurance policy.**

Where by reason of an error, which was unknown to the assured, the name of the beneficiary mentioned in the application for insurance was omitted in the policy, it was held, nevertheless, that such beneficiary was entitled, the benefit of the insurance enuring to him, and not falling into the general estate of the deceased person (*u*).

**Devolution in case of unworthy beneficiary.**

The proceeds of a life policy from the succession to which an unworthy beneficiary has been excluded enure to the benefit of the next of kin of the deceased, nor will the fact that the original beneficiary (who was excluded) murdered the assured discharge the insurer from liability upon the policy toward the legal representatives of the insured (*x*).

### *Fire Insurance.*

**Conditions in policies. Chitty, 668.**

Where it is one of the terms contained in a policy of assurance against fire that the applicant for insurance shall disclose to the insurers all material facts relating to the risk, and that the statements so made shall constitute the basis of the liability of the company and a part and a condition of the insurance contract, the wilful suppression or misrepresentation, whether fraudulent or not, of a material fact avoids the policy *ab initio*, and renders the insurance of no force in respect of the property in regard to which the misrepresentation or omission is made; and, in such case, the payment of a renewal premium in respect of a policy which was void *ab initio* does not cure the original misrepresentation so as to substitute a new contract or obligation in place of the earlier payment of premium which had become void by effluxion of time. The effect of such second or subsequent annual payment being

(*s*) *People's Life Ins. Co.* v. *Tattersall* (1906), XXXVII. S. C. R. 690; and see sect. 95 of the Insurance Act, 1910 (sub-s. (a)).

(*t*) *Home Life Association of Canada* v. *Randall* (1899), XXX S. C. R. 97.

(*u*) *Cornwall* v. *Halifax Banking Co.* (1902), XXXII. S. C. R. 442.

(*x*) *Standard Life Offices* v. *Trudeau* (1900), XXXI. S. C. R. 376.

merely to give the renewal receipt therefore efficacy in so far as there was a prior valid contract in existence. It does not constitute, and was never intended to constitute, a novation, for a novation presupposes an original valid contract, and where there never was a valid contract the payment of a subsequent premium cannot be a renewal of it (*y*).

In cases of claims for return of premiums paid for insurance the general rule is that when once the risk attaches there shall be no return of premiums (*z*).

Conditions in policies.

A condition endorsed on a policy of fire insurance to the effect that if the application be referred to in the policy it would be held a term of the contract constitutes the application a warranty by the assured of the circumstances therein stated; consequently, if any false representation of a material fact be made in such application it avoids the policy, and operates as a bar to the recovery of the amount assured in case of loss (*a*).

Conditions in policies.

A condition in a policy of insurance that notice of a loss shall be given within a certain specified number of days is a condition precedent to an action on the policy (*b*).

Nor can compliance with such a condition be waived unless such waiver is clearly expressed in writing signed by the person specifically mentioned in the condition as the party authorised to grant such waiver; nor is the acquiescence of a local agent or of "an adjuster" sent for the purpose of investigating the loss effectual to waive the condition (*c*).

Conditions in policies.

But a condition in a policy of fire insurance that the insured shall forthwith give notice to the company of any other insurance being effected on the same property is not broken merely by the assured applying for a further assurance on the same property, as the condition does not apply until the applicant for insurance has received notice from the second insurance company that they have accepted the risk and will insure him against it. Where, therefore, insured premises were destroyed by fire upon the day when the risk was accepted by the second insurance company, and the assured did not receive notice of such acceptance until after

(*y*) *Liverpool, London and Globe Ins. Co.* v. *Agricultural Savings and Loan Co.* (1903), XXXIII. S. C. R. 94; compare *North American Life Assurance Co.* v. *Elson* (1903), XXXIII. S. C. R. 383.

(*z*) *Tyrie* v. *Fletcher* (1777), 2 Cowper, 666; *Bermon* v. *Woodbridge* (1781), 2 Douglas, 781.

(*a*) *The Norwich Union Fire Ins. Co.* v. *Le Bell* (1899), XXIX. S. C. R. 478. Compare statutory rule in the case of life policies contained in sect. 95, para. (d) of the Insurance Act, 1910.

(*b*) *Employers' Liability Assur. Co.* v. *Margaret G. Taylor* (1898), XXIX. S. C. R. 104; *Atlas Ass. Co.* v. *Brownell* (1899), XXIX. S. C. R. 537.

(*c*) *S. C.*; *Commercial Union Assce. Co.* v. *Margeson* (1899), XXIX. S. C. R. 601. As to questions material to a risk, see *Western Assurance Co.* v. *Harrison* (1903), XXXIII. S. C. R. 173.

the loss, it was held by the Supreme Court of Canada that there was no such breach of the condition as to avoid the first policy (*d*).

Conditions in policies.

It has also been decided that a condition in a policy of fire insurance excluding liability "for loss or damage occurring while gasoline is stored or kept on the building insured" connotes something in the nature of dealing in such articles or having a store-house therefor. Consequently, such a condition does not apply in the case of a fire caused by a small quantity of gasoline in a stove which was being used for cooking purposes, no other gasoline being in the building (*e*).

Conditions in policies.

But, apparently, a variation from a provincial statutory condition, or an addition thereto, is not necessarily *primâ facie* unjust and unreasonable, especially if such variation is introduced in the policy as a consideration for a reduced premium (*f*).

Rules governing the amount of compensation.

The amount of compensation recoverable by an assured in case of loss by fire is not necessarily limited to his own interest in the chattel or realty destroyed thereby if, when the insurance was effected, he intended to protect others having an insurable interest therein (*g*). Nor, apparently, in the absence of an express condition, need the fact that the insured is not the sole owner be stated in the policy or disclosed to the insurer (*h*).

Limited interest of insurer.

Chitty, 668, 669.

As to the governing principle, it is a matter of general knowledge, alike in marine and fire insurance, that a person who has a limited interest may, nevertheless, insure on the total value of the subject-matter of the insurance, and may recover the whole value subject to these two provisoes, viz.:—

(a) The form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and

(b) He must intend to insure the whole value at the time of effecting the insurance.

Because when once the insurance is effected he cannot recover the entire value unless he intended to insure the entire value; and whether or no there is sufficient evidence of such intention to justify the recovery of the entire value is a proposition the answer to which must be deduced from the whole circumstances attendant upon the insurance.

(*d*) *Western Assurance Co.* v. *Temple* (1901), XXXI. S. C. R. 373; *Commercial Union Assurance Co.* v. *Temple* (1898), XXIX. S. C. R. 206.

(*e*) *Thompson* v. *Equity Fire Ins. Co.*, [1910] A. C. 592, P. C.

(*f*) *Eckardt & Co.* v. *Lancashire Ins. Co.* (1900), XXXI. S. C. R. 72.

(*g*) *Keefer* v. *The Phœnix Ins. Co. of Hartford* (1901), XXXI. S. C. R. 144.

(*h*) See *Western Assce. Co.* v. *Temple* (1901), XXXI. S. C. R. 373.

A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interests of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy, but he can only hold for so much as he has intended to insure. Or, to take an illustration which may, perhaps, more exactly elucidate the argument, imagine the case of a mortgagee: if he has the legal ownership he is entitled to insure for the whole value; but even supposing he is not entitled to the legal ownership he is, nevertheless, entitled to insure *primâ facie* for all. If he intends to cover his mortgage alone and is only insuring his own interest, he can only in the event of a loss recover the amount to which he has been dammified, but if he has intended to cover other persons beside himself he can hold the surplus for those whom he has intended to cover.

### *Marine Insurance.*

Method of estimating a constructive total loss.

Chitty, 666.

In determining whether a ship seriously damaged by perils insured against can be treated as a constructive total loss the rule may thus be stated:—

If the ship is actually lost by a peril of the sea . . . the assured may call it a total loss. If she sustains damage to such an extent that she cannot be repaired at all, that also is a total loss.

It may be that the injury sustained by the ship is irreparable with reference to the place where she is: for instance, the ship may have met with the disaster at a place where no workmen of requisite capacity are to be met with, or where the materials necessary for reparation are not to be found, so that to repair her there is altogether impracticable; and in such case the loss would also be a total loss.

But, short of that, it may be that it may be physically possible to repair the ship, but at an enormous cost; and there also the loss would be total, for, in matters of business, a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible by some very expensive contrivance to recover it. So if a ship sustains such extensive damage that it would not be reasonably practicable to repair her, seeing that the expense of repairs would be such that no man of common sense would incur the outlay, the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do arises. How[illegible]r damaged the ship

may be, if it be practicable to repair her so as to enable her to complete the adventure she is not totally lost.

In such circumstances, the ordinary measure of prudence which the Courts have adopted is this: If the ship when repaired will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss.

Where, therefore, in an action on a marine policy of assurance covering damage resulting from "total loss of the vessel," in which it was found by the jury in the Court of first instance that the ship and cargo had been practically, if not completely, submerged, and that there had been an actual total loss of the cargo, it was decided by the Privy Council that the verdict of the jury amounted to a finding of a total loss within the meaning contemplated by the policy and, therefore, that the insurers were liable (*i*).

## RE-INSURANCE.

Contracts of insurance.

Where a contract of reinsurance is engrafted on an ordinary printed form of fire insurance policy and incorporates *all* its terms a particular term contained therein which is inappropriate to a contract of reinsurance, although appropriate to one of ordinary insurance, may be deleted from the policy if by so doing the obvious intention of the parties when entering into the contract may thereby be effectuated.

Where, therefore, a contract of reinsurance contained a clause prohibiting legal proceedings after a limited period, it was held by the Privy Council that such clause might be deleted, as its retention would operate so that an honest claim might be defeated without any default or delay on the part of the insured owing to unavoidable difficulties or complications over which he had no control, or possibly in consequence of some dilatory proceeding prompted by the very person in whose favour time was running (*k*).

(*i*) *Montreal Light, Heat and Power Co.* v. *Sedgwick*, [1910] A. C. 598, P. C.

(*k*) *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Ins. Co.*, [1907] A. C. 59, P. C.

# CHAPTER XXV.

## Contracts of Bailment.

Chitty, 157—534.


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Although a bailee for hire or reward is not an insurer of the goods bailed, nevertheless, as the undertaking is for reward, there is raised, by reason of the compensation, a legal obligation to exercise the same degree of care towards their preservation from injury or destruction as might reasonably be expected from a skilled store-keeper acquainted with the risks to be apprehended either from the character of the store-house itself or of its locality or of the commodity which is the subject of the contract. This obligation includes not only the duty of taking all reasonable steps to obviate risk of loss to the owner of the goods, but also a positive duty to adopt proper measures of precaution for

Chitty, 467—475.

Nature of contract.

their protection when such risks are imminent or have actually occurred.

**Measure of responsibility.**

It would, moreover, be a dangerous doctrine, and quite unsupported by authority, to hold that a bailor or depositor of goods for safe custody, who, either by himself or by his servants, has had an opportunity of observing certain defects in the store-house, must by reason of such opportunity be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him and not by the paid bailee.

Nor are the authorities relating to the much discussed maxim, *Volenti non fit injuria*, more relevant to the law of bailments than are those decisions that public bodies are not liable to individuals for mere non-feasance applicable to cases where the public body as bailee is under contract with an individual bailor for remuneration (*a*).

**Warranty of capacity.** Chitty, 467, 468.

Moreover, where goods are entrusted to a bailee for the performance of some act of preservation, reparation or manufacture in connection with them, to which the custody is merely ancillary, their acceptance by the bailee amounts to an implied warranty of capacity and skill adequate to the due achievement of the object for which the goods were entrusted to him.

**Effect of inherent vice.**

But even in such cases, apart from a very special contract, the bailee is not liable for losses caused by some inherent natural infirmity or vice in the chattel or thing of which he was not aware when he entered into the contract. Thus, where goods are consigned to a carrier for the purposes of transit "the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases" (*b*).

*Charrest* v. *Manitoba Cold Storage Co.* discussed.

Probably upon this principle, or upon an amplification thereof, was based the decision of the Supreme Court of Canada in the unsatisfactory case of *Charrest* v. *Manitoba Cold Storage Co.* (*c*), in which the material facts were as follows:—A cold storage com-

(*a*) *Brabant* v. *King*, [1895] A. C. 632, P. C. (Queensland).

(*b*) Story on Bailments, § 492A, cited with approval in *Blower* v. *Great Western Rail. Co.* (1872), L. R. 7 C. P. 655, at p. 664 (an English case).

(*c*) (1908), 17 Man. L. R. 539, affirmed, XLII. S. C. R. 253; compare *Dunn* v. *Prescott Elevator Co.* (1902), 4 O. L. R. 103.

pany holding themselves out, to such members of the public as required their services and were prepared to pay for them, as being possessed of the requisite facilities for carrying on the business of preserving poultry, game, freshly-slaughtered butchers' meat, the carcases of animals, &c., by properly freezing them and keeping them frozen, received from the plaintiffs certain consignments of fresh beef, enclosed in wruppers, for the purpose of preserving the same by the process of cold storage and of restoring them at the end of the bailment in a merchantable condition to the owners thereof.

The meat, however, upon being examined at the bailees' warehouse prior to re-delivery at the end of the term was found to be so badly tainted and mouldy that it had to be destroyed.

Briefly, the meat was admitted, for the purposes of the subsequent action, to be fresh and free from taint when delivered to the bailees, but when re-delivered by them it was tainted and spoilt, although, it was also admitted, had it been frozen and kept frozen, as was impliedly contracted for, it would have been capable of re-delivery in a merchantable condition.

The warehouse receipt for the beef contained a clause providing, *inter alia*, that the bailees should not be responsible to the bailors "for any loss or damage caused by . . . depreciation from inherent defects, or from defects in the packages, barrels, *wrappers or coverings* in which the said goods are contained, or from any defect in the manner in which the same are put up, or from any lack of any special care or precaution by the company, or through change of temperature owing to the refrigeration plant or any part thereof becoming unworkable or out of order."

The protection given to the bailees by the above clause which was incorporated in the contract of bailment is so comprehensive as practically to shield them from responsibility, especially as it is well-established law that if a bailor and bailee agree that the goods shall be deposited on other terms than those implied by law, the duty of the bailee and, consequently, his responsibility, is determined by the terms on which both parties have agreed (*d*).

The unsatisfactory feature in this decision was not, therefore, the circumstance that by the terms of the agreement between the parties the bailees had, apart from negligence, contracted themselves out of their common law liability, but that the Court by its decision threw the *onus* of proving negligence, that is, of showing how the chattels were rendered unfit for human consumption, upon

(*d*) *Harris v. Great Western Rail. Co.* (1876), 1 Q. B. D. 515, Lord Blackburn, at p. 530 (an English case).

the wrong party (*e*); it being clear law that in cases where chattels entrusted to a bailee are lost, injured, or destroyed, the *onus* of proving negligence is not on the bailor at all; it lies on the bailee to show clearly and plainly that the injury, loss or destruction did not happen in consequence of his neglect (*f*) to use due and proper care and precaution (*g*), and if he fail to discharge this obligation to the satisfaction of the Court the bailor who has lost his goods, and not the bailee who has failed in his undertaking, is entitled to the verdict (*h*).

Agistment. Chitty, 468.

In contracts of agistment the degree of diligence to be exercised by the agister is that which a diligent and prudent man would take of his own property (*i*). Therefore, in order to avoid actionable liability, the place of custody must be secure against the ordinary accidents incident to the property to be preserved. The grazing field should be properly safeguarded against the escape of the cattle, and must be free from pitfalls and dangers which may lame and injure them (*k*). The livery-stable or barn must be wind and water-tight and of adequate size for the reception of the cattle housed therein (*l*). A failure in these respects will expose the agister to a claim for the damage occasioned by his fault.

Unsolicited bailments. Chitty, 459, 460.

In the case of unsolicited bailments or involuntary deposits the *quantum* of diligence to be exercised by the bailee is, in the former case, an almost negligible quantity. Thus, if a trader-man, without invitation, forward a sample of his wares to another person, the recipient owes little or no duty towards the sender either to preserve the commodity thus entrusted to him or to return it; the most that can be expected of him is to notify the sender that he has received the goods, and to request that he will forthwith remove them, and should he fail so to do the bailee is thereforward discharged from further responsibility.

Involuntary deposits.

In the case of involuntary deposits the bailee, whether he be a finder of lost goods or the recipient by mistake of goods intended for another, is, apparently, bound to exercise ordinary diligence in their preservation, although until he actually meddles with them he is under no responsibility to their owner, or, in the words of

(*e*) Compare *Dignac* v. *Woodburn* (1906), Q. R. 29, S. C. 431.

(*f*) *Gremley* v. *Stubbs* (1908), 39 N. B. Rep. 21.

(*g*) In the case of *Cie. de l'Union des Abattoirs de Montreal* v. *Leduc*, proof by the defendants that they had not been guilty of negligence was held insufficient to absolve them from liability (1900), Q. R. 10 K. B. at p. 292).

(*h*) *Reece* v. *Palmer* (1858), 5 C. B. (N. S.) 84; *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T. L. R. 49; *Brentwell* v. *Westrop* (1906), 11 W. L. R. 372.

(*i*) *Nadon* v. *Proulx* (1904), Q. R. 26 S. C. 384.

(*k*) Wyatt Paine on Bailments, p. 87.

(*l*) *McLenaghan* v. *Hood* (1905), 1 W. L. R. 422; 25 Occ. N. 19.

Bulstrode (*m*): "He who finds goods is bound to answer him for them who hath the property, and if he deliver over to any one, unless it be unto the right owner, he shall be charged with them, for at the first it is in his election whether he will take them or not into his custody, but when he hath them one only hath then the right unto them, and therefore he ought to keep them safely" (*n*).

Banks as bailees of their customers' valuables. Chitty, 648—656.

The law as regards the measure of responsibility of a bank for the safe custody of valuables entrusted to it by its customers is in a very unsatisfactory condition, and needs a pronouncement of the highest judicial tribunal of the Empire satisfactorily to settle it.

The following paragraphs represent the considered views of the author of the present treatise upon the question, and are reproduced from his work on Bailments (*o*).

The responsibility of a bank for the safe custody of securities deposited with it (not in the ordinary course of business, but in a special manner for the convenience of its customers) raises questions of the highest importance, not only to the persons thus depositing their securities or valuables for safe custody, but also to the banks accepting such deposits for the convenience of those having dealings with them. It has been held in several cases that the bank is a gratuitous bailee in respect of such custody, and is, therefore, to be held responsible only for such a degree of ordinary diligence as a reasonably prudent man would take of his own property of a like description. But if one consider the exact relationship existing between a bank and those from whom it accepts a deposit, it would appear that only by straining the definition of a gratuitous bailee to meet the requirements of this particular case can it be regarded as a custodian without reward in any true sense of the words.

A bank does not accept deposits for safe custody from every one who applies to it to do so; they are always received by it from a class, and that class consists exclusively of those persons who deal with it in the course of its ordinary business. It is true that it probably discriminates even among the persons constituting this class, nor does it necessarily follow because a man has an account at a bank that the bank is bound to take charge of any valuables which he may choose to deposit with it. Were it so, it would be obvious that the bank, in connection with such deposits, was not a gratuitous bailee; for if the mere fact that the

(*m*) 2 Buls. 312.

(*n*) Compare *Coventon* v. *Dominion Express Co.* (1906), 16 Man. L. R. 563.

(*o*) Wyatt Paine on Bailments, p. 19 *et seq.*

relationship of bank and customer raised an obligation on the part of the former to render a particular and well defined service to the latter whenever he asked it to do so, without any power of refusal on the part of the bank, so long as the customer dealt with it, it would necessarily show that the safe custody of valuables formed part of the consideration upon which the customer undertook to deal with the bank, and consequently, that the bank could not in any sense of the word be regarded as a mere gratuitous depositary.

But even assuming a discretionary power on the part of the bank, whenever such an entity undertakes the safe custody of valuables for its client it is, as has been shown, a condition precedent to such undertaking on its part that the depositor should be a customer; and though in most of the cases in which it has been sought to make the bank liable for loss, the Court by its decision has discriminated between the relationship existing between bank and customer and that existing between depositor and depositary, it is submitted that the distinction is a highly artificial one, if it really exist at all, as the two capacities are inseparable.

It should, moreover, be remembered that although the consideration for the safe custody of the valuables is not actually received in the form of rental, nevertheless an indirect remuneration, sufficient to take this particular form of deposit out of the category of gratuitous bailment altogether, is afforded by the profit accruing to the depositary from the relationship of bank and customer which invariably exists between the parties at the time when the deposit is made.

## CONTRACTS OF CARRIAGE.

Definition of common carrier.

Chitty, 481.

A person who by the nature of his undertaking holds himself out as being willing to carry the goods of all persons indifferently for reward is a common carrier, and as such is subject to whatever liabilities and exemptions attach to individuals acting in that capacity alike under the law of the Dominion of Canada and of Great Britain; that is to say, such a person is an insurer of the goods which he carries, and consequently is liable to make good all losses, save those caused by the act of God, the King's enemies, or inherent vice in the thing carried (*a*). He is, moreover, liable to an action at common law for refusing to carry on any terms short of unlimited liability qualified only by the two exceptions above specified (*b*).

(*a*) *Seymour* v. *Sincennes* (1869), 1 Rev. Leg. 715.

(*b*) *Leonard* v. *American Express Co.* (1867), 26 U. C. Q. B. 533.

Quantum of liability. Chitty, 484

**Again, as to the *quantum* of liability, the broad principle involved in a contract of carriage, which has been so long and so consistently invoked in the interpretation of contracts with carriers by sea as well as by land, is that words of general exemption from liability are only intended, unless the words are clear, to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants (*c*). The exceptions in a bill of lading are not intended to excuse the carrier from the obligation of bringing due skill and care on the part of himself and his servants to bear both upon the stowing and upon the carrying of the cargo.**

Even in cases within the exceptions the ship-owner is not protected if default or negligence on his part or that of his servants has contributed to the loss. It is, therefore, the duty of the ship-owner, by himself and his servants, to do all he can to avoid the excepted perils, or, in other words, the exception limits the liability, not the duty.

And, *à fortiori*, conditions inserted in a bill of lading will not relieve the carrier from liability to the owner of the goods in cases where the former is guilty of some overt illegal act during the transit by reason of which the latter sustains loss (*d*).

*Nature of Contract of Common Carrier and of Express Company*

Carriage of perishable goods. Chitty, 503.

The contract entered into by an express company, who are themselves common carriers (*e*), for the carriage of perishable goods to a specified address is an undertaking to forward the same to the point nearest to the ultimate destination by fast train, and it is further implied that a safe and rapid transit will be furnished by the company for the whole distance. Therefore, if in breach of this contract the goods are unduly delayed by being transferred to a freight train the company are liable for any damages attributable to such a deviation from the usual and proper method of forwarding the goods.

Nor will a special clause in the receipt, providing that the company shall "not be liable for loss or damage for any cause whatever, unless it be proved to have occurred from the . . . gross negligence of the company or its servants," help the situation, as, according to well settled rules of liberal construction in carriers' cases, the agencies they employ for the transaction of their business (whether independent lines of rail or not, are all

(*c*) *Farr* v. *Great Western Rail. Co.* (1874), 35 U. C. Q. B. 534.

(*d*) *Wilson* v. *Canadian Development Co.* (1903) XXXIII. S. C. R. 432.

(*e*) *Dominion Express Co.* v. *Rutenberg* (1908), Q. R. 18 K. B. 50.

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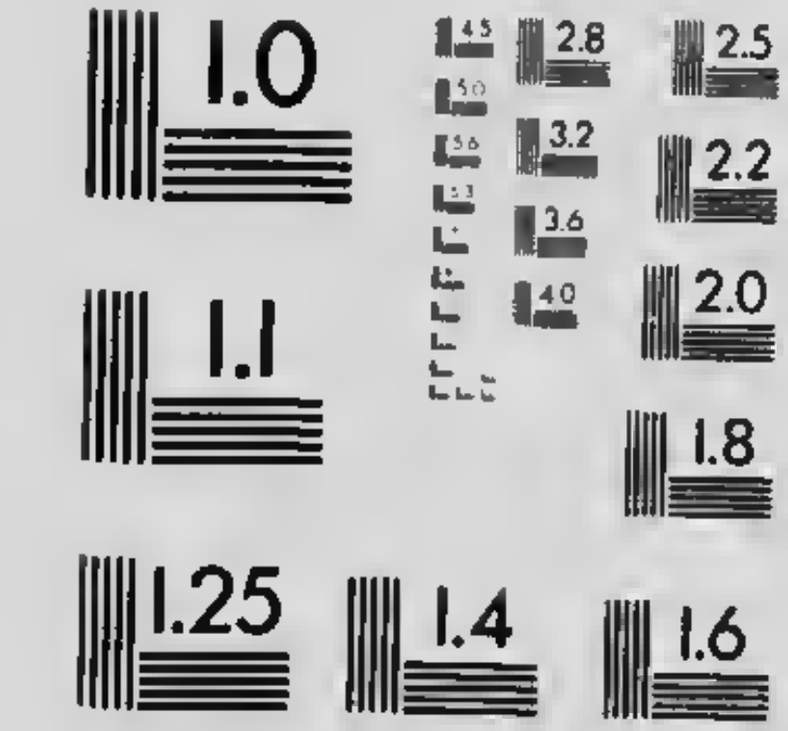


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accounted employees, agents or servants of the contracting company: consequently, every person who, either directly or indirectly is employed by a company as a carrier to do that which the company have engaged to do by themselves, or by others under them, is a servant of the company, and any act of negligence committed by such servant relates back and renders the contracting company immediately responsible for such act (*f*).

*Scienter* of carrier. Chitty, 12th, 880, 881.

Moreover, if at the time when goods are consigned for transit the consignor informs the carrier of the object for which such goods are despatched, the principle is now settled that whenever in this way the object of the sender is brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object (*g*). Therefore, "where it is part of the common knowledge of the contracting parties that the goods are wanted for a particular market or for a particular season, at which they will command a special price, or to fulfil a special sub-contract, damages for loss of such market, season or sub-contract may be recovered" (*h*).

Consequential damages.

And this rule as to damages, which is of general application to common carriers by sea or land, was adopted in *Courian* v *Richelieu and Ontario Navigation Co.* (*i*), in which it was held that carriers, whether by land or water, are bound to make speedy delivery upon the arrival of the goods at the place or port of destination, and if, owing to negligence, such speedy delivery is not made they are liable in damages to the owners of the goods: and further, that the terms of a bill of lading do not empower carriers to deliver at their convenience or shield them from the consequences of their own negligence.

