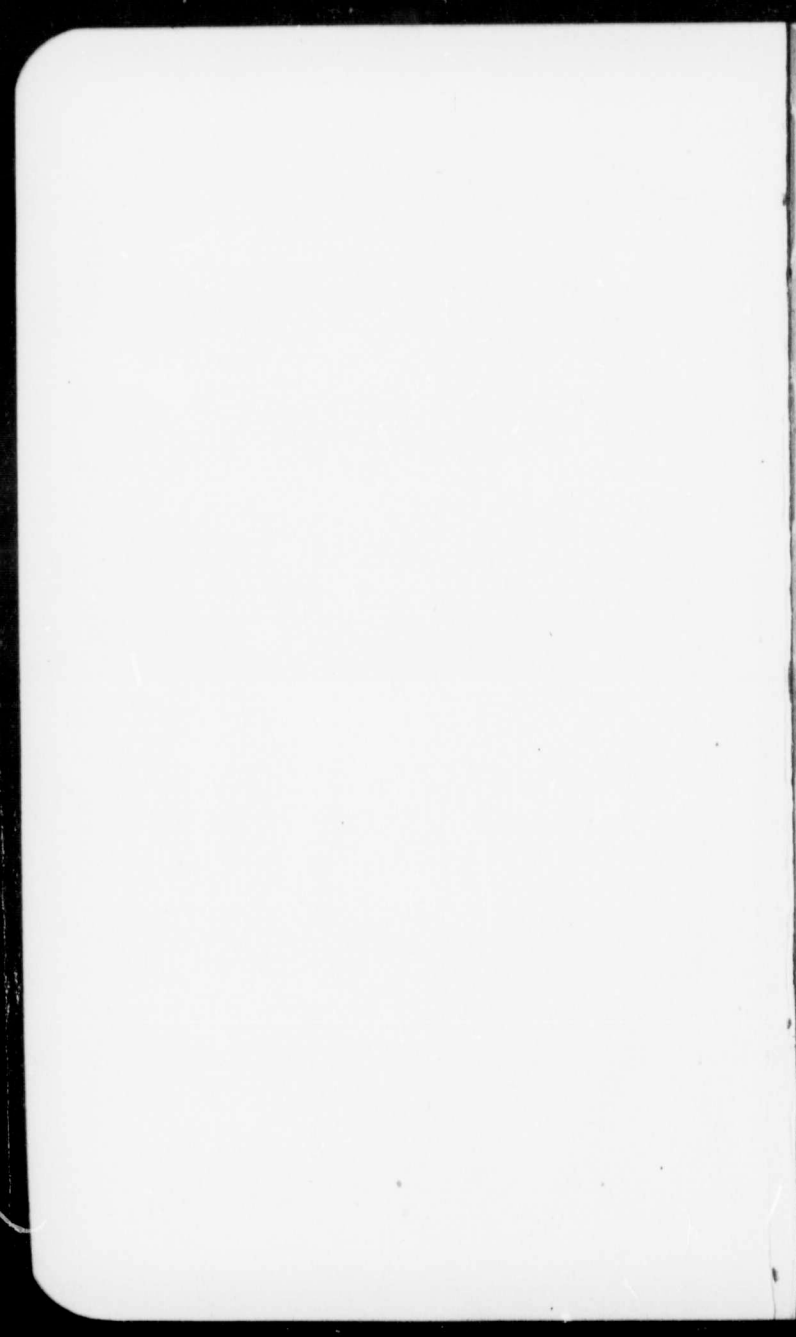




Modern Business

CANADIAN EDITION

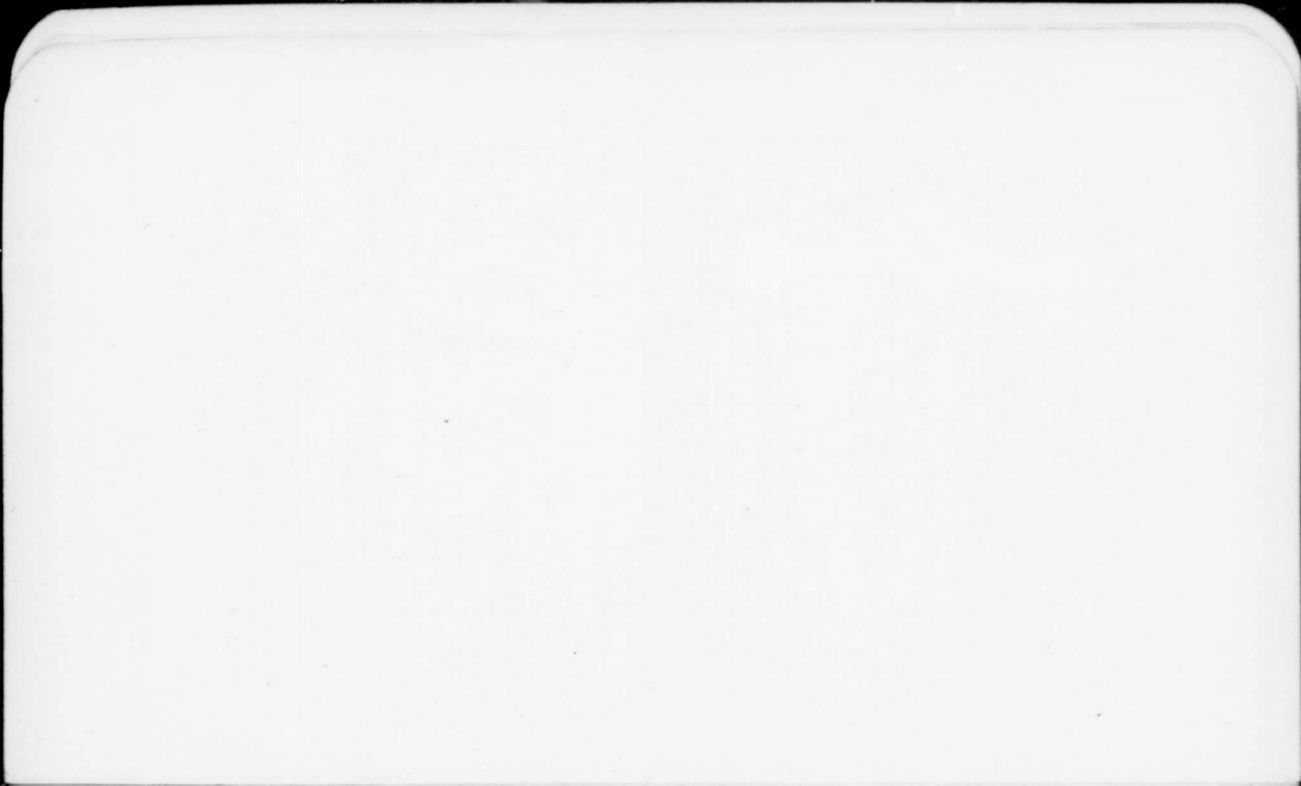
A SERIES OF EIGHTEEN TEXTS, ESPECIALLY PREPARED
FOR THE ALEXANDER HAMILTON INSTITUTE COURSE IN
ACCOUNTS, FINANCE AND MANAGEMENT

EDITED BY

JOSEPH FRENCH JOHNSON

DEAN, NEW YORK UNIVERSITY SCHOOL OF COMMERCE, ACCOUNTS AND FINANCE
NEW YORK CITY

<i>Title</i>	<i>Author</i>
APPLIED ECONOMICS	JAMES MAVOR
ORGANIZATION AND MANAGEMENT	LEE GALLOWAY
SELLING	R. S. BUTLER
CREDITS	LEE GALLOWAY
TRAFFIC.	S. J. McLEAN
ADVERTISING	LEE GALLOWAY
BUSINESS CORRESPONDENCE	G. B. HOTCHKISS
ACCOUNTING PRACTICE	{ LEO GREENDLINGER E. W. WRIGHT
CORPORATION FINANCE	{ WILLIAM H. LOUGH FRED W. FIELD
MONEY AND BANKING	{ EARL DEAN HOWARD W. W. SWANSON
BANKING PRACTICE	E. L. STEWART PATTERSON
FOREIGN EXCHANGE	{ FRANKLIN ESCHER E. L. STEWART PATTERSON
INVESTMENT AND SPECULATION	{ THOMAS CONWAY ALBERT ATWOOD FRED W. FIELD
INSURANCE	{ EDWARD R. HARDY FRED W. FIELD
REAL ESTATE	{ WALTER LINDNER E. W. WRIGHT
AUDITING	SEYMOUR WALTON
COST ACCOUNTS	STEPHEN W. GILMAN
COMMERCIAL LAW	WALTER S. JOHNSON



Commercial Law

A TREATISE FOR BUSINESS MEN ON
THE LAW APPLICABLE TO CANADIAN
COMMERCIAL RELATIONS

BY

WALTER S. JOHNSON

MEMBER OF THE MONTREAL BAR; SESSIONAL LECTURER ON
RAILWAY AND COMMERCIAL LAW IN MCGILL UNIVERSITY

Modern Business
Canadian Edition
Volume XII

ALEXANDER HAMILTON INSTITUTE
NEW YORK

K1005

4

J64

1914

COPYRIGHT IN GREAT BRITAIN, 1914, BY
ALEXANDER HAMILTON INSTITUTE

COPYRIGHT, 1914, BY
ALEXANDER HAMILTON INSTITUTE

To

Frederick Parker Walton

B.A., (Oxon), LL.B., (Edin.), LL.D., (Aberdeen)

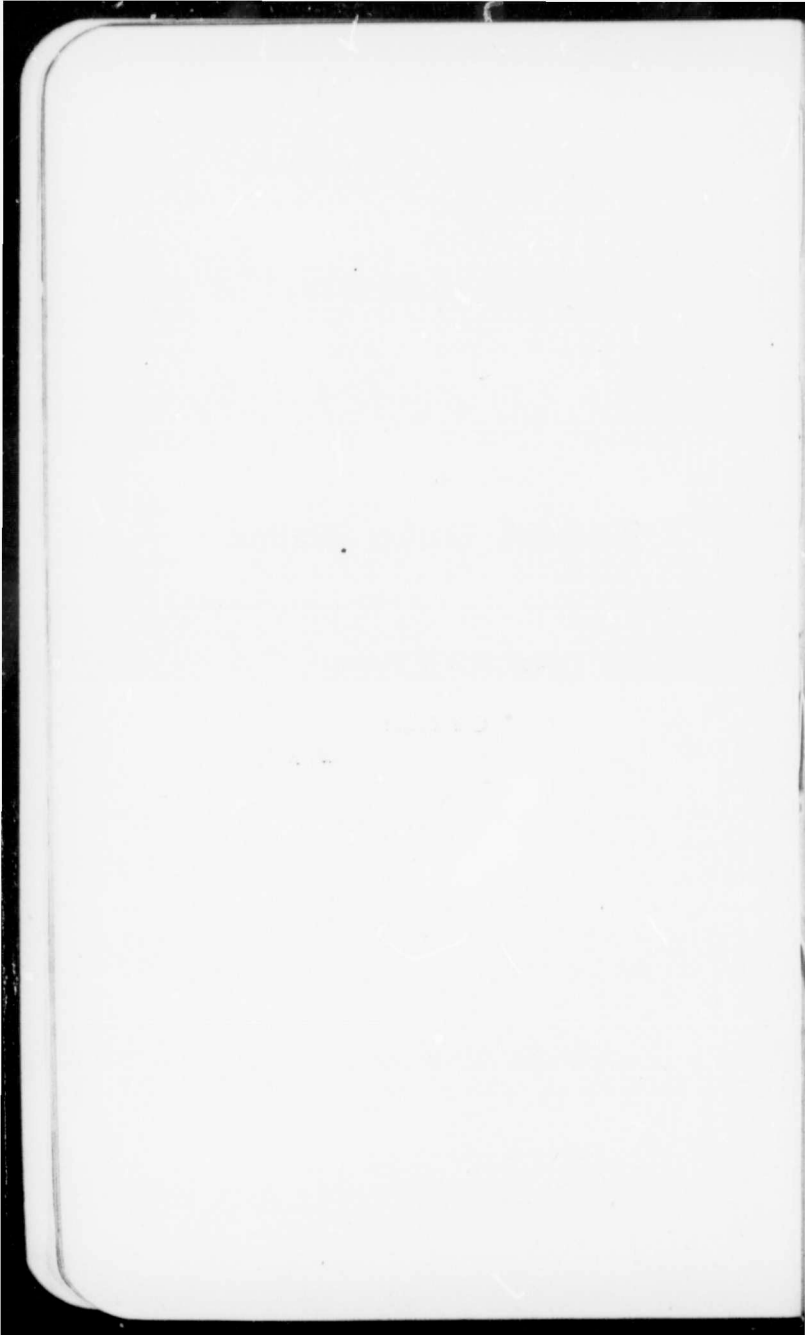
Dean of the Faculty of Law, McGill University, Montreal

This Book is Inscribed

by

The Author

W. S. J.



EDITOR'S PREFACE

Law provides the ultimate sanction for all business operations, and it is fitting that the final book in the *Modern Business* text should contain an exposition of those principles of law that are most frequently applied in business transactions. What have become well-established principles of finance or of accounting may be vitally modified, if not wholly disarranged, by the enactment of some law, or by a subsequent judicial interpretation. If, for example, the term "net profits" is defined by a statute which provides that the payment of dividends except out of net profits shall constitute a crime, the accountant will have to calculate net profits in conformity with the statute, whatever his previous methods and the general practice of the profession may have been.

Many business men who have attained marked success, can attribute their success, in some degree, to a more or less thorough study of law, especially of that branch which relates to their respective lines of business. Indeed, in some fields, banking for instance, promotion beyond a certain point must necessarily be conditioned on a knowledge of law. That more men in business do not appreciate the value of an acquaintance with the law is often due to their mistaken idea of its nature. There are not a few men who believe that the lawyer begins his study by memorizing the Confederation Act of Canada. The fact is that he usually begins with everyday business transactions, with contracts, and

progresses through the various forms of business dealings and business relationships. As these dealings and relationships become more diverse and more complex the body of written law continually expands. But while the law grows and law books multiply—so fast, indeed, that a modern encyclopedia will contain when finished approximately ninety thousand pages, about one-third more than it was thought at the outset would be required—certain principles remain almost immutable. As these principles affect the ordinary business man in his everyday business transactions, they will be found briefly stated in this volume.

This volume, like all the others in the series, should be studied with a view to the application of its contents to the reader's own business. Numerous examples will be found in the text that will suggest parallel cases, perhaps in the reader's experience. Where examples are not given, the reader will do well to imagine situations to which the principles of law can be applied. By thus reducing the abstract principles to concrete cases, the reader's knowledge will become available for immediate use when the occasion for it arises.

This book is founded almost entirely upon the common law, but important statutory modifications of the common law are indicated. The author has aimed especially at clarity and simplicity of exposition and illustration, and at the greatest possible freedom from technicalities, and he has succeeded in making a book that a layman can read with pleasure and comprehension. Every business man will find it an interesting as well as a useful volume. It will not make him his own lawyer, but it will give him a clearer understanding of his rights and duties and of the inherent risks in all business relations, and will save him from many a

blunder and foolish law suit. He may not have less need for a lawyer, but he will not be in doubt when he really needs one, and his cases will be less desperate.

JOSEPH FRENCH JOHNSON.

TABLE OF CONTENTS

CHAPTER I

PRELIMINARY TOPICS

SECTION	PAGE
1. Introduction	1
2. Definition of Law	2
3. Municipal Law	2
4. International Law	3
5. Public Law	4
6. Private Law	4
7. Sources of Law	4

PART I: CONTRACTS IN GENERAL

CHAPTER II

NATURE AND CLASSIFICATION OF CONTRACTS

8. Definition and General Features	10
9. Agreement in General	11
10. Purposes of Agreement	13
11. Classification of Contracts	14

CHAPTER III

FORMATION OF CONTRACTS: COMPETENCY OF PARTIES

12. Requisites of a Contract	17
13. Capacity	17
14. Minors	17
15. An Infant's Liability for Necessaries	18
16. Legal Obligations of Minors	20
17. Disaffirmance by an Infant	21
18. Who May Disaffirm an Infant's Contracts	24
19. Ratification	24

SECTION	PAGE
20. Insane Persons	25
21. Good Faith of the Other Party	25
22. Disaffirmance by an Insane Person	27
23. Return of Consideration by the Insane	28
24. Drunken Persons	29
25. Disaffirmance and Ratification by Drunkard	30
26. Aliens	31
27. Married Women	31
28. Corporations	32

CHAPTER IV

THE CONTRACT ITSELF

29. Offer and Acceptance	34
30. Offer and Acceptance by Mail or Telegraph	36
31. Offer to the Public	37
32. Consideration	38
33. What May Be a Sufficient Consideration	40
34. The Statute of Frauds	41

CHAPTER V

VOID AND VOIDABLE CONTRACTS

35. Legality of Object	44
36. Wagering Contracts	46
37. Usurious Contracts	47
38. Contracts in Restraint of Trade	48
39. Unlawful Combinations	49
40. Contracts Made on Sunday	52
41. Contracts in Restraint of Marriage	53
42. Contracts in Fraud of Third Persons	54
43. Contracts Against Liability for Negligence	55
44. Effect of Illegality	56
45. Reality of Consent	60
46. Mistake or Error	61
47. Misrepresentation and Fraud	62
48. Undue Influence	64
49. Duress—Violence and Fear	66

CONTENTS

xiii

CHAPTER VI

OPERATION AND INTERPRETATION OF CONTRACTS

SECTION	PAGE
50. Rights and Liabilities of Third Parties	69
51. Contracts Made for the Benefit of a Third Person	70
52. Rules of Evidence	72
53. Rules of Construction	73
54. Surrounding Circumstances Given Consideration	74
55. Matters Implied by Law	75
56. Liquidated Damages	75
57. Joint and Several Contracts	76

CHAPTER VII

ASSIGNMENT AND DISCHARGE OF CONTRACTS

58. Definition of Assignment	77
59. Competent Parties to an Assignment	77
60. Assignment of Liabilities	78
61. Other Examples of Assignment	79
62. Modes of Discharging a Contract	79
63. Discharge by Agreement	79
64. Discharge by Payment or Performance	80
65. Time and Place of Payment or Performance	81
66. Composition with Creditors	82
67. Application or Imputation of Payment	83
68. Tender	84
69. Novation	85

CHAPTER VIII

DISCHARGE OF CONTRACTS (Continued)

70. Discharge by Breach	88
71. Breach by Failure of Performance	89
72. Independent Promises	90
73. Conditional Promises	91
74. Breach of a Subsidiary Promise	93
75. Breach by Renunciation	94

CHAPTER IX

DISCHARGE OF CONTRACTS (Continued)

SECTION	PAGE
76. Discharge by Impossibility of Performance	97
77. Destruction of the Subject Matter	98
78. Legal Impossibility	101
79. Incapacity for Personal Services	101
80. Liability upon Refusal to Work under Dangerous Con- ditions	103
81. Performance Impossible by the Fault of Either Party	105
82. Discharge by Operation of Law	106
83. Insolvency: Proceedings in Bankruptcy	108
84. By Confusion	109
85. By Compensation	109
86. Remedies for Breach of Contract	109
87. Damages Recoverable for Breach of Contract	110

PART II: SPECIAL FORMS OF CONTRACT

CHAPTER X

SALES—THE CONTRACT

88. Definition	112
89. Distinguishing Features	113
90. Parties to a Contract of Sale	114
91. Subject Matter of the Sale	115
92. Statute of Fraud	118
93. Satisfaction of the Statute	121
94. Contracts for Work and Labor	125
95. When Title Passes	126
96. Conditional Sale	129
97. When the Seller Retains Possession	133
98. Goods to be Manufactured	133
99. Sales by Sample	134

CHAPTER XI

SALES: PERFORMANCE OF THE CONTRACT

100. Delivery of the Goods	137
101. Place of Delivery	138

CONTENTS

XV

SECTION	PAGE
102. Delivery to a Carrier	139
103. Time of Delivery	141
104. Quantity Specified Must be Delivered	142
105. Quality Specified Must be Delivered	145
106. Symbolic or Constructive Delivery	146
107. Warranties: Definition and Classification	146
108. Implied Warranty of Title	149
109. Implied Warranty of Quality— <i>Caveat Emptor</i>	150
110. Remedies for Breach of an Express Warranty	152
111. Remedies for Breach of an Implied Warranty	153
112. Rights of an Unpaid Seller Against the Subject of the Sale	153
113. Vendor's Right of Resale or Rescission	157
114. Actions by Unpaid Vendor for Breach of Contract	158
115. Remedies of the Buyer	160