But although, in accordance with the above-stated principles, a carrier is responsible not only for the value of the goods, but also for consequential damages in cases where the probable losses resulting from delay were communicated to him or his agents by the consignors, the converse of this rule applies when he is not informed that loss would result from delay at the time when he accepted the goods for transmission (*k*). Nor is a carrier who receives goods in order to forward them by other carriers responsible for damage

(*f*) *James* v. *Dominion Express Co.* (1907), 13 O. L. R. 211.

(*g*) *Rould* v. *Smith* (1901), 40 N. S. Rep. 291.

(*h*) Scrutton on the Merchant Shipping Act, 1894.

(*i*) (1908), 6 E. L. R. 229.

(*k*) *Black* v. *Canadian Express Co.* (1909), Q. R. 36 S. C. 493; *Clarke* v. *Holliday* (1911), Q. R. 39 S. C. 499; see also *Ram* v. *Boston and Maine Rail. Co.*, *infra*.

or delay resulting from congestion of traffic on the lines of such other carriers (*l*).

Act of God. Chitty, 459–553.

In the case of loss occasioned by the act of God (which has been defined as "such a direct and violent and sudden and irresistible act of Nature as could not by any amount of ability have been foreseen, or, if foreseen, could not by any amount of human care or skill have been prevented" (*m*), whenever a doubt arises as to the facts of a case alleged to come within this category, it is the province of a jury to determine whether the loss is rightly to be ascribed to the act of God or to the negligence, unskilfulness or wilful default of the carrier (*n*).

Unjust discrimination. Chitty, 483, 506.

It was at one time held that a common carrier, though bound to carry for all, might, in the matter of charges, discriminate amongst his customers, and thereby penalise such among them as were engaged in active opposition to himself, apparently upon the ground that such a person was not a common carrier of common carriers (*o*).

But the above-stated ruling, in so far as it relates to carriage by railway, is now superseded by the provisions of the Railway Act (*p*) and its subsequent amending Acts.

Difference between common and special carriers.

Not every person, however, who undertakes to carry the chattels of another for reward is a common carrier of all sorts of commodities which may be delivered to him for transit. In order to impose liability upon a person to convey particular chattels tendered to him for transport it must appear that he professes to carry such goods, for a person may be a carrier of one thing, and yet not be a common carrier of all sorts of things. Thus, for example, a lumberman agreeing to carry lumber for hire at the request of the owner thereof does not thereby become a common carrier of wheat or farm produce, or render himself an insurer of such commodities, the act of God or the King's enemies alone excepted (*q*).

Carriers and warehousemen distinguished. Chitty, 482.

Moreover, the obligation to receive and carry, and the concurrent liability of a common carrier as an insurer of the goods carried, is confined to the reception, carriage and insurance of goods actually tendered to a carrier for transport, and does not extend to goods which such a person may receive and store for a

(*l*) *Ram* v. *Boston and Maine Rail. Co.* (1911), Q. R. 41 S. C. 68.
(*m*) *Nugent* v. *Smith* (1876), 1 C. P. D., Cockburn, C. J., at p. 436 (an English case).
(*n*) *Smith* v. *Whiting* (1835), 3 O. S. 597.
(*o*) *Johnson* v. *Dominion Express Co.* (1896), 28 O. R. 203.
(*p*) 3 Edw. VII. c. 58.
(*q*) *Coombe, Cockburn and Campbell, In re* (1877), 24 Gr. 519.

customer in the capacity of warehouseman, and not of carrier (r) the responsibility in the one case being absolute, and in the other relative and subject to limitation (s).

Carriers not involuntary bailees.

And in this connection it may be well to point out that railway companies are not involuntary bailees of goods loaded on trucks or in cars in places or stations where there is a freight-house or warehouse designed for the reception of merchandise. So long as the freight remains in the cars it is usually to be regarded as freight in transit, even though the cars in which it is contained have reached their ultimate destination. This view of the law, which is especially applicable to railroad companies as common carriers of merchandise, affords a plain, precise and practical rule of duty of easy application, well adapted to the security of all persons interested. It determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; and that if, by reason of their arrival in the night or at any other time when by the usage and course of business the doors of the merchandise depôt or warehouse are closed, or from any other cause, they cannot then be delivered, or if, through any other circumstance, the consignees are not ready to receive them, it is the duty of the company to store them and to preserve them safely under the charge of competent and careful servants ready to be delivered. It is also the duty of the carriers actually to deliver the goods when duly called upon so to do by the parties authorised and entitled to receive them; and for the performance of these duties after the transit is completed and the goods are delivered from the cars the company are liable as warehousemen or bailees of goods for hire (t). The respective differences in the *quantum* of liability in these cases is aptly stated by Story in his Commentary on the Law of Bailments (tt), thus: "Suppose (which is not an uncommon case) that a person acts both as a common carrier and as a warehouseman, it sometimes becomes a matter of great nicety to decide in which character he is chargeable; for, as the responsibilities of the two characters are very different, he may in one character be liable for a loss, from which he would be exempt in the other (u). For example, a common carrier is liable for losses by fire not occasioned by inevitable casualty,

When liability of carrier is merged in that of warehouseman.

(r) *Milloy* v. *Grand Trunk Railway of Canada* (1894), 21 O. A. R. 404.

(s) *Ham* v. *McPherson* (1841), 6 O. S. 360; *Thirkell* v. *McPherson* (1844), 1 U. C. Q. B. 318.

(t) *Grand Trunk Railway of Canada* v. *Frankel* (1903), XXXIII S. C. R. 115.

(tt) (1832), sect. 446.

(u) See *Milloy* v. *Grand Trunk Rail. Co.* (1894), 21 O. A. R. 401; reversing 23 O. R. 454; *Richardson* v. *Canadian Pacific Rail. Co.* (1890), 19 O. R. 369.

whereas a warehouseman is not liable for any losses by fire unless he has been guilty of ordinary negligence."

### *Connecting Lines—Joint Tariffs (uu).*

Carriage over consecutive lines of rail. Chitty, 512, 527.

Where a railway company undertakes to carry goods to a point beyond the terminus of its own line, the contract is for the carriage of the goods from the terminus *a quo* to the terminus *ad quem*, and consequently, in such case, the other companies over whose lines the goods must subsequently pass are merely agents of the contracting company for the purpose of such carriage, and have no privity of contract with the consignor (*x*).

Therefore, an action for damage caused by the negligent fault of some one of the companies or its servants at any intermediate stage of the transit will lie only, at the suit of the owner, against that particular railway company which originally undertook the carriage of the goods to their destination, all the subsequent links in the chain of intercommunication being no more than matters of arrangement between the respective companies agreeing to furnish the requisite facilities for through traffic (*y*). This original common law liability of the carrying company for loss or damage during the whole course of the transit may, however, be limited, by special contract, to a company's own railway system; and, in such case, if the company originally receiving the goods obtain a signed agreement from the consignor that they shall be responsible only for their safe transit so long as they are being carried on their own lines, their individual liability ceases as soon as they hand them on, as agents for the consignor, to the carriers who form the next link in the chain of transit, who thereupon become liable for them to the consignor until they in their turn hand them on as his agents to yet another carrying company. And a like rule, apparently, applies in cases where the consignor himself designates the line of route and the various lines of railroad over which the transit is to be made, in which case each carrier's responsibility terminates when it hands on the goods to the next designated carrying company (*z*).

(*uu*) Sects. 333 *et seq.*

(*x*) *Grand Trunk Railway of Canada* v. *McMillan* (1889), XVI. S. C. R. 543; and see Wyatt Paine on Bailments, at p. 299.

(*y*) *Grand Trunk Railway of Canada* v. *McMillan* (1889), XVI. S. C. R. 543; *Northern Pacific Rail. Co.* v. *Grant* (1895), XXIV. S. C. R. 346; *Richardson* v. *Canadian Pacific Rail. Co.* (1890), 19 O. R. 369. As to international through traffic, see *Niagara, St. Catherine's and Toronto Rail. Co.* v. *Dary* (1910), XLIII. S. C. R. 277; *Grand Trunk Railway* v. *British American Oil Co.* (1910), XLIII. S. C. R. 311; and *Crawford* v. *Great Western Rail. Co.* (1868), 18 U. C. C. P. 510.

(*z*) *Jenckes* v. *Canadian Northern Rail. Co.* (1909), 14 O. W. R. 307.

Railway carriers' right to limit liability to their own system

Moreover, the terms of a special contract by carriers may limit the facilities for transit to their own lines of railway; and in these circumstances, if the next connecting carrier (which term is of general application and does not mean exclusively the next railway system) refuse to handle the goods and pass them on, the original recipients of the goods for transit are not liable in damages to the consignors (*a*). But, on the other hand, if the immediate cause of loss or damage to chattels in the course of transit is an initially unlawful act on the part of the carrier, such as the wilful contravention of a prohibitive statute, then, and in such case, the terms of a special contract limiting liability are unavailing to relieve him from responsibility (*b*). And a like rule avoiding limitation of liability by special contract applies where there is no privity of contract between the actual carrier and the owner of the chattels damaged in transit. Where, therefore, a consignor entrusted goods to an express company, and accepted from them a receipt limiting liability therefor to $50, and whilst such goods were in a car belonging to the express company travelling over a line of railway the goods were damaged by reason of the negligence of the servants of the railway company, it was held that the limitation of liability did not relieve the railway company from responsibility (*c*).

Discussion on "through traffic."

With regard to contracts limiting liability in cases of "through traffic," it may be remarked that in a country where railway companies receive goods for the purpose of being conveyed to places very remote and over many independent, but connecting lines, such agreements seem to be necessary and to be framed alike in the interests of the owners and of the carriers. The owners thereby secure a continuous and speedy conveyance of their goods to their final destination, while they can have little or no difficulty in determining which of several carriers is the one to be charged with a loss or damage occurring during the transit of the goods; for as the first receiving carrier is made liable until he can prove his delivery of the goods to the next, so each carrier in succession, upon delivery of goods to the one succeeding, will take the receipt of the latter for his own security and discharge from liability on the contract (*d*).

Perishable goods.

In the case of perishable goods there is, however, a sufficiently strong presumption, where a certain amount of damage is proved to have taken place during the initial stage of the transit, to fix

(*a*) *Laurie* v. *Canadian Northern Rail. Co.* (1910), 21 O. L. R. 178.
(*b*) *Rice* v. *C. P. Rail. Co.* (1910), 14 W. L. R. 635.
(*c*) *Allen* v. *C. P. Rail. Co.* (1910), 21 O. L. R. 416.
(*d*) *Lake Erie and Detroit River Rail. Co.* v. *Sales* (1896), XXVI. S. C. R. 663.

the entire responsibility upon the first carrier and to relieve subsequent carriers therefrom (*e*). And in one case where the agent of the carrier entered into a supplementary verbal contract with the consignor as to the particular description of car in which the chattels were to be transported, it was held that parol evidence to prove such a contract was admissible, although thereby the responsibility of the carrier was enhanced (*f*).

A railway company or other carrier may so by special contract limit their liability as to the amount damages to be recovered from them for negligent loss of or in to goods during the course of transit (*g*). Chitty, 501, 508–514.

Rules relating to limitation or liability by special contract.

But in order for such limitation of liability by special contract to be operative the special conditions must not only be actually brought to the notice of the consignor, or he will not be bound by them (*h*), but they must also be approved by order or regulation of the Board of Railway Commissioners of Canada (*i*). It has, however, been held that the regulation or order thus desiderated covers the whole day on which it is made. Where, therefore, by a strange coincidence, the Board of Railway Commissioners approved of a form of limitation by special contract which was adopted by a company of railway carriers upon the same day that they lost three boxes of household goods belonging to a consignor, it was held that, although the loss was possibly antecedent in point of time to the meeting of the Board, nevertheless the carriers were protected thereby (*k*).

Moreover, an interim order of the Board is operative until it be either confirmed or rescinded by a subsequent order. Where, therefore, a carrying company, with the approval of the Board, by interim order, introduced into a shipping bill a clause limiting their liability to cases in which a written notice of loss was given to the company within thirty-six hours of the happening thereof, such special contract was held binding on the consignor (*l*).

(*e*) *Côté* v. *Grand Trunk Rail. Co.* (1905), Q. R. 28 S. C. 529. As to carriage of fish, see *Matthews* v. *Can. Ex. Co.* (1910), 8 E. L. R. 28; *Vernon* v. *C. P. Rail. Co.* (1909), 12 W. L. R. 445.

(*f*) *Grand Trunk Railway of Canada* v. *Fitzgerald* (1881), V. S. C. R. 204.

(*g*) *Robertson* v. *The Grand Trunk Rail. Co.* (1895), XXIV. S. C. R. 611; *Mercer* v. *C. P. Rail. Co.* (1908), 17 O. L. R. 585; *Sutherland* v. *Grand Trunk Rail. Co.* (1908), 18 O. L. R. 139.

(*h*) *Bate* v. *C. P. Rail. Co.* (1889), XVIII. S. C. R. 697; *Lamont* v. *Can. Transfer Co., Ltd.* (1908), 19 O. L. R. 291.

(*i*) Railway Act (3 Edw. VII. c. 58), s. 340.

(*k*) *Buskey* v. *C. P. Rail. Co.* (1905), 11 O. L. R. 1.

(*l*) *Hayward* v. *Canadian Northern Rail. Co.* (1906), 4 W. L. R. 299; *Mason and Risch Piano Co.* v. *C. P. Rail. Co.* (1908), 8 W. L. R. 951; see also *Booth* v. *C. P. Rail. Co.*, 7 O. W. R. 593; 2 Can. Ry. Cas. 389; *Costello* v. *Grand Trunk Rail. Co.*, 7 O. W. R. 846.

But a validation subsequent in point of time does not relate back to an antecedent liability (*m*).

Time limits for bringing action.

And although where loss is sustained owing to the negligence of common carriers they are relieved from liability if the claim is not made in writing within the time limited by the special condition (*n*), nevertheless if the original contract of affreightment provide that they should make delivery to the holder of the bill of lading of the goods, and no one else, and there is a breach of such contract, then, and in such case, the carriers, whether by land or water, are liable for the goods, although no notice of loss may be given within the time limited, upon the ground that the relief from liability provided by the special condition could not be extended to another liability resulting from a breach of their contract to deliver the property carried to the holder of the bill of lading, and to no one else (*o*).

Nor does the limitation contained in sect. 242 (Dominion Statute, sect. 306 (R. S. C.) of the Railway Act, apply to injuries suffered through the refusal of a railway company to furnish reasonable and proper facilities for the transmission of merchandise to and from a warehouse over a private siding, upon the ground that such injury resulted from non-feasance and not from misfeasance, and, therefore, was not caused by the construction or operation of the railway (*p*).

It has, however, been decided that the terms of a special contract limiting liability in cases where such terms have been duly approved by the Board of Railway Commissioners apply not only to the railway company with whom the contract was originally made, but also all connecting lines of rail over which the transit passes, and constitute an exemption from liability for an amount exceeding the sum specified in the special contract (*q*).

Nor is a carrier liable in contract for the value of chattels belonging to a third party when carried by a passenger with his own personal luggage, although in case of negligence there might possibly be a remedy in tort (*r*).

But, on the other hand, by reason of his contract, a carrier who receives an animal for transit assumes, so long as it is in his custody, the same measure of responsibility as an owner for any

(*m*) *Mackenzie* v. *C. P. Rail. Co.* (1909), 7 E. L. R. 26.

(*n*) *Newman* v. *Grand Trunk Rail. Co.* (1910), 21 O. L. R. 72.

(*o*) *Tolmie* v. *Michigan Central Rail. Co.* (1909), 19 O. L. R. 26; and see *Mackintosh* v. *Coast Exeton, &c.* (1909), 7 E. L. R. 142 (a case of passenger's luggage being given up to the wrong person).

(*p*) *Canadian Northern Rail. Co.* v. *Robinson* (1910), XLIII. S. C. R 387.

(*q*) *Sutherland* v. *Grand Trunk Rail. Co.* (1908), 18 O. L. R. 139.

(*r*) *Cullen* v. *Canadian Southern Rail. Co.* (1909), 11 W. L. R. 341.

loss or damage which may be caused by the animal to the property of a third party (*s*).

*Contract limiting Liability to be construed strictly.*

It has been held that where a carrier seeks to limit his liability by special contract the terms of such a proviso are to be construed strictly against the carrier (*t*); and this rule as to strict construction is of general application in all cases where a common carrier endeavours to limit his liability by special contract; the initial ground for the severity of construction being that all limitations of liability by special contract are derelictions from that well known principle of the common law which makes carriers insurers of such goods as they accept for carriage, and obliges them to deliver chattels to the consignee in like condition as received. Moreover, if goods arrive at their destination in a damaged condition there is an initial presumption that such damage was caused during the transit, and therefore the carrier is responsible without proof of fault.

It may also be pointed out as an additional reason for interpreting such limitations of liability most strongly against the carrier that he himself prepares the clause stipulating for exemption (*u*).

*Unjust Discrimination and Undue Preference.* Chitty, 506.

The procedure prescribed by statute to prevent railways treating certain customers with partiality to the prejudice of other customers is very simple and effective. Starting from the fundamental proposition that all members of the public using a railway should be treated alike, it enacts that if one class of members of the public can establish that there is a difference of treatment on the part of the railway company between themselves and another class of persons, it is for the railway company to show that such difference of treatment does not constitute an unjust discrimination. They may do this either by showing that in reality it is not a preference at all, or, alternatively, they may show that there are circumstances which justify the difference in treatment and render it fair and equitable. Ordinarily, indeed, where a railway company acquires land compulsorily by virtue of statutory powers, the consideration for such acquisition is a cash payment adjusted by arbitration. But there is, apparently, nothing inherently

(*s*) *Leonard* v. *C. P. Rail. Co.* (1909), Q. R. 35 S. C. 382.
(*t*) *Sheppard* v. *C. P. Rail. Co.* (1908), 1ª O. L. R. 259.
(*u*) *Alexander* v. *C. P. Rail. Co.* (1908), Q. R. 33 S. C. 438.

inequitable or *ultra vires* of a railway company for the original owners of the acquired land to stipulate for payment in services to be rendered by the railway company instead of in money. Or, in other words, agreements for the acquisition of land are not rendered invalid by containing, as part of the consideration from the railway company, stipulations as to special rates or to easements and services over the land so acquired.

When companies may discriminate in rates.

Where, therefore, the directors of a railway system traversing various adjacent municipalities in the vicinity of Montreal covenanted with one of them that, in consideration of the municipal authority of that place allowing them to enter upon its streets and lay railway lines therein, they would charge a lower scale of passenger fares to all persons residing within the boundaries of the municipality than those demanded from the inhabitants of certain other municipalities adjoining thereto, it was held that such special rebate was not necessarily an unjust discrimination, although in order to justify against a charge of undue preference between two adjoining municipalities, it is necessary that all the circumstances connected with the cost of construction and operation of the railway should be considered, and that the conditions under which the railway obtained permission from the favoured municipality to enter upon its streets should be taken into account. And if, in all the circumstances of the case, it can be shown that the advantage gained by the railway company is no more than adequately paid for by the preference awarded in tolls, the charge of unjust discrimination must be regarded as not having been proved (*x*).

### *Government Railways.*

At one period, alike in regard to passenger and goods traffic, the Government railways of Canada enjoyed a practical immunity from responsibility for the results of either accident or negligence.

So late as 1883, in a case in which the Court of Exchequer found as a matter of fact that the permanent way of the Prince Edward Island Railway was, owing to the rottenness of the ties, "in a most unsafe condition, that the safety of life had been recklessly jeopardised by running trains over it with passengers, and that there had been a breach of the contract to carry safely and securely," it was held by the Supreme Court of Canada, overruling the decision of the Exchequer Court, that a petition of right would not lie against the Crown for injuries resulting

(*x*) *Montreal Park and Island Ry. Co. v. City of Montreal* (1910), XLIII. S. C. R. 256.

from the non-feasance [illegible], misfeasance, wrongs, negligences or omissions of duty of the subordinate officers or agents employed on Government railways, and, further, that the Crown was not liable as a common carrier for the safety of passengers using the said Government railways (*y*).

It is, however, now provided by the Government Railways Act (*z*) that "His Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employé or servant of the Minister; nor shall any officer, employé or servant be relieved from liability by any notice, condition or declaration if the damage arises from his negligence or omission"; and generally, the law relating to the measure of responsibility on Government railways, with regard alike to injuries to goods and passengers, is assimilated by statute to that imposed by the Railways Act (*a*).

A somewhat similar provision is contained in the Intercolonial and Prince Edward Island Railways Employés' Provident Fund Act, 1907, which enacts, *inter alia*, that "nothing in this Act, and no action taken, thing done, or payment made by virtue hereof shall relieve His Majesty from liability in the event of damage arising from the negligence, omission or default of any officer, employé or servant of the Minister" (*b*).

Further amending Acts are 7 & 8 Edw. VII. c. 31 (1908); 8 & 9 Edw. VII. c. 18 (1909); 9 & 10 Edw. VII. c. 24 (1910).

### *Carriage of Passengers and Passengers' Luggage.*

Chitty, 520—527.

Although, as before stated, it is competent for a carrying company to limit its liability by special contract, it is, nevertheless, essential to the validity of such a limitation for its terms to be actually brought to the notice of the passenger or of the consignee of goods at the time when the ticket is issued or the goods delivered to the company for carriage. Moreover, if the signature of the passenger or consignee to the contract containing such limitation is induced by a false or misleading representation on the part of the agent of the carrier the person so signing is not estopped thereby from subsequently repudiating his assent to the limitation (*bb*).

Chitty, 511—520.

(*y*) *Reg.* v. *McLeod* (1882), VIII. S. C. R. 1; but see *Hall* v. *McFadden* (1879), 19 N. B. Rep. 340; and Cass. Dig., 1st ed., 430.

(*z*) R. S. C., 1906, c. 36, s. 60.

(*a*) 2 Edw. VII. c. 55 (R. S. C., 1906); see also 6 Edw. VII. c. 22, s. 26.

(*b*) The Intercolonial and Prince Edward Island Railways Employés' Provident Fund Act, 1907 (6 Edw. VII. c. 22), s. 26.

(*bb*) *Bate* v. *C. P. Rail. Co.* (1889), XVIII. S. C. R. 697.

By the common law carriers and innkeepers are alike insurers of the chattels which, in the former case, are delivered to them for the purposes of transit, or, in the latter case, are entrusted to them for safe custody by their guests. But although both carriers and innkeepers are insurers of goods they are not insurers of the persons of passengers or of guests, by reason of the personal volition of the individual carried or housed being a necessary constituent of the contract. There is, however, laid upon them both a positive duty to take exceptional care. And if where the two callings are combined in one, as in the case of the omnibus provided by a hotel proprietor conveying a parting guest from his hotel to the railway station, an accident occurs whereby the guest is injured, the obligation to take care is put so high by reason of the necessity of the thing that the hotel-keeper is responsible to the guest for the results of such accident although there may have been no specific charge made for the carriage (*c*).

### *Injury to Passengers at Stations.*

A negligent breach of contract sounding in damages may arise from a combination of circumstances no one of which, apart from such combination, would of itself actually amount to actionable negligence, the underlying principle in such case being that although a single act or circumstance under ordinary conditions may not constitute negligence, the same act or circumstance when coupled with other venial acts of misfeasance will amount in the aggregate to an actionable wrong.

Thus, in a case of injury to a railway passenger by reason of a long night train stopping at a short and dimly lighted platform, it was held that although there may have been no actionable negligence in having a short platform or in stopping a car so that the entrance thereto was at the end of the platform, or in inadequately lighting the station, yet that the combination of these circumstances amounted to an actionable wrong (*d*).

### *Effect of Non-payment of Fare or Refusal to Produce Ticket.*

It is provided by sect. 281 of the Railway Act (*e*) that, "Every passenger who refuses to pay his fare may, by the conductor of the train, be expelled from and put out of the train, with his baggage,

(*c*) *Barker* v. *Pollock* (1906), 4 W. L. R. 327.

(*d*) *Swan* v. *Canadian Northern Rail. Co.* (1908), 9 W. L. R. 275.

(*e*) 3 Edw. VII. (repealing and replacing sects. 217, 248 of the General Railway Act (51 Vict. c. 29)).

at any usual stopping place or near any dwelling-house, as the conductor elects: Provided that the conductor shall first stop the train and use no unnecessary force. In spite, however, of this provision it is submitted, though an opposite view was taken in the case of the *Grand Trunk Railway* v. *Beaver* (*f*), that a mere refusal on the part of a passenger to produce his ticket upon request so to do, if he has in fact purchased one, does not entitle the conductor of a train to expel him therefrom under the above-cited section of the Railway Act, upon the ground that where a railway company issues a ticket to a purchaser for a passage on a particular train to a particular place such ticket constitutes a contract between the purchaser and the railway company that the latter will carry the former upon such train to the particular destination or stopping place specified on the ticket, and the mere fact of the holder of the ticket refusing to exhibit it on demand, though enough to put him on inquiry, is not sufficient to justify a repudiation by the conductor or other servant of the company of the contract of carriage.

Liability of carrier for refusing to convey passenger who has paid fare.

Consequently, it is a breach of contract sounding in damages for a person who has paid his fare from one station or place of departure to another station to be ejected at an intermediate point, nor in such case is a claim for additional damages for illness resulting from exposure to cold in consequence of such ejectment too remote a cause of damage (*g*). And a like rule as to damages for breach of contract applies when, without being actually ejected, some overt act on the part of the carrier or his agent prevents the passenger from reaching his destination (*h*).

But although the issue of a ticket is evidence of a contract between the railway company and the purchaser to convey him to the destination specified on such ticket, it is no evidence of a contract conferring upon him the right to stop at any intermediate station.

Duty of carrier to convey passenger to destination. Chitty, 525-527.

As regards the duty of a carrier to convey a passenger to the destination printed or written on the ticket or voucher issued to him by any car purporting to go thither, it is, apparently, a question of fact for a jury as to whether or no a written or printed statement of destination exhibited upon a public conveyance plying for passengers upon a public way constitutes an invitation and engagement, to all whom it may concern, that the vehicle thus labelled will in fact proceed to the destination so specified. Probably, however, the issue of a ticket, by an official properly

(*f*) (1894), XXII. S. C. R. 198.
(*g*) *Toronto Rail. Co.* v. *Grinsted* (1895), XXIV. S. C. R. 570.
(*h*) *Jones* v. *Norgan Navigation Co.* (1906), 12 O. L. R. 481.

in charge of a conveyance so labelled, to a member of the public amounts not only to a request by the owner of the vehicle to the person accepting and paying for the same to become a passenger for the purpose of being carried from the point of departure to the terminus *ad quem*, but also a warranty that, apart from *force majeure*, the journey so advertised will be performed (*i*).

In the case of *O'Connor* v. *Halifax Tramway Company* (*k*), which, in spite of the decision of the Supreme Court of Nova Scotia being upheld by the Supreme Court of Canada (Idington, J. dissenting), it is submitted, is of doubtful legal authority, the following facts were proved:—Upon regatta day, at an hour when the number of sightseers was considerable, the plaintiff, who was a resident in Halifax, accompanied by his wife and a friend, boarded "a trailer" attached to a tramway car labelled in the front and rear "Quinpool Road," with the intention of proceeding thither, and was furnished with tickets available for that purpose by the person in charge of the vehicle. At a certain point *en route* he was informed that the conveyance would proceed no farther, but was returning to its starting point, and that he must change, although the conductor in reply to his question informed him he was on a Quinpool Road car. As it was raining at the time he refused to change or accept a proffered transfer to another car, being under the impression that the tramway company by their representation of the destination of the car had undertaken to carry him to that place. After some discussion he left the car, and two or three minutes later, without waiting for another car or ascertaining whether or no another car was coming, chartered a cab and, with his wife and friend, drove home. He subsequently claimed from the tramway company all the outlay he had incurred and damages, but was non-suited upon the ground that there was no obligation on the part of the tramway company to carry him through to his destination on any particular car; and this decision, it is submitted incorrectly, was upheld on appeal. The dissentient judgment of Idington, J. is well worthy of perusal.

Again, a tramway company is responsible for accidents and collisions which may arise by reason of the curves of the track being too abrupt for the length of the cars. Nor is there any legal duty cast on a passenger to be on the look-out for accidents; consequently, the fact of a passenger being absorbed in reading

(*i*) *Skinner* v. *L. B. & S. C. Rly.* (1850), 5 Ex. 787; see also *Jennings* v. *Great Northern Rail. Co.* (1865), L. R. 1 Q. B. 7 (English cases).

(*k*) (1905), XXXVII. S. C. R. 325.

whilst travelling by car is no evidence of contributory negligence (*l*).

*General Proposition as to the Liability of a Carrier of Passengers.*

There is an implied contract on the part of a carrier of passengers that he will carry safely and securely. Whenever, therefore, a carrier, by his agents or servants, knows or has the opportunity of knowing of a threatened injury, or might reasonably have anticipated the happening of an injury, and fails or neglects to take the proper precautions or to use the proper means to prevent or mitigate such injury, the carrier is liable; and this rule applies to the case of an assault or threatened assault on a passenger by a fellow-passenger: for although a railway company is not liable for the wrongful acts of a passenger, it is, nevertheless, bound to exercise the utmost vigilance in maintaining order and guarding its passengers against violence. It has authority to refuse to receive as a passenger or to expel one who so demeans himself as to endanger the safety or interfere with the reasonable comfort and convenience of other passengers, and this power the conductor or other servant in charge of the car or train is bound to exercise by all the means at his command when occasion requires. If this duty, which arises out of the contract of carriage, is neglected, and in consequence a passenger receives injury which might have been reasonably anticipated, and, therefore, avoided, the company is liable. But a conductor or servant of a railway company is only called upon to act in the case of improprieties or offences witnessed by or made known to him, and consequently can only be charged for the neglect of some duty arising from circumstances of which he was cognisant, or of which, in the due and proper discharge of his duties, he ought to have been cognisant. Nor does the fact that an individual has drunk to excess in every case warrant his expulsion from a public vehicle; it is rather the effect of the stimulant upon him, and the fact that by reason of the intoxication he is dangerous or annoying to others, that gives the right and imposes the duty of expulsion; or, in other words, the intoxicated person must be drunk in a police sense, and not merely quarrelsome and excited by reason of the consumption of alcoholic liquor (*m*).

Chitty, 521.

Duty to protect passenger from assault on railway premises.

The general proposition is, however, somewhat qualified in the case of a gratuitous passenger, it having been held by the Supreme Court of Canada in such circumstances that, apart from evidence

(*l*) *Jago* v. *Montreal Street Rail. Co.* (1908), Q. R. 35 S. C. 109.

(*m*) *C. P. Rail. Co.* v. *Blain* (1903), XXXIV. S. C. R. 74.

of gross negligence, the carrier is not liable (*n*). But, on the other hand, a railway company who, with knowledge of his condition, allows a drunk and incapable passenger to travel on their cars is bound to exercise reasonable precautions to ensure his safety (*o*).

Again, carriers of passengers, in addition to the obvious duty (arising out of the contract of carriage) of protecting the persons and safeguarding the goods of those travelling in the cars, are also responsible for losses occasioned by the neglect of their servants in other and subsidiary matters. Where, therefore, during the course of the journey the servants of a railway company detached one of the cars without giving proper and sufficient notice of the fact, by reason of which neglect a person who had taken a seat in that car, but was temporarily absent in another car, suffered loss, it was decided that action was maintainable against the railway company for the loss (*p*).

### *Definition of Personal Luggage.*

Chitty, 514. Whatever a passenger takes with him for his personal use or convenience according to the habits or wants of the particular class of society to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only articles of apparel, whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller and the taking of which has arisen from the fact of his journeying (*q*). With regard to responsibility in case of loss or damage, it is quite clear that, as regards personal luggage, the liability is the same whether the luggage is carried in a baggage-car or elsewhere, so long as the loss or injury is not occasioned by any act of interference with the control of the luggage by the passenger to whom it belongs (*r*).

(*n*) *Nightingale* v. *Union Colliery Co. of British Columbia* (1904), XXXV. S. C. R. 65.

(*o*) *Ducharme* v. *C. P. Rail. Co.*, 16 R. de J. 27.

(*p*) *Great Northern Rail. Co.* v. *Fainar* (1908), Q. R. 18 K. B. 72.

(*q*) *Bruty* v. *Grand Trunk Rail. Co.* (1871), 32 U. C. Q. B. 66, at p. 73, quoting Cockburn, C. J., in *Macrow* v. *Great Western Rly.* (1871) L. R. 6 Q. B. 612, at pp. 621, 622.

(*r*) *Chan dy Chea* v. *Alberta Railway and Irrigation Co.* (1905), 1 W. L. R. 371.

### *Termination of Carrier's Liability.*

A carrier is responsible for the value of the goods carried by him until they are delivered at their destination (*u*). But, as a general proposition of law, a carrier having once tendered a delivery to the consignee thereby discharges himself of his obligation, as otherwise his liability might be extended indefinitely. Moreover, a consignee may receive the goods at any stage of the journey, and though the consignor directs the carrier to deliver them at a particular place, there is no absolute contract by the carrier to deliver them at that place and not elsewhere, unless such term be specially incorporated in the contract. Therefore, by implication, the contract is no more than an undertaking to deliver at the place designated, unless the consignee requires the goods to be delivered at some other place short of the ultimate destination. Or, in other words, in a general consignment for transit the contract is not both an affirmative one to deliver to the consignee and a negative one not to deliver otherwise or elsewhere than at the place named; it is merely an affirmative one; and that being so, as between carrier and consignor, the *transitus* is at an end when the consignee by his own act forestalls delivery at the ultimate destination by taking it earlier, and thus prevents the goods from arriving at the terminus *ad quem* as they otherwise would have done (*x*).

### *Action for Freight Tolls (against whom).*

Where there is evidence that chattels are, with the consent or by the authority of the purchaser, consigned by the vendors as consignors to be carried by common carriers and by them to be delivered to the purchaser as consignee, and that the name of the consignee was made known to the carrier at the time of delivery, then, and in such circumstances, the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it. The remedy of the common carrier in such case is either by enforcing his lien upon the goods or else by bringing an action on the contract against any one who, at the time when the goods were shipped or placed on the cars, was a party to the bill of lading or to the freight bill, either as being on the face of it a contracting party or as being an undisclosed principal of such party (*y*).

(*u*) *Black* v. *Canadian Express Co.* (1909), Q. R. 36, S. C. 499.

(*x*) *Smith* v. *Canadian Express Co.* (1906), 12 O. L. R. 84.

(*y*) *C. P. Rail. Co.* v. *Forest City Paving, &c. Co.* (1909), 12 W. L. R. 229.

### *Carrier's Lien.*

Chitty, 484, 520.

A carrier's right of lien for tolls of chattels carried is indivisible, and applies not only to the goods in bulk, but also to each article composing the aggregate for the entire sum due to him for the transportation of the whole. Where, therefore, a carrier of household furniture detained certain articles until the whole of his charges should be paid, his right to do so was uphold. Nor is this rule varied by the fact that he may have delivered some of the goods to the consignee (*z*). But although it is provided by sect. 345 of the Railway Act that railway carriers may (instead of proceeding by action for the recovery of tolls) seize the goods for and in respect whereof such tolls are payable, and may detain the same until payment thereof . . . nevertheless the statutory remedy is not of so general and wide an application as to allow them to retake goods which have been delivered. Therefore, the section does nothing more than confirm and establish the carrier's lien. If while the lien exists and can be enforced there is, from the circumstances, any condition that renders a seizure necessary, it may be made. But there is nothing in the Act to warrant the belief that a railway carrier, without warrant or claim in Court, or legal process, can follow goods in the hands of the consignee and take them wherever found and at any period after delivery so long as the goods retain their original character and can be identified, subject, possibly, to the right of a *bonâ fide* purchaser for value without notice, and so long as the claim was not barred by the Statute of Limitations. The power conferred by the Act is evidently limited to the period during which the goods remain in the custody of the carrier; consequently, there is a right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee, and not afterwards (*a*).

Chitty, 504—505.

Third class carriages.

### *Obligation of Railway Companies to provide proper facilities.*

The Railway Act of 1903 and the statutes since passed in amendment or amplification thereof do not either expressly or by implication repeal those sections of earlier Acts which expressly relate to public convenience. Where, therefore, the private Act of a railway company laid an obligation upon the

(*z*) *de Senneville v. Baillargeon* (1909), Q. R. 37, S. C. 215.

(*a*) *Clisdell v. Kingston and Pembroke Rail. Co.* (1909), 18 O. L. R. 169.

company to run third class carriages between certain specified stations the duty so to do is not avoided by later legislation, and obedience to the requirements of the private Act may be enforced (*s*). And generally, if the terms of any special Act relating to a particular railway system are inconsistent with the Railway Act of 3 Edw. VII. the provisions of the private Act, and not those of the Railway Act, are binding (*t*).

Limitation time for bringing action.

But, by way of exception, although it is provided by certain private Acts having specific application to the particular railways in respect of which such Acts are granted that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works in operation of the company shall be commenced within six months next after the time when such supposed damage is sustained . . . and not afterwards," nevertheless this or other provisions of a like kind do not apply to an action under Lord Campbell's Act, because the right of action created by Lord Campbell's Act is not the same cause of action as was vested in the deceased, but is an entirely new right given for the benefit of the dependents, not merely because the deceased died from his injuries, but also because he died possessed of a good cause of action in respect of the injuries. Therefore, in such cases, the right of action on the part of the representatives is not concluded by the expiration of the time limit provided for in the private Act, but extends to the period mentioned in Lord Campbell's Act (*u*).

Nature of actions.

In former years the question of injury to a passenger arising out of something done or left undone by the servants of a railway company gave rise to much discussion as to whether or no such an action was an action in contract or in tort. It was eventually decided that the plaintiff might maintain an action either in contract or in tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and, on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent such negligence was a matter in respect of which an action for tort could be brought. Apparently, however, at the present time a plaintiff may frame his claim in either way, but is not bound by the pleadings, nor if he base his claim on one ground and prove

(*s*) *Grand Trunk Rail. Co.* v. *Robertson* (1907), XXXIX. S. C. R. 506; affirmed, [1909] A. C. 325, P. C.

(*t*) *Northern Counties Investment Trust Co.* v. *C. P. Rail. Co.* (1906), 4 W. L. R. 539.

(*u*) *Green* v. *British Columbia Electric Rail. Co.* (1906), 4 W. L. R. 273.

it on another is he now embarrassed by any rules as to departure. The question to be raised is the same in either case, and all that the plaintiff has to do is to prove negligence; whether that negligence is active or passive is, apparently, immaterial (*v*).

### *Contributory Negligence of Passengers.*

Chitty, 523. Contributory negligence, in order to deprive a person who is injured by the negligence of another of the right to recover damages from that other, is such negligence on the part of the person injured as actually to conduce to the accident so that without it the misfortune would not have happened in spite of the negligence of the other party. Negligence of this character is thus defined by Lord Ellenborough, C. J. (*x*): "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." Two things, therefore, must concur to support an action for negligence: a hindrance or obstruction by the fault of the defendant and no want of ordinary care to avoid it by the plaintiff. Thus, in cases of persons riding upon what is considered the wrong side of the road, that would not authorise another purposely to ride up against them.

Applying the above-stated rule to contracts of passenger carriage by methods of mechanical traction, it seems impossible to lay down any specific rule for the guidance of railways or street railways generally.

"In some railways, for example, those lines whose object, or one of whose objects, is to take passengers through scenery, it is expected that passengers will lean out to look back or forward; whilst in some railways which permit, if they do not invite, overcrowding, and which, by reason thereof, compel some travellers to stand on the steps and project part at least of their persons beyond the line of the car, must expect this to happen and guard accordingly. A railway operating in a country in which tobacco-chewing or gum-chewing is not uncommon must expect its patrons, or some of them, to be tobacco or gum-chewers, and, if it be the custom of such passengers to put their heads past the line of the car in order to expectorate, whether this be due to the prohibition against spitting in the car or to some lingering remains of common decency, the railway should be held to know of such custom. And in every case a rail-

(*v*) *Sayers* v. *British Columbia Electric Rail Co.* (1906), 3 W. L. R. 44.

(*x*) *Butterfield* v. *Forrester* (1809), 11 East, 60 (an English case).

way company must take all reasonable precautions against an accident happening to one who is acting as, in the ordinary course of events 'in the virinage,' it may be expected that some will act. By 'ordinary' I do not mean happening always, or every minute, or every hour, or every day, perhaps not every week, but as likely to occur from time to time. . . . If, as is, I think, common knowledge, smokers sometimes and ordinarily expectorate, and that over the line at the side of the car, the railway companies should either remove all obstructions from the side of the track a sufficient distance so as to avoid the probability of an accident, or they should (by the erection of a screen) prevent the passengers from projecting their heads over the side, or at the least give proper warning as to the danger" (*y*); and should they not do so a plea of contributory negligence will not suffice to avoid their liability in case of injury.

Occasionally, moreover, the promptings of humanity towards the saving of life may urge generous minded persons to jeopardise their own personal security for the safety of others. In such cases the ordinary canons regulating self-preservation may be somewhat relaxed, for as the saving of human life is a lawful act —to put it on no higher ground—if a person by his negligence creates a dangerous situation which puts a human life in imminent peril, a man is doing a lawful and proper act in endeavouring to rescue the person so threatened. His conduct in placing himself in danger in order to effect the rescue, unless he is needlessly reckless in exposing himself to injury, is not negligence, and does not absolve the tort-feasor from responsibility for his negligence; and in such circumstances whether he was himself needlessly reckless in his conduct is a question which should be left to the jury to determine (*z*).

### *Contracts of Carriage by Sea.*

Chitty, 532.

An Act respecting the Water Carriage of Goods.

9 & 10 Edw. VII. c. 61.

2. In this Act, unless the context otherwise requires —

Interpretation as amended by 2 Geo. V. c. 27, s. 1.

(a) "goods" includes goods, wares, merchandise, and articles of any kind whatsoever, except live animals and lumber, deals and other articles usually described as "wood goods";

(*y*) Riddell, J., in *Simpson* v. *Toronto and York Radial Rail. Co.* (1907), 16 O. L. R. 31, at pp. 41, 42, for an admirable summary of decisions as to what amounts to or does not amount to contributory negligence, see this case.

(*z*) *Seymour* v. *Winnipeg Electric Ry.* (1910), 13 W. L. R. 566.

(b) "ship" includes every description of vessel used in navigation not propelled by oars;

(c) "port" means a place where ships may discharge or load cargo.

Application of Act.

**3.** This Act applies to ships carrying goods from any port in Canada to any port outside of Canada, and to goods carried by such ships.

Prohibited clauses in bills of lading.

**4.** Where any bill of lading or similar document of title contains any clause, covenant or agreement whereby

(a) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship; or

(b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried (*a*), fit and safe for their reception, carriage and preservation, are in any way lessened, weakened or avoided; or

(c) the obligations of the master, officers, agents or servants of any ship to carefully handle and stow goods, and to care for, preserve and properly deliver them, are in anywise lessened, weakened or avoided (*b*),

such clause, covenant or agreement shall be illegal, null and void, and of no effect (*c*), unless such clause, covenant or agreement is in accordance with the other provisions of this Act.

[Apparently, a condition in a bill of lading that all claims for damage to or loss of any goods shall be made within a month is not repugnant to the proviso (*d*). Moreover, these provisions are binding only on a shipper so long as the goods are in transit, and are not applicable when the transit is ended. If, therefore, shippers warehouse the goods for the convenience of consignees upon their arrival at the terminus *ad quem* their liability is only that of warehousemen (*e*).]

(*a*) Compare *Manufacturers' Paper Co.* v. *Cairn Line S.S. Co.* (1911), 41 Que. S. C. 33.

(*b*) See, in this connection, *Merchants' Despatch Transportation Co.* v. *Hately* (1887), XIV. S. C. R. 572.

(*c*) Compare *Wilson* v. *Canadian Development Co.* (1903), XXXIII. S. C. R. 132.

(*d*) *Union Steamship Co.* v. *Drysdale* (1902), XXXII. S. C. R. 379.

(*e*) *Lake Erie and Detroit Rail. Co.* v. *Sales* (1896), XXVI. S. C. R. 663.

Every bill of lading expressly to refer to the Act.

**5.** Every bill of lading, or similar document of title to goods, relating to the carriage of goods from any place in Canada to any place outside Canada shall contain a clause to the effect that the shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, this Act; and any stipulation or agreement purporting to oust or lessen the jurisdiction at the port of loading in Canada in respect of the bill of lading or document shall be illegal, null and void, and of no effect (*f*).

Limitation of ship-owners' liability.

**6.** If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation, or in the management of the ship, or from latent defect.

[Moreover, if a chartered ship be disabled, by excepted perils, from completing the voyage the owner does not necessarily lose the benefit of his contract, but may, within a reasonable time (*g*), forward the goods by other means to the place of destination, and thus earn the freight (*h*).]

Loss for which neither the ship, the owners, the charterer, &c. is liable.

**7.** The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire (*i*), dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employés.

Limitation of liability as to value of goods.

**8.** The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package, unless a

(*f*) See, in this connection, *Hart* v. *Furness, Withy & Co.* (1904), 37 N. S. R. 74.

(*g*) In an action for damages on a charter-party a fraction of a day counts as a whole day (*Trechman S.S. Co.* v. *Hirsch* (1909), 37 Que. S. C. 143.

(*h*) *Owen* v. *Outerbridge* (1896), XXVI. S. C. R. 272.

(*i*) But, *e converso*, if a railway company contracts with a shipping company to deliver full cargoes for its ships, and is prevented from so doing by a fire on the permanent way, it can only escape liability for non-performance of the contract by proving (1) that the fire occurred through no fault of their own; and (2) that it was impossible to forward the goods by an alternative route (*Great Northern Rail. Co.* v. *Furness, Withy & Co.* (1908), 17 R. L. (N. S.) 156).

higher value is stated in the bill of lading or other shipping document, nor for any loss or damage whatever if the nature or value of such goods has been falsely stated by the shipper, unless such false statement has been made by inadvertence or error. The declaration by the shipper as to the nature and value of the goods shall not be considered as binding and conclusive on the ship, her owner, charterer, master or agent.

Declaration of value by shipper not conclusive.

Bill of lading to be issued on demand.

**9.** Every owner, charterer, master or agent of any ship carrying goods shall, on demand, issue to the shipper of such goods a bill of lading showing, among other things, the marks necessary for identification as furnished in writing by the shipper, the number of packages or pieces, or the quantity or the weight, as the case may be, and the apparent order and condition of the goods as delivered to or received by such owner, charterer, master or agent; and such bill of lading shall be *primâ facie* evidence of the receipt of the goods as therein described (*k*).

*Primâ facie* evidence of receipt.

**10.** [This section is repealed by 1 & 2 Geo. V. c. 27.]

Notice of arrival of ship.

**11.** When a ship arrives at a port where goods carried by the ship are to be delivered, the owner, charterer, master or agent of the ship shall forthwith give such notice as is customary at the port to the consignees of goods to be delivered there that the ship has arrived.

[But the circumstance that a shipper is instructed to notify someone other than the consignee will not entitle him to treat such other person as being the consignee, and should he do so he will be liable for any loss occasioned thereby (*l*).

Statutory offences.

**12.** Every one who, being the owner, charterer, master or agent of a ship—

(a) inserts in any bill of lading, or similar document of title to goods, any clause, covenant or agreement declared by this Act to be illegal, or makes, signs, or executes any bill of lading, or similar document of title to goods, containing any clause, covenant or agreement declared by this Act to be illegal, without incorporating *verbatim*, in conspicuous type, in the same bill of lading or similar document of title to goods, section 4 of this Act; or

(b) refuses to issue to a shipper of goods a bill of lading as provided by this Act; or

(*k*) A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped (*North West Transportation Co. v. McKenzie* (1895), XXV. S. C. R. 38.

(*l*) *Montreal and Cornwall Navigation Co. v. L'Ecuyer*, 21 Que. S. 49.

(c) refuses or neglects to give the notice of arrival of the ship required by this Act,

is liable to a fine not exceeding one thousand dollars, with cost of prosecution; and the ship may be libelled therefor in any Admiralty district in Canada within which the ship is found. Penalty.

(2) Such proportion of any penalty imposed under this section as the Court deems proper, together with [illegible] costs, shall be paid to the person injured, and the balance shall belong to His Majesty for the public uses of Canada. Disposal of penalty

**13.** Every one who knowingly ships goods of an inflammable or explosive nature, or of a dangerous nature, without, before shipping the goods, making full disclosure in writing of their nature to, and obtaining the permission in writing of the agent, master or person in charge of the ship, is liable to a fine of one thousand dollars. Shipping inflammable explosives or dangerous goods.

**14.** Goods of an inflammable or explosive nature, or of a dangerous nature, shipped without such permission from the agent, master or person in charge of the ship, may, at any time before delivery (to the consignee), be destroyed or rendered innocuous by the master or person in charge of the ship without compensation to the owner, shipper or consignee of the goods, and the person so shipping the goods shall be liable for all damages directly or indirectly arising out of such shipment. Master may destroy dangerous goods if shipped without disclosure. Shipper liable for damages.

**15.** This Act shall not apply to any bill of lading, or similar document of title to goods, made pursuant to a contract entered into before this Act comes into force, that is, before September 1st, 1910. Act not retrospective.

*Liabilities of Carriers by Water.*

The Canada Shipping Act (*m*). Chitty, 532—534.

Part XV., sects. 961—966 of c. 113.

**961.** In this Part (of the Canada Shipping Act), unless the context otherwise requires— Definitions. "Goods."

(a) "goods" means and includes goods, wares, merchandise and articles of any kind whatsoever;

(b) "valuable securities" includes every document forming the title or evidence of the title to any property of any kind whatsoever. "Valuable securities."

(*m*) For general principles governing the contract of carriage by sea, see *Midland Navigation Co.* v. *Dominion Elevator Co.* (1904), XXXIV. S. C. R. 578. For an admirable disquisition on the law relating to charter-parties and the respective obligations of ship-owners and charterers, see *Nelson* v. *Iuchl* (1879), 12 Ch. Div. 568, at p. 580 (this decision was affirmed by the House of Lords, 6 App. Cas. 38).

*Responsibilities of Carriers.*

Obligation to carry passengers and goods.

**962.** Carriers by water shall, at the times and in the manner and on the terms of which they have respectively given public notice (*o*), receive and convey according to such notice all persons applying for passage and all goods offered for conveyance, unless in either case there is reasonable and sufficient cause for not doing so.

Responsibility for goods.

**963.** Carriers by water shall be responsible not only for goods received on board their vessels, but also for goods delivered to them for conveyance by any such vessel, and they shall be bound to use due care and diligence in the safe-keeping and punctual conveyance of such goods, subject to the provisions hereinafter made.

Liability for loss or damage.

**964.** Carriers by water shall be liable for the loss of or damage to goods entrusted to them for conveyance, except that they shall not be liable when such loss or damage happens

(a) without their actual fault or privity, or without the fault or neglect of their agents, servants or employees (*o*); or

(b) by reason of fire or the dangers of navigation; or

(c) from any defect in or from the nature of the goods themselves; or

(d) from armed robbery or other irresistible force.

Specie and jewels; declaration of value condition precedent to liability.

**965.** Carriers by water shall not be liable for any total or partial loss of gold or silver, diamonds, watches, jewels or precious stones, money or valuable securities, or articles of great value not being ordinary merchandise, by reason of any robbery, theft, removal or secreting thereof, unless the true nature and value thereof has, at the time of delivery for conveyance, been declared by the owner or shipper thereof to the carrier or his agent or servant, and entered in the bill of lading or otherwise in writing.

Personal baggage of passengers.

**966.** Carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessels (*p*): Provided that such liability shall not extend to any greater amount

(*n*) The master of a ship has no authority to alter or vary a contract made direct with the owners (*Perry* v. *Prince Edward Island Steam Navigation Co.* (1874), 1 P. E. I. R. 476; see also *Wilson* v. *Canadian Development Co.* (1903), XXXIII. S. C. R. 132).

(*o*) In order for the shipper to recover where the cause of loss apparently falls within a stipulation for exemption from liability in the bill of lading, he must prove personal default on the part of the carrier (*Mathys* v. *Manchester Liners* (1904), Q. R. 25, S. C. 426).

(*p*) *Wenska* v. *Canadian Development Co.* (1911), 8 E. C. R. 190.

than *five hundred dollars*, as to the loss of or damage to any such valuable articles as are mentioned in the last preceding section, unless the true nature and value of such articles so lost or damaged have been declared and entered, as provided by the said section (*q*).