CHAPTER XII

BAILMENTS

116. Definitions	163
117. Distinctions	164
118. Classification of Bailments	165
119. Extraordinary Bailment	166
120. Contract of Bailment	167
121. Use and Care of Bailed Property	167
122. Obligations of Bailor in a Bailment for His Sole Benefit	168
123. Obligations of Bailee in a Bailment for the Sole Benefit of the Bailor	168
124. Bailment for the Sole Benefit of the Bailee	170
125. Termination of Bailment for Sole Benefit of One Party	172
126. Creation of a Pledge or Pawn	173
127. Construction and Operation of Pledge	174
128. Termination of Pledge or Pawn	176
129. Hiring Property for Compensation	177
130. Caring for Chattels, Repairing or Transporting them	177
131. Rights and Duties of the Bailor	177
132. Rights and Duties of the Bailee	179
133. Termination of Bailment Arising Out of the Hiring, Caring for, Repairing or Transporting of Chattels	182

SECTION	PAGE
134. Warehousemen and Wharfingers	182
135. Innkeepers	185
136. What Constitutes an Innkeeper	186
137. What Constitutes a Guest	186
138. Rights and Duties of Innkeeper and Guest	188
139. Termination of the Relation of Innkeeper and Guest	190

CHAPTER XIII

COMMON CARRIERS

140. Definition	191
141. Liabilities of Common Carriers	192
142. Liability as an Insurer	194
143. Limiting Liability	197
144. Termination of the Carrier's Liability	198
145. Time of Delivery	199
146. Place of Delivery	199
147. Liability as Warehouseman	200
148. Connecting Carriers	201
149. Stoppage <i>in Transitu</i>	203
150. Public Carriers of Passengers and Baggage	204
151. Passenger Regulations	207
152. Sleeping Cars	208
153. Timetables	209

CHAPTER XIV

SURETYSHIP

154. Nature of the Contract	210
155. Distinguished from Original Contract	210
156. Formation of a Contract	211
157. When the Contract May be Void	212
158. Authority of Agents and Partners	213
159. Notice of Default	214
160. Action Against the Principal	214
161. Obligations of Surety Toward Creditor	214
162. Joint Sureties	215
163. Obligations of Principal Debtor Toward a Surety	216
164. Termination of Suretyship Contract	216
165. Other Means of Discharge	218

CONTENTS

xvii

CHAPTER XV

INSURANCE

SECTION	PAGE
166. Definition	220
167. Risk an Essential Element	222
168. What Risks May be Insured	222
169. Good Faith	223
170. Voluntary and Personal Contract	224
171. Life Insurance	224
172. Marine Insurance	227
173. Accident Insurance—Insurance of the Person	228
174. Reinsurance	229
175. Co-insurance	230
176. Valued Policies	232
177. Open Policies	232
178. Blanket Policies and Specific Policies	232
179. Floating Policies	232
180. Subrogation	233
181. Insurable Interest in General	234
182. Insurable Interest Life Insurance	235
183. In Fire and Marine Insurance	238
184. Assignment of Insurance Contracts	238
185. Construction of the Policy	240
186. Misrepresentation or Concealment	241
187. Warranties	243
188. Waiver	245
189. Special Rules of Marine Insurance	246
190. Notice and Proof of Loss	249

PART III: NEGOTIABLE CONTRACTS

CHAPTER XVI

NEGOTIABLE INSTRUMENTS IN GENERAL

191. Introductory	250
192. Negotiability	251
193. Presumption of Consideration	251
194. Days of Grace	252

SECTION	PAGE
195. Bills of Exchange	252
196. Promissory Notes	253
197. Bills of Exchange	255
198. Bills in a Set	258
199. Checks	259
200. Acceptance or Certifying of Checks	261
201. To Whom Payable	262
202. Certainty of Drawee	263
203. Blanks	263
204. Alteration of Bill	263

CHAPTER XVII

TRANSFER AND NEGOTIATION

205. Methods of Transfer	267
206. By Assignment	267
207. By Operation of Law	268
208. By Negotiation	269
209. Endorsement	270
210. Requisites of Endorsement	271
211. Kinds of Endorsement	273
212. Endorsements in Blank	274
213. Special Endorsements	274
214. Qualified Endorsements, or Endorsements Without Re- course	274
215. Conditional Endorsement	275
216. Restrictive Endorsements	275
217. Endorsement Waiving Conditions	276
218. Irregular and Other Endorsements	276
219. Transfer Without Endorsement	277
220. Delivery	278
221. Holder in Due Course	280
222. Regularity of Face of Instrument	281
223. Maturity	282
224. Without Notice of Dishonor or Defect	283
225. Consideration	285
226. Negotiation	285
227. Rights of a Holder in Due Course	286

CONTENTS

xix

CHAPTER XVIII

CONTRACT OF PARTIES

SECTION		PAGE
228.	Maker's Contract	288
229.	Acceptor's Contract	289
230.	Facts Which Acceptor Admits, and Facts Which He Does Not Admit	290
231.	Kinds of Acceptance	291
232.	Who May Accept	292
233.	Effect of Acceptance and Refusal to Accept	293
234.	Drawer's Contract	293
235.	Endorser's Contract	294
236.	Warrenties of Endorser	294
237.	Liability of Endorsers Among Themselves	295
238.	Liability of Other Parties	296
239.	Damages	297

CHAPTER XIX

PRESENTATION AND NOTICE OF DISHONOR

240.	Presentment	299
241.	When, Where and How Made	300
242.	Presentment for Payment	301
243.	Time and Place of Presentment for Payment	303
244.	Presentment Waived and Dispensed with	303
245.	Payment for Honor	304
246.	Notice of Dishonor	305
247.	By Whom Notice is Given	306
248.	Sufficiency of Notice	306
249.	Time Within Which Notice Must be Given	306
250.	Place of Notice	307
251.	Notice Waived and Excused	307
252.	Protest	308

CHAPTER XX

DEFENSES

253.	Definition	309
254.	Fraud and Threats of Violence	309
255.	Partial or Total Want of Value or Consideration	310

SECTION	PAGE
256. Illegality	311
257. Release, Renunciation or Payment	311
258. Discharge of Persons Secondarily Liable	312
259. Real Defences	312
260. Cancellation	313
261. Forgery	313

PART IV: CONDUCT OF BUSINESS THROUGH REPRESENTATION

CHAPTER XXI

PRINCIPAL AND AGENT

262. Definition and Distinctions	316
263. How Constituted	318
264. Agency by Estoppel	319
265. Agency by Necessity	320
266. Who May be Principal	321
267. When a Business May be a Principal	322
268. Who May be Agent	322
269. What Acts May be Done by an Agent	323
270. Co-agents	324
271. What Acts May be Ratified	324
272. Conditions Necessary for Ratification	327
273. Ratification Express or Implied	328
274. Scope of Agents' Authority	328
275. General and Special Agent	329
276. Authority in Ambiguous Terms	330
277. Power of Attorney	331
278. Implied Powers	333
279. Must Execute Accepted Mandate	335
280. Delegation of Agent's Authority to a Sub-agent	335
281. Relation of Agent, Sub-agent and Principal	337
282. Duties of Agent	337
283. Fiduciary Obligations	338
284. Liability of Agent to Principal	340
285. Measure of Damages	342
286. Agent Not Liable on Agency Contracts	343

CONTENTS

xxi

SECTION	PAGE
287. Actions by Agents	345
288. Remuneration of Agent	346
289. Agent's Right to Indemnity	347
290. Lien of Agents	349
291. Acts Performed Within the Powers of the Mandate	350
292. Acts Exceeding the Scope of Authority	351
293. Termination of Agency	352

CHAPTER XXII

MASTER AND SERVANT

294. Definition	354
295. Contract of Hire and Service	355
296. Independent Contractor	355
297. Fellow-Servant and Vice-Principal	357
298. Master Liable for Servant's Acts	358
299. Servant's Personal Liability	358
300. Workmen's Compensation Acts	359
301. Alien Labor Act	361

PART V: PROPERTY

CHAPTER XXIII

PROPERTY IN LAND

302. Preliminary Remarks	363
303. Definitions	363
304. Duration of Estates in Land	364
305. Freehold Estates	365
306. Estates Less Than Freehold	367
307. Severalty and Joint Estates	369
308. Special Applications of Joint-tenancy and Tenancy in Common	371
309. Estates Classified with Reference to Their Nature	372
310. Estates Classified as to the Time When Enjoyment Begins	374
311. Titles to Real Property	375

SECTION	PAGE
312. Involuntary Alienation	378
313. Legal and Equitable Estates	379
314. Lands, Tenements and Hereditaments	380
315. Water Rights	383
316. Ownership of Land Under and Near Water	384
317. Surface Waters	385
318. Fruits	386
319. Border Trees	387
320. Fixtures	387
321. Rights of Adjoining Owners; Fences and Party Walls	390
322. Support of Wall	391
323. Easements	391

CHAPTER XXIV

TRANSFER OF OWNERSHIP OR POSSESSION OF PROPERTY

324. Contract of Sale	393
325. Conveyances	394
326. Mortgages on Real Property	394
327. Other Liens	396
328. Landlord and Tenant	396

CHAPTER XXV

PROPERTY IN LAND
QUEBEC LAW

329. Distinction of Things	399
330. Ownership	401
331. Usufruct	402
332. Use and Habitation	405
333. Real Servitudes	405
334. Registration of Real Rights	408

CHAPTER XXVI

TRANSFER OF PROPERTY BY WILL

335. Definitions and Classifications	410
336. Who May Make Wills	411
337. Execution of Wills	412

CONTENTS

xxiii

SECTION	PAGE
338. Revocation of Wills	413
339. Interstate Succession	415
340. Executors and Administrators	419
341. Duties of Administrators and Executors	420

CHAPTER XXVII

PERSONAL PROPERTY

342. Classifications and Definitions	423
343. Trade-marks and Trade-names	423
344. Names	426
345. Patents	427
346. Assignment of Patent	428
347. Copyrights	428
348. Lost Property	429
349. Treasure Trove	430
350. Acquisition by Occupancy	431
351. Property in Animals	431
352. Title of Personal Property: Accession and Confusion	431
353. Gifts	433

PART VI: BUSINESS ASSOCIATIONS

CHAPTER XXVIII

PARTNERSHIP

354. The Nature of Partnership	435
355. Agreement of Competent Parties	436
356. Business Must be Carried on for a Profit	438
357. Partners Must Own and Share in the Profits	439
358. Business Must be Lawful	442
359. Association Must be Unincorporated	444
360. Partnership as a "Person" or "Moral Being"	445
361. Partnership Capital	447
362. Partnership Property	448
363. Title to Firm Property	449
364. Partnership Real Estate	450
365. Partner's Interest in Firm Property	451

SECTION	PAGE
366. Rights of Surviving Partners in Firm Property	452
367. Firm Creditors and Separate Creditors	453
368. Good Faith Toward Co-partners	455
369. Duty to Exercise Care and Skill	455
370. Must Receive No Private Benefits	456
371. Must Carry on No Separate Business	457
372. May Take Part in the Management of the Firm	457
373. Rights and Powers of a Majority	458
374. Partnership Accounts	459
375. Contribution	459
376. Indemnity	460
377. Compensation	460
378. Interest on Balances	461
379. Partner's Lien	461
380. Agency of a Partner	463
381. Implied Authority of a Partner	464
382. "Holding Out"	465
383. Notice of Withdrawal	466
384. Dissolution of Partnership	467
385. Limited Partnerships	468
386. Its Nature	468
387. How Formed	469

CHAPTER XXIX

COMPANY LAW

388. Nature of Corporations	470
389. Provincial Powers	472
390. The Charter	473
391. By-Laws	475
392. Powers	482
393. <i>Ultra Vires</i> Acts	483

CHAPTER XXX

COMPANY LAW (Continued)

394. Promoters and Their Contracts	485
395. Prospectus	486
396. Commencing Business	487

CONTENTS

XXV

SECTION	PAGE
397. Shares-Certificate for Shares	488
398. Subscription and Allotment	489
399. Forms of Corporate Stock	490
400. Subscribers to Memorandum	493
401. Underwriting	493
402. Payment of Commission	494
403. Corporate Meetings	495
404. Right of a Shareholder to Vote	497
405. Voting at Corporate Meetings	498
406. Proxies	498
407. Transaction of Corporate Business	499
408. Right to Inspect Company's Books	500
409. Right to Dividends	501
410. Right to Subscribe to New Stock	503
411. Minority Shareholders	503
412. Liabilities of Shareholders	504
413. Who are the Officers: Powers and Duties	505
414. Compensation	507
415. Liabilities	507
416. Directors: Agents and Trustees	508
417. Qualifications	508
418. Election	508
419. Proceedings	509
420. Votes—Personal Interest	510
421. Contracts by Directors	510
422. Powers	511
423. Number	512
424. Personal Liability	512
425. Negligence	513
426. Disqualification—Removal—Resignation	514
427. Remuneration	514
428. Amalgamation—Merger—Consolidation	514
429. Holding Companies	519

CHAPTER XXXI

WINDING-UP OF COMPANIES

430. Application of the Dominion Winding-Up Act	520
431. Insolvency: How Determined	521

SECTION	PAGE
432. When a Winding-Up Order Will be Granted . . .	522
433. Who May Petition	523
434. Duties of Liquidator	524
435. Powers of Liquidator	525
436. Contributories: How Settled	525
437. Defences	526
438. All Claims May be Proved	527
439. Secured Creditors	528
440. Hire-purchase Creditors	528
441. Claims of Clerks	529

COMMERCIAL LAW

CHAPTER I

PRELIMINARY TOPICS

1. *Introduction.*—In recent years increasing attention has been given by business men, and by those preparing for commercial careers, to a study of mercantile law. Not only in commercial colleges, but in the extension courses of the larger universities, a serious effort is made to enable the business man to acquire some knowledge of the general legal principles applicable in his relations with his fellow men. Apart from the fact that the study of law affords an excellent training in accuracy of thought and expression, it is of the utmost practical value in the conduct of one's affairs.

An extension course of lectures in law or the study of a book like the present is not, of course, intended to make a man his own lawyer. Either should, however, if it has no other benefit, train a man to perceive or scent legal difficulties and suffice to warn him of the advisability of consulting a lawyer. The man of affairs who understands his position, his rights and liabilities, and the rights and liabilities of others, in matters relating, for instance, to contracts in general, to negotiable instruments, to agency and partnership, to corporations, insurance, sales, bailments and carriers, and so on, is doubly armed for encounters in the arena of commercial life. Ignorance of the law, it has been said, is no excuse. The adage supplies its own commentary. Legal

rules, it may here be said, are founded on common sense; they have been formulated out of the accumulated wisdom and experience of diverse peoples and countless generations; they represent the striving of men for just and wise guidance and restraints in human relationships.

Economic, social and political conditions throughout many centuries have moulded the great body of general law. The process is even now going on. The student should approach the study with the desire to understand the rules of law; but he will understand these better if at the same time he seeks to appreciate their historical background, their wisdom, justice and harmony, and the point of view of the legislator.

2. *Definition of law.*—In its technical sense (for we are not here concerned with laws of nature, with divine or moral law) the term law means a general rule or a body of general rules of human conduct, enforceable by the public authority by which it is prescribed. In other words, a law is a general rule of external human action enforced by a sovereign political authority.

Technical law may be divided into two classes: (1) municipal law, and (2) international law.

In another sense it may be divided into: (1) public law, and (2) private law.

3. *Municipal law.*—By municipal law is meant the body of legal rules, or the system of social order, which is established and enforced by the state. It differs from public international law, which is not enforceable by any supreme authority. The state—the supreme authority—makes and enforces laws. It may delegate its authority in these respects: as, for example, where it grants authority to a province, a city or a territory, to make and enforce local laws. It must not be understood that the word “municipal” is used to designate only laws made by

or relating to "municipalities." The word is used in a technical sense, to include all laws enacted and enforced by a state or supreme authority, whether they relate to land, wills, partnerships, criminals, or otherwise.

4. *International law*.—The affairs of nations among themselves require and, by consent or custom, are subject to certain rules and regulations. Public international law, then, is the body of rules which nations have by common consent recognized in the regulation of their affairs. We have pointed out that it differs from ordinary law in that it cannot be enforced. It is then, properly speaking, not law at all in the technical sense. Yet it forms part of the common law of England. The courts of England, Canada and the United States would recognize it under proper circumstances.

The field of international law is very broad. It covers, for instance, rules for the treatment of contraband of war, prize-courts, the status of belligerents and neutrals, the laws of blockades, and so on. These and many similar subjects come within what is called public international law. In more peaceful matters, rules of international law may be applied to the interpretation of contracts, the validity of documents and agreements drawn in one country and enforceable in another, and the determination of the status of individuals, and so on. And these and many similar subjects are governed by rules of private international law, which will be enforced in the countries where they are to be applied.

Questions of international law may arise even as between persons domiciled in different provinces of Canada. One example will suffice. A person's capacity to contract is governed by the law of his domicile, i. e., of the country where he has his permanent home. A minor is domiciled in Ontario: his permanent home is there.

By the law of Ontario a minor cannot make a binding contract merely because he is a trader. In Quebec a minor who is engaged in trade may make valid and binding contracts in connection with his trade. The Ontario minor goes to Montreal and starts in business. He gives promissory notes to his creditors, and the notes are not met at maturity. He is sued in Montreal, but pleads that his capacity is to be governed by the law of Ontario, where he is domiciled. His plea will be upheld and the action dismissed.

5. *Public law*.—By a “public person” is meant the state, or the sovereign part of it, or a body or individual holding delegated authority under it.¹ Public law, then, regulates rights where one of the persons concerned is “public.” Public law also includes constitutional and administrative law. The conquest of Canada in 1763 had the effect of substituting the public law of England for that of France.

6. *Private law*.—Where the parties interested or affected by a right are private persons, they are governed by private law, which they may invoke the aid of the state to regulate and enforce. A given act, it must be said, may violate both a public and a private right. If one man assaults another, the private right of the person injured to be unmolested is violated, as is also the public right of the state that the public peace shall not be disturbed. Generally speaking, private law includes the law relating to contracts, torts or damages, pleadings, evidence—in a word, all the subjects that we shall treat of in this book, as well as many others.

7. *Sources of law*.—The sources of our law may be briefly mentioned. They are:

(a) THE CONFEDERATION ACT, AND SUPPLEMENTARY

¹ Holland, Jurisprudence, p. 124.

ACTS—THE CONSTITUTION OF CANADA. The Confederation Act was passed by the British Parliament on March 29, 1867. On the first day of July, 1867, it came into force. It is the foundation and authority for our federal system of government. From it flows the authority of the Dominion government and of the legislative bodies of the various provinces to make laws and to govern within their various jurisdictions.

It shall be lawful, says the act, for the king, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces. Among the subjects within the exclusive jurisdiction of the Dominion are the regulation of trade and commerce, the militia, the postal service, navigation and shipping, currency and coinage, banking, bills of exchange and promissory notes, bankruptcy and insolvency, patents and copyrights, marriage and divorce, the borrowing of money on the public credit, the criminal law, penitentiaries.

Matters of a local or private nature generally, are within the exclusive jurisdiction of the provinces, and comprise, among others, the amendment of the constitution of the province, except as regards the office of lieutenant governor, direct taxation within the province, the borrowing of money on the sole credit of the province, the management and sale of the public lands of the province, the establishment, maintenance and management of prisons in and for the province, municipal institutions, the incorporation of companies with provincial objects, property and civil rights, the administration of justice,

the solemnization of marriage, and local works and undertakings.

(b) **DOMINION STATUTES.** The Dominion Parliament may make laws relating to the classes of subjects assigned to it by the constitution. In these matters it is supreme. It must not legislate concerning a matter within the exclusive jurisdiction of the provinces.

(c) **TREATIES.** Treaties are agreements made between independent nations. These may be treaties of alliance, treaties of peace, purely commercial treaties, and so on. The Constitutional Act provides that the Parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. These powers were exercised in the case of the Washington Treaty of 1871 between the United States and England, which settled disputes arising out of the American Civil War, the Canadian fisheries and other important matters.

(d) **PROVINCIAL CONSTITUTIONS.** The constitution of a province is the fundamental law by which it exists and upon which it builds its system of government. The Constitutional Act includes constitutional provisions for the provinces; and, as we have seen, a province may, within certain restrictions, amend its constitution. Such amendments must not conflict, however, with the provisions of the Constitutional Act, with Dominion statutes, or with any treaties which the Dominion must observe.

(e) **PROVINCIAL STATUTES.** Each province may legislate freely concerning the classes of subjects assigned to it by the Constitutional Act. Its statutes must not

conflict with Dominion legislation. Provincial statutes may merely re-enact pre-existing laws concerning the existence or scope of which there is doubt, or repeal existing laws, or create new laws. A glance at the revised statutes of any of the provinces will afford a good idea of the range and diversity of provincial legislation. As between a province and the Dominion, the residuary power lies with the Dominion. That is, where a fair doubt exists whether the Dominion or the province has jurisdiction in a given matter, the Dominion will get the benefit of the doubt. Under the American constitution the residuary power lies with the various states.

(f) COMMON LAW.—“In its largest sense,” says Sir Frederick Pollock, the common law “means the whole body of legal principle and usage which is common to all parts of England, and now to all jurisdictions whose law is of English origin.” Custom exists as law in every country. The existence of custom or common law is generally proved by reference to decisions by which it has been affirmed, or to the writings of commentators who have appealed to it for guidance or authority. The common law then does not depend for its authority upon statutes, treaties or constitutions. It is described as the “unwritten law,” in the sense that the British Constitution is unwritten. It may be found in the written or printed decisions of the courts and in the pages of legal authorities, but it is still “unwritten” in the sense that it has not been reduced to statutory form or declared by statute to be law.

In so far as a given rule of common law is finally embodied in statutory form, it ceases to exist as common law and becomes statute law. For instance, the English Act relating to bills of exchange and promissory notes is largely a codification of old common law rules found

in the customs and usages of merchants and in the decisions of the courts. The laws of the United States, with the exception of those of Louisiana, had their origin in the common law of England. Many of these laws have, of course, been formulated in Acts of Congress or of state legislatures. The same may be said of the English law provinces of the Dominion. It will be found that these provinces have frequently enacted that the law of England as it existed at a given date shall form part of the law of the particular province. Thus in Ontario, the laws of England as to property, civil rights and evidence, in force on October 15, 1792, were adopted.¹ In Manitoba the laws of England as to property, civil rights, evidence and procedure, as existing on July 15, 1870, were adopted by an act passed in 1874.² In British Columbia, English laws were declared to be in force by the proclamation of November 19, 1858, and this so far as those laws "are not from local circumstances inapplicable," and as modified by past local legislation.

It is unnecessary to go through the list of provinces. Since these dates, English statutes have been expressly adopted in certain provinces. Thus the English Sale of Goods Act was adopted by the Northwest Territories and by Manitoba in 1896, and by British Columbia in 1897.

In Quebec the case is different. The conquest of Canada in 1763, while it replaced French public law by English public law, did not introduce English private law. The private law in force in Canada at that time was of course that of France.³ Canada then included what are now Ontario (Upper Canada) and Quebec (Lower

¹ Consol. Stats. U. C., 1859, c. 9.

² Man. 38 V. c. 12, s. 1.

³ Walton, "Scope and Interpretation of the Civil Code," 26.

Canada). When Upper Canada was created in 1791, it at once proceeded to abrogate the French laws then in force, and introduced the laws of England. In Quebec, then, from the first settlement by the French in 1608, the common law has been the *Coutume de Paris*, except in commercial matters. This law has been greatly modified in the course of years by statute, and, as modified, is now found in the Civil Code of Quebec, which came into force in 1866. In commercial matters, when no provision is found in the Code, English rules of evidence apply. Sections 4 and 17 of the English Statute of Frauds, with certain exceptions which will hereafter be explained, are also in force. Quebec commercial law, in so far as it is codified, is a blending of English and French commercial law. The English law and jurisprudence are, however, constantly and almost exclusively followed in commercial matters.

PART I: CONTRACTS IN GENERAL

CHAPTER II

NATURE AND CLASSIFICATION OF CONTRACTS

8. *Definition and general features.*—A contract is an agreement by which one or more persons bind themselves in favor of one or more other persons to give or to do or not to do something. It is essential to a contract that there be an agreement. A contract, to be valid and enforceable, must give rise to an obligation. An obligation is a legal bond by which one person is bound in favor of another to give or to do or not to do a certain thing. A true contract is, therefore, an agreement, but every agreement is not a contract.

If we may repeat, a contract must give rise to an enforceable obligation. The word "obligation" is derived from the Latin word *obligare*, meaning to bind together. Two persons are thus bound towards each other and in order that they shall be liberated, the bond must be severed by payment; that is, by the handing over of money, or the doing of something, or the refraining from doing something. In other words, the contract must be executed.

When we say that there is an obligation, we mean that upon one of the parties to the contract a duty is laid, the fulfilment of which can be enforced by the other party. The distinction may be made clear by explaining that a moral obligation lacks this feature. A moral obligation cannot be enforced through the courts.

In a famous case of *Laidlaw vs. Sage*,¹ this principle was clearly brought out. Russell Sage was in his office one day when a lighted bomb was thrown in through the window. Terrified, he pushed his secretary between himself and the bomb, with the result that the secretary was seriously injured by the explosion. The latter brought action against Sage, claiming indemnity on the ground that he had saved Sage from great injury, and that he himself had been seriously hurt. The case was thrown out, on the ground that Sage acted in a moment of extreme panic, and on the ground that it was not proved that the secretary would not have been as much injured had Sage not acted as he did. There was no doubt that there was a moral duty on the part of Mr. Sage to compensate his secretary, but the court held that his obligation was an imperfect obligation.

In order that a true contract must exist, there must be:

- (a) Parties legally capable of contracting;
- (b) Their consent legally given;
- (c) Something which forms the object of the contract;
- (d) A lawful cause or consideration.

The matter may be expressed more simply by saying that there must be an agreement, and there must be a lawful obligation; that is, an enforceable obligation.

9. *Agreement in general*.—In order that a person shall be bound, he must have agreed to be bound. The minds of the parties contracting must have met upon the subject matter of the contract. There must be a common intention. If the terms of the alleged contract are so doubtful or so contradictory that the court cannot ascertain definitely what the terms were, an action to enforce the contract will be dismissed, because of the in-

¹ 52 New England Reports, p. 679.

ability of the court to determine whether there was a contract, or what were its terms. Thus if A asks B whether he will take \$200 for a certain horse and B replies, "Very possibly I will," there cannot be said to have been an agreement on the part of B that he would sell A his horse.

The subject matter of the contract must be definite. Thus if A, who owns several farms, offers to sell B 100 acres of land for \$10,000, and B replies, "I accept your offer," the subject matter is too indefinite to constitute a contract. No special 100 acres of land have been mentioned, nor have any special 100 acres of land been in contemplation by the parties. But if A offers to sell B 1,000 bushels of wheat at \$1 a bushel, and B accepts this offer, a contract will have been formed, because it is not necessary to describe any particular 1,000 bushels of wheat.

A person will be bound where he authorizes an agent to make a contract on his behalf, or he will be bound to pay the debts of a succession which he has accepted; by accepting he has contracted to take the assets and to pay the debts of the succession; he has acted by his free choice and voluntarily, and thus has come under an obligation.

A person may also come under an obligation by reason of some *quasi* contract. For example, if in paying an account A overpays, there is an obligation on the part of the person receiving payment to account for such overpayment. Under the French law, though apparently not under the English law, if a person discovers that the water-pipes in the house of his neighbor, which is closed for the summer, are burst, and he employs a plumber to repair them and stop the leak, he can call upon the owner of the house to pay him what the work has cost.

Similarly, a person may come under an obligation by reason of his tort, as it is called under the English law, or of his offence, or quasi-offence, as it is called under the French law. An offence of this kind arises by reason of a person's wilful wrongful act (offence), and as a result he must pay the damages which he causes, and generally these damages will be somewhat increased because of his wilful intention. Where the act is done involuntarily or in error (quasi-offence), he will be liable only for the actual damage caused: as, for example, where a druggist in mixing a prescription makes a mistake, there has been no wilful intention, and he will be liable only for the damages that can be proved.

10. *Purposes of agreement.*—Agreements or contracts create rights, and they also transfer or assign and extinguish or release rights. A may have a claim for \$1,000 against X, and he may agree with B to transfer to him his right against X. A contract of assignment has thus been formed. The agreement may be to pay a debt in cash, or by way of exchange, and thus a release or a discharge takes place.

Sometimes what is called *novation* takes place, when by an agreement rights are at the same time created, transferred and extinguished. Thus if A has a judgment against B on a promissory note, and B gives him a check in settlement of debt and costs, which is not paid upon being presented at the bank, A cannot take execution against B without tendering him back his check. The old debt has been extinguished by the delivery of the check to A, and a new contract has been formed on the check itself.

Or if A is a lessee of B and he contracts with B and C that C shall acquire A's rights under the lease and take

over his obligations under it, there has been novation, for in the result a new contract has been formed, a transfer of liability has been made, and the original lease has been extinguished.

11. *Classification of contracts.*—There are various classifications of contracts, which may be briefly expressed as follows. A contract may be an executed contract: that is, a contract the terms of which have been carried out; the obligation has been fulfilled or paid, and as a result has been discharged. The contract, in reality, by reason of its execution, has ceased to exist.

The contract may be executory: it has yet to be performed. The contract may be bilateral, and both parties be bound to fulfil certain obligations. It may be unilateral, and one of the parties be bound to fulfil his obligation. A contract may be formal, in that it requires for validity to be made in some solemn form, as before a notary public or under seal; or it may be informal, and be a simple writing signed by one or both of the parties. An informal contract may be in writing; it may be expressed only orally, in which case it will be subject to certain strict rules as to its proof. A formal contract in solemn form proves itself.

A contract may be valid, or void, or voidable. If valid, it is binding on the parties to it, because it is in proper form, the proper consent of the parties exists, and there is a lawful cause and an object. If the contract is void, it is a contract only in name, and cannot be enforced; neither party can hold the other to it. Thus if a person rents a house for immoral purposes, such a contract is void, and cannot be enforced. Where the contract is illegal and void, no action can be brought to compel the parties; damages cannot be asked for

breach of performance; and generally, if money has been paid over under the contract, it can be recovered. Such contracts are said to be contrary to good morals and public policy. A contract may be voidable in that one of the parties may either consent or refuse to be bound by it. Thus if A sells a horse to a minor, the latter can buy it and pay the price, but he can refuse to pay the price or to carry out his obligation to complete the contract by payment, or if he has paid and it can be shown that he has suffered injury by the bargain, he can have it upset and recover his money.

Contracts may be express, whether oral or written, when the terms of the contract are in so many definite words, and there is a distinct understanding. But the existence of a contract may be also implied, where from the conduct of the one or the other of the parties, or from the circumstances, it can be said that they intended to be or should be bound. Thus if a man holds another out as his agent for the performance of a certain act, or the making of a certain contract, and does not repudiate the act or contract made by his agent, he will generally be bound, in that his consent to what has been done or contracted will be implied.

Contracts have been classified as simple contracts, contracts under seal, and contracts of record. In the case of a simple contract there is no special requirement as to form; whether in writing or oral, such a contract is frequently called a parol contract. If the contract is under seal, its validity depends upon its form rather than upon the consideration that may underlie it. Contracts in this form take effect only when they are delivered. If such a contract is handed to a trust company to be held, pending the fulfilment of certain conditions or events, the delivery is not complete, but is described

as an escrow. Upon the completion of the conditions or the fulfilment of the event, upon which delivery is to take place, delivery may then be made and will be complete, and the person who has obliged himself under the contract will be bound to performance. If the trust company should deliver the contract before the fulfilment of the conditions, delivery would not be complete, and the person obliged would not be bound. Contracts of record are obligations recorded in a Court of Record. Thus when a judgment is entered in a case against a defendant, a contract has been formed by judicial authority. The debtor has been declared bound to pay. A Court of Record may also bind a person under a recognizance: as, for example, to keep the peace, or pay a debt, or appear as a witness. The person so bound under recognizance is bound to perform the obligations thus imposed upon him.

CHAPTER III

FORMATION OF CONTRACTS: COMPETENCY OF PARTIES

12. *Requisites of a contract.*—We have already said that there are four requisites to the validity of a contract, namely, parties legally capable of contracting; consent legally given; an object; and a lawful cause or consideration. There must not be fraud, error, or undue influence, such as threats or violence.

13. *Capacity.*—The common law rule is that every person is capable of making a contract, unless his incapacity is expressly declared by law. By capacity is meant that a person must be of age, he must be in his right mind and able to understand what he is doing, and he must not be excluded as falling within the classes described as incompetent. The following persons are subject to defective capacity:

- (1) Minors.
- (2) Interdicted persons.
- (3) Married women in certain cases.
- (4) Persons insane or intoxicated, or otherwise unable to consent, owing to weakness of understanding.

14. *Minors.*—The legal age of majority is almost universally the age of twenty-one years. Persons under that age, both male and female, are infants in the eyes of the law, and while they may enter into contracts, they cannot as a general rule be bound by them. Under the French law, if a minor was born at 8 A. M. on October

10, 1912, he would become of age at 8 A. M. on October 10, 1933. Under the English law, he would become of age at the first instant of October 9, 1933, because under the English law fractions of a day are not recognized. In other words, he reaches his majority on the last day of his twenty-first year: that is, on the day preceding the anniversary of his birth. Under the law of the province of Quebec, a minor may be partially relieved from his incapacity by emancipation: as, for example, by his marriage. Under the laws of the other provinces, there is no such rule.

The contracts of a minor are voidable at his option. He has the privilege of refusing to be bound by his contracts, the idea being that as an infant he needs protection, and must be protected against his own acts, or against the acts of persons better able to judge than he of the benefit to be derived from a particular contract. An infant is, however, bound to pay for necessities, though no more than the reasonable value thereof.

15. *An infant's liability for necessities.*—The term includes more than the mere food that will keep him alive, or the mere clothes that will keep him warm. Such food and clothes as are suitable to his station in life and to his particular circumstances at the time of the contract are covered by the term. Necessaries may, therefore, be food and clothing, medicines and medical attendance, at least a common school education—under certain circumstances even a college education, where this is not unreasonable, having regard always to the minor's station in life. But necessities would not include mere luxuries, such as champagne, unless ordered by a doctor, or a fancy waistcoat, when he already has several. The term may include a watch, if the minor has not already one, especially if the watch is within the minor's means.

It has been held to include a horse, a bicycle, and a moderate amount of jewelry, under the same proviso, however. But articles of mere ornament and luxury, unless luxurious articles of utility, would certainly be excluded.

If a minor buys a horse, under the advice of his doctor, for the purpose of exercise, the bargain would be binding, if the price were reasonable. If he bought it for use in some business enterprise, it might be hard to consider it a necessary. Articles which he buys for the mere pleasure that they may give him, although they may be useful, are not necessities.

It has been held in the United States that a common school education is necessary, but a collegiate or professional education is not. Under the English cases, however, a broader interpretation is followed, and education will include such an education as the social position of the minor warrants at the time, or as will fit him for the position which he may expect to occupy when he becomes an adult.

It was recently held in England that a minor who was a professional billiard player, and who made a contract with a famous billiard player to go on a tour, was bound by his contract, as for necessities, because, as he evidently intended to make the playing of billiards the occupation of his life, the instruction that he might get while in company with the billiard player in question would be of the greatest assistance and value to him.

If a minor is living with his father or with a guardian who gives him all reasonable necessities and supports him, the minor will not be liable if he buys other food and clothing on credit, and persons dealing with him do so at their peril. If they sue him, they must be able to show that the minor really needed the articles in question.

A minor who is married will be held liable for the

necessaries supplied to his wife. It has been held in the United States that a minor would not be liable, however, to pay for materials furnished for the erection of a house upon his land, nor for the expense of repairing a house, even though they might be necessary. But a minor who has entered into the contract of marriage cannot be released from his contract on the ground of lesion—that is, on the ground that he has suffered injury. In certain jurisdictions he may be relieved if he contracted the marriage without the consent of his parents or tutor; and apparently if he made an ante-nuptial contract with the consent of his parents or tutor, he could sue for a breach of promise of marriage, but could not himself be sued for such a breach.

In Quebec, as has been said, a minor can be emancipated by his marriage, or by application to the courts. Once emancipated, he can deal with the income of his estate as though he were of age, but he cannot deal with his immovable property by sale or mortgage, or dispose of the capital of his immovable property, unless he acts with the advice and consent of a curator. With respect to obligations which he may have contracted by purchase or otherwise, they may be reduced if excessive, and the courts will take into consideration the fortune of the minor, the good or bad faith of the persons who have contracted with him, and the utility or inutility of the expenditure. If the minor is engaged in trade, he is reputed of full age for all acts relating to such trade.

16. *Legal obligations of minors.*—The common law rule is that a husband is liable for the debts of his wife contracted before her marriage, and a minor who is a husband apparently could not plead his infancy as a defence. In certain cases a minor may contract under the authority or direction of the law (as, for example, if he

enlists in the army), and his contract will be enforced. So also if a minor is a mortgagee, and upon payment of the debt he re-conveys the property, he has performed a legal obligation, and is bound by his act. Ordinarily speaking, however, and with the exceptions we have discussed, a minor may at his option carry out his contracts or treat them as void, unless he has been properly authorized to make the contract. If he makes a contract for personal services, or enters into a partnership, or gives a promissory note, or buys or sells either movable or immovable property, he may refuse to be bound.¹

17. *Disaffirmance by an infant.*—The general rule is that an infant may avoid his voidable contracts either before or within a reasonable time after becoming of age.² On the other hand, he may enforce his voidable contracts against every party while he is still a minor, though it is laid down that he cannot demand specific performance from the other party to the contract: the remedy is not mutual; the other party could not hold him to *his* contract.

It has been decided that a minor cannot deprive himself of his privilege of voiding, after he becomes of age, his contract made during minority. If an infant pays a sum of money under a contract, says Pollock, in consideration of which the contract is partly or wholly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age.³ So if he enters into a partnership agreement and pays a premium, he cannot, while he is a minor or afterwards, recover the premium. He may repudiate his contract in various ways: expressly, in writ-

¹ This broad rule is subject to qualification in Quebec law, as explained in the next section.

² Pollock, *Contracts*, 8th Ed., p. 62.

³ Pollock, p. 63.

ing or by express words, or even by his conduct. If the contract is executory, that is, a contract under which he is bound to do something, he may refuse to act, and if he is sued he may plead the fact of his minority. If he sells a property to one person, it would be a sufficient repudiation of his contract if after becoming of age he sold it to another person, though in such case he would have to return to the first purchaser the money received from him.

If it can be shown, however, that the express contract which he has entered into is really for his benefit, he will be bound by it, or even sometimes where it is shown that it is not manifestly to his prejudice. Or if he enters into an agreement of apprenticeship or employs himself with a firm for a reasonable wage, he will be bound if he unlawfully absents himself from his employment. But it has been held that where a minor is allowed to make frequent journeys by a railway on special terms, and in consideration he waives any claim for accident that may occur, such a contract is harmful to him, and he is not bound. But supposing that he were to buy goods on credit, in order to take advantage of a rising market, his contract might not be manifestly disadvantageous, especially if he were of years of discretion; but he could void such a contract, at least at common law.