Apparently, a ship-owner who accepts goods for carriage by sea undertakes to deliver them in good order and condition, and, therefore, impliedly contracts to perform the voyage in a ship which is seaworthy. Or, in other words, the contract of carriage entered by a ship-owner imports as one of its terms a promise to provide a seaworthy vessel, tight, staunch and strong, well manned and properly equipped for the carriage of the goods, and if he does not do this there is nothing in the exceptions usually contained in a bill of lading to relieve him from liability (*r*). Moreover, if there be evidence of gross negligence on the part of the ship-owner, or of those responsible for the safety and life of passengers, the provisions of sect. 921 of the Canada Shipping Act (*s*), which enacts *inter alia*, that

"The owners of any ship, whether British, Canadian or foreign, shall not, wherever without their actual fault and privity

> "(a) any loss of life or personal injury is caused to any person being carried in such ship . . . be answerable in damages in respect of loss of life or personal injury . . . to an aggregate amount exceeding 38 dollars and 92 cents for each ton of the ship's tonnage";

cannot be invoked so as to limit the liability in case of disaster (*t*).

Contractual powers of managing owner of a ship.

A managing owner or ship's husband has, by implication, authority deputed to him by the co-owners to employ the vessel for their benefit, and this can only be done by employing her in the ordinary course of trade suitable to the class of vessel.

As a necessary consequence of this deputed authority a managing owner is entitled to conduct and manage on shore whatever concerns the employment of the ship, and for that purpose has authority to give orders for the necessary repair, fitting and outfit of the vessel, in addition to seeing that she is properly manned, properly sent to sea, and properly chartered for the voyage. Without that power he would be unable to send the ship to sea, even if trifling repairs only were necessary for that purpose, with-

(*q*) *Ivers* v. *Richelieu and Ontario Navigation Co.* (1908), Q. R. 35, S. C. 344.

(*r*) Compare *Union Steamship Co.* v. *Drysdale* (1902), XXXII. S. C. R. 379.

(*s*) R. S. C., 1906, c. 113.

(*t*) *Dominion Fish Co.* v. *Isbester* (1910), XLIII. S. C. R. 637.

out obtaining a fresh mandate from the various co-owners; nor is there any authority for the proposition that the managing owner's authority is limited in cases where the ship is insured. There is no case, nor even dictum to that effect, though, of course, if the vessel be insured the co-owners will get the benefit of any money paid by the underwriters to discharge the account for repairs (*u*).

(*u*) *The Huntsman*, [1894] P. 214. Unreported Cases, S. C. R. 131, p. 218; *Troop* v. *Everett* (1894), Notes

# CHAPTER XXVI.

## CONTRACTS RELATING TO LAND.

See Chitty on Contracts, 16th edition, titles, "Sale of Land," pp. 356—378; "Landlord and Tenant," pp. 379—419 (*a*).


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THE fundamental idea on which is based property in land throughout the Dominion of Canada is that primarily all lands belong to the Crown as trustee for the people. Consequently, individual property in land is first created throughout the territories by letters patent of the Crown purporting to grant out the land to an individual or to a corporation, either of whom thereupon becomes seised of the subject-matter of the grant as in fee simple. Canadian land tenure.

As regards procedure, although under the provisions of the British North America Act, 1867 (*aa*), each province of the Dominion is entitled, *inter alia*, to make laws in relation to "the management and sale of the public lands belonging to the province and of the timber and wood thereon," and consequently certain variations from the Dominion statute are to be found in those enacted by the various provincial Legislatures, nevertheless the general procedure adopted with regard to grants by letters patent and the

(*a*) As to "Interest in Land," see pp. 366—369.

(*aa*) 30 & 31 Vict. c. 3.

registration of transfers of property in land from the Crown to an individual is that provided by the Land Titles Act of 1894 (*b*).

Land Titles Act.

This Act is based upon what is denominated the "Torrens System," by which term is meant that system of registration of transactions relating to interests in land whose declared object is, under Governmental authority, to establish and certify the ownership of an absolute and indefeasible title to realty and to simplify its transfer. "Torrens" systems are of comparatively recent origin, and import a new principle of conveyancing and real property law into British jurisprudence. Their essential feature as a system of conveyancing is that transactions relating to or transfers of land are effected by registration or record in a public office, instead of being as heretofore effected solely by the execution of instruments or the occurrence of events. The effect of these systems is to confer upon the registered proprietor of property allodial ownership, that is, ownership free from either "tine" or "service," in the lands of which he is seised (*c*).

It is enacted by sect. 49 of the Land Titles Act, 1894 (*d*), that whenever lands situate in the Dominion are granted to an individual, the registrar of the land registry of the district in which the lands so granted are situated, upon reception of the letters patent (which he retains in his office), is authorised to issue to the patentee therein designated, free of all fees and charges (*e*), a duplicate certificate of title, provided that, upon searching the registry files, it is found there are no incumbrances or other instruments affecting the land (*e*). But, on the other hand, if it be found there are any instruments in existence which incumber the land or affect the patentee's title thereto, the duplicate certificate will only be issued upon payment of certain specified fees.

The above-stated rules, which also relate to any estate for life or for any term exceeding three years, are not, however, applicable to transfers of land by certain corporations more particularly specified in sects. 51–53 of the Act (*ee*), notification to the corporation of any transfer in such cases being substituted for and deemed equivalent to letters patent.

In cases where the original grant of lands from the Crown was made before January 1st, 1887, the owner of any estate or interest therein *may* avail himself of the protection afforded by registration upon compliance with the provisions contained in sects. 55 and 56 of the Act.

(*b*) 57 & 58 Vict. c. 28.
(*c*) See, in this connection, *Fraser* v. *Douglas* (1908), XL. S. C. R. 381 (a case decided under the provisions of the Manitoba Real Property Act).
(*d*) 57 & 58 Vict. c. 28.
(*e*) Sect. 50.
(*ee*) 57 & 58 Vict. c. 28.

And in such cases (*f*) where the land is unencumbered and the applicant (who may be represented by his attorney duly appointed (*g*)) is either the original grantee of the Crown or his successor in title, and there is no other person in adverse possession of the land, nor any reasonable doubt as to the right of ownership of the party claiming to be registered, the applicant is entitled to claim a certificate of title from the registrar; it being provided by the Act (*h*) that, at any time after registration of a title, the registrar, upon application therefor by the owner or his duly authorised agent, shall make out, sign, officially seal and deliver to him a duplicate of the certificate of title in the register on which shall be entered all memoranda endorsed on or attached to the certificate of title.

Moreover (*i*), where the interest of an applicant, desirous of having his title registered, is qualified by subsidiary interests, should there be no reasonable doubt as to the extent and nature of such applicant's residuum of interest, he is entitled to the grant of a certificate of title and the issue of a duplicate thereof, subject to such other subsidiary or conflicting interests.

It is provided by sect. 63 that any person having either an adverse claim or a claim not recognised by the applicant, or any person interested in the land who has not consented to the application for registration, is entitled, at any time before the judge has approved of the applicant's title, to file with the registrar a short statement of his claim verified by affidavit. And where any such adverse claim is filed the judge (by which term is meant an official authorised in the territories to adjudicate in civil matters in which the title to real estate is in question) shall examine into and adjudicate thereon, and no title shall be granted until such adverse claim has been disposed of (*j*).

### *Nature and effect of Grant of Certificate.*

**174.** Every certificate of title granted under the Land Titles Act shall, except— **Certificate to be conclusive evidence of title.**

(a) in case of fraud wherein the owner has participated or colluded; and

(b) as against any person claiming under a prior certificate of title granted under the Land Titles Act in respect of the same land; and

(c) so far as regards any portion of the land, by wrong descrip-

(*f*) Sect. 57.
(*g*) Sects. 110—113.
(*h*) Sect. 67.
(*i*) Sect. 58.
(*j*) Sect. 2 (22).

tion of boundaries or parcels included in such certificate of title, so long as the same remains in force and uncancelled under the Act,

be conclusive evidence in all Courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject, however, to the exceptions and reservations implied under the provisions of the Act.

[It should, however, be remarked in this connection that occupation against the Crown for any period less than the full term of the sixty years required by the Nullum Tempus Act (*k*) is of no avail against the title and legal estate of the Crown, and, *à fortiori*, still less against its grantee in actual possession.

The Act 21 Jac. 1. c. 14, which enacts that in informations of intrusion the subject is allowed to plead the general issue and to retain possession until trial, really only regulates procedure, and its effect is that if an information of intrusion is in fact filed, and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. But where no information has been filed, there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title (*l*).

It has, however, been decided that a grant of land by the Crown will not prevail against a claim by possession where the Crown has made a previous grant of the same land, unless there is evidence to show that the Crown at some time resumed its title to the land (*m*).]

*Effect of Registration.*

Unregistered instrument ineffectual.

**70.** After a certificate of title has been granted for any land no instrument, until registered under the provisions of the Land Titles Act, shall, as against any *bonâ fide* transferee of land under the provisions of the Act, be effectual to pass any estate or interest therein, save a leasehold interest of three years or less, or to render such land liable as security for the payment of money.

Effect of registration.

**71.** Upon the registration of any instrument in manner above described the estate or interest specified therein shall pass, or the land become liable as security, in manner and subject to the cove-

(*k*) 9 Geo. III. c. 16.

(*l*) *Emmerson* v. *Muddiman*, [1906] A. C. 569, P. C. Decisions by the Courts of New Brunswick and Nova Scotia to the effect that when the Crown had been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled.

(*m*) *Chisholm* v. *Robinson* (1895), XXIV. S. C. R. 704.

nants, conditions and contingencies either specifically set forth in such instrument or inferentially by implication of law.

Implied statutory reservations, &c.

**73.** The title to the land mentioned in any certificate of title granted under the Land Titles Act shall, by implication, and without any special mention in the certificate, unless the contrary is expressly declared, be subject to—

(a) any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

(b) all unpaid taxes;

(c) any public highway or right of way or other public easement, howsoever created, upon, over or in respect of the land;

(d) any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation of the land under the same.

(e) any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner;

(f) any right of expropriation which may by statute or ordinance be vested in the Crown or any person or body corporate;

(g) any right of way or other easement granted or acquired under the provisions of the Irrigation Act (61 Vict. c. 35), ss. 7, 8.

Effect of certificate

**72.** The owner of land for which a certificate of title has been granted, except in case of a fraud wherein he has participated or colluded, shall hold such land subject, in addition to the incidents implied by virtue of the Land Titles Act, to such incumbrances, liens, estates, or interests as are notified on the folio of the register which constitutes the certificate of title, but absolutely free from all incumbrances, liens, estates, or interests whatsoever, except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of the Land Titles Act.

Computation of priority in certificate.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

It is further provided by sect. 75 of the Land Titles Act that for the purposes of the Act trustees shall be deemed beneficial owners, and that no memorandum or entry shall be made upon a certificate of title or upon the duplicate thereof of any notice of trusts, whether express, implied, or constructive.

Priority of instruments in order of registration.

**77.** Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration, and not according to the date of execution.

Instruments operative on registration.

**76.** Every instrument shall become operative according to the tenor and intent thereof so soon as registered, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or estate or interest mentioned in such instrument.

Implied covenants in instruments relating to land.

**68.** In every instrument transferring, encumbering or charging any land for which a certificate of title has been granted, the following statutory covenant is implied by the transferor or encumbrancer, viz.: That the transferor or encumbrancer will do such acts and execute such instruments as . . . are necessary to give effect to all covenants, conditions and purposes expressly set forth in such instrument, or are by the Land Titles Act declared to be implied against such person in instruments of a like nature.

**172.**—(2) In any action for an alleged breach of any such implied covenant the covenant alleged to be broken may be set forth, and it shall be lawful to allege, precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary, notwithstanding that the party against whom the action is brought did so covenant.

Effect of implied covenant.

(3) Every such implied covenant shall have the same force and effect, and be enforced in the same manner as if it had been set out at length in the transfer or other instrument.

Covenants several and not joint.

(4) When any transfer or other instrument in accordance with the Land Titles Act is executed by more parties than one, such covenants as are by the Act to be implied in instruments of a like nature shall be construed to be several, and not to bind the parties jointly.

Implied covenants may be negatived or modified.

But every covenant and power declared to be implied in any instrument by virtue of the Land Titles Act may be negatived or modified by express declaration in the instrument.

Covenants implied in transfer of and subject to encumbrance.

**69.** In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or encumbrance, there shall be implied a covenant by the transferee that he, the transferee, will pay the principal money, interest, annuity or rent-charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by the instrument creating such mortgage or encumbrance, and from and against the liability in respect of any covenant therein contained or under the Land Titles Act implied on the part of the transferor.

### *Transfers of Land* (*mm*).

Upon a transfer of land, which must be sufficiently identified and (if deemed necessary by the registrar) accompanied by plans made on a prescribed scale (*n*), no words of limitation are necessary in order to transfer all or any title therein, unless a contrary intention is expressed in the transfer (*o*). If, however, words of limitation are introduced into any transfer or devise of land, such words have the same force and meaning as similar words of limitation would have if used by way of limitation of any personal estate. Therefore, in construing a reservation of mines or minerals or other limitation, whether such reservation or limitation be by private deed or by statute, regard must be had not only to the words employed to describe the thing reserved, but also to the substance of the transaction or arrangement which such deed or act embodies. Again, the words "mines" and "minerals" when used in such a connection are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are employed. But although the phrases are elastic, the meaning of words reserving mines and minerals cannot be so enlarged as to include therein a substance or thing which was not in the contemplation of either of the parties when the reservation was made and the contract entered into. Where, therefore, a deed reserved to the grantors thereof "all mines and quarries of metals and minerals, and all springs of oil in or under the said land, whether already discovered or not," it was held by the Privy Council that according to the true construction of such a reservation the right to search and bore for natural gas was not excepted, and therefore passed to the grantee (*p*).

Conditional sale of land.

In the case of a conditional sale of realty or contract of sale with a right to redeem, although the grant is limited by the proviso giving the vendor the right to repurchase, nevertheless, until the exercise of the power reserved the effect of the sale is to transfer the title in the land to the purchaser in the same manner as a simple contract of sale would do, subject only to the proviso for repurchase. But such a proviso is valid and binding not only

(*mm*) Sects. 78—82.

(*n*) Sects. 83—87.

(*o*) Where land is transferred under a conveyance absolute in form, though in fact there is a trust to sell and account for the price, the transferee may sell without notice to the equitable owner (*Oland* v. *McNeil* (1902), XXXII. S. C. R. 23). As to the effect of a deferred conveyance, see *Clergue* v. *Vivian* (1909), XLI. S. C. R. 607.

(*p*) *Barnard-Argue-Roth-Stearns Oil and Gas Co., Ltd.* v. *Farquharson*, [1912] A. C. 864. P. C.

upon the original parties thereto, but also upon a transferee of the purchaser (*q*).

**Voluntary conveyance.**

A voluntary conveyance of land is void under 13 Eliz. c. 5 (Imperial), as tending to hinder and delay creditors even though the vendor was solvent when it was made, should it result in divesting him of all his property and so rendering him insolvent thereafter.

Thus, should a settlor, being solvent at the time, but having contracted a considerable debt secured by mortgage, make a voluntary settlement whereby he withdraws a large portion of his property from the payment of his debts, and consequently deprives the expectant creditor of the means of being paid, the evidence of actual intention on his part to defeat creditors is obvious. Again, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property, which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequences of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Court to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and, therefore, that the case is within the mischief contemplated by the statute of Elizabeth (*r*).

It is further provided by sect. 79 of the Land Titles Act that a transfer of land shall generally operate by way of estoppel, and that (*s*) upon every transfer of the land mentioned in a certificate of title a duplicate thereof shall be issued to the transferee by the registrar upon application therefor.

**Rights, duties and obligations of vendors and purchasers of land.**

**Forfeiture of deposit.**

The general rule of law as to whether or no a person who has contracted to purchase land and subsequently refuses to complete his contract can recover back his deposit from the vendor upon the latter subsequently selling the property to another, seems to be though it is not absolutely clear that the mere fact of default in completion is not enough in all cases to justify a forfeiture of the deposit, unless there be a specific clause to that effect in the agreement (*t*). Instances are, of course, quite conceivable in which the conduct of a purchaser is so indefensible as to disentitle him to recover back his deposit even though there be no clause in the agreement precluding him from so doing (*u*).

(*q*) *Salvas* v. *Vassal* (1897), XXVII. S. C. R. 68; *The Queen* v. *Montminy* (1899), XXIX. S. C. R. 484.

(*r*) *Sun Life Assurance Co. of Canada* v. *Elliott* (1900), XXXI. S. C. R. 91.

(*s*) Sect. 82.

(*t*) *Sprague* v. *Booth*, [1909] A. C. 576, P. C.

(*u*) *Barrell, Ex parte, Parnell, In re* (1875), L. R. 10 Ch. 512.

According to the law of vendor and purchaser the inference usually is that the purchaser's deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by reason of the default of the purchaser the vendor is entitled to retain the deposit.

This is certainly the case where the purchaser is in fault, and the vendor has not parted with the subject-matter of the contract, it being clear law in such circumstances that a purchaser cannot, by reason of his own default, acquire a right to rescind a contract into which he has voluntarily entered (*x*).

(Even in such circumstances, however, it has been held that an ineffectual attempt to recover back a deposit will not estop the defeated party from launching a second action for the recovery of the deposit after a sale of the property to a third person, the causes of the two actions not being identical (*xx*).)

Moreover, where, by reason of a breach of contract on the part of the original purchaser, the subject-matter of the bargain is again put up for sale, and the property at such second sale realises a smaller sum than that which was contracted to be paid for it, in the first instance, it seems—at least, alike arguable and equitable—that the amount of the forfeited deposit should be set off against the loss at the second sale if the seller seeks to recover the deficiency upon such resale from the defaulting original purchaser.

Again, there is some conflict of opinion as to whether or no in the absence of express stipulation money paid as a deposit on the signing of a contract can be recovered by the payer if he has made such default in performance as to have lost all right either to performance by the other party to the contract or to damages in lieu thereof. Or, in other words, can a purchaser who by reason of his own default is held disentitled to a decree for specific performance subsequently sue the vendor for the return of his deposit? And in such circumstances decisions show that it is by no means certain in all cases where specific performance at the suit of a purchaser has been refused the vendor ought to be entitled to retain the deposit.

It may well be that there are circumstances which justify the non-intervention of the Court, and which would require it according to its ordinary rules to refuse to order specific performance, in which it could not be said that the purchaser had repudiated his contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit.

(*x*) *Palmer* v. *Temple* (1839), 9 Ad. & E. 508 (an English case).

(*xx*) *S. C.* (1839), 9 Ad. & E. 508.

In order to enable a vendor so to act it is submitted there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation of his part of the contract (*y*).

Thus, for example, if there be a wilful and deliberate attempt on the part of a purchaser to evade the duties imposed upon him by the general rule that where, in a written contract, it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees and undertakes to do all that is necessary to be done on his part for the carrying out of that thing, though there be no express words to that effect (*z*), then in such or cognate circumstances it may well be that the action of the purchaser in endeavouring either to defeat or delay the fulfilment of his just and legal liabilities may disentitle him to recover the deposit which he has handed over to the vendor.

Thus, where under a contract of sale of railway stock (and also for the transfer of bonds to be thereafter executed) a deposit to be forfeited by default was received by the vendor as security for and as a payment on account of the price, it was held by the Privy Council in an action by the assignee of the purchaser (without tendering the balance) to recover back the deposit as the bonds were not ready for delivery at due date, that as either the purchaser or his assignee were responsible for the non-delivery and non-completion of the bonds, there was default by him in the completion of the contract, and, consequently, that the vendor could not be compelled to return the deposit (*a*).

Easements.

**80.** In cases where any easement or any incorporeal right in or over any land for which a certificate of title has been granted is created for the purpose of being annexed to or used and enjoyed together with other land for which a certificate of title has also been granted, it is the duty of the registrar to make a memorandum of the instrument creating such easement or incorporeal right upon the folio of the register which constitutes the existing title of such other land and upon the duplicate thereof (*b*).

(*y*) *Howe* v. *Smith* (1884), 27 Ch. D. 89, C. A. (an English case).

(*z*) Blackburn, Lord, in *Mackay* v. *Dick* (1881), 6 A. C. at p. 263, H. L. (S.).

(*a*) *Sprague* v. *Booth*, [1909] A. C. 576, P. C.

(*b*) As to effect of non-registration of easement, see *Ross* v. *Hunter* (1882), VII. S. C. R. 289.

*Easements—Unity of Ownership.*

Unity of ownership extinguishes all pre-existing easements, such as a private right of way over one part of the land for the accommodation of another part, or a right to ancient lights. Nor does a subsequent severance of the property revive by implication the previously existing right; there must be an express reservation by the vendor in favour of the vendee in order to confer upon the latter the rights possessed by the owner of the dominant easement before the dominant and servient ownership were united (*c*).

The general rules relating to easements may thus be summarised:— Chitty, 402, 403.

a Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those continuous and apparent easements, including *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

(b If the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant.

To this second rule there are, however, certain exceptions, chief among which may be specified the well-known exception which attaches to what are called ways of necessity; and there may, perhaps, be others. Thus, for example, to cite a well-known instance, there is nothing unreasonable in supposing that where a person who had enjoyed during the unity of ownership the right of pouring water on his grantor's land should also be held to take it by implication, subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose ground the water had come (*d*).

But, speaking generally, the law will not permit a man who conveys property to derogate from his grant by reserving to himself impliedly any continuous apparent easement; consequently, if he wishes to retain any dominant rights over the property which he has granted away he must do so by express stipulation or reservation, and unless he does so the Courts will not lend him their assistance (*e*).

(*c*) *McClellan* v. *Newcastle Lumber Co.* (1909), XLI. S. C. R. 249.

(*d*) *Pyer* v. *Carter* (1857), 1 H. & N. 916 (an English case).

(*e*) *Wheeldon* v. *Burrows* (1879), 12 Ch. D., Thesiger, L. J., at pp. 48 *et seq.* (an English case).

And generally, a right of way appurtenant to a specified property cannot be extended by the dominant owner so as to cover its user by him for the same purpose in respect of another property to which such right is not appurtenant; the restriction of an easement to the purposes for which it was granted being an old and well-established rule of the law of property (*f*).

And in the case of a demise by lease, if the instrument refers to a plan the tenant cannot thereafter set up a title to an easement which is directly rebutted by the plan (*g*).

Nor will the temporary user of a passage or way over the land of another ripen into a title by prescription where there is no evidence of acquiescence in the easement by the person to whom the property belongs (*h*). And a like rule applies in the case of a highway, it being essential, in order to establish the existence of a highway by dedication, to show (a) an intention on the part of the owner of the land to dedicate; and (b) an acceptance by the public of the road as a highway, which acceptance is evidenced by user thereof as a public highway (*i*).

Rules as to the severance of easements.

Where the owner of an entire heritage grants a part thereof there will pass to the grantee all those apparent and continuous easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used and enjoyed by the owner of the entirety for the benefit of the part granted.

But, apparently, one grantee of a section cannot enforce against the grantee of another section a continuous easement not actually enjoyed by the original grantor at the time of the sale (*k*).

### *Rights of Riparian Owners.*

Chitty, 362, 375.

The law relating to the rights of riparian owners is alike in Great Britain and the Dominion of Canada. Every riparian owner has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes and for his cattle, and this without regard to the effect which such use may have to the case of a deficiency upon proprietors lower down the stream. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, a riparian proprietor may dam up the stream for the purpose of

(*f*) *Purdom* v. *Robinson* (1899), XXX. S. C. R. 64.

(*g*) *Casey* v. *City of Toronto* (1886), XIV. S. C. R. 172.

(*h*) *Canadian Pacific Railway* v. *Guthrie* (1901), XXXI. S. C. R. 155.

(*i*) *Moore* v. *Woodstock Woollen Mills Co.* (1902), XXIX. S. C. R. 627.

(*k*) *Hurt* v. *McMullen* (1903), XXX. S. C. R. 245.

a mill or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury. Where, therefore, a party purchased a piece of land in the Dominion with the right to use the water of a river, subject to a preference in favour of a mill thereafter to be built, which preference was to be exercised in a particular manner, such purchaser is not bound by the exercise of the preference in a different manner and in favour of a different mill.

Nor will the purchase of the right to use a portion of the water of a river operate so as to prevent a subsequent purchaser from the same vendor of another portion from diverting the water by virtue of a right which existed prior to the grant to the earlier purchaser (*l*).

In the case of navigable or floatable rivers, however, the rights of riparian owners are qualified by the fact that the waters of such streams are *publici juris* and traversable by the public at large. Consequently, the mere ownership of the banks of a navigable stream confers upon its possessors no right of property in the waters of the river. Where, therefore, a riparian owner placed a boom across a floatable river for the purpose of retaining timber and an unusual freshet broke the boom and carried some of the lumber down stream to a boom erected by a lower riparian owner for his own purposes, whence the upper riparian owner recovered it, it was held that the lower riparian owner could not claim against the upper for either salvage or demurrage, upon the ground that as both riparian owners had equal legal rights to the user of the stream, the mere fact that one of them by necessity and without damage to the other had availed himself of the assistance of the lower boom to recover possession of his timber created no legal obligation on his part to pay for the negative service thereby rendered (*m*).

As to the question what is in law to be deemed a navigable river, it seems that the question of navigability does not necessarily depend upon the actual extent of user—it is enough if navigation is possible thereon (*n*); or, in other words, "a river is navigable when with the assistance of the tide it can be navigated in a practical and profitable manner, notwithstanding that

(*l*) *Miner* v. *Gilmour* (1858), 12 Moore's P. C. 131 (an appeal from the Province of Lower Canada).

(*m*) *Tanguay* v. *Price* (1906), XXXVII. S. C. R. 657; see also *Tanguay* v. *Canadian Light Co.* (1908), XL. S. C. R. 1.

(*n*) *Bell* v. *Corporation of Quebec* (1879), 5 A. C. 84, P. C.

at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth (*o*).

Riparian owners and the rights of lumbermen.

The right of lumbermen to float timber down rivers and streams is not a paramount right, but an easement which must be enjoyed with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian owners and public corporations entitled to bridge or otherwise make use of such watercourse; the rule being that "Lumbermen are not to be regarded as the owners of floatable rivers, and no law can be cited which secures them the exclusive use of these streams for the passage of their logs. They enjoy merely a right of servitude for that purpose. The riparian proprietors have also rights in and over floatable rivers, especially those *à bûches perdues*. They have a right to the use of the water running in the stream for themselves and their cattle, and also to cross it in canoes, scows or on bridges, of which they cannot unnecessarily be deprived. Lumbermen when exercising their rights of servitude for the floatage of their logs and timber, either in a public or private river, must respect these rights, and if, in the course of the drive, they cause damage they, like all other persons, must take the consequences and pay the damages caused by their fault or that of persons under their control, or by the logs and timber under their care" (*p*).