If a minor is a shareholder in a company and is in arrears for calls, he may, upon reaching his majority, be sued for the unpaid calls, unless he has repudiated his contract either before majority or within a reasonable time afterwards. It has been held in a Quebec case that a minor who has attained his majority can be sued for the recovery of the amount of a promissory note made while he was a minor in payment of the first premium on a policy of insurance on his life, where he retained

the policy, and where he took no procedure to annul the insurance contract. The insurance premium having been so paid, the insurance, it was held, stands in force for all purposes; and a minor, having attained his majority, can avoid a contract entered into during his minority only in so far as he proves legal injury or prejudice. That distinction brings out clearly the difference between the law of the Province of Quebec and that of Ontario and the other English law provinces. In the English law provinces a minor's incapacity is greater than in the Province of Quebec. He can, as a general rule, get any contract into which he has entered set aside. In the Province of Quebec, the general rule is that he must show that he has suffered a prejudice by his contract.

If he has represented himself as being of the age of majority, it may be said as a general rule that he must restore any advantage he has obtained by reason of his misrepresentation, if he chooses to void his contract. There is a good deal of contradiction about the cases in which it has had to be decided whether a minor, where a contract has been executed and he has received a benefit, must return what he has received, where he sues to recover what he has parted with. The weight of authority is against the view that where he has obtained a substantial advantage out of a contract which has been executed, he can repudiate his contract and recover what he has paid, without returning or at least offering to return the consideration he has received. It was held in a Manitoba case that if an infant pays money without valuable consideration, he can get it back; and if he pays money for a valuable consideration, he may also recover it, but on condition that he can restore the other party to his former position; and it was held in that case that on the evidence the plaintiff, a minor, could

not recover from the defendant moneys which he had paid for the rent of premises, and the purchase of goods and fixtures.

18. *Who may disaffirm an infant's contracts.*—The general rule is that the plea of infancy is personal to the infant. If he dies or becomes insane, it is competent for his tutor, executor or personal representative, as the case may be, to disaffirm his voidable contracts. It has been laid down that where a beneficiary under an insurance policy on the life of a minor brings action against the insurance company, and the latter pleads that the minor made certain false warranties in his application, the beneficiary may answer by setting up the fact of the infancy of the infant.

19. *Ratification.*—An infant cannot ratify before maturity the contract which as an infant he could disavow, because his capacity for the one is no greater than his capacity for the other. His ratification should be in writing. If he ratifies his contract, he must ratify it as a whole; he cannot merely ratify what he thinks will be of advantage to him, and repudiate the balance. Thus if he buys a piece of real estate and gives a mortgage for the unpaid balance, he cannot upon becoming of age ratify the purchase and repudiate the mortgage.

In the English law provinces, if a minor bought a horse and paid a fair price for it, and a month afterwards it was killed by lightning, he could repudiate his contract: but in the Province of Quebec he could not, on the ground that he was not injured by the contract, because at the time it was made it was fair.

So also if he buys goods on credit, and wastes or squanders them, he may still refuse to pay for them, at least in the English law provinces. Where he pays cash for something he buys, which is afterwards lost or de-

stroyed, he may recover the amount paid: but if he has the property still in his possession, he must tender it back with his action. But if the goods purchased were necessities, or if (in the Province of Quebec) it could be shown that he had not been prejudiced by his purchase, of course the rule would not hold good. All these contracts, however, upon attaining his majority, he may ratify.

20. *Insane persons.*—The general rule may be laid down that the contracts of an insane person are voidable. The old rule was that he was unable to void them himself. If he has been legally declared insane, or as the result of an inquisition, he cannot deal with his property by deed, even in a lucid interval.¹ But a lunatic who has not been so found may contract during lucid intervals.

A person may be insane upon one subject, yet as regards other matters be quite capable of contracting. So far as concerns the subject of his insanity or delusion, he cannot contract, though in other matters he may. A person, for example, who is insane upon the subject of religion, may be quite sane enough to protect his interests in the purchase of a horse.

21. *Good faith of the other party.*—If the other party to the contract is in good faith and does not know of the insanity of the person with whom he contracts, and has no reasonable ground to suspect it, and if the contract is fair and reasonable, the person insane may be held to his contract. In a well known English case² an action was brought by administrators to recover money paid to an insurance society by a person who had died without a will. The assured was not in his right mind at the date of the contract, but the transaction was fair and in

¹ Pollock, p. 95.

² Molton vs. Camroux, see Pollock, p. 97.

the ordinary course of business, and the insurer did not know that the assured was insane. It was held that the money could not be recovered, and the decision laid down that "the modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original positions."

It is clear from this case also that this rule would apply to either lunacy or drunkenness. It would appear, therefore, that the contract of a person insane or drunk is not void, but voidable. The main point of the case, however, must be noticed, namely, that it was there decided that if the contract is to be rescinded, it must be before it has been executed, so that the parties may be restored to their former condition.

This case was followed by another case of *Matthews versus Baxter*.¹ Here the action was for breach of contract in not completing a purchase. It was pleaded that when the contract was made the defendant was so drunk that he was incapable of doing business, or of knowing what he was doing, and this to the plaintiff's knowledge. It was replied to this plea that later, when the defendant became sober, he ratified and confirmed the contract. A contract which is void from the beginning cannot be ratified, but it was held in this case that the contract was not void, but voidable, and that as the defendant, it was proved, had when sober ratified his contract, he was bound by it. So a partnership contract does not become void by the insanity of a partner, but merely voidable, upon application to the court.

It may be stated as a general rule to follow that every

¹ 8 Ex. 132 (1873), L R

case will be decided upon its merits, and that the practical question to be decided is whether the person was so drunk or so insane as to be unable to make the contract in question. But even where a person has been declared insane, and even where he is under the protection of a guardian, a person in good faith who supplies him with necessities or gives him money to buy necessities and knows him to be insane will have an action against him, if the circumstances were such that the court can find that there was an intention to pay. Thus a husband would be liable for necessities supplied to his wife while he is insane. The wife is presumed to have a continuing authority to pledge the husband's credit for necessities. And a person who, while drunk or insane, receives money or goods, and retains them after he recovers his senses, will be held to pay for them.

Of course contracts made by a person who is sane at the time and who afterwards becomes insane do not become invalid by reason of the insanity. The general rule is that if a defendant sets up such an incapacity, he must not only prove that he was incapable, but that the plaintiff, at the time of making the contract, was aware of his condition. Mere weakness of intellect may not be a sufficient plea. The criterion will be whether at the time of the contract he was in such a condition that he was incapable of understanding the nature of his contract, and the consequences which would be expected to flow therefrom.

A deaf and dumb person was formerly considered in the position of a lunatic with respect to his contracts, but under the modern view, where there is no evidence of fraud, he will not be regarded as incapable.

22. *Disaffirmance by an insane person.*—During a lucid interval, or within a reasonable time after he be-

comes sane, a person who has made a contract while insane may repudiate it. If he has a guardian the latter may, during his insanity, repudiate the contract for him. If he dies, his personal representatives or heirs may do so. But the other party to the contract, as well as any third party, cannot disaffirm the contract. Under the latest decisions in England, it is clear that there is no distinction between executed and executory contracts, as either may be voided; and it has been laid down under the American decisions that the fact that third persons may in good faith have acquired interests accruing out of the contracts of the insane person, does not deprive him of his right to disaffirm.¹

The marriage of a lunatic is void. That he may validly enter into the contract of marriage, the same degree of sanity will be required of him as for making a will or any other contract. But the burden of proving his insanity will be upon him.²

23. *Return of consideration by the insane.*—If an insane person chooses to repudiate his contract, he must, if he can, tender back with his claim the consideration he may have received. If he cannot, there is authority for the view that he will not as a result be bound by his contract. For if, for this reason, he could not relieve himself of the contract he made while insane, the rule which entitles him to void his contracts would be set at naught, and what he could not do directly would be forced upon him indirectly. The same weakness which led him into the contract may have led him to dispose of the consideration, and the law undertakes to protect him against his weakness. So if in a lucid interval he tenders back a watch which while insane he has bought, the vendor

¹ C. F. Molton vs. Camroux, *ante*.

² Pollock, p. 95.

is bound to accept the watch and give him back the price. But if meanwhile he had lost the watch, the vendor would be bound to return the price.

In Quebec the rule may be stated as follows. Generally speaking, contracts of this class of person cannot be voided unless there has been lesion, that is, injury or loss suffered by such person and arising out of the contract. And the code expressly declares that when minors, interdicted persons (which would include persons incapable, because of some mental weakness, of making a contract) or married women are admitted in those qualities to be relieved from their contracts, the reimbursement of what has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been paid has turned to their profit. It is not for the incapable to prove that the bargain has not turned out to his profit, but for his opponent to prove that it actually has turned out to his profit.

24. *Drunken persons.*—As we have seen, a person insane need not be interdicted, that is, be placed under the care of a guardian by judicial authority, to be entitled to avoid his contracts. He may be only mildly insane, or insane upon the subject matter concerning which he has contracted, or be quite incapable of understanding the nature and consequences of his act.

So also a drunken person need not be legally declared a drunkard and an incapable. If at the moment of the contract he is in such a state of intoxication as not to be able to give a consent, his contract may be set aside. This condition is different from that of a man who by great addiction to drink may have weakened his mental powers, but who is yet quite able to know what he is about. If he was interdicted or under guardianship for

drunkenness when he made his contract, his incapacity is proved; otherwise his condition at the moment of the contract is a matter for proof.

If necessities have been furnished him while drunk, he will be liable for the fair value thereof. Whether the things furnished can be regarded as necessities at all will be a question of law; and whether they were necessary under the circumstances will be a question of fact. A drunken person will be liable for offences he may commit, as also on his quasi-contracts, i. e., his contracts created by law, in which his consent is implied by law. So, for instance, if he is paid by a debtor more than the debt, he must return any surplus. Drunkenness or insanity would probably not be a good defence against a third person in good faith. Thus it has been held that complete drunkenness, such, that is, that the party did not know what he was doing, was a good defence by the endorser of a note against an endorsee who took the note knowing that the endorser was drunk when he signed it.¹ But a holder for value in good faith who took the note from the endorsee could collect from the endorser. And in a more recent case it was held that it is not enough that the defendant shows that he was insane (or drunk) when he gave the note sued on; he must also show that the person to whom he gave it knew that he was insane or drunk.²

25. Disaffirmance and ratification by drunkard.—When a person who was drunk when he made his contract becomes sober, he may, under the circumstances we have explained, either ratify or disaffirm his contract. If he decides to repudiate his contract, he must return the consideration, if he still has it. If he does not within a reasonable time make known his disaffirmance, or if after

¹ Gore vs. Gibson, 13 M. & W. 623 (1845).

² Imperial Loan Co. vs. Stone (1892), 1 Q. B. 599.

becoming sober he disposes of the consideration, he will be held to have ratified his contract.

26. *Aliens*.—Aliens may be under a disability as to contract. Alien enemies, it has been held in England, cannot sue in an English court, though the cause of action arose in time of peace; but they may bind themselves by contract while their country is at war with England, and they may when the war is over enforce such contracts. But an alien enemy could be sued upon his contract in time of war, and would be entitled to defend the action.

27. *Married women*.—The old rule of the English common law was that a married woman could not, with rare exceptions, make a valid contract apart from her husband. This has been changed by statute. In the English law provinces it may now be said that a married woman may deal with her separate property quite as freely as if she were unmarried and of age. Her contracts will bind her.

In Quebec the general rule is that a wife cannot contract without her husband's authorization. If she is married without a marriage contract stipulating separation of property, her property and that of her husband fall into what is called a community of property. In theory, this common property belongs to both; but the husband is head of the community, and alone can say how the property, goods or money composing it shall be spent or disposed of. His wife cannot, therefore, bind herself by contract without his consent, for otherwise he might find the property of the community of which he is the virtual master and owner, dispersed or dissipated by the wife's contracts.

In the other provinces, when a woman marries she retains control and absolute ownership of all her prop-

erty and of all she may earn or acquire. In Quebec, however, separation of property may be stipulated by marriage contract, and the wife will thus be and remain owner of all her property. But even then she cannot alienate her real property, though she may administer it. She can deal with and dispose of her income; but as to capital, speaking broadly, she is subject to the authority of her husband. In the English law provinces a wife may freely be a public trader. In Quebec a wife needs her husband's authorization to be a public trader (though his consent will be implied where he knows what she is doing and does not protest); if she is separate as to property, she binds her separate property; if she is common as to property, she binds her husband also. A wife cannot in Quebec bind her separate property in any contract with or for her husband, saving the rights of creditors in good faith.

28. *Corporations.*—A corporation, as we shall see later, is a legal person, with the right to make such contracts as by its charter it is authorized to make, or such as are implied from its expressed objects or powers. To a certain extent, then, a corporation's right to contract is limited. For instance, a railway company has no implied right, it may be fairly said, to go into the business of operating coal mines unless by its charter it is empowered to do so.

The Civil Code of Quebec states the doctrine applicable generally. The rights which a corporation may exercise, it says, besides those specially conferred by its charter, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate and possess property, sue and be sued, contract, incur obli-

gations, and bind others in its favor.¹ In an English case it was laid down that:

When the legislature constitutes a corporation, it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making.²

A corporation is an artificial person. It must therefore act through duly constituted agents or representatives. Its shareholders, merely as such, have no right to act for it. Its duly authorized representatives are its board of directors who are chosen by its shareholders; the directors represent the company, or cause it to be represented, in all matters. The Dominion Companies' Act provides that every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and check made, drawn or endorsed on behalf of the company by any agent, officer or servant of the company in general accordance with his powers as such under the by-laws of the company, shall be binding upon it. But no person so acting as agent, officer or servant of the company shall be thereby subjected individually to any liability whatsoever to any third person. And a company may be liable on a quasi-contract, or other contract created by law.

¹ C. C., Art. 358.

² South Yorkshire Ry. vs. Great Nor. Ry., 9 Ex. 84.

CHAPTER IV

FORMATION OF CONTRACTS: THE CONTRACT ITSELF

29. *Offer and acceptance.*—It is essential to a contract that the parties thereto shall have come to some agreement. By this is meant that the parties are of one mind upon some proposed transaction, and that they have declared this fact. The purpose of both must be declared; the law cannot deal with the secret thoughts of men.

Hence if A is willing to sell his horse for \$500 to B, and B has made up his mind to buy the horse, if he can get it, but neither has referred to or discussed the matter, A and B are really of one mind on the subject. But there is no contract, for their wills have not met in a declaration of willingness to buy and sell.

So it is the declared will and not the secret intentions of the parties that the law will examine. If A offers to buy B's horse for \$500 and B accepts, A may have no intention of paying the money, but there is a valid contract. B takes his chance of being paid if he has not received cash or security. And A cannot be encouraged and assisted in getting out of his contract when he declares that he did not mean what he said.

The agreement of the parties is reached by means of an offer and an acceptance. Neither need be in express or formal terms. Some promise or act or some course of conduct may be quite enough. If A advertises that he will pay a reward of \$5 for the return of his lost

watch, he makes an offer of a promise for an act, and the finder upon presenting the watch and claiming the reward accepts the offer and is entitled to the reward. So a cabman at his stand must be ready to convey people about town. He offers an act for a promise to pay the amount which by tariff he can charge.

If a piano firm offers a man a piano for \$300, and the latter says he will give \$250, there is no contract, because the minds of the two have not met. But if the piano firm at once says it will accept the \$250, there is a contract. The acceptance of the offer clinches the bargain. Hence the acceptance and the offer must agree—the one must conform to the other. If the acceptance adds terms or conditions not contemplated in the offer, the so-called acceptance is rather a rejection of the offer. Hence where A offered to buy a house from B on certain terms, possession to be had on July 25, B agreed to the terms, but fixed the date of possession as August 1. It was held there was no acceptance. If A writes B that he will pay him \$5,000 for his house, but B must accept by return mail, and B after waiting a week writes accepting, A is not bound to buy.

There is this to be said also that the offer must have in view the immediate formation of a contract by an acceptance. For instance, a call for tenders for the building of a bridge or a warehouse is merely an invitation to builders or contractors to send in proposals which the person who intends to build may consider. Such an invitation is an offer to treat rather than a simple offer which may be at once accepted. The person offering to treat is not bound to accept the lowest or any tender. A rather interesting and difficult case was decided in England in 1893.¹ One Harvey telegraphed to the de-

¹ Harvey vs. Facey, 1893, A. C. 552.

fendant, Facey, "Will you sell us Bumper Hall? Telegraph lowest price." Facey telegraphed: "Lowest price £900." Harvey replied: "We agree to buy Bumper Hall for £900." Facey did not answer this telegram, and refused to sell. He was sued, and it was held that though Facey had quoted a price, he had not said he would sell. There was really no contract, because Harvey's "We agree to buy Bumper Hall for £900" was really the offer, and Facey did not acknowledge it.

30. *Offer and acceptance by mail or telegraph.*—An offer sent by mail or telegraph is not complete until it reaches the offeree. According to the English law it may be revoked at any time before it is accepted. Thus if A writes B offering to sell his house, A can withdraw his offer by telegram or by another letter which will arrive before the first. If when the revocation arrives the offeree has not made up his mind, the offer stands revoked. But if the revocation is merely on the way to the offeree, his acceptance of the offer is none the less good. Until the revocation comes to the mind of the offeree, he is entitled to accept the offer and to treat it as expressing the mind of the offerer. While the French commentators do not as a rule accept this view, the French courts will allow damages where the revocation of an offer causes loss. In Quebec the English rule would probably be followed, the balance of convenience in all commercial transactions, apart from the strict theory of the law, being distinctly in favor of its application.

Where, however, an offer has been accepted and the acceptance posted, the acceptance cannot be revoked. The acceptance might have gone by mail and the revocation by telegraph. The telegram may have arrived first, and the offerer known of the revocation before he

knew of the acceptance, and he may thus have suffered no prejudice. He can hold the offeree to his original acceptance. Pollock, commenting on this rule, says:

This is a startling consequence at first sight, but the hardship is less than it seems, for a party wishing to reserve his freedom of action as long as possible will still have two ways of doing so: he may make his acceptance in writing expressly subject to revocation by telegraph, or he may abstain from answering by letter at all, and only telegraph his final decision.

While the revocation of an offer must be made before it has been accepted and must be received before the acceptance is posted or telegraphed, apparently the offer is revoked by the death or insanity of either party.

31. *Offer to the public.*—An offer may be made to the public in general. That is, it need not be made to an ascertained person. But it will be binding where it is accepted by an ascertained person. Thus a shop-keeper who exposes a certain silk in his window with a price affixed, will be bound to sell the silk at that price to anyone who on the strength of what he has seen in the window wishes to buy. The hotel keeper and the common carrier make a continuing offer to the public, and unless they have exceptional reasons for refusing to receive a certain person, are bound to receive all comers, at least up to their capacity.

If a reward is offered through the newspapers for the capture of a fugitive or the finding of lost property, the reward will be due to the person who with knowledge of the offer captures the fugitive or finds the property. A person who had no knowledge of such an offer could not claim the reward if before knowing of it he gave the desired information. But if, without knowledge of the offer of a reward at the time a person finds lost prop-

erty, before handing it over he learns of the offer, then he can claim the reward.

Pollock refers to an interesting English case decided in 1893. A company called the Carbolie Smoke Ball Company advertised an offer to pay £100 to anyone who contracted influenza after using its smoke balls according to directions. The plaintiff, one Carlill, read the advertisement and so induced bought a smoke ball and used it according to directions. Unfortunately for him, or rather for the company, he contracted influenza after using the remedy, and it was held in his favor that there was a valid contract arising out of an offer and an acceptance.

An offer by public advertisement may, it appears, be revoked by an advertisement equally public. The Supreme Court of the United States has so held,¹ and even as against a person who afterwards acts on the proposal not knowing that it has been revoked, "For he should have known that it could be revoked in the manner in which it was made." Sir Frederick Pollock says of this decision:

In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. This may be a convenient rule, and may perhaps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind: yet it seems a rather strong piece of judicial legislation.²

32. *Consideration*.—In the English law provinces, as in England and in the United States, a contract is valid only if it is based upon a valuable consideration. It may be valid, however, in those jurisdictions where sealing

¹ Shuey vs. United States (1875), 92 U. S. 73.

² Pollock, p. 23.

is necessary, if made by a deed or writing under seal, when the contract is said to be valid without consideration.