Rights of fishery in navigable and floatable rivers.

Where by letters patent the Crown has granted out lands on both sides of a navigable and floatable river, such grant, in the absence of an express term, does not convey to the riparian grantees any exclusive right of fishing in the river opposite to the lands granted out; the general principle being that where a patent issued by the Crown is plain and unambiguous in its language the rights of the parties must be determined by it, and cannot be added to, altered or diminished by any previous negotiations, written or oral, leading up to its issue. Consequently, no such prior negotiations can be looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee. Nor will the circumstance that the grantees have in fact exercised such exclusive rights from the date at which the patent was granted to them improve their position in law (*q*).

Cases in which the estuary of a river pertains to the Crown.

The property in the soil of the sea, and of estuaries and of rivers in which the tide ebbs and flows, is *primâ facie* of common right vested in the Crown, but the property in dry land is not of common right in the Crown. It is clearly and uniformly laid down that

(*o*) *Att.-Gen. of Quebec* v. *Fraser* (1902), XXXII. S. C. R. 510.
(1906), XXXVII. S. C. R. 577.
(*p*) *Ward* v. *Township of Grenville*
(*q*) *Wyatt* v. *Att.-Gen. of Quebec*, [1911] A. C. 439, P. C.

where the soil is covered by the water forming a river in which the tide does not flow, the soil forms of common right belong to the owners of the adjoining land, and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake (*r*).

### *Positive and Negative Covenants running with the Land.*

In the case of a negative covenant, according to well-settled practice, a Court of equity would have no discretion to exercise, but must enforce the covenant; for if parties for valuable consideration, and with their eyes open, contract that a particular thing shall not be done, all that the Court has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the Court to that which already is the contract between the parties. Chitty, 10.

It is not in such case a question of the balance of convenience or inconvenience, or of the amount of damage or of injury which may accrue to one or other of the parties by reason of the decision; it is merely the enforcement by an order for specific performance of that negative bargain which the parties have made with their eyes open between themselves.

But, on the other hand, where, instead of a negative covenant, the covenant is affirmative, very different considerations may arise, and it is quite conceivable that the contract may be of such a character that a Court of equity, although it cannot enforce affirmatively the performance thereof, may in special cases interpose to prevent that being done which would be a departure from and a violation of the original covenant; and such power of interposition in appropriate circumstances constitutes a well-settled and well-known branch of the jurisdiction of Courts of equity, although in connection therewith considerations may often arise which do not occur in the case of a negative covenant.

It may be, having regard to the attendant circumstances, that the Court will consider that by interposition, instead of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good; and beside, there are, as is well known, other and different matters of which the Court, in such conditions, is almost bound to take cognisance. It will, for example, consider whether the affirmative injury which it is asked

(*r*) *Bristow* v. *Cormican* (1878), 3 A. C. 641, at p. 666, H. L. (I.).

to restrain is an injury which, if done, cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will also ask this question: Suppose the act to be done, would the right to damages therefor be decided exhaustively, once and for all, by the present action, or would there be of necessity a repetition of actions for the purpose of recovering damages from time to time? These are all matters which a Court of equity would well look into; and, on the other hand, it would also have to consider, should it interfere in aid of the person setting up the affirmative covenant, whether or no by so doing it would cause possible damage to the other party to the covenant out of all proportion to the possible advantage which it could give to the plaintiff.

All these matters in a case in which there is a certain amount of discretion to be exercised by the tribunal must be carefully weighed by the Court before it can decide how it will exercise its discretionary powers (*s*).

Applying these general observations to a concrete case, it may be laid down that where an affirmative covenant relating to land is, if stringently observed, irreconcilable with certain of the by-laws and regulations of a municipal, urban or provincial authority which are obligatory upon the covenantor, but if less stringently observed would admit of compliance therewith without materially affecting the rights of the covenantee, then, and in other cases of a like character, the affirmative covenant will be so adapted by the Court to the exigencies of the case as to make compliance with the municipal or other requirements possible, even though by so doing it may to a small extent trench upon the obligations of the covenantor towards the covenantee (*t*).

### *Leases of Land.*

Chitty, 381—387.

Where any land, for which a certificate of title has been granted, is intended to be leased for term of more than three years, the owner is required adequately to describe the same for the purpose of identification, and to execute a statutory lease thereof in accordance with a prescribed form. But no lease of mortgaged or encumbered land shall be valid against the mortgagee or encumbrancee unless he consents thereto prior to its registration or subsequently adopts it (*u*).

(*s*) *Doherty* v. *Allman* (1878) 3 A. C. 709, note pp. 719—721.

(*t*) See *Doherty* v. *Allman* (1878), 3 A. C. 709 H. L. (I.); compare *Meighen* v. *Pacaud* (1908), XI. S. C. R. 188.

(*u*) It has been held that a provision in a mortgage whereby the mortgagee undertakes to lease the land

*Implied Covenants in Leases—Lessee's Covenant.*

**89.** In every lease, unless a contrary intention expressly appears therein, the following covenants are implied, viz.:—

(a) That the lessee will pay the rent reserved at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised land during the continuance of the lease.

(b) That the lessee will at all times during the continuance of the lease keep and, at the termination thereof, yield up the demised land in good and tenantable repair; accidents and damage to buildings from fire, storm and tempest, or other casualty, and reasonable wear and tear excepted.

*Implied Powers of Lessors.*

**90.** Apart from a contrary intention expressly appearing in the lease, the following powers of lessors are also implied:—

(a) That the lessor by himself or his agents may enter upon the demised land and view the state of repair thereof, and may serve upon the lessee, or leave at his last or usual place of abode or upon the demised land, a notice in writing of any defect, requiring him within a reasonable and specified time to repair the same in so far as the tenant is bound so to do.

(b) That in event of the rent or any part thereof being in arrear for the space of two *calendar* months, or in case default is made in the fulfilment of any covenant in such lease on the part of the lessee, whether express or implied, and such default continuing unremedied for the space of two calendar months, or in case the repairs required by the notice above-mentioned are not completed within the time specified, then, and in either of such cases, the lessor may enter upon and take possession of the demised land.

[In cases where a lessor demises land to a limited company in which he is himself a shareholder the respective relationships of landlord and shareholder are entirely distinct the one from the other. Where, therefore, upon a breach of the conditions of the lease by the company resulting in a forfeiture the lessor enforced his rights against the lessee, it was decided that his connection

to the mortgagor will not create the relationship of landlord and tenant between the parties in cases where it is clear from the nature of the agreement, &c., that the intention of the parties was merely to provide additional security for the repayment of the principal debt and interest thereon (*Hobbs* v. *Ontario Loan and Debenture Co.* (1890), XVIII. S. C. R. 483).

with the company did not estop him from so doing, although in his capacity as shareholder he might be accessory to the breach (*x*).]

Duty of registrar in cases of re-entry.

**91.** In cases of lawful re-entry and recovery of possession of land by a lessor or his transferee it is the duty of the registrar, on request, to make a memorandum of the same upon the certificate of title and upon the duplicate thereof, and the estate of the lessee in such land shall thereupon determine, without, however, releasing the lessee from his liability in respect of the breach of any covenant in the lease express or implied.

Covenants for quiet enjoyment by vendors and lessors.

[A covenant for quiet enjoyment by a vendor or lessor of land is not broken by reason of the purchaser or lessee suffering annoyance from the acts of parties foreign to the vendor or landlord, and not claiming under him (*y*). Consequently, a vendor or lessor is not obliged to defend a purchaser or lessee against troubles resulting from the subsequent exercise by municipal authorities of statutory powers; although the exercise of such powers materially detracts from those amenities which were in the contemplation alike of both parties to the contract of sale or lease when the agreement between them was made (*z*).]

*Short forms of Lessee's Covenants in Leases and meanings thereof.*

**92.** Whenever in any lease made under the Land Titles Act the following short forms of words are used, the lease shall be construed as if there had been inserted therein the form of words subjoined to such form of words in the text. And every such form or modification thereof (*zz*) shall be deemed a covenant by the covenantor with the covenantee and his transferees, binding the former, and his heirs, executors, administrators and transferees:—

(1) Will not without leave assign or sub-let (*a*).

The covenantor, his executors, administrators or transferees, will not during the said term transfer, assign or sub-let the land and premises hereby leased, or any part

(*x*) *Soper* v. *Littlejohn* (1901), XXXI. S. C. R. 572; and see *Salomon* v. *Salomon & Co.*, [1897] A. C. 22.

(*y*) *Drouin* v. *Morissette* (1901), XXXI. S. C. R. 563.

(*z*) *Monarque* v. *Banque Jacques-Cartier* (1991), XXXI. S. C. R. 474. As to the measure of damages recoverable by an owner of land who is forcibly and illegally dispossessed thereof by a corporation, see *City of Montreal* v. *Hogan* (1890), XXXI. S. C. R. 1.

(*zz*) Sub-sect. (3).

(*a*) An assignment by a tenant holding under a parol agreement will not raise the relationship of landlord and tenant between the assignee and the superior landlord in cases where the latter has repudiated the subtenancy (*McGee* v. *Gilmour* (1890), XVIII. S. C. R. 579).

thereof, or otherwise by any act or deed procure the said land and premises, or any part thereof, to be transferred or sub-let, without the consent in writing of the lessor or his transferees first had and obtained (*b*).

(2) Will fence.

The covenantor, his executors, administrators or transferees, will during the continuance of the said term erect and put upon the boundaries of the said land, or on those boundaries on which no substantial fence now exists, a good and substantial fence.

(3) Will cultivate.

The covenantor, his executors, administrators or transferees, will at all times during the said term cultivate, use and manage in a proper husbandlike manner all such parts of the land as are now or shall hereafter, with the consent in writing of the said lessor or his transferees, be broken up or converted into tillage, and will not impoverish or waste the same.

(4) Will not cut timber.

The covenantor, his executors, administrators or transferees, will not cut down, fell, injure or destroy any living timber or timber-like trees standing and being upon the said land without the consent in writing of the said lessor or his transferees.

(5) Will not carry on offensive trade.

The covenantor, his executors, administrators or transferees, will not at any time during the said term use, exercise or carry on, or permit or suffer to be used, exercised or carried on in or upon the said premises, or any part thereof, any noxious, noisome or offensive art, trade, business, occupation or calling; and no act, matter or thing whatsoever shall at any time during the said term be done in or upon the said premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damage or any disturbance of the occupiers or owners of the adjoining lands and properties.

*Surrender of Lease and effect of Memorandum thereof.*

**93.** Whenever any lease or demise registered under the provisions of the Land Titles Act is surrendered otherwise than through the operation of a surrender in law, then and in such case, upon the production of the document (in statutory form) evi-

(*b*) See *Loveless* v. *Fitzgerald* (1909), XLII. S. C. R. 254.

dencing such surrender, the registrar shall make a memorandum thereof upon the certificate of title in the register and upon the duplicate certificate, and thereupon the estate or interest of the lessee in the land shall vest in the lessor, or in the person in whom, having regard to intervening circumstances, if any, the land would have vested if the lease had never been executed.

But no lease subject to a mortgage or encumbrance can be surrendered without the consent of the mortgagee or encumbrancee.

Chitty, 379—419.

### *Respective Rights of Landlords and Tenants.*

Derogation from demise.

Where an owner of property demises land for a term of years, and subsequently to granting the lease endeavours to exact from his lessee, or those legitimately claiming under him, a toll or fee for access to a way of necessity to the demised premises, the conduct of the landlord constitutes a derogation from his grant, and the Court will not support his claim to levy a toll.

But as such a claim involves neither the title to real estate or some interest therein, nor a matter relating to the taking of an annual or other rent, fee or duty, the Supreme Court of Canada has no jurisdiction to hear and determine the matter save when the amount in controversy exceeds the sum or value of $1,000, exclusive of costs (*c*).

Vendor remaining tenant by sufferance.

A vendor who conveys by deed to a purchaser a property described by metes and bounds, and subsequently to such conveyance remains in physical prehension of part of the property so conveyed, cannot thereby prescribe against his purchaser, although he may remain in physical occupation of the land for a period which would, apart from the circumstances, give him an absolute title under the Statutes of Limitation, as he is merely a tenant by sufferance (*d*).

Covenant not to assign.

A covenant not to assign without license is broken upon the execution by the lessee without license of any deed whereby he parts with the demised premises for the whole of the residue of his term. And there is a like breach where there is an assignment by one of two joint lessees to the other. Where, therefore, one of two partners who are co-lessees for a term of years, in breach of a covenant not to assign or sub-let, makes over his interest in the lease to his co-partner, the assignment constitutes a breach of such covenant (*e*). And, in such circumstances, it has been held, where the terms of the lease provided that in the event of there

(*c*) *Grimsby Park Co.* v. *Irving* (1908), XLI. S. C. R. 35.
(*d*) *Massawippi Valley Rail. Co.* v. *Reed* (1903), XXXIII. S. C. R. 457.
(*e*) *Varley* v. *Coppard* (1872), L. R. 7 C. P. 505.

being no breach of the covenants thereof the lessees, upon giving due notice, should be entitled to a renewal, the fact that, after giving the requisite notice, one of the partners assigned his interest to the other amounted to a breach of covenant avoiding the right to a renewal (*f*).

Covenant to renew lease.

In cases where there is a valid and enforceable covenant to renew a lease, the tenant is only entitled to ask for such a lease as the landlord covenanted to grant. Where, therefore, a landlord covenanted to grant a renewal of the lease of certain premises, and the premises, before the termination of the lease in which the covenant was contained were severed, such severance, although assented to by the landlord, was held to avoid the right to renewal (*g*).

But the converse of this rule has been held not to apply in all cases if the severance be involuntary. Where, therefore, a lessor who was entitled to the possession of premises, subject to a demise, was expropriated under statutory powers as to a portion thereof, it was held that such severance did not preclude him from recovering damages in respect of a breach of covenant committed by the assignees of the lessee of the remainder of the property (*h*).

Construction of clause providing indemnity for eviction.

Where, without qualification, the conditions of a Crown or other lease provide for the payment of an indemnity to the lessee in case of eviction before the expiration of the term, the fact that the lessee actually commits a breach of the covenants contained in the lease does not avoid his right to indemnity, as such right arises *eo instanti* upon eviction, even for cause: for as the lessor could not evict the lessee before the expiration of the lease, save for some breach of the conditions or covenants in the lease to be duly observed and performed by him, it cannot be contended that the lessee loses his right to indemnity, even if the eviction should be for cause, since the eviction could not take place except for such cause: and it is upon the actual occurrence of dispossession by the lessor that the right to indemnity arises under the express terms of the lease (*i*).

Rights of lessees against third parties.

The right to interfere with the possession of a tenant under a formal lease, independently of the lessor and in derogation of his rights, is not one of the natural incidents of a mere license carrying no legal or equitable interest in the soil. Moreover, an *ex facie* regular lease, followed by possession, is unimpeachable as between the parties, save on the ground of breach of covenant, and

(*f*) *Loveless* v. *Fitzgerald* (1909), XLII. S. C. R. 254.

(*g*) *Alexander Brown Milling and Elevator Co.* v. *Canadian Pacific Rail. Co.* (1910), XLII. S. C. R. 600.

(*h*) *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134 (an English case).

(*i*) *The Queen* v. *Poirier* (1899), XXX. S. C. R. 36.

the lessee is not liable to ejectment at the suit of a licensee, the license being automatically determined by the grant of the lease (*k*).

### *Chattels acceding to Land.*

Chitty, 415. Where it is alleged by a landlord that a chattel structure placed upon land has acceded to the land, the *onus* of showing an intention on the part of the tenant that the chattel or building should permanently form part of the land is placed upon him who alleges it; for though there is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, it is, nevertheless, very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation.

When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel. But, even in such a case, if the intention is apparent to make the articles part of the land they do become part of the land. Thus, blocks of stone placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall would become part of the land; though the same stones if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped, although an anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land.

Apparently, the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing the

(*k*) Founded on *St. Laurent* v. *Mercier* (1903), XXXIII. S. C. R. 314; and *Osborne* v. *Morgan* (1888) 13 A. C. 227, P. C.

they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel *l*).

### *Mortgages and Incumbrances* (*m*).

Chitty, 658—680.

Mortgages and incumbrances are defined by sub-sects. (5) and (7) of sect. 2 of the Land Titles Act as meaning, in the case of a mortgage, "any charge on land created merely for securing a debt or a loan," and, in the case of an incumbrance, "any charge on land created or effected for any purpose whatever, inclusive of mortgages, mechanics' liens when authorised by statute or ordinance), and executions against lands, unless expressly distinguished."

It should, however, be noted in this connection in the case of "Dominion Land" that it is provided by sect. 142 of the Dominion Lands Act *in* that every charge, assignment or transfer of homestead or pre-emption right, or any part thereof, made before issue of the patent therefor is null and void. And, further, that the meaning of the words "transfer" and "transferable" when used in the above sense are of the widest import, and include every means whereby the property may be passed from one person to another. Where, therefore, a holder of rights of homestead and pre-emption in Dominion lands of Manitoba charged the lands as security for the payment of a debt, it was held that the instrument was within the mischief contemplated by the above-cited section of the Act and was, consequently, absolutely null and void (*n*).

Statutory forms of mortgage and incumbrance (which may be varied to suit particular cases) are appended in the schedule to the Act, which expressly provides that every instrument of mortgage or incumbrance shall "contain an accurate statement of the estate or interest intended to be mortgaged or encumbered, and shall, for description of the land intended to be dealt with, refer to the certificate of title on which the estate or interest is held, or shall give such other description as is necessary to identify the land, together with all mortgages or incumbrances affecting the same,

(*l*) *Bing Kee* v. *Yick Chong* (1910), XLII. S. C. R. 334.
(*m*) Sect. 94.
(*n*) R. S. C., 1906, c. 55.
(*o*) *American-Abell Engine and Thresher Co.* v. *McMillan* (1909), XLII. S. C. R. 377.

if any." The Act also provides (*o*) that: "A memorandum of the mortgage or incumbrance shall be made upon the certificate of title in the register and upon the duplicate thereof."

**95.** Persons, other than settlers under the Dominion Lands Act (*p*), rightfully in possession of land prior to the issue to them of the grant from the Crown, or prior to the issue to them of the transfer from certain specified companies, may file with the registrar an indenture validly (*q*) mortgaging the same, provided it be fortified by affidavit in statutory form and accompanied (in cases other than those of Crown lands) by a certificate from the land commissioner or other proper officer of the company that the purchase price of such mortgaged lands has been paid, and that the mortgagor is entitled to a transfer in fee simple therefor from the company.

(4) And where more than one mortgage or incumbrance is filed relating to the same land, such mortgages or incumbrances shall be registered in the order of time in which they were filed in the office.

Implied covenants by mortgagor.

**108.** There is an implied covenant in every mortgage when the mortgagor remains in possession that he will repair, and keep in repair, all buildings or other improvements erected or made upon the land, and that, until redemption, the mortgagee shall be entitled at all convenient times, either by himself or his agent, to enter into or upon the land to inspect the state of repair of the buildings or improvements.

Effect of creating mortgage or incumbrance.

**98.** Any mortgage or incumbrance created under the Land Titles Act, though effectual as a security, does not operate as a transfer of the land charged.

Transfer of mortgages, incumbrances and leases.

**104.** Any mortgage, incumbrance or lease for which a certificate of title has been granted may be transferred by an instrument of transfer executed in statutory form, transferees thereunder having priority according to date of registration.

### *Short forms of Mortgagor's Covenants in Deeds of Mortgage and meanings thereof* (*r*).

The following short forms of covenants carry by implication the undertakings by the mortgagors subjoined thereto:—

Short forms of covenants.

Wherever in any mortgage made under the Land Titles Act the following short forms of words are used, the mortgage shall

(*o*) Sect. 94, sub-sect. (4).
(*p*) Sect. 96.
(*q*) Sub-sect. 3.
(*r*) Sects. 108, 109.

construed as if there had been inserted therein the form of words subjoined to such short form of words in the text. And every such form or any modification thereof (s) shall be deemed to be a covenant by the mortgagor with the mortgagee and his transferees, binding the former and his heirs, executors, administrators and transferees:—

(1) Has a good title to the said land.

And also, that the mortgagor, at the time of the sealing and delivery hereof, is and stands solely, rightfully and lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple, of and in the lands, tenements, hereditaments, and all and singular other the premises hereinbefore described, with their and every part of their appurtenances, and of and in every part and parcel thereof, without any manner of trusts, reservations, limitations, provisos or conditions, except those contained in the original grant thereof from the Crown, or any other matter or thing to alter, charge, incumber or defeat the same.

(2) Has the right to mortgage the land.

And also that the said mortgagor now hath in himself good right, full power, and lawful and absolute authority to convey the said lands, tenements, hereditaments, and all and singular other the premises hereby conveyed or hereinbefore mentioned or intended so to be, with their and every of their appurtenances unto the said mortgagee, his heirs, executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.

(3) And that on default the mortgagee shall have quiet possession of the land.

And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the said above proviso mentioned, or the interest thereof, or any part thereof, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements, or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case, it shall and may be lawful to and for the said mortgagee, his heirs, executors, administrators and assigns, peaceably and quietly to enter into, have, hold, use, occupy,

(s) Sect. 109, sub-sect. (2).

possess, and enjoy the aforesaid lands, tenements, hereditaments and premises hereby conveyed, or mentioned, or intended so to be, with their appurtenances, without the let, suit, hindrance, interruption or denial of him the said mortgagor, his heirs or assigns, or any other person or persons whomsoever.

4 Free from all incumbrances.

And that free and clear, and freely and clearly acquitted, exonerated and discharged of and from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments and premises, or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, judgments, executions and recognisances, and of and from all manner of other charges or incumbrances whatsoever

5 Will execute such further assurances of the land as may be requisite.

And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the said proviso mentioned, or the interest thereof, or any part of such money or interest, or of or in the doing, observing, performing, fulfilling, or keeping of some one or more of the provisions, agreements, or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then, and in every such case, the said mortgagor, his heirs and assigns, and all and every other person or persons whomsoever having or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest or trust of, in, to or out of the lands, tenements, hereditaments and premises, hereby conveyed, or mentioned or intended so to be, with the appurtenances or any part thereof, by, from, under or in trust for him the said mortgagor, shall and will, from time to time and at all times thereafter, at the proper costs and charges of the said *mortgagee*, his heirs, executors, administrators and assigns, make, do, suffer and execute, or cause or procure to be made, done, suffered and executed all and every such further and other reasonable act or acts, deed or deeds, devices, conveyances and assurances in the law for the further, better, and more perfectly and absolutely conveying the said lands, tenements, hereditaments and premises with the appurtenances, unto the said mortgagee, his heirs executors, administrators and assigns, as by the said mort-

gagee, his heirs, executors, or his or their counsel learned in the law, shall or may be lawfully and reasonably devised, advised or required, so as no person who shall be required to make or execute such assurances shall be compelled, for the making or execution thereof, to go or travel from his usual place of abode

(6) Has done no act to incumber the land.

And also, that the said mortgagor hath not at any time heretofore made, done, committed, executed or wilfully or knowingly suffered any act, deed, matter or thing whatsoever whereby, or by means whereof, the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, or any part or parcel thereof, are, is, or shall or may be in anywise impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever.

Proceedings to enforce mortgage or incumbrance, in certain territories.

**99.** In the North-West Territories and in Yukon Territory all proceedings to enforce payment of moneys secured by mortgage or incumbrance, or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any mortgage or incumbrance, or for the sale of the lands mortgaged or incumbered, or to foreclose the estate, interest or claim of any person in or upon the land mortgaged or incumbered.

Proceedings to discharge mortgage or incumbrance.

And all proceedings to redeem or discharge any land from any mortgage or incumbrance shall be had and taken in such manner as is by sect. 99 of the Land Titles Act provided (*ss*).

Proceedings to redeem on *abeyance*.

**102.** In cases where a right to redeem has accrued and the registered mortgagee is absent from the territories, and there is no person authorised by registered power of attorney to give a receipt to the mortgagor for the mortgage money, the judge may, upon application, direct payment to the credit of the mortgagee of the capital sum and all interest thereon accrued to be made into a chartered bank having a branch or agency in the district in which the mortgage was registered, and thenceforward the interest upon the mortgage shall cease to run or accrue; and subsequently to the registrar making a memorandum of the transaction upon the certificate of title all liability under the covenants contained in the mortgage deed shall determine (*t*).

It is also provided by sects. 103 and 104 of the Land Titles Act that a mortgagee may transfer the whole or any part of the principal moneys secured by the mortgage deed to one or

(*ss*) R. S. C. 1901 c. 110. (*t*) Sect. 103.

more third parties, whose rights under the statutory form of transfer shall have priority according to the time of registration.

*Transmission and Devolution of Land and of Mortgages thereon (tt).*

Land to vest in personal representative.

Whenever the owner of any land, or the holder of any mortgage, incumbrance or lease on or of land, for which a certificate of title has been granted, dies, such land, or such mortgage, incumbrance or lease thereon, shall . . . vest in the personal representatives of the deceased owner in the same manner as personal estate, and be dealt with and distributed as personal estate.

[Before dealing with such land, or such debt secured on land, it is, however, necessary for the personal representative to make application in writing to the registrar to be registered as owner, and for this purpose he must produce to the registrar the probate of the will of the deceased owner, or letters of administration, or the order of the Court authorising him to administer the estate of the deceased owner, or a duly certified copy of the said probate, letters of administration or order.

The probate of a will granted by the proper Court of any province of Canada or of the United Kingdom of Great Britain and Ireland, or an exemplification thereof, will, however, fulfil the above requirement.]

Procedure to be adopted by Registrar of Land Titles Office.

**114.** Upon production by the personal representative of the probate of the will, or of the letters of administration, or the order of the Court authorising him to administer the estate of a deceased owner, the registrar shall enter a memorandum thereof upon the certificate of title, and upon the probate of the will, letters of administration, order or other instrument (*u*); and thereupon the executor or administrator, as the case may be, shall be deemed to be the owner of the land, mortgage, incumbrance or lease; subject, however, to any trusts and equities upon which the deceased owner held the same, although for the purposes of any registered dealings with such land, or such mortgage, incumbrance or lease of land, he shall be deemed to be the absolute and beneficial owner thereof as from the date of the death of the deceased owner.

Effect of registration.

Nature of title of personal representative.

*Devolution of Land.*

Title to relate back to date of death.

**6.** Save in the case of such devises as are made by the testator to his personal representative, either in his representative character or for his own use, no devise shall be valid or effectual as against the personal representative of the testator until the land affected

(*tt*) Sects. 114—120. (*u*) Sect. 115.

thereby is transferred to the devisee thereof by the personal representative of the devisor.