What may be consideration is well defined in an English case;¹ "either some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." The party who accepts the consideration may or may not get any apparent benefit. It is sufficient if he accepts it. By some act or forbearance, or the promise thereof, A buys the promise of B, and B's promise is thereby made enforceable. A mere moral obligation will not support a promise, and cannot be enforced. In this view of the law, therefore, a promise to contribute money to charity is not a contract at all, at least under the English law.²

The civil law of Quebec distinguishes "cause or consideration" from "consideration" as we have just been viewing it. In Quebec it is said that if the contract has an object, it may be enforced, though the promise was given without consideration. By object is meant "what is due." Thus if A lends a book to B, the object of the loan is the book—what is due; the cause of the borrower's obligation—i. e., why there is a debt on his part—is his receipt of the book. The *cause* is the immediate end of the parties—that which impels every buyer, every seller, every lender and giver. This "immediate end" in the case of the seller is the price; in the case of the buyer it is the legal obligation of the seller to give him delivery and warranty; in the case of the giver (and here the theory is strained) it is the desire of the giver to give. The word "con-

¹ Currie vs. Misa (1875), L. R. 10, Ex. at p. 162

² Pollock, p. 176.

sideration" is used rather as an equivalent for "cause."

In actual practice, however, "consideration" is used almost exclusively. The theoretical difference it is impossible to pursue further in this small book; to do so would perplex the lay student. But a word further may be said to show that there is a real distinction.

We said above that a promise to contribute money to a charity—a pure gratuity—is not a contract in English law, because there is no consideration. The giver gets no *quid pro quo*. In the theory of the French and Roman law, there is a contract because there is a *cause*—the desire of the giver to give or his satisfaction or pleasure in giving. There is an object—that is, something due—the money he has promised.

33. *What may be a sufficient consideration.*—It may be stated as a general principle that the adequacy of the consideration will not be inquired into. "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give."¹

The consideration may consist in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." The Supreme Court of the United States has held that the release of a supposed right of dower (a wife's interest in her husband's real estate), which the parties thought necessary to confirm a title, is a good consideration for a promissory note. Forbearance to prosecute a meritorious claim made in good faith may also be sufficient.

But if a person is legally bound to do a certain thing,

¹ Hobbes, *Leviathan*, pt. 1, c. 15. Cited by Pollock, p. 184.

a promise to do it is not a sufficient consideration. Thus part payment of a liquidated claim which is due is no consideration for a promise to forego the balance. But if A out of charity does some kindly act for B, and the circumstances are such that B could have had no intention of paying for what is done, a promise on his part to pay will not be implied. But a promise will not be binding if based upon a consideration which fails or which is non-existent. But the rule may be different where, for instance, a piece of property is bought, and both vendor and purchaser understand that the title is doubtful, and it proves to be faulty.

If the consideration is illegal it will not support an action. If the parties contract about something which they believe exists, but which really does not, there is no contract. Thus if A in Montreal sells a horse which is in Toronto, but unknown to him the horse is dead, there is no contract. Similarly if A insures B's life in which at the time he has an insurable interest, but unknown to him B is dead, the policy is void. But A who has a ship at sea may insure it "lost or not lost," provided he does not actually know it is lost at the time; and the insurer will be bound though the ship may have been lost when the contract was made. And A could make a contract to buy an automobile to be made a year hence; or he could sell a crop of hay which he expects next season. If A promises B \$10 if he will not drink or smoke for a month, there is a sufficient consideration.

34. *The Statute of Frauds.*—The English Statute of Frauds was enacted in 1676. In the United States and in the Canadian provinces, provisions similar to those of the English Statute of Frauds are in force. Their purpose is to prevent fraud and perjury in the proving of contracts. The general rule is that a contract must

be proved by a writing. But there are exceptions to the rule:

(a) A contract may be proved orally if the written contract is lost by unforeseen accident, or is in the possession of the adverse party or of a third person and cannot be produced.

(b) A commencement of proof—i. e., a writing which, though it does not set out the contract, makes its existence probable—may be sufficient. This is the “note or memorandum” of the English Statute.

(c) A writing is not necessary if the amount in question does not exceed fifty dollars.

(d) If the adverse party admits the contract under oath, no writing is necessary.

There is a further exception, that any facts concerning a commercial matter may be proved orally. But if the amount in question is over fifty dollars, a writing will be necessary, in Quebec, even in commercial matters:

(a) Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions. Thus, by the law of Quebec, for example, a promissory note is prescribed or outlawed in five years. If a plaintiff is to succeed in an action upon a note made more than five years before the action is taken, then he must allege and prove by a writing signed by the defendant that the latter has acknowledged his indebtedness and promised to pay it. If an amount had been paid on account and the amount was written on the back of the note and initialed by the debtor, that would be sufficient proof that he regarded the note as still unpaid and payable.

(b) A promise to answer for the debt, default or miscarriage of another person must be in writing.

(c) A minor after attaining his majority may ratify

a contract made during his minority. His ratification cannot be proved unless it is in writing.

(d) In the case of a contract for the sale of goods exceeding \$50 in value, the contract cannot be proved unless the buyer has accepted or received part of the goods or has given something in earnest to bind the bargain.

The two sections of the English Statute relating particularly to contracts may be briefly summarized. Section 4 states that the following promises or contracts to be enforceable must be in writing and be signed by the debtor:

(a) Any promise of an executor or administrator to pay out of his own estate any debt due from the estate he is administering.

(b) Any promise to answer for the debt, default or miscarriage of another person.

(c) Any promise to perform some act, such as to transfer property or pay money, in consideration of marriage.

(d) Any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them.

(e) Any contract which by its terms is not to be performed within the space of one year from the making thereof. For example, a lease for more than one year must be in writing.

The seventeenth section provides that:

No contract for the sale of any goods, wares, or merchandise for the price of ten pounds sterling, or upwards, shall be allowed to be good, except (1) the buyer shall accept part of the goods so sold and actually receive the same; (2) or give something in earnest to bind the bargain; (3) or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

CHAPTER V

FORMATION OF CONTRACTS: VOID AND VOID- ABLE CONTRACTS

35. *Legality of object.*—The law may prohibit the doing of certain things, or certain acts may be contrary to public policy. If an agreement has an object which is thus contrary to law or public policy, an enforceable contract cannot result. The contract cannot be enforced, damages would not be allowed for non-performance, and what has been paid under the contract may be recovered. Hence if the performance of a given contract would consist in doing such forbidden act, or an act contrary to public policy, the law will not exact performance, nor will the parties be entitled to ask the aid of the law. Such contracts are void, in that they are illegal. If the contract then involves some violation of rules of decency, morals or good manners, the law will take notice of the mischievous nature of such an agreement, to the extent of refusing to recognize that any legal right can arise out of it. As was said in a leading case:

A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it.¹

Such agreements are void as being immoral. Then there are agreements which are void as being against public policy: for example, agreements concerning matters touching the good government of the commonwealth and the administration of justice, or concerning

¹ Cowan vs. Milbourn, 1867, L. R. 2, Ex. p. 236.

matters affecting particular legal duties of individuals whose performance is of public importance, or concerning things which are lawful in themselves, but which are such that individual citizens cannot, without general inconvenience, be allowed to set bounds to their freedom of action in connection with them as freely as they may with regard to other things.¹

An agreement is also void which provides for some act which involves the commission of a civil wrong: for example, an agreement of a debtor to defraud his creditor, or an agreement to carry out some fraudulent scheme and divide the profits. A debtor in difficulties who makes a compromise with his creditors, at, say, 50 cents on the dollar, cannot secretly agree with one creditor that the latter shall get some preference over other creditors; such an agreement could be upset. This was well laid down in an English case, as follows:

Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor, in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is to lose the benefit of the composition.²

It is a general rule of public policy that persons who are of full age and in the possession of their faculties should be allowed to contract freely. A person may make a foolish bargain, but the courts will not, as a matter of public policy, declare such contracts void, though of course if the party to the contract comes within one of the classes we have above considered, namely, minors

¹ Pollock, p. 288.

² Mullalieu vs. Hodgson, 16 Q. B. D. 689.

or insane persons, for example, the court will then interfere. When a contract is set aside as being contrary to public policy, what is meant is that the contract belongs to some class of contract which has long been recognized by the law as unlawful. Lord Halsbury said in a recent case:

I do not think that the phrase "public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. I deny that any court can invent a new head of public policy. A contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or the assisting of the King's enemies, are all undoubtedly unlawful things; but it is because these things have been either acknowledged or assumed to be by the common law unlawful, and in case a judge or a court have a right to declare that such things are, in his or their view, contrary to public policy.

36. *Wagering contracts.* — Wagering contracts, though they were at one time enforceable under the common law, are now by statute illegal. A wagering contract is one by which one party agrees to pay another money or property upon the happening of some uncertain event. There is no right of action for the recovery of a bet claimed under a gaming contract, and if the losing party has paid over the money he cannot get it back, unless he proves that there has been fraud. The law thus endeavors to discourage gambling. Buying stock on margin has been held not to be a gambling contract, though betting in a bucketshop is. In a bucketshop transaction the broker does not buy the stock; he merely makes a bet for his client that the stock will rise or fall, and it is a gaming contract. But a broker who buys and sells shares for a client, although on margin,

actually buys the stock. The contract is not a gaming contract, though the broker may know that his client is not investing, but is merely speculating, and that the client has really insufficient means and should be saving rather than risking his money.

A contract of insurance, although it is in the nature of a wagering contract, is enforceable; so also are contracts for the sale and delivery of commodities at different prices. The actual intention of the parties will decide whether or not the contract is a gaming contract and, therefore, illegal. Thus if goods are bought subject to delivery at a future date at a fixed price, but it is agreed that the goods shall not be delivered and the price paid, and it is understood that when the time for purchase arrives, the intention is merely to make a settlement by one party paying the difference between the market price and the contract price, such a contract is a gaming contract and illegal. A note given in payment of such a settlement would be void.

37. *Usurious contracts.*—By statute the legal rate of interest in Canada is fixed at 5 per cent, where the agreement does not fix the rate. The maximum rate is also fixed by statute, and any excess over this maximum is usury. The Bank Act provides that a bank may stipulate for any rate of interest or discount not exceeding 7 per cent per annum, and may receive and take any advance in such rate, but no higher rate of interest shall be recoverable by a bank. By the Money Lenders Act, any lender who shall stipulate for, allow or exact on any negotiable instrument, contract or agreement concerning a loan of less than five hundred dollars, a rate of interest greater than 12 per cent per annum, is liable to one year's imprisonment, or a penalty of one thousand dollars. If a judgment has intervened, the rate is re-

duced to 5 per cent. A bona fide holder before maturity of a negotiable instrument discounted by a preceding holder at more than 12 per cent may recover the amount thereof, but the party paying may reclaim the excess from the money lender.

38. *Contracts in restraint of trade.*—The general principle is that contracts which unreasonably restrain trade are void. It is contrary to public policy for a man to contract not to engage in business at all. There may be circumstances, however, which make it reasonable that a man should undertake not to engage in a particular business for a certain length of time. Thus if a man sells a business and he undertakes not to carry on any business which will compete with that which he has sold, he may obtain a better price, and such a contract, if not otherwise unreasonable, will be maintained. Even then, however, the restraint must not be wider than is reasonably necessary. A restraint of this kind may be more reasonable now, with our modern means of transportation, than would have been the case fifty years ago. Such a restraint is not necessarily unreasonable because it is unlimited as to space. Thus in a leading case in England,¹ Mr. Nordenfelt, who was a manufacturer of guns and explosives, and who supplied them to the various governments of Europe, sold his business to Maxim Nordenfelt & Company, Limited, and undertook not to compete with the business for twenty-five years. There was no restriction as to space. The sale was made in England, and later Mr. Nordenfelt began business again in Belgium. The House of Lords held that the restraint in this case was not unreasonable, and that he was bound by his contract.

So also in another case recently decided by the House

¹ Nordenfelt vs. Maxim Nordenfelt & Co., 1894, A. C. 535.

of Lords, where a man was employed to sell clothing on the instalment plan, and he entered into a contract for three years, and bound himself that upon leaving his present employ he would not work for any competing firm or in the clothing trade for a year at any place within twenty-five miles of the employer's place of business, or within twenty-five miles of any place where it might do business, the contract was held unreasonable and void. Under the contract, it was pointed out, the employer might have dismissed the man at any time, and if the contract were good the employee would find himself unable to earn a livelihood by perhaps the only business he knew.

In Quebec an injunction has been refused to restrain a bread driver from employing himself with a competing firm, although he had bound himself to his employer for a certain period, and had agreed that he would not engage in the bread business or in the soliciting of orders for bread for a certain period in the city of Montreal. It was held that his services were not of such a unique and unusual character that he could not be replaced, and that any loss that might be caused by his leaving could be reasonably and adequately compensated for in damages. Apparently, however, it is not a restraint of trade for a dealer in liquors to bind himself to sell only the liquors of a certain firm.¹ The general rule, as laid down in the Nordenfelt case, is that the restraint must not be greater than is reasonably necessary for the protection of the parties, and so as to be contrary to public policy.

39. *Unlawful combinations*.—Combinations in restraint of trade are unlawful and criminal. Thus combinations between dealers in staple commodities to con-

¹ Gervais vs. Paquette, 1907, 37 Que. S. C. 501.

trol and increase the price by decreasing the production or competition are illegal and void. The law may be stated as follows. Everyone is guilty of an indictable offence and liable to a penalty not exceeding \$4,000 and not less than \$200, or to two years' imprisonment, or if a corporation, to a penalty not exceeding \$10,000, who conspires, combines, agrees or arranges with any other person or with any railway, steamship, steamboat or transportation company: (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or, (b) to restrain or injure trade or commerce in relation to any such article or commodity; or, (c) to unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. This rule, however, is not construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees. As a combination in restraint of trade is illegal, the Supreme Court of the United States has held that parties to it have no standing in court, and the court will not assist in enforcing such contracts. In the United States, however, it has been held illegal for workmen to combine to enhance the price of their labor. For example, it was said in an Illinois case:¹

All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all com-

¹ Moore vs. Bennett, 149 Ill.

petition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographical work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but so far as it goes it is precisely of the same character, produces the same results and is subject to the same legal objection.

Greenhood, on "Public Policy," points out, however, that where the means contemplated and the objects sought are not unlawful, combinations of workmen to control the price of their labor or skill are not necessarily illegal. He says:

Combinations of artisans for their common benefit, as for the development of skill in their trade, or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their fold, or for the purpose of raising the prices of labor, are valid, provided no force or other unlawful means be employed to carry out their needs, or their object be not to impoverish third persons, or to extort money from employers, or to encourage strikes or breaches of contract, or to restrict the freedom of members for the purpose of compelling employers to conform to their rules.¹

In an American case, where a wallpaper company sued to recover the price of wallpapers which it had supplied, the defendant pleaded that the company was a combination in restraint of trade.² It was clear from the evidence that the company had a monopoly, and that

¹ Greenhood, Public Policy, Rule 546.

² Continental Wallpaper Co. vs. Voight. Decided Feb. 5, 1909.

it was really an illegal combination of factories in the wallpaper trade. The Supreme Court pointed out that to give judgment in favor of the company would be to legalize and make effective the illegal agreement constituting the monopoly, and the court said:

Such a judgment cannot be granted without departing from the salutary rule long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to enforce or to realize the fruits of an agreement which appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield a defendant who had got something for which, as between man and man, he ought perhaps to pay, but for which he is unwilling to pay. In such cases the aid of the court is denied, not for the benefit of the defendant, but because it should be denied without regard to the interests of individual parties.

A case was recently decided by the Supreme Court of Canada, on an appeal from Manitoba. Two junk dealers, who had practically a monopoly of this trade in Manitoba and elsewhere in the West, agreed to fix the price which they would pay for junk of various kinds. The agreement rendered their business more profitable than ever, and under it they were to divide the profits. One sued the other to account for profits, but it was held that no action would lie, because the agreement was really an illegal combination under the statute.¹

40. *Contracts made on Sunday.*—The common law rule is that contracts made on Sunday are valid. In England, in the United States and in certain of the Canadian provinces, however, contracts are generally illegal if made on Sunday. The Bills of Exchange Act, for instance, provides that a bill is not invalid by reason

¹ Weidman vs. Shragge, 1912, 46 S. C. R., p. 1.

only that it bears date of a Sunday, or other non-judicial day; but apparently if the bill were given in pursuance of a contract which under the statute may be illegal if made on a Sunday, it would be void as between the immediate parties, and as to any person who takes it with notice; but the mere fact that it is dated on a Sunday would not be such a notice.

Under a Dominion statute¹ it was made unlawful for any person to carry on or transact any business of his ordinary calling, except works of necessity or mercy, on the Lord's day, but this act goes on to provide that it shall not affect any existing provincial law on the subject. The act apparently would not apply in a particular province where under the provincial law druggists, tobacconists and fruit dealers kept open on Sunday. What may be a work of necessity or charity is a question of fact in each case, but anything done to save life or preserve health or property, which must be done on a Sunday or not at all, would probably be considered a work of necessity. So also any act, the object of which is to relieve distress or suffering, or which relates to religious worship, would be an act of charity.

It has been held in American cases that notes, deeds and mortgages which are signed on a Sunday, but which are not delivered on that day, are valid; but that on the contrary, if signed on a secular day and delivered on a Sunday, they are void, saving the rights of a bona fide holder for value of a negotiable instrument.

41. *Contracts in restraint of marriage.*—Contracts in restraint of marriage are generally held to be against public policy, and are therefore void. A contract not to marry a certain person, or not to marry anyone before attaining the age of twenty-one, or perhaps twenty-five,

¹ 6 Ed. 7, Chap. 27 (now R. S. C., Chap. 153).

may be valid, in that it does not restrain marriage in general: but a contract not to marry anyone but a particular person would be void. A widow or widower may contract not to marry a second time, but a person may not contract not to marry at all. A contract not to marry without the consent of parents, or during minority, would be valid, because the restraint is not unreasonable. A contract not to marry a Hebrew or a Roman Catholic would be valid. A contract not to marry until one has attained the age of forty would be invalid, because it discourages matrimony. A bet by one person that he will not marry within a certain time is a wager, and void.

Agreements to procure or negotiate marriage for reward, known as marriage brokerage contracts, are held to be contrary to public policy, and therefore void. Pollock remarks¹ that all such agreements are void, whether for procurement of marriage with a specified person, or of marriage generally, and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely no consideration, but an illegal consideration for a subsequent promise of reward. It was said in an English case:² "Both ladies and gentlemen frequently are induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life, at the will of most inexorable jailers—disappointed lovers."

42. *Contracts in fraud of third persons.*—A contract is void if it tends to induce some third person to commit a breach of trust, or if it tends to defraud a third person.

¹ Pollock, p. 366.

² Wilm, 371.

Contracts are opposed to public policy if they are opposed to open, upright and fair dealing, and contracts are void which place a person under an inducement to violate a confidence reposed in him, or which place him under a wrong influence, or under a temptation which may injure the rights of third persons. Thus an agreement to divide the profits of a fraudulent scheme, or even to carry out some lawful object by means of an apparent trespass, breach of contract or breach of trust, is void. Thus if A and B are interested in common with other persons in a transaction which requires the good faith of all persons interested, and A and B make a secret agreement which is intended to benefit them at the expense of the others, the agreement is void. Or if B, upon application of A, agrees to advance money to enable him (A) to buy certain goods of C; B goes to C and pays him the money agreed upon, in order that A may get the goods; A and C agree that A shall pay a further sum: this agreement between A and C is void, as it is a fraud upon B, who intended to relieve A from paying any part of the price.

43. *Contracts against liability for negligence.*—It is difficult to express a rule of universal acceptance in Canada upon this subject. According to French law, it is very doubtful whether a man may stipulate for freedom from the consequences of his ordinary negligence. Against his wilful negligence, which is assimilated to fraud, it is said that he cannot stipulate. A person may stipulate, of course, that he will not be liable for loss under certain circumstances. Thus if a repairer of antiques is asked to repair some very fragile article, he may stipulate that he will not be responsible if the article goes to pieces in the course of repair. The effect of the various Workmen's Compensation Acts, whatever may

have been the law before, is to prevent employers stipulating against liability as toward workmen.

At English common law it is said that in the absence of statute to the contrary, a carrier may stipulate for total exemption from liability for negligence. In the English law provinces this rule has in several instances been altered by statute. In Quebec, under the authority of a decision of the Supreme Court, a carrier may stipulate by express contract that he shall not be liable for the negligence of his employees or servants.

The rule laid down by the Dominion Railway Act is, however, that a railway, that is, a Dominion railway, cannot contract itself out of liability for its negligence or that of its servants by any notice, condition or declaration. A company may, however, with the approval of the Railway Board, stipulate that its liability may be limited to a fixed sum, even in case of negligence. It may also stipulate that unless notice of claim is given to it within a certain delay, it shall not be liable. Ordinarily, carriers are liable as insurers of goods carried. In other words, a carrier is bound to deliver in good condition articles received and carried by it, though there be no negligence on its part. It is evident that the carrier may contract against this liability.

44. *Effect of illegality.*—Whether an illegal stipulation in a contract will void the contract as a whole or only in part will depend upon the circumstances. It is not sufficient to assert merely that an unlawful agreement cannot be enforced. Where there is a lawful promise made for a lawful consideration, the contract is not necessarily void because there is an unlawful promise made at the same time for the same consideration. It is well established that if in a deed, for instance, there are certain covenants or conditions which are good and

lawful, and others which are contrary to law, the latter will be struck out and the former will stand good. That is, where there are distinct engagements in a contract by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law the performance of those which are legal may be enforced, though the performance of those which are illegal cannot.¹

It has also been laid down that where a transaction which is partly valid and partly invalid is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part, the party who is called upon to perform his part of the agreement, which is on the face of it valid, will not be allowed to urge that the transaction as a whole is unlawful and void. If the illegal cannot be separated from the legal part of the covenant, the contract is entirely void, but if they can be severed, the bad part may be rejected and the good part retained.

Thus Kent lays down that "if the part which is good depends upon that which is bad, the whole is void; and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract so entire, that there can be no apportionment, the contract is void."

Where any part of a single consideration for a promise or set of promises is unlawful, and the consideration cannot be severed so as to assign a lawful consideration to any of the promises, the contract as a whole is void. The immediate object or consideration may not be unlawful, but the intention of one or both parties in making the contract may be unlawful, in which case there are two possibilities: if the unlawful intention when the

¹ Bank of Australasia vs. Breillat, 1847, 6 Moo., P. C. 152.

contract is made is shared by both parties, or is entertained by one to the knowledge of the other, then the contract is void; if one of the parties, unknown to the other, has an unlawful intention when the contract is made, it may be voided by the innocent party, if he discovers the intention before the contract is executed.

Thus if the lessee of a house, which he knows is used by the tenants for immoral purposes, assigns the lease, and he knows that the person to whom he assigns it intends to continue the same use, he will not be allowed to recover on a contract made by the person to whom he assigns the lease to indemnify him against the covenants of the original lease.

And a person who owns a property and who has undertaken to sell or lease it, but who finds that the purchaser or lessee intends to use it for unlawful purposes, is entitled and may even be bound to rescind the contract. It has been laid down that he need not even give his reasons for doing so, as he may justify his refusal later. But where a contract has been completely executed, as for example by the transfer of property, the consideration may be paid or the transfer may have been made for some unlawful purpose of which both parties were aware, but once executed it cannot be set aside. Thus in an English case, where two promissory notes were secretly given to a creditor by a debtor who was making a compromise with his creditors, the notes being in excess of the amount of the creditor's rightful composition share, judgment was given on one of the notes; a third person intervened and gave the creditor a guaranty for the amount involved, upon the creditor's staying proceedings. An action on this guaranty was dismissed.

If a school teacher who has not the proper license un-

dertakes to teach and does teach in a school for a number of months at a good salary, he will not be entitled to recover for his services. A doctor who practises without the necessary license or qualification would be in the same position. The sale of tobacco may be prohibited by statute on a Sunday: a tobacconist who sold tobacco on a Sunday on credit would not be entitled to collect.

A director of a railway company cannot have a private interest in a contract with the company. Thus if a director of a railway company which is putting up a building makes a secret partnership with the contractor who is doing the work, his contract is illegal, and he could not sue his partner for a division of profits.

It is illegal to pay money or undertake to pay money to avoid or prevent the prosecution of a criminal. Thus the Court of Appeals of the Province of Quebec has held that where a bank clerk embezzled money and his father gave the bank a note to cover the amount stolen, on the condition that the bank would drop the prosecution, and the bank accepted the note and went no further with the case, the note could not be collected.

A contract by which a Member of Parliament accepted money in return for his promise to vote as he might be directed by another person would be illegal.

Contracts between a lawyer and his client are illegal which stipulate that the lawyer, if the action is successful, will accept for his services a share of the money recovered. The lawyer is entitled to a reasonable fee, but as he is supposed to be so much better able than his client to judge of the possible success of a case, such a contract is deemed illegal, because the client is placed at a disadvantage.

If a person sells a grocery business and contracts that he will not, during a period of five years, engage in the

grocery business in the same town, such an agreement is reasonable, and is not in restraint of trade, and is therefore valid; but if the seller agreed that he would not engage in the grocery business for the same period at any place in Canada, the contract would be unreasonable and void.

A loan to a person to enable him to run a bucketshop, it being agreed that the lender is to receive a share of the profits, would be illegal.

In certain jurisdictions, steamboat excursions may be prohibited on a Sunday. The captain or engineer or other person who assisted in running the excursion would be unable to collect his wages.

45. *Reality of consent.*—As we have seen, the consent of the parties to a contract must be expressed in some way. The minds of the parties must meet, but there must be something which indicates the fact. In other words, the consent must be real. The consent may, therefore, be unlawful or defective on various grounds: as, for example, owing to mistake, misrepresentation, fraud, undue influence or duress.

Where a party to a contract can show that he gave his consent in error as to the nature of the contract, or as to the thing about which he was contracting, or as to something which was the principal consideration for making the contract, he may have it set aside. He may be able to prove fraud or misrepresentation of the other party, or that by some form of violence he was coerced into making the contract. In a sense the contract is good, but a person who has been led into it by error or fraud, or otherwise, may have it declared void, if he takes steps to do so before his right is prescribed.

If a person, who has made a contract under any of the above circumstances, ratifies the contract or acquiesces

in it, he will not then be allowed to set it aside. In certain cases, however, as for example in the case of a promissory note, the maker may have signed in error, or as a result of some fraud or misrepresentation, but if the note gets into the hands of a third party who in good faith without notice of the defect gives value for it, the maker will be bound toward such third party.

46. *Mistake or error.*—A mistake may be a mistake of fact or a mistake of law. A mistake of fact may be a mistake of intention or a mistake of expression. If the parties to a contract do not mean the same thing, or one of them forms an untrue conclusion as to the subject matter of the contract, there has been a mistake of intention and the contract is void, because the minds of the parties have not met.

Thus A may lend B a horse, and B may think that A is giving it to him: there is no contract of gift. A man may sign a paper by which he purports to subscribe for shares in a company, and he pays \$500. At the time he thought that he was subscribing for five fully paid-up shares. In the contract as drawn he appears to subscribe for fifty shares of \$100 upon which he pays \$10 each, or \$500 on account. Such a contract has been set aside. Or if a man signs a promissory note and thinks it is merely an order for certain goods, he will not be bound by his mistake.

Where one party is ignorant of the subject matter of the contract, the law requires the other to disclose all material facts that he may know. So also if goods are bought in reliance upon the judgment of the seller, and the buyer finds that goods are shipped to him which he did not intend to buy, he is not bound by his contract. And if a man buys a quantity of goods and he intends to buy one hundred pieces, and the other party thinks

that he is buying five hundred pieces, or the buyer thinks that he is paying \$1 and he is actually charged \$2, there has been no consent as to the subject matter of the contract, and the contract is voidable. So if a man buys plated goods in mistake for silver, or buys a modern reproduction which he thinks is an antique, he may have the contract set aside. So also if a person pays down a sum of money for some secret process, as for the manufacture, say, of ginger ale, and it turns out that there is no secret, he will not be bound. It is different if a man buys a picture from a dealer by some unknown painter, and he believes it to be by Rembrandt, and the dealer does not state that it is a picture by Rembrandt. The buyer will then be bound. There was no guarantee, and the buyer bought in doubt. His purchase was really a speculation.

A contract is not necessarily invalid because there has been a mistake of expression. The expression may be corrected, where the minds of the parties have met, but their intention has not been exactly set out. A mistake of law does not void a contract. Thus a man may make a contract by which he sells a certain thing, and by law the sale of it carries with it its accessories; he cannot have the contract set aside on the ground that he did not intend that the accessories should go with the thing sold. He may accept a succession, in ignorance of the fact that by accepting the succession he accepts the liabilities attached thereto.

47. Misrepresentation and fraud.—To constitute misrepresentation or fraud sufficient to set aside a contract, there must be proof of an intention to deceive; there must be proof that artifice was used by one party, or with his knowledge, to induce the other to contract. An

innocent misrepresentation in most cases will not be sufficient, though in a contract of insurance, and sometimes as between persons who stand in a confidential relation, the innocent misrepresentation, if material, will render the contract null. Fraud generally includes misrepresentation. If there is present a dishonest intention on the part of the person who makes the representation, or recklessness equivalent to dishonesty, fraud will be easily found, because the mistake of the one party has been induced by the deliberate words or conduct of the other.

Fraud has been defined as a false representation of a material fact, made with knowledge of falsity, or in reckless disregard of its truth or falsity, with the intention that it be acted upon by another who has the right to rely upon the statement, and who does act upon it, to his injury. The failure to disclose material facts, where there was a plain duty to disclose them, may amount to fraud.

The representation may be made by express words, or by conduct. It may be a positive assertion, or merely a suggestion of what is false. The representation may be of a particular fact, or as to a general state of things.

It is characteristic of a misrepresentation tainted with fraud or deceit, that it is made without positive belief in its truth; there may not be positive knowledge of its falsehood. Thus a person may, in ignorance of its truth or falsehood, make a material representation which proves to be false. In such case, his ignorance will be treated as equivalent to knowledge of falsehood. It was remarked in an English case that "If persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must in a

civil point of view be held as responsible as if they had asserted that which they knew to be true."

As to the effect of silence, it has been held that it is equivalent to misrepresentation, if the withholding of that which is not stated makes that which is stated absolutely false. Thus a person who complains of fraud or misrepresentation must not only establish the misrepresentation, but he must also establish that it was false in fact; that the person who made it knew that it was false, or made it recklessly without knowing whether it was true or false; that he was induced by the misrepresentation to make the contract; and that within a reasonable time after he discovered the fraud he repudiated the contract. He will not be allowed to continue to act under the contract after he has knowledge of the fraud practised upon him, and then to ask to have the contract set aside.

It was said by Lord Campbell that "a single word or nod or wink, or a shake of the head, or a smile from the purchaser, intending to induce the vendor to believe the existence of a non-existent fact, might be fraud." Thus if A has a picture which he considers valuable, and he thinks it is a Rembrandt, and takes it to a dealer who, knowing that it is a Rembrandt, laughs at A's suggestion, and indicates that he does not think it is a Rembrandt, and thus induces A to sell it to him for a trifling amount, A, if he finds out that the picture is actually a Rembrandt and that the dealer is disposing of it as such, can recover his picture.

48. *Undue influence*.—The consent of the parties to a contract must be freely given. If it is obtained under such circumstances that it is not freely given, the contract may be set aside, if the person whose consent has been so obtained desires. The contract is voidable, not

void; though if a person were seized and his hand were forcibly guided to sign his name, as, for example, to a promissory note, it is probable that this contract would be void, because there would be no consent.

To secure a consent by undue influence would mean that another's weakness of mind, his necessities or distress, have been taken advantage of in order to induce his consent. It might be that the person signing had in confidence told the other party of some incriminating action on his part, and that the other party threatened to expose him unless he signed. This would be undue influence. Thus it has been said in a case decided in the United States:¹

Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections cannot be properly termed undue influence in a legal sense; but influence obtained by flattery, importunity, superiority of will, mind, character, or by what art soever that human thought, ingenuity, art or cunning may employ which would give dominion over the will to such an extent as to destroy the free agency or constrain a person to do against his will what he is unable to refuse, is such an influence as the law condemns as undue.

What may be undue influence in a particular case it is difficult to say. In attempting to discover whether a person gave his consent freely and deliberately, the courts will take into consideration the age and capacity of the person, the nature of the transaction, and all the other circumstances of the case. It may be that the parties stand in such a relation that the one from habit dominates the other, or that one under the circumstances is in a position to use some undue influence. Thus it

¹ Schofield vs. Walker, 58 Mich., p. 96.

has been laid down in an English case, that "Where 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 party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." And, again, Lord Eldon lays it down that:

In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought into question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proof that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced over-reached by him of more mature intellect.

49. *Duress—violence and fear.*—A person may give his consent to a contract, but that consent may be induced or extorted by fear. If actual violence is used, or violence is threatened, the party consenting under such influence may have his contract set aside. A distinction may be drawn between duress which involves actual compulsion, and menace which means the threat of actual compulsion. The term duress, however, covers both, as would also the terms violence and fear. If a man holds a pistol to another's head and threatens to shoot unless that other signs some deed in his favor,

that other signs the deed as the lesser evil. Under some of the English decisions, especially the older ones, it has been held that to constitute duress or violence there must have been fear of loss of life or limb or of imprisonment; other cases, however, and perhaps the more acceptable doctrine, require that at least there shall be a reasonable and present fear of serious injury. Thus mere idle threats which are not intended nor understood in a serious sense will not ordinarily be sufficient.

The courts will consider the age, sex, character and constitution of the party who is threatened. Thus a threat made against a business man might have no effect, whereas it might induce an ignorant countryman to enter into a contract. The threat or violence that might terrify a woman into signing might be held insufficient to bring a man to the same result.

Physical violence may be used, as for example where a girl was beaten by her father until she consented to marry a certain person. It may consist of threats of injury in the future—threats to do physical injury, or to injure the fortune or honor of the victim, or even of a relative or friend. In France it has been held that where the manager of a company which was in financial difficulties threatened several of the employees with dismissal unless they signed bills for him, this was violence; and where a young partner in a firm was informed by his co-partners that the books showed that he was \$9,000 short in his accounts, and they threatened him with criminal proceedings and refused to let him see the books, and in the belief that what they said was true he paid them \$6,000, and later it was found when the books were examined that he owed nothing, it was held that he was entitled to get his money back.

It is not violence if a creditor threatens his debtor with

suit, but it would be violence if he threatened the debtor that unless he paid some sum in excess of the debt he would sue him. If A has stolen money from B, B can threaten that if he does not pay back what he has stolen he will have him arrested. But if A admits that he has stolen \$50 from the bank which employs him, and the bank asserts that he has stolen much more, and induces his mother to sign a note for \$400, this has been held to be violence.¹ The person who alleges and proves duress or violence or fear may have his contract set aside.

¹ Macfarlane vs. Dervey, 1870, 15 L. C. J., p. 85, Que. C. 9.

CHAPTER VI

OPERATION AND INTERPRETATION OF CONTRACTS

50. *Rights and liabilities of third parties.*—A contract is an agreement conferring rights and imposing liabilities upon the parties to it. It is their consent which has made the contract. A creditor can demand performance of the obligation from the debtor, or from his representatives. He cannot, as a rule, demand performance from a third person, nor can the debtor require him to do so. Yet the debtor or his representatives may perform the duty by an agent. Of course where an agent makes a contract for his principal and acts within the scope of his agency, the person with whom he contracts and to whom the fact of the agency has not been disclosed may, as a general rule, look for payment or performance to either the agent or the principal. On the other hand, if the agent gave a promissory note or a check in payment, he would be bound. The principal may not only be held liable on the contract made by his agent, but he may claim the benefits arising from it. In England it is well understood that a third person who maliciously interferes in the performance of a contract, as between the rightful parties to it, may render himself liable in damages: for example, if a third person maliciously induces an employee to break his engagement with his employer, he may be liable in damages to the employer, and under the English cases this doctrine has been made applicable to contracts in general.

51. *Contracts made for the benefit of a third person.*

—In England it is well established that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may.¹ In most of the American states the third party in whose favor a direct benefit has been contracted for by others may recover. In New York, however, the promise must be for the benefit of the third party, and there must also be such a relation between him and the promise that the promisor's obligation constitutes a satisfaction of some duty of the promisee to the third party.²

In an English case, which is an apparent exception to the English rule, it was held that a provision in a partnership contract to the effect that a partner's widow should be entitled to his share of the business, might be enforced by the widow. But the court in rendering judgment pointed out that this provision in the contract in reality created a trust of the partnership property in the hands of the surviving partner, and that if the widow acquired any right, as indeed she had, she acquired it because a trust had been created in her favor.

So it has been held in England that an agreement between A and B, that B shall pay a sum of money to C (an agreement to which C is not a party, either directly or indirectly), will not prevent A and B from coming to an agreement to the contrary the next day. If the third person is to have any right, he must be a party to the contract.

In Quebec the law is stated as follows: a person cannot, by a contract in his own name, bind anyone but himself and his heirs and legal representatives; but he may contract in his own name that another shall perform

¹ Pollock, p. 223.

² Gerstenberg & Hughes, p. 71.

an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it if the third person has signified his assent to it. Under the English law, while a stipulation may be made in favor of a third person, that third person cannot enforce it, as we have said above. Under the law of Quebec, however, it has been held that a third person in whose favor a stipulation has been made, and who has signified his acceptance of it, may take action to enforce performance, although he was not a party to the contract.¹

In another case, decided by the Court of Appeals of Quebec, it was held that a third party need not intervene in case a gift is made by one person to another, with stipulations in favor of the third party, and that mere acceptance by the person to whom the gift is made confers on the third person the right to exact performance of the charge or benefit stipulated in his favor.²

It may be laid down as a general rule, however, that creditors may exercise the rights and actions of their debtor when to their prejudice he refuses or neglects to do so. Thus if a debtor refuses to recover from third persons goods belonging to him which are in their possession, creditors may take action to recover them, in order that their rights may be protected; and creditors may attack fraudulent contracts made by the debtor, as, for example, a transfer of personal property which hinders and delays them. Such an action will fail if the

¹ Brisebois vs. Campeau, 21 L. C. J., p. 16.

² Pare vs. Pare, 3 D. C. A., p. 359.

goods which it is sought to recover in this way are not really liable to answer the claims of the creditors. Thus it was held that where a debtor gave certain creditors an agreement for an absolute sale of his property as security, with the necessary result of surrendering and delaying his other creditors under circumstances which would support the preference, the judgment creditors were held entitled to such order and directions from the court as would enable them to reach in the preferred creditors' hands all the property of the debtor that remained after the preferred claims were paid.¹

52. *Rules of evidence.*—When the parties to a contract put into writing what they have agreed upon, this document is the best evidence of what they intended. The purpose in reducing the agreement to writing, and the actual effect of doing so, are to put into definite and permanent form what the parties intend, and to render impossible later disputes as to what actually were the terms of the agreement. Having put their agreement into writing, the parties must be held to have intended that it shall fully express their agreement, and to have excluded the possibility of altering it by any oral evidence. It may be stated, therefore, as a general rule, that oral evidence will not be admitted to contradict the terms of a valid written instrument. If A and B make a contract in writing, neither can make oral evidence to show that he means something different from what is stated in the contract itself.

Oral testimony may be allowed in certain cases, however, as, for example, to explain abbreviations, or ambiguous words or phrases; to identify the subject matter of the contract and the parties to it; to show surrounding circumstances, usage or custom, a condition pre-

¹ *Beliveau vs. Miller*, 20 W. L. R., p. 96.

cedent, fraud or illegality, delivery, a mistake of expression, and a subsequent oral agreement. Thus witnesses have been allowed to prove that by local custom "a thousand" of rabbits was 1,200 (i. e., 10 long hundreds of 6 score each); to define "year" in a theatrical contract to pay a weekly salary for three years, as meaning only the part of the year during which the theatre was open; to identify the wool described as "your wool," in a contract to buy wool. To admit evidence of this kind is not to contradict the writing, but is to get something auxiliary to the writing—to explain the words, to supply, as was stated in an English case, "the mercantile dictionary in which you are to find the mercantile meaning of the words which are used." This is necessary to assist the court in its endeavor to give effect to the intention of the parties.