Abolition of limited estates in land.

**7.** No estate in fee simple shall be changed into any limited fee or fee tail, but the land, whatever form of words of limitation may be used in any devise, shall transfer the greatest estate that the devisor or transferor had therein, nor shall any form of words and in any transfer, transmission or dealing (save in the cases hereinafter specified) operate so as to convey to the owner for the time being anything less than an absolute estate.

Abolition of dower and estates by the courtesy.

**12—13.** Nor shall any husband be entitled to any estate by the courtesy in the land of his deceased wife; nor any widow be entitled to dower in the land of her deceased husband; but either spouse surviving shall have the same right therein as if it were personal property.

Illegitimate children to inherit from mother.

**8.** Illegitimate children inherit from the mother as if they were legitimate, and through the mother, if dead, any land which she would, if living, have taken by purchase, gift, devise or descent from any other person.

Illegitimate child dying, intestate.

**9.** When an illegitimate child dies intestate without issue, the mother of such child shall inherit any land of which he was the owner at the time of his death.

Adultery of wife.

**10.** If a wife has left her husband and has lived in adultery after leaving him, she shall take no part of the land of her husband.

Adultery of husband.

**11.** If a husband has left his wife and has lived in adultery after leaving her, he shall take no part of her land.

### *Married Women* (*v*).

Transfer of land to man and wife.

**14.** Whenever land is transferred to a man and his wife, the transferees shall take according to the tenor of the transfer, and they shall not take by entireties unless it is so expressed in the transfer.

Transfers between spouses.

**15.** A man may make a valid transfer of land to his wife, and a woman may make a valid transfer of land to her husband, without, in either case, the intervention of a trustee.

Married woman to be as if *feme sole*

**16.** A married woman shall, in respect of land acquired by her after January 1st, 1887, have all the rights and be subject to all the liabilities of a *feme sole*, and may, in all respects, deal with land as if she were unmarried.

(*v*) And see p. 22.

Procedure upon marriage of female owner of land.

**17.** Upon furnishing the requisite statutory proof of marriage, a married woman possessed of land may surrender to the registrar for cancellation an existing certificate of title, and shall thereupon be granted a fresh certificate together with a duplicate thereof in her newly-acquired surname, setting forth her husband's full name, residence and occupation.

Next friend of married woman.

**165.**—(3 The Court or a judge may, when deemed expedient, appoint a person to act as the next friend of a married woman for the purpose of any proceeding under the Land Titles Act, and may from time to time remove or change such next friend.

As regards the right of married women to hold lands, it has been decided that where a married woman has lands conveyed to her as a voluntary gift by a solvent husband, and a certificate of title therefor is issued in her name under the provisions of a provincial Real Property Act, the subsequent bankruptcy of her husband does not invalidate or impair her title to the property, which remains in her and does not pass either to her husband's trustee or to an execution creditor (*x*).]

Infants. Idiots. Lunatics.

**165.** Whenever any person, who, if not under disability, might have made any application, given any consent, done any act, or been party to any proceeding under the Land Titles Act, is an infant, idiot or lunatic, the guardian or committee of the estate, respectively, of such person may make such application, give such consent, do such act, or be party to such proceeding as such person, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of the Act.

Where there is no guardian or committee of the estate of any of the aforesaid persons, or where a person is of unsound mind and incapable of managing his affairs, but has not been found an idiot or lunatic by inquisition, then, and in either of such cases, a Court or judge may appoint a guardian of such person for the purpose of any proceedings under the Land Titles Act, and may from time to time change such guardian.

Prohibition of transfer of land of person under disability.

The judge, on application for that purpose on behalf of any person absent from the territories, or for any person who is under the disability of infancy, lunacy or unsoundness of mind, may, by order directed to the registrar, prohibit the transfer of or any dealing with land belonging to such person.

(*x*) *Fraser* v. *Douglas* (1908), XL. S. C. R. 381.

*Notice.*

No person contracting or dealing with land to be affected by notice.

**167.** No person contracting or dealing with, or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted, shall, except in case of fraud by such person (and the knowledge of the existence of any trust or unregistered interest does not of itself constitute fraud), be bound or concerned to inquire into or to ascertain the circumstances in or the consideration for which the owner, or any previous owner of the land, is or was registered, or to see to the application of the whole or any part of the purchase money, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

*Joint Ownership by Trustees.*

Words of limitation upon transfer to trustees.

**168.** Upon the transfer to two or more persons as joint owners of any land for which a certificate of title has been granted, to be held by them as trustees, it shall be lawful for the transferor to insert in the transfer or other instrument the words "No survivorship," or for the trustees themselves by written application to the registrar to authorise him to enter the words "No survivorship" upon the certificate of title; and in either of such cases it shall be the duty of the registrar to include such words in the duplicate certificate issued to such owners pursuant to the transfer, and in the certificate of title.

Effect of words of limitation upon certificates of title.

In either case aforesaid, after such entry has been made and signed by the registrar it shall not be lawful for any less number of joint owners than the number so entered to transfer or otherwise deal with the land without obtaining the sanction of the Court or a judge by an order or motion or petition.

*Damages.*

Indemnification of person deprived of land by fraud, &c.

**143.** After a certificate of title has been granted for any land, any person deprived of such land by fraud, or by the registration of any other person as owner of such land, or in consequence of any fraud, error, omission or misdescription in any certificate of title, or in any memorandum thereon or the duplicate thereof, or otherwise, may—

(a) if the land has been included in two or more grants from the Crown; and

(b) in any other case;

Action for damages.

bring and prosecute an action at law for the recovery of damages against the person upon whose application the erroneous registration was made, or who acquired title to the land in question through such fraud, error, omission or misdescription.

Saving of defendant in certain cases for liability subsequent to transfer.

(2) Except in the case of fraud, or of error occasioned by any omission, misrepresentation or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land *bonâ fide* for value, cease to be liable for the payment of any damages, which, but for the transfer, might have been recovered by him under the provisions hereinbefore contained.

(3) In the last-mentioned case such damages with costs may be recovered out of the assurance fund provided by sects. 157 to 161 of the Land Titles Act.

Protection of *bonâ fide* purchasers and mortgagees.

**144.** Save in the case of misdescription of the land or of its boundaries, notwithstanding anything in the Land Titles Act to the contrary, no *bonâ fide* purchaser or mortgagee of land for valuable consideration under the provisions of the Act shall be subject to any action for damages as aforesaid, or to an action of ejectment, or to deprivation of the land in respect of which he is registered as owner, upon the ground that his transferor or mortgagor has been registered through fraud or error, or has derived his title from or through a person registered as owner through fraud or error.

Action against registrar as nominal defendant.

**145.** In cases where the person against whom the action for damages is directed to be brought is dead or cannot be found within the territories, and also in cases where any person sustains loss or damage through any omission, mistake or misfeasance of the inspector, registrar, or other official of the Land Titles Office and who, by reason of the provisions of the Land Titles Act, is barred from bringing an action of ejectment or other action for the recovery of the land, then, and in either of such cases, after

Requisite notice.

serving at least three calendar months' notice upon the Attorney-General of Canada and the registrar before the commencement of action, the person damnified may bring an action against the registrar as nominal defendant for the recovery of damages.

And a like right of action exists where any person is deprived of land by reason of the registration of any other person as owner thereof, or by any error, omission, or misdescription in any certificate of title, or in any memorandum upon the same or upon the duplicate certificate thereof, in cases where, by reason of the provisions of the Land Titles Act, the person damnified is barred

from bringing an action for ejectment or other action for the recovery of the land.

Recovery of damages from assurance fund.

**146.**—(2) If in either of the above specified cases the plaintiff recovers final judgment against the nominal defendant, the judge before whom the action is tried shall certify to the fact of such judgment and the amount of the damages and costs recovered, and the Minister of Finance shall pay the amount thereof out of the assurance fund to the person entitled on production of an exemplification or certified copy of the judgment rendered.

Limitation of actions.

**148.** No action for recovery of damages sustained through deprivation of land shall lie or be sustained against the registrar, or against the assurance fund, unless the same is commenced within the period of six years from the date of such deprivation: Provided that any person under the disability of infancy, lunacy or unsoundness of mind may bring the action within six years from the date on which the disability ceases.

Cases where time does not run.

Grounds for non-suiting plaintiff.

**149.** If, however, the plaintiff in an action brought within six years after the cessation of disability, or the plaintiff in an action at whatever time brought, or, generally, the plaintiff in any action whatsoever for the recovery of land, or if the person through or under whom he claims title had either actual or constructive notice of such delay, and wilfully or collusively omitted to lodge a *caveat* with the registrar to the effect that no registration of any transfer or other instrument affecting the said land should be made, and that no certificate of title therefor should be granted, or if he allowed such *caveat* to lapse, then, and in either of such cases, upon the circumstance being proved to the satisfaction of the judge, he (the plaintiff) shall be non-suited.

*Executions.*

**124.** Where a copy of a writ of execution issued in respect of land has not already been forwarded or delivered to the registrar it is the duty of the sheriff, upon reception thereof and upon payment of the statutory fee therefor (by the execution creditor named therein), to transmit by registered post to the registrar a copy of the writ and of all endorsements thereon duly certified under his hand and seal, if any.

The reception of a copy of the writ by the registrar for the registration district in which such land is situated is a condition precedent to the land being bound thereby.

(3) From and after the reception of such writ by the registrar no certificate of title or other instrument dealing with the

land which may be executed by the debtor shall be effectual, exc
subject to the rights of the execution creditor under the writ wh
the same continues in force.

Biennial renewal of writ.

(5) Writs of execution cease to bind or affect land at the
piration of two years from the date of receipt thereof by
registrar, unless before the expiration of that term a renewa
such writ is filed with the registrar in like manner as the orig
was filed with him.

**126.**—(1) and (2) Upon the satisfaction or withdrawal f
his hands of any writ, the sheriff shall forthwith transmit to
registrar under his seal, if any, a certificate of withdrawa
satisfaction as to the whole or any portion of the land so bo
and the registrar shall make a memorandum thereof upon
certificate of title; and thenceforth such land or portion of
shall be absolutely released and discharged from the writ.

*Sheriff's Sales of Land.*

Confirmation of sheriff's sale by Court.

**127.** No sale by a sheriff or other officer . . . under pro
of law of any land, for which a certificate of title has been gra
shall be of any effect until the same has been confirmed by
Court or a judge.

Registration.

(2) When any land is sold under process of law, the re
trar, upon the production to him of the transfer in statutory f
with proof of the due execution thereof, and with an order o
confirmation of the sale endorsed upon the transfer or atta
thereto, shall, after the expiration of four weeks from its re
tion (unless such registration is in the meantime stayed by o
of the Court or judge), register the transfer.

Confirmation of sale.

**129.** Application for confirmation of the sale of land u
process of law, or for arrears of taxes, may be made by the sh
or by any person interested in the sale (on notice to the ow
unless the judge to whom the application is made dispenses
such notice.

(2) If the sale is confirmed the costs of confirmation s
subject to the direction of the judge, be paid out of the pur
money.

(3) If the sale is not confirmed the purchase money sha
refunded to the purchaser, and the judge may make such ord
to the costs of all parties to the sale and of the application fo
confirmation as he thinks just.

Subsequently to registration the registrar shall cancel
existing certificate of title, either wholly or in part (if less
the whole of the land comprised therein be sold), grant a ce

cate of title to the transferee, and issue to him a duplicate in prescribed form.

But no registration shall be made when a judicial stop order has been obtained, save according to the order and direction of the Court or judge. Effect of judicial stay of registration.

**128.** No transfer of land sold under process of law or for arrears of taxes shall be valid as against the owner of the land so sold, or of those claiming under him, unless it be registered within a period of two months from the date of the order of confirmation (*y*).

But this time may be extended by filing a judicial order therefor with the registrar.

*Sale for Arrears of Taxes.*

**130.** When any land, for which a certificate of title has been granted, is sold for taxes, the buyer may, at any time after the sale, lodge a *caveat* against a transfer of the land by the *quondam* owner. *Caveat* by purchaser at tax sale.

(2) Upon completion of the legal time allowed for redemption, and upon production of the transfer of the land in the prescribed form for tax sales, with proof of the due execution thereof by the proper officer, and a judge's order confirming such sale, the registrar shall, after the expiration of four weeks from the delivery to him of the transfer and judge's order of confirmation, register the transferee as absolute owner of the land so sold, and shall cancel the certificate of title in whole or in part, as the case requires, grant a new certificate of title to the transferee, and shall issue to the purchaser a duplicate certificate, unless the registration has in the meantime been stopped by order of a judge.

*Lost or Destroyed Certificates of Title.*

**164.** Upon production to the registrar of satisfactory proof by statutory declaration of the person to whom a duplicate certificate has been issued, or some one having knowledge of the facts of the accidental loss or destruction of the duplicate certificate so issued, the registrar may, after having entered in the register the facts so proven, issue a fresh duplicate certificate in lieu of the one so lost or destroyed, noting upon the same why it is so issued (*z*). Cf. ttv, 815, 816.

(*y*) As to the formalities to be observed in cases of sales of land for taxes, see *Johnson* v. *Kirk* (1900), XXX. S. C. R. 314 (a case decided under the B. C. Land Registry Act).

(*z*) Parol evidence is admissible of the contents of an unregistered deed (*Carey* v. *Carey*, Cass. Dig., 2nd ed., 778).

But unless the registrar is satisfied as to the loss or destruc
of the duplicate certificate so issued, and that such notice is
necessary, no such fresh duplicate certificate shall be issued u
the registrar has for four weeks—

(a) published a notice of his intention to issue such fresh
tificate in the newspaper published nearest to the
described in the register, or if more newspapers than
are published in the same locality, then in one of
newspapers; and

(b) posted up such notice in a conspicuous place in the L
Titles Office.

*Substitution of one Certificate of Title for several, or* vice ve

**162.** Upon the application of an owner of several parcel
land held under separate certificates of title, or of several pa
of land held under one certificate, and the delivery up for cance
tion of the duplicate certificates or certificate, the registrar
cancel the existing certificate or certificates of title granted
the duplicate or duplicates thereof, and substitute therefo
single certificate of title for all the parcels of land or sev
certificates of title thereby sub-dividing the land in accord
with the application.

(2) Upon each of such respective certificates of title so gra
shall be entered a memorandum of each and every incumbra
lien, charge, mortgage, or other instrument affecting such pa
or parcels of land, setting forth the occasion of the cancella
and referring to the certificate of title so granted.

(3) The registrar shall issue to the applicant one or m
duplicate certificates, as the case requires.

[Under the provisions of sect. 126 of the Land Titles
1894 (*a*), which enacts that, apart from fraud (*b*), persons d
ing with the registered owners of land are not bound to inq
into the circumstances under which such registered ow
acquired the land, it has been held that a *bonâ fide* purchaser f
the registered owner of land subject to the statute is not affe
by an improperly filed notice of a *lis pendens;* and that
exception as to fraud referred to in the above-cited section of
Act means actual fraud in which the purchaser has participa

(*a*) 57 & 58 Vict. c. 128; R. S. C. c. 110, s. 167.

(*b*) In order to set aside a conveyance on the ground of misrepresentation, the party seeking to set it aside must establish such frau would have been sufficient ground an action of deceit (*Bell* v. *Ma* (1887), XV. S. C. R. 576).

and does not include constructive or equitable fraud. Consequently, a registered *bonâ fide* purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor (*c*).]

Proceedings not to abate in case of death.

**176.** Proceedings under the Land Titles Act shall not abate or be suspended by any death, transmission or change of interest, but in any such event a judge may make such order for carrying on, discontinuing or suspending the proceedings, upon the application of any person interested, as under the circumstances he thinks just. . . .

(*c*) *Syndicat Lyonnais du Klondyke* v. *McGrade* (1905), XXXVI. S. C. R. 231.

## CHAPTER XXVII.

### RULES PRESCRIBED BY THE JUDICIAL COMMITTEE OF MAJESTY'S PRIVY COUNCIL FOR REGULATING APPEAL THE PRIVY COUNCIL FROM THE PROVINCIAL COURTS OF DOMINION OF CANADA.


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IN the subjoined list only those provisions absolutely essenti the right of appeal from the various Provincial Courts of Dominion are set out.

The provinces are arranged in alphabetical order and the l (with one exception) are much abbreviated.

The full particulars contained in the Rules relating to app to His Majesty's Privy Council from the Supreme Cour Alberta may be regarded as being of general application to other provinces of the Dominion.

#### ORDER IN COUNCIL REGULATING APPEALS TO HIS MAJESTY IN CO FROM THE SUPREME COURT OF ALBERTA.

At the Court at Buckingham Palace, the 10th day of January, 1910.

PRESENT,

The King's Most Excellent Majesty.

Lord President — Lord Chamberlain
Lord Privy Seal — Lord Pentland
Sir Walter Hely-Hutchinson.

Whereas by an Act passed in a session of Parliament held in seventh and eighth years of Her late Majesty's reign (shortly ent

"The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British colony or possession abroad although such Court should not be a Court of Errors or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Act of the Province of Alberta in the Dominion of Canada passed in the seventh year of His Majesty's reign and being Chapter 3 entitled "An Act respecting the Supreme Court," a Superior Court of Civil and Criminal Jurisdiction was constituted and established in and for the said Province of Alberta called the Supreme Court of Alberta.

And whereas it is expedient with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such appeals that provision should be made for appeals from the said Supreme Court to His Majesty in Council:

It is hereby ordered by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the Rules hereunder set out shall regulate all appeals to His Majesty in Council from the said Province of Alberta.

1. In these Rules, unless the context otherwise requires:

"Appeal" means appeal to His Majesty in Council;

"His Majesty" includes His Majesty's heirs and successors;

"Judgment" includes decree, order, sentence, or decision;

"Court" means either the full Court or a single judge of the Supreme Court of Alberta according as the matter in question is one which, under the rules and practice of the Supreme Court, properly appertains to the full Court or to a single judge;

"Record" means the aggregate of papers relating to an appeal (including the pleadings, proceedings, evidence, and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the registrar or other proper officer having the custody of the records in the Court appealed from;

"Month" means calendar month;

Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an appeal shall lie:—

(a) as of right, from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of one thousand pounds sterling or upwards, or

where the appeal involves, directly or indirectly, some
claim or question to or respecting property or some civi
right amounting to or of the value of one thousand pound
sterling or upwards; and

(b) at the discretion of the Court from any other judgment o
the Court, whether final or interlocutory, if, in the opinio
of the Court, the question involved in the appeal is or
which by reason of its great general or public importanc
or otherwise, ought to be submitted to His Majesty
Council for decision.

3. Where in any action or other proceeding no final judgment c
be duly given in consequence of a difference of opinion between t
judges, the final judgment may be entered *pro forma* on the app
cation of any party to such action or other proceeding according
the opinion of the Chief Justice, or in his absence, of the seni
puisne judge of the Court, but such judgment shall only be deem
final for purposes of an appeal therefrom, and not for any oth
purpose.

4. Applications to the Court for leave to appeal shall be made
motion or petition within twenty-one days from the date of
judgment to be appealed from, and the applicant shall give
opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by
Court in the first instance:—

(a) upon condition of the appellant, within a period to be fi
by the Court, but not exceeding three months from
date of the hearing of the application for leave to app
entering into good and sufficient security, to the satis
tion of the Court, in a sum not exceeding five hun
pounds, for the due prosecution of the appeal, and
payment of all such costs as may become payable to
respondent in the event of the appellant not obtai
an order granting him final leave to appeal, or of the ap
being dismissed for non-prosecution, or of His Majest
Council ordering the appellant to pay the respondent's
of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or t
within which the appellant shall take the necessary
for the purpose of procuring the preparation of the r
and the dispatch thereof to England as the Court, h
regard to all the circumstances of the case, may th
reasonable to impose.

6. Where the judgment appealed from requires the appella
pay money or perform a duty, the Court shall have power,
granting leave to appeal, either to direct that the said judgment
be carried into execution or that the execution thereof shall b
pended pending the appeal, as to the Court shall seem just

case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon

7. The preparation of the record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

8. The registrar, as well as the parties and their legal agents, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the appeal, and generally to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the record.

9. Where in the course of the preparation of a record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the record as finally printed (whether in Canada or in England) shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in Canada or in England.

11. Where the record is printed in Canada the registrar shall, at the expense of the appellant, transmit to the registrar of the Privy Council forty copies of such record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof, and by affixing thereto the seal of the Court.

12. Where the record is to be printed in England, the registrar shall, at the expense of the appellant, transmit to the registrar of the Privy Council, one certified copy of such record, together with an index of all the papers and exhibits in the case. No other certified copies of the record shall be transmitted to the agents in England by or on behalf of the parties to the appeal.

13. Where part of the record is printed in Canada and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to such parts as are printed in Canada and such as are to be printed in England respectively.

14. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings

out of which the appeal arises shall by such judge or judges be
communicated in writing to the registrar and shall by him be trans-
mitted to the registrar of the Privy Council at the same time when
the record is transmitted.

15. Where there are two or more applications for leave to appea
arising out of the same matter, and the Court is of opinion that i
would be for the convenience of the Lords of the Judicial Committe
and all parties concerned that the appeals should be consolidated
the Court may direct the appeals to be consolidated and grant leav
to appeal by a single order.

16. An appellant who has obtained an order granting him co
ditional leave to appeal may at any time prior to the making of
order granting him final leave to appeal withdraw his appeal
such terms as to costs and otherwise as the Court may direct.

17. Where an appellant, having obtained an order granting hi
conditional leave to appeal, and having complied with the conditio
imposed on him by such order, fails thereafter to apply with d
diligence to the Court for an order granting him final leave to appe
the Court may, on an application in that behalf made by the respo
dent, rescind the order granting conditional leave to appeal,
withstanding the appellant's compliance with the conditions impo
by such order, and may give such directions as to the costs of
appeal and the security entered into by the appellant as the C
shall think fit, or make such further or other order in the prem
as in the opinion of the Court the justice of the case requires.

18. On an application for final leave to appeal, the Court
inquire whether notice, or sufficient notice, of the application
been given by the appellant to all parties concerned, and, if
satisfied as to the notices given, may defer the granting of the
leave to appeal, or may give such other directions in the matte
in the opinion of the Court the justice of the case requires.

19. An appellant who has obtained final leave to appeal
prosecute his appeal in accordance with the Rules for the time
regulating the general practice and procedure in appeals to
Majesty in Council.

20. Where an appellant, having obtained final leave to a
desires, prior to the dispatch of the record to England, to with
his appeal, the Court may, upon an application in that behalf
by the appellant, grant him a certificate to the effect that the
has been withdrawn, and the appeal shall thereupon be deem
from the date of such certificate, to stand dismissed without e
Order of His Majesty in Council, and the costs of the appe
the security entered into by the appellant shall be dealt with
manner as the Court may think fit to direct.

21. Where an appellant, having obtained final leave to
fails to show due diligence in taking all necessary steps
purpose of procuring the dispatch of the record to Engla

respondent may, after giving the appellant due notice of his intended application, apply to the Court for a certificate that the appeal has not been effectually prosecuted by the appellant, and if the Court sees fit to grant such a certificate, the appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the order granting final leave to appeal and the dispatch of the record to England the record becomes defective by reason of the death, or change of status, of a party to the appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the record as aforesaid without express Order of His Majesty in Council.

23. Where the record subsequently to its dispatch to England becomes defective by reason of the death, or change of status, of a party to the appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The case of each party to the appeal may be printed either in Canada or in England, and shall in either event be printed in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the counsel who attends at the hearing of the appeal, or by the party himself if he conducts his appeal in person.

25. The case shall consist of paragraphs numbered consecutively, and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the case of long extracts from the record. The taxing officer, in taxing the costs of the appeal, shall, either of his own motion or at the instance of the opposite party, inquire into any unnecessary prolixity in the case, and shall disallow the costs occasioned thereby.

26. Where the Judicial Committee directs a party to bear the costs of an appeal incurred in Alberta such costs shall be taxed by

the proper officer of the Court in accordance with the Rules for t time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order wh His Majesty in Council may think fit to make on an appeal from judgment of the Court in like manner as any original judgment the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interf with the right of His Majesty, upon the humble petition of a person aggrieved by any judgment of the Court, to admit his appe therefrom upon such conditions as His Majesty in Council sh think fit to impose.

ALMERIC FITZROY

SCHEDULE.

I. Records and Cases in Appeals to His Majesty in Council shall be pri in the form known as Demy Quarto (*i.e.*, 54 cms in length and 42 in width

II. The size of the paper shall be such that the sheet, when folded trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Pri shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereab and every tenth line shall be numbered in the margin.

BRITISH COLUMBIA.

ORDER IN COUNCIL, DATED JANUARY 23RD, 1911.

An appeal lies as of right from any final judgment of the Cou Appeal of British Columbia when the matter in dispute on appeal amounts to or is of the value of £500 sterling or upward

Time limit for making appeal.

Applications to the Court for leave to appeal shall be made motion or petition within *twenty-one days* from the date of judgment to be appealed from.

Amount to be deposited as security for prosecution of appeal and costs.

Leave to appeal . . . shall only be granted by the Court in first instance—

(a) Upon condition of the applicant, within a period to be fi by the Court, but not exceeding *three months* from the date of hearing of the application for leave to appeal, entering into g and sufficient security, to the satisfaction of the Court, in a sum exceeding £500, for the due prosecution of the appeal, and payment of all such costs as may be payable to the respondent in event of the appellant's not obtaining an order granting him l leave to appeal, or of the appeal being dismissed for non-prose tion, or of His Majesty in Council ordering the appellant to pay respondent's costs of the appeal (as the case may be); and

Procedure to be adopted by appellant in preparing appeal.

(b) Upon such other conditions (if any) as to the time or ti within which the appellant shall take the necessary steps for purpose of procuring the preparation of the record and the disp thereof to England as the Court, having regard to all the circ stances of the case, may think it reasonable to impose.

MANITOBA.

ORDER IN COUNCIL DATED NOVEMBER 26TH, 1892, AS AMENDED BY AN ORDER IN COUNCIL DATED NOVEMBER 28TH, 1910.

An appeal lies as of right from any final judgment of the Court of Appeal of Manitoba when the matter in dispute on the appeal amounts to or is of the value of £1,000 sterling or upwards.

Any person or persons feeling aggrieved by any judgment, decree, order or sentence may within *twenty-one days* next after the same shall have been pronounced, made or given apply to the said Court by motion or petition for leave to appeal therefrom. Time limit for making appeals.