53. *Rules of construction.*—When the courts are called upon to interpret a contract, they endeavor, as we have said, to discover the intention of the parties, and will proceed by means of certain rules of construction. Where, for example, the terms of a contract are capable of more than one meaning, there is thrown upon the courts the task of construction, or of determining which meaning is to be preferred. The following are the principal general rules of construction:

(a) Words are to be given their plain and ordinary meaning, unless the context or surrounding circumstances show an intention to use them in a peculiar sense.

(b) In determining the intention of the parties, the agreement is to be construed as a whole; in other words, particular terms are to be construed in the sense which is most consistent with the general intention. The meaning must be collected from what is expressed in the contract, and not from a mere conjecture of some

intention which the parties may have had in their minds, and which they might have expressed had they been better advised.

(c) That construction should obtain which will best carry out the intention of the parties.

There are certain subsidiary rules, as, for example:

(d) In the case of a contention, as between printed and written words, the written will govern.

(e) Words are to be construed more strictly against the party using them.

(f) Where words or clauses are repugnant to each other, those which are in conflict with the manifest intention of the parties should be rejected as surplusage.

(g) Where a contract is ambiguous and one interpretation renders it valid and the other invalid, the former will govern.

(h) Where one interpretation renders the contract reasonable and another unreasonable, the former will govern.

(i) Subsequent acts of the parties, not contrary to rules of law or the express terms of the contract, are entitled to strong consideration.

(j) Obvious errors of grammar are subject to correction.

(k) Words of general meaning are subject to restriction by words of a more specific character.

54. *Surrounding circumstances given consideration.*—The intention of the parties may be obscure. The court will then be entitled to look at the surrounding circumstances. There is apparent in the more recent decisions, especially in England, a tendency to pay greater attention to all admissible indications of what the intention of the parties actually was, and to examine

the conduct of the parties themselves as an indication of their own construction of the contract.

55. *Matters implied by law.*—Many contracts carry with them certain unexpressed obligations attached to them by law. Thus a man may sell another a horse, and though he does not warrant it sound, the law imports that warranty into the contract. On the other hand, he may sell the horse and stipulate that the sale is made without warranty. In mercantile contracts there is a presumption that time is an essential condition where time is specified; but even where time is not specified, or is not so specified as to be of the essence of the contract, performance within a reasonable time can, notwithstanding, be required, and notice may be given that the contract will be rescinded unless performance is made.

If a person contracts to do a certain thing at or before a specified time, and fails to do so, the contract becomes voidable in whole or in part, as the case may be, at the option of the person in whose favor it is to be performed, provided that it was the intention of the parties that time should be of the essence of the contract. If time was not the essence of the contract, then the general rule is that the contract is not voidable by the failure to do it at or within the time specified; and the person in whose favor the contract is made may obtain damages for the loss he has incurred by the delay in performance.

56. *Liquidated damages.*—The parties to a contract may stipulate that a certain sum shall be paid for damages in case of breach of execution of the contract, in which case such sum and no other, either greater or less, will be allowed to the creditor for such damages. This clause, at least under the French law, is frequently called a penal clause, or *clause pénale*. The Civil Code

of Quebec has rejected the doctrine laid down by some of the older French writers to the effect that the amount payable under such a clause might be reduced by the court as being excessive where it was shown that it was larger than the damage actually suffered. Under the English law, penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced if the substantial performance of that which was really contemplated can be otherwise secured.

57. *Joint and several contracts.*—There may be one or more persons on each side of a contract. Their liabilities or rights may be joint or joint and several. For example, if there are three joint and several creditors of a debtor, each of them may singly exact performance of the whole obligation, and thereupon give a discharge in full to the debtor. If the creditors are merely joint, and not joint and several, then only one action can be brought against the debtor, and in this they all should join. There is a joint and several obligation on the part of co-debtors when they are all obliged to the same thing, in such a manner that each of them singly may be compelled to the performance of the whole obligation, and that the performance by one discharges the others toward the creditor.

An obligation is not presumed to be joint and several; it must be expressly declared to be so. That is the general rule. A joint and several obligation may arise of right by virtue of some provision of law, and in commercial transactions joint and several liability is the rule rather than the exception. In a partnership, for example, the partners are jointly and severally liable; and in some jurisdictions the obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

CHAPTER VII

ASSIGNMENT AND DISCHARGE OF CONTRACTS

58. *Definition of assignment.*—Persons other than a creditor may become entitled by representation or assignment to stand in the creditor's place, to exercise his rights under the contract: in other words, the creditor may transfer his rights against his debtor to some third person. An assignment, says another authority, is a transfer by one party to another of some right, title or interest in personal or real property. The instrument by which the transfer is made is also frequently called an assignment. The assignment must not increase the debtor's burden or diminish his remedies.

59. *Competent parties to an assignment.*—Persons who have capacity to contract may make an assignment. Where a partnership has a claim against some debtor, ordinarily one partner can assign this claim to some other person. A may assign his claim against B through the ministry of his agent C. A tenant, where he is not forbidden by his contract or by law, may assign his interest in a lease. The person to whom the rights under a contract are assigned may bring action in his own name; generally notice in writing must be given to the debtor of the assignment, as he is entitled to know to whom he can pay his debt. Thus if a debtor, before receiving notice of the assignment, were to pay his original creditor, he would be discharged. If the assignee sues him, he will be able to raise against the assignee any defence he might have raised against the original cred-

itor. On the other hand, the debtor may consent to the assignment, in which case no notice will be necessary.

Where there are several competing assignees, their claims will rank as between themselves, not according to the order in date of the assignment, but according to the dates at which they have respectively given notice to the debtor.¹ If there are several competing assignees, and the debtor pays the first who gives notice to him, he is discharged. In the case of negotiable instruments, these difficulties are overcome in that the absolute benefit of the contract is attached to the ownership of the document, which according to ordinary rules would be the only evidence of the contract. The instrument itself is an authentic record of the successive transfers, where it is transferable by endorsement; and the bona fide possessor of the instrument is presumed to be the true owner thereof.

60. *Assignment of liabilities.*—This is the converse of the rule we have been considering. Ordinarily speaking, a debtor may not assign his liability to be performed by some third person. It is a matter of public policy that the creditor should know to whom he may look for satisfaction, as it is presumed that he entered into the contract after considering the character, credit and substance of the person with whom he contracted. Of course if the creditor consents to accept another debtor, a new contract is formed, and the old debtor will be released to the extent of the new contract.

Where a person has undertaken an obligation which is not purely personal and does not require the exercise of his own peculiar skill, he may have the contract performed by some other person, but he will remain liable for its due performance according to his contract.

¹ Dearle vs. Hall, Pollock, p. 232.

Again, there may be certain servitudes attaching to a piece of land, as, for example, the servitude by which low lying land must receive surplus water naturally flowing from higher land; if the owner of the lower land assigns or sells it, the person to whom he assigns or sells must respect the servitude. If a party to a contract dies, his rights and liabilities pass to his heirs or representatives, and while they may take advantage of the rights, they must also carry the liabilities under the contract made by the deceased.

61. *Other examples of assignment.*—Bonds and mortgages are generally assignable, as also the benefits under judgments, insurance policies and contracts of suretyship. Chattel mortgages may also be assigned, in which case the transfer may cover the legal title to the property mortgaged and all the rights of the mortgagor under the mortgage, or only the equity or equitable interest of the assignor. But if a person has a right of action for breach of promise to marry, it is contrary to public policy that this right of action should be assigned to a third person. And if A contracts with a famous artist to paint his portrait, and the artist assigns the contract to another artist equally famous and able, A is not bound to accept the picture by the second artist, or to recognize him in any way.

62. *Modes of discharging a contract.*—There are several modes of discharging a contract, all of which we cannot here discuss. Among them, however, are the following: by agreement, by payment or performance, by novation, by breach, by performance becoming impossible, by operation of law, by confusion, or by compensation.

63. *Discharge by agreement.*—Naturally the parties who make a contract may in turn agree to cancel it.

The contract itself may contain a stipulation for its cancellation under certain conditions. Thus in an insurance policy it may be provided that if the risk insured is increased or changed, the policy shall be immediately void. The release of an obligation may be made either expressly or tacitly. The release would be considered to be tacit when the creditor voluntarily surrenders to the debtor the original title of the obligation, unless there is proof of a contrary intention.

64. *Discharge by payment or performance.*—By payment is meant not only the delivery of a sum of money in satisfaction of an obligation, but the performance of anything to which the parties are respectively obliged. If a contract is bilateral, that is, involves the doing of something by both parties, then the performance by one party of his obligation discharges him, but the contract is not wholly discharged, because he is entitled to enforce performance by the other party thereto.

Whether the payment or performance is sufficient will depend upon the construction of the contract. Generally speaking, if the debtor has substantially performed his part of the contract, he may recover payment, but will be subject to a deduction for such damages as his omission or deviation from the contract may have caused the other party, though this omission or deviation must be slight and not such as to deprive the other party of his rights. If the omission or deviation cannot be adequately compensated for in damages, the performance may be held incomplete.

A contract may provide that it must be performed to the satisfaction of the creditor, and the debtor will be strictly held to his obligation to meet the personal taste or judgment of the creditor, where this is intended. It has been held in some cases that under such circum-

stances performance will be sufficient if it would satisfy the mind of a reasonable man. The obligation may be to deliver a thing determined in kind only; in this case the debtor need not give a thing of the best quality, nor can he offer one of the worst: he must offer a thing of merchantable quality.

Unless the contract so stipulates, a debtor must perform or pay his obligation as a whole, and not in parts; and if a creditor has a right under his contract to receive a specific thing, he is not bound to accept another, though it be of greater value than the thing due. If the obligation is to do a certain thing, the parties to the contract may agree that money shall be paid in lieu of such performance, and the new contract discharges the old.

Generally speaking, where a negotiable instrument is given in payment of a debt which is due, under the English law the original obligation is only conditionally discharged, in which case if the instrument is not paid, the creditor may sue on the original contract, or on the instrument.

65. *Time and place of payment or performance.*—If the contract does not fix a date for performance, it is implied that the contract is to be performed within a reasonable time: but performance on a certain date may be of the essence of the contract. If so, the contract will be strictly construed. Performance later will not be binding on the other party, unless he waives the delay, as, for example, by agreeing to performance at a later date, or by accepting performance when it is made. In mercantile contracts the presumption is, if any, that time where specified is an essential condition, and where a person promises to do a thing “as soon as possible,” he is bound to do it within a reasonable time.

Payment must be made in the place expressly or impliedly indicated by the contract. As a general rule, if no place is indicated and the thing to be paid or delivered is a certain specific thing, payment must be made at the place where the thing was at the time the contract was made. In all other cases, as, for example, where money is to be paid, the general rule is that payment must be made at the domicile of the debtor. Thus in a Manitoba case it was held that when a contract is silent as to the place of payment, and the debtor is a contractor who has done work in another province, the money will be payable at his residence.¹ In a Quebec case² it was held that the domicile which determines the place of payment is the debtor's actual domicile at the place of payment, and not some different domicile which he had at the time of the contract. The fact that the debtor may have paid certain instalments at the domicile of the creditor is not of itself of such a nature as to modify the law, or the rights of the parties in this respect. The court refused to hold that the defendant had, by virtue of any such payment at the domicile of the creditor, waived his right to pay the subsequent instalments at his own domicile.

66. *Composition with creditors.*—As we have already seen, a debtor may come to an arrangement with his creditors by which they accept less than the full amount of their claims on a compromise settlement. If such an agreement is made, the creditors have no claim for any balance. In the case of each creditor, the consideration for accepting less than is due him is the fact that the other creditors also forbear to exact performance in full.

¹ *Empire Sash & Door Co. vs. McGreevy; Canadian Pacific Ry. Co.*, 22 W. L. R. 872.

² *Coutu vs. Auclair*, 18 Rev. de Juri, 435.

If each forbears for part of his claim, each receives a benefit, because if one or more exacted full payment, some would be sure to lose thereby. In making such a composition with his creditors, however, a debtor cannot benefit one creditor over another, and an agreement to do so would be an agreement in fraud of his creditors and would be void.

67. *Application or imputation of payment.*—A debtor of several debts may, when paying, declare what debt he means to discharge, and his wishes in this respect must be observed. His intention may be discovered from his conduct, or from the circumstances under which he pays. If the debtor does not indicate what debt he means to discharge, the creditor may apply the payment toward any debt due him by the person paying, provided the debt is not illegal. Having made his choice, he will be held to it, unless the debtor consents to another application of the payment. And if the debtor has accepted a receipt by which the creditor has imputed the payment in discharge of a special debt, the debtor cannot afterwards require the imputation to be made upon another debt, except upon the ordinary grounds for the avoidance of contracts.

If neither party makes a choice as to which of several debts shall be discharged by the payment, the payment will be imputed in discharge of the debt actually payable which the debtor has at the time the greatest interest in paying. This is the rule under the English law, as also in the Province of Quebec. Following this rule, it was held in a New York case ¹ that the amount paid will be applied to a debt secured by a mortgage in preference to a debt which is not secured.

The Supreme Court of the United States has held,

¹ *Pattison vs. Hull*, 9 Cow. N. Y., p. 747.

however, in a sense contrary to this rule, namely, that: "If the application is made by neither party, it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. It would seem reasonable that an equitable application should be made; and, it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In Quebec, also, it is laid down that if of several debts one alone is actually payable, the payment must be imputed in discharge of such debt, although it be less burdensome than those which are not actually payable; if the debts are of like nature and equally burdensome, the imputation is made upon the oldest; all things being equal, it is made proportionately on each.

68. *Tender*.—When a creditor refuses to receive payment, the debtor may make an actual tender of the money or other thing due. By making a tender, the debtor thus offers to carry out his bargain. Where what is tendered is a sum of money and the tender is refused, the tender is equivalent to a payment on the date of the first tender, provided the tender was unconditional and was made at a reasonable time and place, and that since making it the debtor has continued always ready and willing to pay the money. If the debtor, after having made his tender, is sued, he should plead his former tender, renew his tender and deposit the money in court. The tender must be in money; the tender of a check or note would not be sufficient. The tender must be made by a person legally capable of paying to a creditor legally capable of receiving payment, or to some one having authority to receive payment for him. If the obligation

of the debtor is to deliver goods, or to perform an obligation other than the payment of money, and the creditor refuses the tender made to him, the debtor is discharged, in that if the creditor sues him for breach of his contract, he may plead his tender as a good defence.

The Civil Code of Quebec lays down certain rules for the tender of specific things.¹ Thus if a certain specific thing is deliverable on the spot where it is, the debtor must by his tender require the creditor to come and take it there. If the thing is not so deliverable and from its nature it is difficult of transportation, the debtor must indicate by his tender the place where it is, and the day and hour when he is ready to deliver it, and the place where payment ought to be made. If the creditor fails, in the former case, to take the thing away, or in the latter, to signify his willingness to accept, the debtor may, if he thinks fit, remove the thing to any other place for safe keeping at the risk of the creditor. These rules are of general application also under the English law.

69. Novation.—By novation is meant that a debtor contracts a new debt toward his creditor which is substituted for the old one, the latter being extinguished; or that a new debtor is substituted for a former one, who is discharged toward the creditor; or that by the effect of a new contract a new creditor is substituted for a former one, toward whom the debtor is discharged. In each case the consideration is the creation of new rights and liabilities and the extinction of the old ones.

Novation can be effected only between persons capable of contracting. It will not be presumed. The intention to effect it must be evident. As Pollock puts it,² whether there has been novation in any particular case

¹ C. C., Article 1165.

² Pollock, p. 216.

is a question of fact, but assent to a novation is not to be inferred from conduct, unless there has been a distinct and unambiguous request. Thus it has been held that the mere acceptance of a renewal note by a bank is only a conditional payment, and is not a novation of the original note, especially when the bank retains the original note. The bank may, at its option, proceed on the original note and tender the renewal note with its action, or it may proceed on the renewal note itself.¹

And it has also been held that when an agent, acting on behalf of a company, guarantees a contract made on behalf of the company, and gives his own promissory notes to accommodate a third person with whom the contract is made, such giving of notes does not constitute novation, whereby a new debt and a new debtor would be substituted for the previous debt and the previous debtor.² It has also been held that a settlement of indebtedness between a debtor and a creditor, by part payment and by notes of the latter, does not make "the intention to effect a novation evident," particularly when the creditor retains accepted drafts which he holds for the original debt. He has, therefore, the right to sue and recover on the latter.³

It has been held, however, that an agreement between an employer and an employee, in settlement of a claim for damages caused by an explosion, operates as a novation, whereby the delictual obligation is extinguished and a contractual obligation arises instead. If the latter be conditional, it only becomes executory upon the fulfilment of the condition.⁴

¹ *The Bank of British North America vs. Harte et al.*, 18 Rev. de Juri, 1834.

² *French Gas Saving Co., Ltd., vs. Desbarats Advertising Agency, Ltd.*, 1 D. L. R. 136.

³ *Sabbath vs. Baker*, 41 Que. S. C. 75.

⁴ *McKinstry vs. Irvine*, 39 Que. S. C. 426.

An unpaid vendor of movables which are delivered to the purchaser on condition that the property shall not pass until the price, payable by instalments, is fully paid up, has the right to revendicate the movables, notwithstanding the acceptance by him of the notes of the purchaser, as no novation has thereby taken place.¹ It has also been held that the acceptance of a draft, for the amount of an overdue note, drawn upon the makers by the holder, and the fact that the latter afterwards files a claim on the draft against the estate of one of the acceptors who had made an assignment, and receives dividends, does not effect a novation of the note. The endorsee could, therefore, recover from the maker the amount due on the note, less the sum received as a dividend.²

There has been no substitution of agreements under the following circumstances. A purchases a case of shoes from B, to be delivered in one week; at the end of the week A requests B to postpone the delivery of the shoes for a week longer, and B consents; at the end of the second week A refuses to accept the shoes, owing to the fact that the price has very materially decreased since he gave the order. A must accept the shoes and pay the price agreed upon.

A distinction must be drawn between a voluntary forbearance to deliver at the request of another, and a substitution of one agreement for another. If A requests postponement of performance, he must take the risk that meanwhile the price of the goods may change.

¹ Tremblay vs. Quinn, 39 Que. S. C., p. 215.

² Saint Arnaud vs. Guilbault, 39 Que. S. C. 481.

CHAPTER VIII

DISCHARGE OF CONTRACTS (*Continued*)

70. *Discharge by breach.*—The failure of one party to a contract to perform his part or undertaking is a breach of the contract, and gives rise to an action by the other party for damages that he may have sustained. The breach may also discharge the other party from the performance of his obligation. Whether the breach will have the effect of discharging the other party will depend upon the circumstances of the particular case. A creditor may in certain cases demand specific performance of the obligation, or that he be authorized to execute it at the debtor's expense, or that the contract be set aside. There are exceptions to the rule, however. For example, the seller of an immovable cannot demand the dissolution of the sale because the buyer fails to pay the price, unless there is a special stipulation to that effect in the contract. But a party to a contract may be estopped from seeking a rescission of it for non-performance, when he has himself done something that makes it impossible to restore the debtor to his former position. It has been held in Quebec that performance after action brought to rescind a contract is not a valid ground of defence, and that no notice of failure to perform the undertakings of a contract is required as a condition precedent to an action to rescind the contract for non-performance.

Under the following circumstances there will be a breach of contract and the contract be discharged:

(a) Where one of the parties does not perform his obligation or promise;

(b) Where one of the parties renounces his liabilities under the contract;

(c) Where one of the parties does something which renders performance of the contract impossible.

71. Breach by failure of performance.—Where one party to a contract has failed in performance, as we have already said, the injured party may or may not be discharged from the performance of his part of the contract. He may merely have a right of action for damages. The distinction depends upon whether the contract is divisible or indivisible, or whether the promises in the contract are independent of one another or are mutually dependent. Thus if a contract is divisible and the promises are independent of one another, as, for example, if the contract as a whole is made up of a series of contracts, a breach of one of them need not discharge the others: but if the contract cannot be broken up into parts, and the promises contained in it depend upon one another, so that if one is broken all are broken, a breach of performance by one party will discharge the other, and also give that other an action in damages, if he has suffered damages.