But such leave to appeal shall only be granted by the Court upon condition of the appellant within *three months* of the date of such motion or petition for leave to appeal giving approved security for a sum not exceeding £500 sterling as an earnest for the due prosecution of the appeal and the payment of all such costs as may be awarded by the Judicial Committee of the Privy Council to the party or parties respondent. Amount of security required to ensure prosecution of appeal and to provide for the costs thereof.

NEW BRUNSWICK.

ORDER IN COUNCIL DATED NOVEMBER 7TH, 1910.

An appeal lies as of right from any final judgment of the Supreme Court of the Province of New Brunswick when the matter in dispute on the appeal amounts to or is of the value of £300 sterling or upwards.

Provided that the person or persons feeling aggrieved by any judgment, decree, order or sentence do within *twenty-one days* next after the same shall have been pronounced, apply to the Court making such order, judgment, decree or sentence by motion for leave to appeal therefrom. Time limit for making appeals.

But such leave to appeal shall only be granted by the Court to which motion is made upon condition of the appellant within a period not exceeding *three months* from the date of motion or petition for leave to appeal entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 for the due prosecution of the appeal and for the payment of all such costs as may be awarded. Amount of security required to ensure prosecution of appeal and to provide for costs.

NEWFOUNDLAND.

By virtue of a Charter of Justice dated September 19th, 1825, and subsequently amended by colonial legislation (*a*), it is provided, *inter alia*, that any person or persons feeling aggrieved by any judgment, decree, order or sentence of the Supreme Court of Newfoundland may appeal therefrom to His Majesty's Judicial Com-

(*a*) See tit. "Newfoundland," Statutory Rules and Orders Revised, 1904, Vol. 9.

mittee of the Privy Council in case any such judgment, decree order or sentence of the said Supreme Court shall be given or pro nounced for or in respect of any sum or matter at issue above the amount or value of £500 sterling, or in case such judgment, decree order or sentence shall involve directly or indirectly any claim demand or question of or respecting any civil right amounting t or of the value of £500 sterling.

Time limit for making appeals.

Any person or persons feeling aggrieved by any such judgmen decree, order or sentence of the said Supreme Court may, withi *fourteen days* next after the same shall have been pronounced, mad or given apply to the said Supreme Court by petition for leave t appeal therefrom.

Security to be given to ensure prosecution of appeal and to provide for the costs thereof.

But such leave to appeal shall only be granted upon condition the appellant within *three months* from the date of such petitio for leave to appeal giving security to the satisfaction of the sa Supreme Court in a sum not exceeding £500 for the prosecution the appeal and for the payment of all such costs as may be award by the Judicial Committee of the Privy Council to the party parties respondent.

NORTH WEST TERRITORIES.

ORDER IN COUNCIL DATED JULY 30TH, 1891.

An appeal lies as of right from any final judgment of the Supre Court of the North West Territories when the matter in dispute the appeal amounts to or is above the value of £300 sterling, or ense the judgment, decree, order or sentence of the said Court sh involve directly or indirectly any claim, demand or question to respecting property or any civil right amounting to or of the va of £300 sterling.

Time limit for making appeals.

Provided the person or persons feeling aggrieved by any ju ment, decree, order or sentence as aforesaid do within *fourteen d* after the same shall have been pronounced apply to the Court mak such order, judgment, decree or sentence by motion or petition leave to appeal therefrom to Her then regnant Majesty, Her h and successors in Her or their Privy Council.

Amount of security required to ensure prosecution of appeal and to provide for costs.

But such leave to appeal shall only be granted by the Court to wh motion is made upon condition of the appellant within *three mo* of the date of such motion or petition for leave to appeal giving secu in a bond or mortgage or personal recognizance for a sum not ceeding the value of £500 sterling as an earnest for the due pr cution of the appeal and the payment of all such costs as may awarded by Her Majesty, Her heirs and successors or by the Jud Committee of Her Majesty's Privy Council to the party or pa respondent.

NOVA SCOTIA.

By virtue of an Order in Council dated July 5th, 1911, and

lished in the *London Gazette* on July 11th, 1911, it is provided that, subject to the Rules by the said Order in Council made and provided, an appeal to His Majesty in Council shall lie—

(a) As of right, from any final judgment of the Supreme Court of the Province of Nova Scotia, where the matter in dispute on appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property, or some civil right amounting to or of the value of £500 sterling or upwards; and a similar right of appeal shall lie—

(b) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

Time limit for making appeal.

Applications to the Court for leave to appeal shall be made by motion or petition within *twenty-one days* from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

Amount of security required to ensure prosecution of appeal and to provide for costs.

Leave to appeal . . . shall only be granted by the Court in the first instance—

(a) Upon condition of the appellant, within a period to be fixed by the Court, but not exceeding *three months* from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the appeal, and the payment of all such costs as may become payable to the respondent in the event of the appellant's not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the appellant to pay the respondent's costs of the appeal (as the case may be): and

(b) Upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the dispatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

ONTARIO.

By virtue of the Privy Council Appeals Act, 1910 (*b*), as amended by the Privy Council Appeals Amendment Act, 1912 (*c*), it is enacted that—

When appeals may be made to the King in Privy Council.

Sect. 2. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary

(*b*) 10 Edw. VII. c. 24 (Ont.).
(*c*) 2 Geo. V. c. 18 (Ont.).

or other duty, or fee or any like demand of a general and pul
nature affecting future rights, of what value or amount soever
same may be, an appeal shall lie to His Majesty in His Pr
Council; and except as aforesaid no appeal shall lie to His Majest
Privy Council.

Amount of security to be given.

Sect. 3. No such appeal shall be allowed until the appellant
given security in $2,000 to the satisfaction of the Court appe
from that he will effectually prosecute the appeal and pay such
and damages as may be awarded in case the judgment appealed f
is confirmed.

Sects. 4 and 5 of the Act of 1910 are repealed and are replace
the provisions of the Privy Council Appeals (Amendment) Act, 1
which provides, *inter alia*, for procedure to be adopted when
cution of the judgment of the Court appealed from is not staye

It is further provided by sect. 6 of the Privy Council Appeals
1910, that a judge of the Court of Appeal (of Ontario) shall
authority to approve of and allow the security to be given
party who intends to appeal to His Majesty in His Privy Co
whether the application for such allowance be made during a si
of the Court or at any other time.

PRINCE EDWARD ISLAND.

ORDER IN COUNCIL DATED OCTOBER 13TH, 1910.

An appeal lies as of right from any final judgment of the Sup
Court of Prince Edward Island when the matter in dispute am
to or is of the value of £500 sterling or upwards.

Time limit for making appeals.

Applications to the Court for leave to appeal shall be mad
motion or petition within *twenty-one* days from the date o
judgment to be appealed from.

Amount of security required to ensure prosecution of appeal and to provide for the costs thereof.

But such leave to appeal shall only be granted by the
upon condition of the appellant within *three months* of the da
such motion or petition for leave to appeal giving approved
rity for a sum not exceeding £500 sterling as an earnest for th
prosecution of the appeal and the payment of all such costs a
be awarded by the Judicial Committee of the Privy Council
party or parties respondent.

QUEBEC.

ARTICLES 68, 69 OF THE CODE OF CIVIL PROCEDURE OF THE PR
OF QUEBEC (*d*) AS AMENDED BY 8 EDW. VII. c. 75.

An appeal lies to His Majesty in His Privy Council from
judgments rendered in appeal by the Court of King's Bench

Article 68.—(1) In all cases where the matter in dispute
to any fee of office, duty, rent, revenue or any sum of money pa
to His Majesty.

(*d*) This Code was given the force of law by 60 Vict. c. 18.

(2) In cases concerning titles to lands or tenements, annual rents or other matters which can affect the future rights of parties.

(3) In all other cases where the matter in dispute exceeds the sum or value of $5,000.

Article 69. Causes adjudicated upon in review which are capable of appeal to His Majesty in His Privy Council, but in respect of which an appeal to the Court of King's Bench is prohibited by Articles 43, 44 of the Code of Civil Procedure, are nevertheless susceptible of appeal to His Majesty in Council. It is further provided by Article 1249 of the Code of Civil Procedure that "The execution of a judgment from which an appeal is made to His Majesty in His Privy Council cannot be prevented or stayed unless the party aggrieved thereby furnishes good and sufficient sureties within the period fixed by the Court adjudicating upon the case that he will diligently prosecute the appeal, satisfy the judgment and pay such costs and damages as may be awarded by His Majesty in the event of the judgment appealed from being confirmed."

For further rules as to procedure, see Articles 1250 to 1252 of the Code of Civil Procedure.

SASKATCHEWAN.

An appeal lies as of right from any final judgment of the Supreme Court of Saskatchewan where the matter in dispute on the appeal amounts to or is of the value of $4,000 or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property, or some civil right amounting to or of the value of $4,000 or upwards; and a similar right of appeal shall lie—

(b) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

Rules as to procedure when the Court is divided.

Where in action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro formâ* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice, or, in his absence, of the senior puisne judge of the Court, but such judgment shall only be deemed final for purposes of an appeal therefrom, and not for any other purpose.

Time limit for making appeal.

Applications to the Court for leave to appeal shall be made by motion or petition within *fourteen days* from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

Conditions precedent to granting leave to appeal.

Leave to appeal shall only be granted by the Court in the first instance—

(a) Upon condition of the appellant, within a period to be fixed

by the Court, but not exceeding *three months* from the date o
hearing of the application for leave to appeal, entering into
and sufficient security, to the satisfaction of the Court, in a su
exceeding $2,500 for the due prosecution of the appeal, an
payment of all such costs as may become payable to the respo
in the event of the appellant's not obtaining an order granting
final leave to appeal, or of the appeal being dismissed for
prosecution, or of His Majesty in Council ordering the app
to pay the respondent's costs of the appeal (as the case may
and

(b) Upon such other conditions (if any) as to the time or
within which the appellant shall take the necessary steps fo
purpose of procuring the preparation of the record and the di
thereof to England as the Court, having regard to all the ci
stances of the case, may think it reasonable to impose.

**Procedure when judgment appealed from enjoins a duty.**

Where the judgment appealed from requires the appellant
money or perform a duty, the Court shall have power, when gr
leave to appeal, either to direct that the said judgment sh
carried into execution or that the execution thereof shall be susp
pending the appeal, as to the Court shall seem just, and in ea
Court shall direct the said judgment to be carried into exec
the person in whose favour it was given shall, before the exe
thereof, enter into good and sufficient security, to the satisf
of the Court, for the due performance of such Order as His M
in Council shall think fit to make thereon.

YUKON (Territory of Canada Dominion).

The Rules relating to appeals to the Judicial Committee
Privy Council from any judgment of the Superior Court of Y
where the matter in dispute on appeal is above the amount or
of £300 sterling, or in case such judgment, decree, order or se
shall involve, directly or indirectly, any claim, demand or
tion to or respecting property, or any civil right amounti
or of the value of £300 sterling, are the same as those applying
North West Territories, from which Yukon was severed by Do
Act 61 Vict. c. 6.

## JUDICIAL COMMITTEE.

*Jurisdiction and Procedure: General Rules as to Appe*

THE JUDICIAL COMMITTEE RULES, 1908.

At the Court at Buckingham Palace, the 21st day of
December, 1908.

PRESENT

The King's Most Excellent Majesty.

Archbishop of Canterbury. Lord Chamberlain.
Lord President. Lord Fitzmaurice.

Whereas there was this day read at the Board a representatio

the Judicial Committee of the Privy Council in the words following, viz.:—

"The Lords of the Judicial Committee having taken into consideration the practice and procedure in accordance with which the general appellate jurisdiction of Your Majesty in Council is now exercised, and being of opinion that the Rules regulating the said practice and procedure ought to be consolidated and amended, their Lordships do hereby agree humbly to recommend to Your Majesty that with a view to such consolidation and amendment certain Orders of Her late Majesty Queen Victoria in Council regulating the said practice and procedure, viz., the Orders in Council dated respectively the 11th day of August, 1842, the 13th day of June, 1853, the 31st day of March, 1855, the 24th day of March, 1871, and the 26th day of June, 1873, and also the Order of Your Majesty in Council dated the 20th day of March, 1905, amending the said practice and procedure ought to be revoked and that the several Rules hereunto annexed ought to be substituted therefor."

HIS MAJESTY having taken the said representation into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the said Orders in Council in the said representation mentioned be and the same are hereby revoked and that the Rules hereunto annexed be substituted therefor.

A. W. FITZROY.

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THE JUDICIAL COMMITTEE RULES, 1908.

Interpretation.

1.—(1) In these Rules, unless the context otherwise requires:

"Appeal" means an appeal to His Majesty in Council;

"Judgment" includes decree, order, sentence, or decision any Court, judge, or judicial officer;

"Record" means the aggregate of papers relating to an app (including the pleadings, proceedings, evidence and ju ments) proper to be laid before His Majesty in Cou on the hearing of the appeal;

"Registrar" means the registrar or other proper officer hav the custody of the records in the Court appealed from;

"Abroad" means the country or place where the Court appe from is situate;

"Agent" means a person qualified by virtue of Her Majesty's Order in Council of the 6th March, 189 conduct proceedings before His Majesty in Council behalf of another;

"Party" and all words descriptive of parties to proceed before His Majesty in Council (such as "petitioner," pellant," "respondent") mean, in respect of all acts pr to be done by an agent, the agent of the party in que where such party is represented by an agent;

"Month" means calendar month;

Words in the singular shall include the plural, and wor the plural shall include the singular.

(2) Where by these Rules any step is required to be tak England in connection with proceedings before His Majes Council, whether in the way of lodging a petition or other docu entering an appearance, lodging security, or otherwise, such shall be taken in the Registry of the Privy Council, Downing S London.

*Leave to Appeal.*

Leave to appeal generally.

2. All appeals shall be brought either in pursuance of obtained from the Court appealed from, or, in the absence o leave, in pursuance of special leave to appeal granted b Majesty in Council upon a petition in that behalf presented intending appellant.

*Special Leave to Appeal.*

Form of petition for special leave to appeal.

3. A petition for special leave to appeal to His Majesty in C shall state succinctly and fairly all such facts as it may be nec to state in order to enable the Judicial Committee to advi Majesty whether such leave ought to be granted. The petitio not travel into extraneous matter, and shall deal with the of the case only so far as is necessary for the purpose of exp

and supporting the particular grounds upon which special leave to appeal is sought.

Three copies of petition to be lodged together with affidavit in support.

4. The petitioner shall lodge at least three copies of his petition for special leave to appeal together with the affidavit in support thereof prescribed by Rule 50 hereinafter contained.

Time for lodging petition.

5. A petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the petitioner shall, in every case, lodge his petition with the least possible delay.

Security for costs and transmission of record.

6. Where the Judicial Committee [illegible] to grant special leave to appeal, the [illegible] specify the amount of the security for costs [illegible] to be lodged by the petitioner, and the period (if any) within which [illegible] is to be lodged and shall, unless the [illegible] render such a course unnecessary, [illegible] transmission of the record by the registrar of the Court appealed from to the registrar of the Privy Council and for such further [illegible] as to justice of the case may require.

General provisions.

7. Save as by the four last preceding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to petitions for special leave to appeal.

Petitions for special leave to appeal *in formâ pauperis*.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to petitions for leave to appeal *in formâ pauperis*, but in addition to the affidavit referred to in Rule 4 every such petition shall be accompanied by an affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the intended appeal, and that he is unable to provide sureties, and also by a certificate of counsel that the petitioner has reasonable ground of appeal.

Exemption of pauper appellant from lodging security and paying office fees.

9. Where a petitioner obtains leave to appeal *in formâ pauperis*, he shall not be required to lodge security for the costs of the respondent or to pay any Council Office fees.

Exemption of unsuccessful petitioner for leave to appeal *in formâ pauperis* from payment of office fees.

10. A petitioner whose petition for leave to appeal *in formâ pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a petitioner in respect of a petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

*Record.*

Record to be transmitted without delay.

11. As soon as an appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the appellant shall without delay take all necessary steps to have the record transmitted to the registrar of the Privy Council.

Printing of record.

12. The record shall be printed in accordance with Rules 1. to

IV. of Schedule A. hereto. It may be so printed either abroad o
England.

**Number of copies to be transmitted, where record printed abroad.**

13. Where the record is printed abroad, the registrar shal
the expense of the appellant, transmit to the registrar of the P
Council forty copies of such record, one of which copies he
certify to be correct by signing his name on, or initialling, e
eighth page thereof and by affixing thereto the seal, if any, o
Court appealed from.

**One certified copy to be transmitted, where record to be printed in England.**

14. Where the record is to be printed in England, the reg
shall, at the expense of the appellant, transmit to the registr
the Privy Council one certified copy of such record, together
an index of all the papers and exhibits in the case. No other ce
copies of the record shall be transmitted to the agents in En
by or on behalf of the parties to the appeal.

**Record printed partly abroad, partly in England.**

15. Where part of the record is printed abroad and part is
printed in England, Rules 13 and 14 shall, as far as practi
apply to such parts as are printed abroad and such as are
printed in England respectively.

**Reasons for judgments to be transmitted.**

16. The reasons given by the judge, or any of the judges,
against any judgment pronounced in the course of the proce
out of which the appeal arises, shall by such judge or judg
communicated in writing to the registrar and shall by him be
mitted to the registrar of the Privy Council at the same time
the record is transmitted.

**Exclusion of unnecessary documents from record.**

17. The registrar, as well as the parties and their agents
endeavour to exclude from the record all documents (mor
ticularly such as are merely formal) that are not relevant
subject-matter of the appeal, and, generally, to reduce the b
the record as far as practicable, taking special care to avo
duplication of documents and the unnecessary repetition of he
and other merely formal parts of documents; but the doc
omitted to be printed or copied shall be enumerated in a lis
placed after the index or at the end of the record.

**Documents objected to to be indicated.**

18. Where in the course of the preparation of a record on
objects to the inclusion of a document on the ground th
unnecessary or irrelevant, and the other party nevertheless
upon its being included, the record, as finally printed (
abroad or in England), shall, with a view to the subsequent
ment of the costs of and incidental to such document, indi
the index of papers, or otherwise, the fact that, and the p
whom, the inclusion of the document was objected to.

**Registration and numbering of records.**

19. As soon as the record is received in the registry of th
Council, it shall be registered in the said registry, with the
arrival, the names of the parties, the date of the judgment
from, and the description whether "printed" or "writte
record, or any part of a record, not printed in accordan
Rules I. to IV. of Schedule A. hereto, shall be treated as

Appeals shall be numbered consecutively in each year in the order in which the records are received in the said registry.

Inspection of record by parties.

20. The parties shall be entitled to inspect the record and to extract all necessary particulars therefrom for the purpose of entering an appearance.

21. Not applicable to the Dominion of Canada.

Notice of appearance by appellant.

22. The appellant shall forthwith, after entering his appearance, give notice thereof to the respondent, if the latter has entered an appearance.

Preparation of copy of record for printer.

23. As soon as the appellant has obtained the type-written copy of the record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert the marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the printer, and shall, if the respondent has entered an appearance, submit the copy, as prepared for the printer, to the respondent for his approval. In the event of the parties being unable to agree as to any matter arising under this Rule, such matter shall be referred to the registrar of the Privy Council, whose decision thereon shall be final.

Lodging copy of record for printing.

24. As soon as the type-written copy of the record is ready for the printer, the appellant shall lodge it, with a request to the registrar of the Privy Council to cause it to be printed by His Majesty's printer or by any other printer on the same terms, and shall engage to pay at the price specified in Rule V. of Schedule A. hereto the cost of printing fifty copies thereof, or such other number as in the opinion of the said registrar the circumstances of the case require.

Special case.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a special case, and print such parts only of the record as may be necessary for the discussion of the same. Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said registrar may call the parties before him, and having heard them, and examined the record, may report to the Judicial Committee as to the nature of the proceedings.

Examination of proof of record and striking off copies.

26. The registrar of the Privy Council shall, as soon as the proof prints of the record are ready, give notice to all parties who have entered an appearance requesting them to attend at the registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been com-

pleted, the appellant shall, without delay, lodge his p
print, duly corrected and (so far as necessary) approved by
respondent, and the registrar of the Privy Council shall there
cause the copies of the record to be struck off from such proof p

Number of copies of record for parties.

27. Each party who has entered an appearance shall be ent
to receive, for his own use, six copies of the record.

How costs of printing record are to be borne.

28. Subject to any special direction from the Judicial Comm
to the contrary, the costs of and incidental to the printing of the r
shall form part of the costs of the appeal, but the costs of and
dental to the printing of any document objected to by one par
accordance with Rule 18, shall, if such document is found o
taxation of costs to be unnecessary or irrelevant, be disallow
or borne by, the party insisting on including the same in the r

29. Not applicable to the Dominion of Canada.

*Petition of Appeal.*

Form of petition.

30. The petition of appeal shall be lodged in the form pres
by Rule 47 hereinafter contained. It shall recite succinctly
far as possible, in chronological order, the principal steps
proceedings leading up to the appeal from the commen
thereof down to the admission of the appeal, but shall not
argumentative matter or travel into the merits of the case.

Service of petition.

31. The appellant shall, after lodging his petition of appea
a copy thereof without delay on the respondent, as soon as th
has entered an appearance, and shall endorse such copy w
date of the lodgment.

*Withdrawal of Appeal.*

Withdrawal of appeal before petition of appeal has been lodged.

32. Where an appellant, who has not lodged his petition of
desires to withdraw his appeal, he shall give notice in wr
that effect to the registrar of the Privy Council, and the said
shall, with all convenient speed after the receipt of such n
letter notify the registrar of the Court appealed from that th
has been withdrawn, and the said appeal shall thereupo
dismissed as from the date of the said letter without furthe

Withdrawal of appeal after petition of appeal has been lodged.

33. Where an appellant, who has lodged his petition o
desires to withdraw his appeal, he shall present a petitio
effect to His Majesty in Council. On the hearing of any s
tion a respondent who has entered an appearance in th
shall, subject to any agreement between him and the ap
the contrary, be entitled to apply to the Judicial Committe
costs, but where the respondent has not entered an appea
having entered an appearance, consents in writing to the
his petition, the petition may, if the Judicial Committee
be disposed of in the same way *mutatis mutandis* as a con
tion under the provisions of Rule 56 hereinafter contained

34. Not applicable to the Dominion of Canada

*Non-Prosecution of Appeal.*

35. Where an appellant who has entered an appearance—

Dismissal of appeal for non-prosecution after appellant's appearance and before lodgment of petition of appeal.

(a) fails to bespeak a copy of a written record, or of part of a written record, in accordance with, and within the periods prescribed by, Rule 21; or

(b) having bespoken such copy within the periods prescribed by Rule 21, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said record; or

(c) fails to lodge his petition of appeal within the periods respectively prescribed by Rule 29;

the registrar of the Privy Council shall call upon the appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said registrar, insufficient, the said registrar shall, with all convenient speed, by letter notify the registrar of the Court appealed from that the appeal has not been effectually prosecuted, and the appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the registrar of the Privy Council to all the parties who have entered an appearance in the appeal.

Dismissal of appeal for non-prosecution after lodgment of petition of appeal.

36. Where an appellant, who has lodged his petition of appeal, fails thereafter to prosecute his appeal with due diligence, the registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said registrar, insufficient, the said registrar shall issue a summons to the appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said summons why the appeal should not be dismissed for non-prosecution. Provided that no such summons shall be issued by the said registrar before the expiration of one year from the date of the arrival of the record in England. If the respondent has entered an appearance in the appeal, the registrar of the Privy Council shall send him a copy of the said summons, and the respondent shall be entitled to be heard before the Judicial Committee in the matter of the said summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said summons, recommend to His Majesty the dismissal of the appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

Restoring an appeal dismissed for non-prosecution.

37. An appellant whose appeal has been dismissed for non-prosecution may present a petition to His Majesty in Council praying that his appeal may be restored.

*Appearance by Respondent.*

**Time within which respondent may appear.**

38. The respondent may enter an appearance at any time bet the arrival of the record and the hearing of the appeal, but unduly delays entering an appearance he shall bear, or be disall the costs occasioned by such delay, unless the Judicial Comm otherwise direct.

**Notice of appearance by respondent.**

39. The respondent shall forthwith after entering an appea give notice thereof to the appellant, if the latter has entere appearance.

**Form of appearance where all the respondents do not appear.**

40. Where there are two or more respondents, and only o some, of them enter an appearance, the appearance form sha out the names of the appearing respondents.

**Separate appearances.**

41. Two or more respondents may, at their own risk as to enter separate appearances in the same appeal

**Non-appearing respondent not entitled to receive notices or lodge case.**

42. A respondent who has not entered an appearance sha be entitled to receive any notices relating to the appeal fro registrar of the Privy Council, nor be allowed to lodge a case appeal.

**Procedure on non-appearance of respondent.**

43. Where a respondent fails to enter an appearance in an the following Rules shall, subject to any special order of the J Committee to the contrary, apply:—

(a) If the non-appearing respondent was a respondent at th when the appeal was admitted, whether by the or the Court appealed from or by an Order of His Maj Council giving the appellant special leave to appe it appears from the terms of the said order, or O Council, or otherwise from the record, or from a cer of the registrar of the Court appealed from, that t non-appearing respondent has received notice, otherwise aware, of the order of the Court appeale admitting the appeal, or of the Order of His Maj Council giving the appellant special leave to appe has also received notice, or was otherwise aware, dispatch of the record to England, the appeal may down *ex parte* as against the said non-appearing dent at any time after the expiration of three mont the date of the lodging of the petition of appeal;

(b) If the non-appearing respondent was made a respon an Order of His Majesty in Council subsequently admission of the appeal, and it appears fr record, or from a supplementary record, or certificate of the registrar of the Court appeale that the said non-appearing respondent has notice, or was otherwise aware, of any intended ap to bring him on the record as a respondent, the may be set down *ex parte* as against the said non-a respondent at any time after the expiration of thre

from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the record as a respondent.

Provided that where it is shown to the satisfaction of the Judicial Committee, by affidavit or otherwise, either that an appellant has made every reasonable endeavour to serve a non-appearing respondent with the notices mentioned in clauses (a) and (b) respectively and has failed to effect such service, or that it is not the intention of the non-appearing respondent to enter an appearance to the appeal, the appeal may, without further order in that behalf and at the risk of the appellant, be proceeded with *ex parte* as against the said non-appearing respondent.

Respondent defending appeal *in formâ pauperis*.

44. A respondent who desires to defend an appeal *in formâ pauperis* may present a petition to that effect to His Majesty in Council, which petition shall be accompanied by an affidavit from the petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the appeal.

*Petitions generally.*

Mode of addressing petitions.

45. All petitions for orders or directions as to matters of practice or procedure arising after the lodging of the petition of appeal and not involving any change in the parties to an appeal shall be addressed to the Judicial Committee. All other petitions shall be addressed to His Majesty in Council, but a petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

Orders on petitions which need not be drawn up.

46. Where an order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such order, unless the Committee otherwise direct, but a note thereof shall be made by the registrar of the Privy Council.

Form of petition.

47. All petitions shall consist of paragraphs numbered consecutively and shall be written, type-written, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the short title and Privy Council number of the appeal to which the petition relates or the short title of the petition (as the case may be), and the name and address of the London agent (if any) of the petitioner, but need not be signed. Petitions for special leave to appeal may be printed, and shall, in that case, be printed in the form known as demy quarto or other convenient form.

Caveat.

48. Where a petition is expected to be lodged, or has been lodged, which does not relate to any pending appeal of which the record has been registered in the registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such petition may lodge a caveat in the matter thereof, and shall thereupon be entitled to receive from the registrar of the

Privy Council notice of the lodging of the petition, if at the time
the lodging of the caveat such petition has not yet been lodge
and, if and when the petition has been lodged, to require the pe
tioner to serve him with a copy of the petition, and to furnish hi
at his own expense, with copies of any papers lodged by the pe
tioner in support of his petition. The caveator shall forthwith af
lodging his caveat give notice thereof to the petitioner, if the petit
has been lodged.

**Service of petition.**

49. Where a petition is lodged in the matter of any pending app
of which the record has been registered in the registry of the Pr
Council, the petitioner shall serve any party who has entered
appearance in the appeal with a copy of such petition, and the pa
so served shall thereupon be entitled to require the petitioner
furnish him, at his own expense, with copies of any papers lod
by the petitioner in support of his petition.

**Verifying petition by affidavit.**

50. A petition not relating to any appeal of which the rec
has been registered in the registry of the Privy Council, and any o
petition containing allegations of fact which cannot be verified
reference to the registered record or any certificate or duly auth
ticated statement of the Court appealed from, shall be supported
affidavit. Where the petitioner prosecutes his petition in per
the said affidavit shall be sworn by the petitioner himself and s
state that, to the best of the deponent's knowledge, informat
and belief, the allegations contained in the petition are true. W
the petitioner is represented by an agent, the said affidavit shal
sworn by such agent and shall, besides stating that, to the be
the deponent's knowledge, information, and belief, the allegat
contained in the petition are true, show how the deponent obta
his instructions and the information enabling him to present
petition.

**Petition for order of revivor or substitution.**

51. A petition for an order of revivor or substitution shal
accompanied by a certificate or duly authenticated statement
the Court appealed from showing who, in the opinion of the
Court, is the proper person to be substituted, or entered, on the re
in place of, or in addition to, a party who has died or undergo
change of status.

**Petition containing scandalous matter to be refused.**

52. The registrar of the Privy Council may refuse to rece
petition on the ground that it contains scandalous matter, bu
petitioner may appeal, by way of motion, from such refusal t
Judicial Committee.

**Setting down petition.**

53. As soon as a petition is ready for hearing, the petitioner
forthwith notify the registrar of the Privy Council to that e
and the petition shall thereupon be deemed to be set down.

**Times within which set-down petitions shall be heard.**

54. On each day appointed by the Judicial Committee fo
hearing of petitions the registrar of the Privy Council shall,
the Committee otherwise direct, put in the paper for hearin
such petitions as have been set down. Provided that, in the ab

of special circumstances of urgency to be shown to the satisfaction of the said registrar, no petition, if unopposed, shall be so put in the paper before the expiration of three clear days from the lodging thereof, or, if opposed, before the expiration of ten clear days from the lodging thereof, unless, in the latter case, the opponent consents to the petition being put in the paper on an earlier day not being less than three clear days from the lodging thereof.

Notice to parties of day fixed for hearing petition.

55. Subject to the provisions of the next following Rule, the registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a petition, notify all parties concerned by summons of the day so appointed.

Procedure where petition is consented to or is formal.

56. Where the prayer of a petition is consented to in writing by the opposite party, or where a petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their report to His Majesty on such petition, or make their order thereon, as the case may be, without requiring the attendance of the parties in the council chamber, and the registrar of the Privy Council shall not in any such case issue the summons provided for by the last preceding Rule, but shall with all convenient speed after the Committee have made their report or order notify the parties that the report or order has been made and of the date and nature of such report or order.

Withdrawal of petition.

57. A petitioner who desires to withdraw his petition shall give notice in writing to that effect to the registrar of the Privy Council. Where the petition is opposed, the opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the petition is unopposed, or where, in the case of an opposed petition, the parties have come to an agreement as to the costs of the petition, the petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a consent petition under the provisions of the last preceding Rule.

Procedure where hearing of petition unduly delayed.

58. Where a petitioner unduly delays bringing a petition to a hearing, the registrar of the Privy Council shall call upon him to explain the delay, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said registrar, insufficient, the said registrar may treat the said petition as set down and may, after duly notifying all parties interested by summons of his intention to do so, put the petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of petitions for such directions as the Committee may think fit to give thereon.

Only one counsel heard on a side in petitions.

59. At the hearing of a petition not more than one counsel shall be admitted to be heard on a side.

*Case.*

Lodging of case.

60. No party to an appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his case in the

appeal. Provided that where a respondent is merely a stak or trustee with no other interest in the appeal, he may g registrar of the Privy Council notice in writing of his inten to lodge any case, while reserving his right to address the Committee on the question of costs.

Printing of case.

61. The case may be printed either abroad or in Engla shall, in either event, be printed in accordance with Rules I of Schedule A. hereto, every tenth line thereof being numb the margin, and shall be signed by at least one of the coun at the hearing of the appeal or by the party himse conducts his appeal in person.

Number of prints to be lodged.

62. Each party shall lodge forty prints of his case.

Form of case.

63. The case shall consist of paragraphs numbered conse and shall state, as concisely as possible, the circumstance which the appeal arises, the contentions to be urged by th lodging the same, and the reasons of appeal. References and line to the relevant portions of the record as printed sha as practicable, be printed in the margin, and care shall be avoid, as far as possible, the reprinting in the case of long from the record. The taxing officer, in taxing the costs of the shall, either of his own motion, or at the instance of the party, inquire into any unnecessary prolixity in the case, a disallow the costs occasioned thereby.

Separate cases by two or more respondents.

64. Two or more respondents may, at their own risk as ledge separate cases in the same appeal.

Notice of lodgment of case.

65. Each party shall, after lodging his case, forthwith gi thereof to the other party.

Case notice.

66. Subject as hereinafter provided, the party who lo case first may, at any time after the expiration of three cl from the day on which he has given the other party the no scribed by the last preceding Rule, serve such other part latter has not in the meantime lodged his case, with a "case requiring him to lodge his case within one month from th the service of the said case notice and informing him that, i of his so doing, the appeal will be set down for hearing *ex* against him, and if the other party fails to comply with case notice, the party who has lodged his case may, at any t the expiration of the time limited by the said case notice ledging of the case, lodge an affidavit of service (which sha the terms of the said case notice), and the appeal shall th if all other conditions of its being set down are satisfied down *ex parte* as against the party in default. Provided case notice shall be served until after the completion of the of the record, and that it shall be open to the taxing o adjusting the costs of the appeal, to inquire, generally, int cumstances in which the said case notice was served, and, i that there was no reasonable necessity for the said case

disallow the costs thereof to the party serving the same. Provided also that nothing in this Rule contained shall preclude the party in default from lodging his case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Setting down appeal and exchanging cases.

67. Subject to the provisions of Rule 13 and of the last preceding Rule, an appeal shall be set down *ipso facto* as soon as the cases on both sides are lodged, and the parties shall thereupon exchange cases by handing one another, either at the offices of one of the agents or in the registry of the Privy Council, ten copies of their respective cases.

### *Binding Records, &c.*

Mode of binding records, &c., for use of Judicial Committee.

68. As soon as an appeal is set down, the appellant shall attend at the registry of the Privy Council and obtain ten copies of the record and cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the appellant's case. The front cover shall bear a printed label stating the title and Privy Council number of the appeal, the contents of the volume, and the names and addresses of the London agents. The several documents, indicated by inents, shall be arranged in the following order: (1) appellant's case; (2) respondent's case; (3) record; (4) supplemental record (if any); and the short title and Privy Council number of the appeal shall also be shown on the back.

Time within which bound copies shall be lodged.

69. The appellant shall lodge the bound copies not less than four clear days before the commencement of the sittings during which the appeal is to be heard.

### *Hearing.*

Notice to parties of date of commencement of sittings; entering appeals for hearing.

70. As soon as the Judicial Committee have appointed a day for the commencement of the sittings for the hearing of appeals, the registrar of the Privy Council shall, as far as in him lies, make known the day so appointed to the agents of all parties concerned, and shall name a day on or before which appeals must be set down if they are to be entered in the list of business for such sittings. All appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such list of business and shall, subject to any direction from the Committee to the contrary, be heard in the order in which they are set down.

Notice to parties of day fixed for hearing appeal.

71. The registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each appeal by summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the appeal, and the parties shall be in readiness to be heard on the day so appointed.

Only two counsel heard on a side in appeals.

72. At the hearing of an appeal not more than two counsel shall be admitted to be heard on a side.

Nautical assessors.

73. In Admiralty appeals the Judicial Committee may, if t
think fit, require the attendance of two nautical assessors.

*Judgment.*

Notice to parties of day fixed for delivery of judgment.

74. Where the Judicial Committee, after hearing an ap
decide to reserve their judgment thereon, the registrar of the J
Council shall in due course notify the parties who attended
hearing of the appeal by summons of the day appointed by
Committee for the delivery of the judgment.

*Costs.*

Taxation of costs.

75. All bills of costs under the orders of the Judicial Comm
on appeals, petitions, and other matters, shall be referred t
registrar of the Privy Council, or such other person as the Ju
Committee may appoint, for taxation, and all such taxations
be regulated by the Schedule of Fees set forth in Schedule C. h

What costs taxed in England.

76. The taxation of costs in England shall be limited to
incurred in England.

Order to tax.

77. The registrar of the Privy Council shall, with all conv
speed after the Judicial Committee have given their decis
to the costs of an appeal, petition, or other matter, issue
party to whom costs have been awarded an order to tax and r
specifying the day and hour appointed by him for taxation
party receiving such order to tax and notice shall, not les
forty-eight hours before the time appointed for taxation, le
bill of costs (together with all necessary vouchers for disburse
and serve the opposite party with a copy of his bill of costs
the order to tax and notice.

Power of taxing officer where taxation delayed through the fault of the party whose costs are to be taxed.

78. The taxing officer may, if he think fit, disallow to an
who fails to lodge his bill of costs (together with all ne
vouchers for disbursements) within the time prescribed by
preceding Rule, or who in any way delays or impedes a t
the charges to which such party would otherwise be enti
drawing his bill of costs and attending the taxation.

Appeal from decision of taxing officer.

79. Any party aggrieved by a taxation may appeal from t
sion of the taxing officer to the Judicial Committee. The
shall be heard by way of motion, and the party appealing sh
three clear days' notice of motion to the opposite party, a
also leave a copy of such notice in the registry of the Privy C

Amount of taxed costs to be inserted in His Majesty's Order in Council.

80. The amount allowed by the taxing officer on the
shall, subject to any appeal from his taxation to the Judic
mittee and subject to any direction from the Committee
contrary, be inserted in His Majesty's Order in Council det
the appeal or petition.

Taxation on the pauper scale.

81. Where the Judicial Committee directs costs to be
the pauper scale, the taxing officer shall not allow any fees o

and shall only award to the agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary appeals.

Security to be dealt with as His Majesty's Order in Council determining appeal directs.

82. Where the appellant has lodged security for the respondent's costs of an appeal in the registry of the Privy Council, the registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the appeal.

*Miscellaneous.*

Power of Judicial Committee to excuse from compliance with rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put the application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested notice of the time so appointed.

Amendment of documents.

84. Any document lodged in connection with an appeal, petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the registrar of the Privy Council, but if the said registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put such application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested notice of the time so appointed.

Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any appeal, petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the registrar of the Privy Council.

Change of agent.

86. Where a party to an appeal, petition, or other matter pending before His Majesty in Council changes his agent, such party, or the new agent, shall forthwith give the registrar of the Privy Council notice in writing of the change.

Scope of application of rules.

87. Subject to the provisions of any statute or of any statutory rule or order to the contrary, these Rules shall apply to all matters falling within the appellate jurisdiction of His Majesty in Council.

Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1908, and they shall come into operation on the 1st day of January, 1909.

## SCHEDULE A.

*Rules as to Printing.*

I. All records and other proceedings in appeals or other matters pen
before His Majesty in Council or the Judicial Committee which are require
the above Rules to be printed shall henceforth be printed in the form kn
as Demy Quarto (*i.e.*, 54 ems in length and 42 in width).

II. The size of the paper used shall be such that the sheet, when folded
trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Pr
shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereab
and every tenth line shall be numbered in the margin.

V. The price in England for the printing by His Majesty's Printer
copies in the form prescribed by these Rules shall be 38*s.* per sheet (
pages) of pica with marginal notes, not including corrections, tabular m
and other extras.

## SCHEDULE B.

Not applicable to the Dominion of Canada.

## SCHEDULE C.

### I.

*Fees allowed to Agents conducting Appeals or other matters before the J
Committee of the Privy Council.*

| | £ |
|---|---|
| Retaining fee | 0 |
| Perusing written record, at the rate of, for every 25 folios | 0 |
| Perusing printed record, at the rate of, for every printed sheet of 8 pages | 1 |
| Attendances at the Council Office, or elsewhere, on ordinary business, such as to enter an appearance, to make a search, to lodge a petition or affidavit, or to retain counsel | 0 |
| Attending at the Council Office to examine proof print of record with the certified record *per diem* | 3 |
| Attending at the Council Chamber on summons for the hearing of a petition | 1 |
| Attending at the Council Chamber all day on an appeal not called on | 2 |
| Attending the hearing of an appeal *per diem* | 3 |
| Attending a judgment | 1 |
| Correcting English proofs, at the rate of, for every printed sheet of 8 pages | |
| Correcting foreign or Indian proofs, at the rate of, for every printed sheet of 8 pages | |
| Instructions for petition | |
| Drawing petition, case, or affidavit *per folio* | |
| Copying petition, case, or affidavit *per folio* | |
| Instructions for case | |
| Instructions to counsel to argue an appeal | |
| Instructions to counsel to argue a petition | |
| Attending consultation | |
| Sessions fee for each year or part of a year from the date of appearance | |
| Drawing bill of costs *per folio* | |

| | £ | s. | d. |
|---|---|---|---|
| Copying bill of costs .....*per folio* | 0 | 0 | 6 |
| Attending taxation of costs of an appeal ..... | 2 | 2 | 0 |
| Attending taxation of costs of a petition ..... | 1 | 1 | 0 |

II.

*Council Office Fees.*

| | | | |
|---|---|---|---|
| Entering appearance ..... | 0 | 10 | 0 |
| Lodging petition of appeal ..... | 2 | 0 | 0 |
| Lodging any other petition ..... | 1 | 0 | 0 |
| Lodging case ..... | 1 | 0 | 0 |
| Setting down appeal (chargeable to appellant only) ..... | 2 | 0 | 0 |
| Setting down petition (chargeable to petitioner only)..... | 1 | 0 | 0 |
| Summons ..... | 0 | 10 | 0 |
| Committee report ..... | 1 | 10 | 0 |
| Original Order of His Majesty in Council determining an appeal.... | 4 | 0 | 0 |
| Any other original Order of His Majesty in Council ..... | 2 | 0 | 0 |
| Plain copy of an Order of His Majesty in Council ..... | 0 | 5 | 0 |
| Original Order of the Judicial Committee ..... | 1 | 10 | 0 |
| Plain copy of Committee Order ..... | 0 | 5 | 0 |
| Lodging affidavit ..... | 0 | 10 | 0 |
| Certificate delivered to parties ..... | 0 | 10 | 0 |
| Committee References ..... | 2 | 0 | 0 |
| Lodging Caveat ..... | 1 | 0 | 0 |
| Subpœna to witnesses ..... | 0 | 10 | 0 |
| Taxing fee in appeals ..... | 3 | 0 | 0 |
| Taxing fee in petitions ..... | 2 | 0 | 0 |

## CHAPTER XXVIII.

### APPELLATE JURISDICTION OF THE SUPREME COURT OF CANA

Jurisdiction throughout Canada.

Sect. 35. The Supreme Court shall have, hold and exerc appellate, civil and crimin[al] jurisdiction within and thro Canada.

Jurisdict in appea from fin judgment of superior Provincial Courts.

Sect. 36. Except as hereinafter otherwise provided, an appe lie to the Supreme Court from any final judgment of the Court of final resort now or hereafter established in any P of Canada, whether such Court is a Court of Appeal or of jurisdiction, in cases in which the Court of jurisdiction is a Court: Provided that—

Exceptions to jurisdiction.

(a) There shall be no appeal from a judgment in any proceedings for or upon a writ of *habeas corpus, certiorari,* hibition arising out of a criminal charge, or in any case of proc for or upon a writ of *habeas corpus* arising out of any e extradition made under any treaty; and

(b) There shall be no appeal in a criminal case except as in the Criminal Code.

Rules as to appeals to Supreme Court when Court of original jurisdiction is not a superior Court.

Sect. 37. Except as hereinafter otherwise provided, an app lie to the Supreme Court from any final judgment of the Court of final resort now or hereaftor established in any Pr Canada, whether such Court is a Court of Appeal or of jurisdiction, where the action, suit, cause, matter, or other proceeding has not originated in a superior Court, in the cases:—

In the Province of Quebec.

(a) In the Province of Quebec, if the matter in controversy the question of or relates to any fee of office, duty, rent, sum of money payable to His Majesty, or to any title to tenements, annual rents and other matters or things wh in future might be bound, or amounts to or exceeds $2,000

In Nova Scotia, New Brunswick, British Columbia, and Prince Edward Island.

(b) In the Provinces of Nova Scotia, New Brunswic Columbia, and Prince Edward Island, if the sum or value amounts to $250 and upwards, and in which the Cou instance possesses concurrent jurisdiction with a superior

In Saskatchewan and Alberta.

(c) In the Provinces of Saskatchewan and Alberta, by the Supreme Court of Canada or a judge thereof;

In appeals

(d) From any judgment on appeal in a case or proceed

(*f*) The Supreme Court Act, R. S. C., 1906, c. 139.

nted in any Court of Probate in any Province of Canada, unless the matter in controversy does not exceed $500; from Courts of Probate.

(e) In the Yukon Territory, in the case of any judgment upon appeal from the Gold Commissioner. Certain appeals from Yukon.

Sect. 38. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from the judgment, whether final or not, of the highest Court of final resort now or hereafter established in any Province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the Court of original jurisdiction is a superior Court, in the following cases: Jurisdiction in appeals from judgment whether final or not.

(a) Upon any motion to enter a verdict or non-suit upon a point reserved at the trial; In motions to enter verdict or non-suit

(b) Upon any motion for a new trial; Motion for new trial.

(c) In any action, suit, cause, matter or other judicial proceeding originally instituted in any superior Court of Equity in any Province of Canada, other than the Province of Quebec, and from any judgment in any action, suit, cause, matter or other judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior Court in any Province of Canada other than the Province of Quebec. In equity suits.

Sect. 39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court— Jurisdiction in other appeals.

(a) From the judgment upon a special case, unless the parties agree to the contrary, and the Supreme Court shall draw any inference of fact from the facts stated in the special case which the Court appealed from should have drawn; Special cases.

(b) From the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any superior Court in any of the Provinces of Canada other than the Province of Quebec; Awards.

(c) From the judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari*, or prohibition not arising out of a criminal charge; Writ of *Habeas Corpus*, *certiorari*, or prohibition other than in criminal cases.

(d) In any case or proceeding for or upon a writ of *mandamus*; Mandamus.

(e) In any case in which a by-law of a municipal corporation has been quashed by a rule or order of Court, or the rule or order to quash has been refused after argument. Municipal by-laws.

Sect. 40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council. Appeals in Province of Quebec from Superior Court in Review.

Sect. 41. An appeal shall lie to the Supreme Court from the judgment of any Court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are, by provincial or municipal authority, authorized Appeals in matters of assessment of property.

rised to adjudicate, and the judgment appealed from invol
assessment of property at a value of not less than $10,000

Jurisdiction limited to appeals from highest Court of last resort only except *per saltum*.

Sect. 42. Except as otherwise provided in this Act or in providing for the appeal, no appeal shall lie to the Supreme but from the highest Court of last resort having jurisdiction Province in which the action, suit, cause, matter or other proceeding was originally instituted, whether the judgment sion in such action, suit, cause, matter or other judicial pro was or was not a proper subject of appeal to such highest last resort:

Proviso limiting above clause.

Provided that an appeal shall lie directly to the Supren without any intermediate appeal being had to any inte Court of Appeal in the Province

By consent.

(a) From the judgment of the Court of original jurisd consent of parties;

By leave from any judgment in equity.

(b) By leave of the Supreme Court or a judge thereof judgment pronounced by a superior Court of equity or by in equity, or by any superior Court in any action, cause, other judicial proceeding in the nature of a suit or proc equity; and

Appeal by leave from any final judgment of a superior Court.

(c) By leave of the Supreme Court or a judge thereof fro judgment of any superior Court of any Province other tha vince of Quebec in any action, suit, cause, matter or oth proceeding originally commenced in such superior Court.

Jurisdiction by special statute.

Sect. 43. Notwithstanding anything in this Act cont Court shall also have jurisdiction as provided in any othe

Appeals to lie from final judgments only.

Sect. 44. Except as provided in this Act or in the Act for the appeal, an appeal shall lie only from final jud actions, suits, causes, matters and (*sic*) other judicial p originally instituted in the superior Court of the Province or originally instituted in a superior Court in any of the of Canada other than the Province of Quebec.

No appeals to lie from orders made in exercise of judicial discretion.

Sect. 45. No appeal shall lie from any order made in suit, cause, matter or other judicial proceeding made in of the judicial discretion of the Court or judge making th

Proviso.

this exception shall not include decrees and decretal order suits, causes, matters or other judicial proceedings in actions or suits, causes, matters or other judicial proceed nature of suits or proceedings in equity instituted in Court.

When appeals shall lie from Province of Quebec.

Sect. 46. No appeal shall lie to the Supreme Court fro ment rendered in the Province of Quebec in any action matter or other judicial proceeding unless the matter in

Validity of an Act or Ordinance.

(a) Involves the question of the validity of an Act ment of Canada, or of the Legislature of any of the Canada, or of an Ordinance or Act of any of the connec tive bodies of any of the territories or districts of Can

Fees to the Crown, title to property, &c.

(b) Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to land or tenement, annual rents and other matters or things where the right in future might be bound, or

(c) Amounts to the sum or value of $2,000.

Amount in dispute, how to be determined.

(2) In the Province of Quebec, whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different.

Exclusion of certain matters.

SEC. 17. Nothing in the three sections last preceding shall in any way affect appeals in habeas corpus, cases of rules for new trials, and cases of *mandamus*, *habeas corpus*, and municipal by-laws.

Regulation of appeals from Province of Quebec.

SEC. 18. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal of Ontario, unless

Appeal.

(a) The title to real estate or some interest therein is in question;

Title to real estate.

(b) The validity of a patent is affected,

Patents.

(c) The matter in controversy in the appeal exceeds the value of $1,000 exclusive of costs;

Value $1,000.

(d) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or,

Annual rent, duty, fee, &c.

Appeal by special leave.

(e) Special leave of the Court of Appeal of Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

Mode of determining amount in dispute.

(2) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different.

Regulations as to appeals from Territorial Court of Yukon.

SEC. 19. No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon Territory other than upon an appeal from the Gold Commissioner, unless

Annual rent, duty, fee, &c.

(a) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights;

Title to real estate.

(b) The title to real estate or some interest therein is in question;

Patents.

(c) The validity of a patent is affected;

Mandamus, &c.

(d) It is a proceeding for or upon a *mandamus*, prohibition, injunction; or

Value $2,000.

(e) The matter in controversy amounts to the sum or value of $2,000 or upwards.

Judgment of Supreme Court to be final and conclusive.

SEC. 39. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any Court of Appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving only any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative.

Saving of the King's prerogative.

Appeal to be

judgments of Supreme Court by special leave.

lies, by special leave, from a judgment of the Supreme Cou
Canada in any case where the question involved in the appe
one which by reason of its great general or public importance
to be submitted to His Majesty in Council for decision (*g*).

Method of entry of appeals on Court list and order of hearing.

Sect. 90 (*h*). The appeals set down for hearing shall be e
by the registrar on a list divided into five parts and numbe
follows: Number One, Election Cases; Number Two, Weste
vinces Cases; Number Three, Maritime Provinces Cases; N
Four, Quebec Province Cases; Number Five, Ontario Provinc
and the registrar shall enter all election appeals on part num
one, all appeals from the Yukon Territory, and the Provi
British Columbia, Alberta, Saskatchewan and Manitoba o
numbered two, all appeals from the Provinces of Nova Scot
Brunswick and Prince Edward Island on part numbered th
appeals from the Province of Quebec on part numbered four,
appeals from the Province of Ontario on part numbered fi
such appeals shall be heard and disposed of in the order in
they are so entered, unless otherwise ordered by the Cour

(*g*) For recent decisions where such an appeal has been allowed.
*Gvn. for Dominion of Canada* v. *Standard Trust Co. of New York*
A. C. 498; *Wyatt and others* v. *Att.-Gen. of Province of Quebec*, (191
189; *Bank of Montreal* v. *Stuart*, (1911) A. C. 120; *Canadian Nort*
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*Gen. for Dominion of Canada* v. *Fodarakis*, 1911) A. C. 735; *Att.*
*Levin*, (1911) A. C. 520; *Ca. adian Pacific Rail. Co.* v. *Corporation o*
*and others*, (1911) A. C. 461; *Grand Trunk Pac. Ely.* v. *The King*
A. C. 204; *Marriage Legislation in Canada, In re*, (1912) A. C. 88
*Montreal* v. *Montreal Street Ely. and others*, (1912) A. C. 333; *Ge*
*Ely.* v. *Land Owners in East William and others*, (1912) A. C. 224

(*h*) 7 & 8 Edw. VII. c. 70 (repealing R. S. C. c. 139, s. 90).

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