The courts differ in their interpretation as to whether given contracts are divisible or indivisible. The Supreme Court of the United States has held that if A contracts to sell B 600 bushels of corn in three monthly instalments of 200 bushels each, the contract is indivisible, and that if A fails to deliver one instalment, the whole contract is discharged. In England the contrary has been held. The supreme court of Canada has held

that an agreement between the parties to several transactions involving litigation, to do a series of acts in settlement of their differences, is divisible, and a performance of part of them will be held binding and effective, notwithstanding the failure to perform the whole, more particularly as against the party through whom such failure appears.

A person sold a restaurant to another, and part of the price was to be paid at the time of the contract, part when the license should be transferred, and the balance in monthly payments; the vendor turned over the restaurant to the purchaser, but later re-took possession. The purchaser, on the other hand, made no attempt to get the license transferred, and the vendor did not offer to assist him. Later, the purchaser asked that the contract of sale be set aside and that he be reimbursed what he had paid, alleging that he had dispossessed himself. It was held that, as both parties had failed to execute their promises and apparently did not wish to carry out the contract entered into between them, there was no need to pronounce it dissolved.

72. *Independent promises.*—It may be difficult to decide whether the promises are independent of one another. It will be sought to discover what was the intention of the parties, and that intention may be disclosed by the order in which the several promises are to be performed. It was held in an English case that “whether covenants be or be not independent of each other must depend on the good sense of the case, and the order in which the several things are to be done.” Suppose that several different articles are bought at different prices and at the same time. If it could be shown that the purchaser intended to take all or none, then the contract would fail if all of the articles could

not be delivered. If it could be shown, however, that this was not the intention, then the contract would be severable as to each article.

73. Conditional promises.—A contract is said to be conditional when it is made to depend upon some event future and uncertain by suspending it until the event happens, or by dissolving it accordingly as the event does or does not happen. Generally speaking, if the contract depends upon some event which, unknown to the parties, has actually happened when the contract is made, the contract is not conditional, but takes effect or is defeated from the time when it is made.

The condition must not be contrary to law, or inconsistent with good morals, and the contract is void if it is made to depend upon the doing or happening of something which is impossible. Thus if A contracts, promising to pay B \$100 if C shall climb to the moon, the condition is an impossibility, and the promise void. An obligation must not be conditional merely on the will of the party promising. Thus a promise by A to go to Toronto on a certain day if he feels in the mood to do so, is conditional purely on the will of A; though A may validly promise to pay B \$100 if he should go to Toronto on a certain day. If no time is fixed for the fulfilment of the condition, apparently it may be fulfilled at any time.

The condition will not be deemed to have failed until it becomes certain that it will not be fulfilled. The condition may be merely suspensory or floating in its nature, and non-performance will not discharge the promisor. The actual carrying out of the promise is merely suspended. Thus in a fire insurance policy the liability of the insurer is conjectural, and fulfilment of the insurer's promise is suspended until the event

insured against takes place. But if A contracts that he will buy a horse from C if B will buy one from C, then A's promise is conditional upon B's promise, and if B does not perform his contract, A need not perform his. These are examples of the condition precedent. An action in damages may lie for breach of a condition precedent which is vital in its nature and not merely suspensory. The injured party may also as a result be discharged from his promise.

If the parties to a contract agree conditionally that they each must do something simultaneously (concurrent conditions), then in order that one shall have an action in damages against the other for non-performance, he must have been ready and willing at the time fixed for performance to do what he had undertaken. If either party is not ready and willing at that time, the other is discharged.

If a company employs an agent under a contract by which it can dismiss him by giving him one week's notice, the condition is fulfilled by the giving of the notice, and the contract is thereby definitely terminated. This is a condition subsequent.

It is a well-recognized principle of law that a contract for personal services which can be performed only during the lifetime of the party contracting is subject to the implied condition that he shall be alive to perform them; if he dies, his executor is not liable to an action for breach of contract occasioned by his death.¹ And if an employer dies, his servant is discharged and cannot treat the contract as in force against the master's personal representatives.² Thus it has been laid down that "a contract by an author to write a book or by

¹ Jackson vs. Union Marine Insurance Co. 1874, 44 L. J. C. P. 27.

² Farrow vs. Wilson, 1869, 38 L. J. C. P. p. 36.

a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the author became insane or the painter paralytic, and so rendered incapable of performing the contract by an act of God, he would not be liable personally in damages, any more than his executors would be if he had been prevented by death." In an English case the father of a boy entered into a contract with a firm that his son should serve as an apprentice for a number of years. The boy fell ill and the employer sued the father for breach of the contract. It was held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance," and the action was dismissed.

74. *Breach of a subsidiary promise.*—If some subsidiary promise in a contract is broken, the contract may not be discharged, but an action for damages may arise. The parties may consider that the subsidiary promise is of such importance that its literal fulfilment is a condition precedent, and if this is so it will be treated as a condition precedent. If on the other hand it is clear from the surrounding circumstances that some subsidiary promise, though apparently of first importance and on its face a condition precedent, is not really vital, and that its non-fulfilment might be adequately compensated for in damages, then if such an intention or understanding is sufficiently expressed, such a condition will not be treated as a condition precedent.

There is a distinction to be made between a warranty which gives rise to an action in damages, and a condition the fulfilment or non-fulfilment of which is of the essence of the contract, in that it strikes at the founda-

tion of the contract. Thus if A sells a horse to B, and he believes it to be sound and warrants that it has not the heaves, and B could discover by having the horse examined by a veterinary surgeon whether it has or has not the heaves, in some jurisdictions B would have an action in damages against A, if after the sale the horse proved to have this weakness. If, however, A sold B a horse upon the condition that it should, with training and within three months, develop a certain speed as a racehorse, this would be a condition precedent, upon the non-fulfilment of which B could ask to have his contract cancelled, and demand the return of the price, upon his handing back the horse.

75. *Breach by renunciation.*—Either at the time that a contract is to be performed or before, a party may declare that he repudiates or renounces the contract and will not perform his part of it. If he so renounces before the time of performance, the contract may or may not be discharged, accordingly as the other party does or does not treat it as discharged: The other party may treat the contract as discharged and take action at once for any damages, or he may wait until after the time for performance, in which case he is entitled meanwhile to insist that the relation created by the contract shall persist up to the time fixed for performance. In an English case it was held that “the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for the performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract; its unimpaired and unimpeached efficacy may be essential to his interests.”

The mere intention of one of the parties to renounce is not sufficient. The renunciation must be express,

positive and unqualified. The contract may be in the course of performance, and if it be then renounced the other party may immediately take action for damages. Thus it was held in an English case that "when there is an executory contract for the manufacture and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract." And it has been held in a Quebec case that, where a person contracts for the manufacture of machinery, and afterwards notifies the manufacturer that he will not accept delivery of it unless certain guarantees respecting it, not mentioned in the contract, be given him, he is thereby held to repudiate the contract, and becomes liable for the price of the machinery, less whatever value it may have for the manufacturer.¹ So also if a person contracts to give his services to a company, and his personal services are the foundation of the contract, his refusal to give his services entitles the other party to rescind the agreement.

If the parties to a contract by mutual consent abandon it after it has been partly performed by one party, the latter is entitled to receive a reasonable price for the work he has done. If, however, a board of school commissioners employs a teacher for eight months, and before the school opens informs him that his services will not be required, the teacher may treat the contract

¹ Morgan-Smith *et al.*, vs. Montreal Light, Heat & Power Co. 30, Que. S. C. 242.

as discharged and sue the board for damages; or he may wait until the expiry of the eight months and sue on the contract for his salary. Of course, meanwhile he must not refuse other work, and what he may have earned in the meantime under another contract will go toward reducing the amount that he may claim under his original contract.

A enters into a contract with B for the purchase of B's farm. Payment is to be made in several instalments, and upon payment of the last one B is to deliver to A the deed of the farm. A refuses to pay the second instalment when due, and B sues him for it. B may recover. A's promise to pay each instalment, other than the last one, is independent of the covenant to convey; hence B may sue him for each instalment other than the last without offering to convey the farm. But in order that one party may demand the rescission of a contract which is in the course of being performed, the other party must be actually in default to fulfill his contract. It is not sufficient for the other party to allege merely that under the circumstances it is impossible for the party performing to fulfil or complete his contract within the delay specified.

CHAPTER IX

DISCHARGE OF CONTRACTS (*Continued*)

76. *Discharge by impossibility of performance.*—A contract may be void or become discharged under certain circumstances, when performance is impossible when the contract is made, or becomes impossible afterwards. Whether a contract is discharged because of impossibility of performance will depend upon the circumstances surrounding the particular contract. Because of the impossibility of performance, the contract may not ever exist, or may be discharged. If the impossibility of performance exists when the supposed contract is made, the contract is not discharged, as it is void to begin with: it is not formed. The doing of some impossible thing is not a proper consideration. The thing which is contracted to be done may in itself be impossible, as, for example, if a man made a contract to make a river run up-hill, or to do some other impossible thing. We have said that the contract may be impossible of performance when it is made. Thus if a person contracts to dig 1,000 tons of a certain kind of clay on a certain property where there is no such clay, or if the subject matter of the contract is no longer in existence when the contract is made, the contract is void. So if A sells B a horse, and unknown to A the horse is dead, there is no contract.

After the contract is made performance may become impossible, and the contract may or may not be discharged, according to circumstances. It may become

impossible by law as being inconsistent with some legal principle, or by reason of the existence of a particular state of things which renders performance impossible. The courts will examine the intention of the parties to discover whether they really intended that, should performance accidentally become impossible, the contract should be altogether discharged; for it must be taken into consideration that so far as possible a valid contract will be maintained, and that under certain conditions a person will be bound to fulfil the duty he has undertaken, although some accident may intervene, against which he might have provided by his contract.

77. *Destruction of the subject matter.*—Performance of the contract may depend on the existence of some specific thing; if performance becomes impossible by reason of its destruction, the contract will as a rule be discharged, unless there is some warranty express or implied that the subject matter shall continue to exist. In a leading English case,¹ the defendants agreed to let the plaintiffs have the use of a music hall on certain days for the purpose of giving entertainments. Before the hall was used for this purpose, however, it was destroyed by fire, neither party being in fault. It was held that the defendants were excused, and the general principle was laid down that “where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall

¹ Taylor vs. Caldwell, 3 B. & S. 826.

exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor."

The rule of the English law is that where the property in a specific thing which is to be delivered at a future date has passed by bargain and sale, and the thing is destroyed before delivery without the fault of the vendor, he is excused from performing his contract to deliver. The Civil Code of Quebec lays down that when the certain specific thing which is the object of an obligation perishes, or the delivery of it from other cause is impossible, without any act or fault of the debtor and before he is in default, the obligation is extinguished; it is also extinguished, although the debtor be in default, if the thing would equally have perished in the possession of the creditor; unless in either of the above mentioned cases the debtor has expressly bound himself for fortuitous events. The rules are therefore similar.

Thus in an English case, where A agreed with M to erect an engine and other machinery on M's premises, at certain prices for the separate parts of the work, and no time was fixed for payment, but while the work was being done and before completion of any part the premises and the uncompleted work and materials were accidentally destroyed by fire, without fault of either party, it was held that there was no promise or warranty by M that the premises should at all times continue fit to receive the machinery; that the burning of the building was a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither.

It has also been held in England that a contractor

for work to be paid for in a lump sum can recover for part only if he has been prevented from completing the work by the other party's default, or if there is a new contract to pay for what has been done. Pollock remarks that in the United States, however, recovery for the work is generally allowed. But if A agrees to make for B certain goods in a particular factory, and before they are made the factory is accidentally destroyed by fire, the contract is discharged, apparently on the principle that it was the intention of the parties that the contract should depend upon the continued existence of the particular factory. In the same way, if A sells B a crop of rye to be grown on a particular piece of land, and the crop is destroyed by a hail-storm before it matures, the contract is discharged, because the subject matter is destroyed.

The rule arising out of the case of *Taylor vs. Caldwell* has in England been extended to cover cases where, although some material object is not destroyed, a state of things which the parties had in mind as essential for performance ceases to exist.

A number of cases arose out of the fact that various contracts were made in preparation for the coronation of King Edward VII., the arrangements having to be cancelled owing to the postponement of the coronation. The general principle laid down by the Court of Appeals to govern these cases was, that the contract was not voided when the failure of the condition assumed as its foundation was ascertained, but all outstanding obligations under it, and those only, were discharged; that is, payment already made could not be recovered back, and any payment which was actually accrued could be recovered.¹

¹ Pollock, 440. *Bailey vs. DeCrespigny*.

78. *Legal impossibility.*—The obligation of a person under a contract is discharged if performance is rendered impossible by law. The performance may be forbidden, or be impossible by a judgment of the court, or by the passing of some statute, or otherwise. In an English case a lessor covenanted with a lessee that neither he (the lessor) nor his assignee would allow any building on an adjoining piece of land. Later, acting under an Act of Parliament, a railway company bought the land and built a station upon it, while the lease was still in force. An action against the lessor by the lessee was dismissed, as it was held by the court that the lessor could not perform his covenant. The principle of the decision was that by the Act of Parliament the lessor had really been compelled to part with his land to the railway company; that under the circumstances he was unable to impose restrictions upon the company, and that the company was not an assign direct from him, but a new kind of assign, such as was not contemplated by the parties when the contract was made. Pollock points out, in commenting upon this decision, that if the lessor had secured the passing of a private act upon his own initiative, he would probably have been bound by his contract toward the lessee.

It has been held in an interesting American case, that if an employee contracts to work for a definite period, and to give two weeks' notice of his intention to leave, or in lieu thereof to forfeit two weeks' wages, and he is imprisoned for some crime which he commits, the giving of the notice becomes impossible, and he is entitled to his wages.

79. *Incapacity for personal services.*—A contract for personal services may depend for performance upon the life or continued health of the person who promises them.

Contracts for personal services, therefore, which can be performed only during the lifetime of the person who promises them are subject to an implied condition that performance will be possible and will be made only if he lives or retains his health. If he dies, his executors or personal representatives cannot be sued for breach of the contract, because the contract has been discharged. Of course the contract may have provided just the contrary, and it may have been stipulated that upon his death or incapacity certain other persons, among whom might be his executors or legal representatives, should be bound to performance.

This point arose in an English case,¹ where it was held, (a person having been under contract to give a piano-forte recital, and being disabled by illness): "This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and, as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute."

Hence if an author who has undertaken to write a book, or a painter who has promised to paint a picture, becomes insane or paralytic and thus incapable of performing his contract, he would not be open to an action in damages, any more than his executors would be if he had been prevented by death. On the same principle

¹ Robinson vs. Davison, L. R. 6 Ex. 269.

a servant is discharged by the death of his master, and cannot bring action to enforce the contract against the master's personal representatives. In the case of *Robinson vs. Davison*, to which we have above referred, the defendant's wife was a well-known piano player. She made a contract to play at a certain concert. Just before the concert was to take place she fell ill and was unable to appear. The person who had employed her sued for the loss he had suffered by having to put off the concert, and judgment was rendered in his favor for a small amount, on the ground that though the illness discharged the contract, she had not given notice of her inability to play within a reasonable time. The amount awarded was intended to cover the expenses of the plaintiff in giving notice of postponement to the public and to subscribers, in excess of what it might have cost him had she notified him by telegraph, instead of by the longer method of writing a letter. It was laid down in the same case that the contract became void by her inability to play, and was not merely voided at her option. She could not have insisted on performing her engagement when she was really not in a condition to do so properly. On the other hand, if the performer had suffered some accident immediately prior to the hour of engagement, say while on her way or during the day, notice would hardly be of any use, and there would probably be no damages which could be assessed against her for lack of notice. Yet in the case of contracts which are not so personal that they cannot be performed by a deputy or an agent, contracts of this kind will not be discharged for such a cause, unless the parties have agreed that such shall be the case.

80. *Liability upon refusing to work under dangerous conditions.*—There is a good deal of authority for the

view that a person who has contracted to do a certain thing will be discharged from his contract if the performance would bring him into positive danger, and that under such circumstances he will not be liable for a breach of his contract if he refuses to perform it. If, however, an employer stops work temporarily, as, for example, in the presence of an epidemic of scarlet fever, it has been held that he will be liable for the wages of his employees during such time.

Thus if one or more employees in a mill quit work because they fear infection owing to an epidemic of some disease, it has been held that they may recover the value of the work they have done, and that as under the circumstances they were justified in refusing to court danger, they will not be liable for damages for having broken their contract. In a case decided in Maine¹ it was laid down: "The plaintiff was under no obligation to imperil his life by remaining at work in the vicinity of a prevailing epidemic so dangerous in its character that a man of ordinary care and prudence, in the exercise of those qualities, would have been justified in leaving by reason of it, nor does it make any difference that the men who remained there at work after the plaintiff left were healthy, and continued to be so. He could not *then* have had any certain knowledge of the extent of his danger. He might have been in imminent peril, or he might have been influenced by unreasonable apprehensions. He must necessarily have acted at his peril under the exercise of his judgment."

Where an epidemic broke out in a school district and the school authorities closed the school, a teacher was held entitled in a Michigan case to recover his salary, and the decision laid down that "the plaintiff continued ready to

¹ *Lakeman vs. Pollard*, 43 Me. 463.

perform, but the district refused to open its house and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district and not the plaintiff had to bear it.”¹

81. *Performance impossible by the fault of either party.*—The person promising, the promissor, may by his own act make it impossible to perform his contract. If so, he is not discharged, and, as he has committed a breach of his contract, he will be liable in damages. If, however, by the fault or act of the promisee, the promissor is prevented from performing his contract or some part of it, the promissor is discharged to that extent. The promissor may in such case sue for damages; he may also bring action to rescind the contract and to recover what he may have paid. Thus if a contractor undertakes to put up a building and have it complete by a certain date, and it is stipulated that for every day beyond that date that he is still engaged on the work he will pay a penalty of \$25, he will not be liable to the penalty or for damages if the delay has been caused by the default or act of the other party.

It has also been held in an English case² that if a person orders a machine designed to do certain work, and the contract provides that the machine is to be accepted only if it prove satisfactory after test, the buyer will be bound to accept and pay for the machine if he does not

¹ Dewey vs. Alpena School District, 43 Mich. 480.

² Mackay vs. Dick, 1881, H. L. (S. C. 6 A. C. 251).

provide a fit occasion to make the test, and deals with the machine in such a way as to prevent a fair test being made, according to the spirit of the contract. So also if A makes a contract to buy 1,000 barrels from a manufacturer who agrees to manufacture them. The manufacturer makes and delivers 500, when he receives a notice from A not to make any more, as he does not need them and will not take them. It has been held that A will be liable in damages to the manufacturer for the breach of his contract.

82. *Discharge by operation of law.*—Under certain conditions, by operation of law, a contract will be discharged, as, for example, where a contract under private signature is replaced by a contract in notarial form, provided the latter is not intended as a merely collateral contract or security. The first is said to be merged in the latter and extinguished. If A and B enter into a contract, and B, because of A's default, sues him and secures a judgment against him, the judgment replaces the contract—the contract is merged in the judgment. No further action can be taken upon the contract itself, though proceedings may be continued upon the judgment. Where a written contract is made embodying the terms of an oral contract, the latter is not merged in the former. The written contract, provided it is not under seal or in solemn form, is a contract of no higher nature than the oral contract, but the written contract is better evidence of what the parties intended, and is given priority over the other.

A contract may be discharged where some material alteration or change in it is made. If it can be shown that the alteration was made before the document was signed, the parties will be held bound. It may be made after the contract is signed, if it can be shown that the

parties consented to it. If, however, after the contract is made and signed, one of the parties intentionally makes some change in it by an erasure or other change, or gets some third person to make it for him, without the knowledge and consent of the other party, then the general rule is that the contract is discharged, and the person who has not given his consent will not longer be bound. Occasionally a third person, without the consent of either party, may make some alteration in a written document, and under the later decisions, if the terms of the original contract can be established, the contract will not be discharged. Generally speaking, in order that the contract may be discharged, the alteration must be material, in which case it will not be a question whether prejudice has or has not been caused.

What may be a material alteration must be decided in each case. As we shall see later, when discussing negotiable instruments, where a bill or note or other negotiable instrument is materially altered without the consent of all parties liable on it, the instrument is voided, except as against a party who has himself authorized or assented to the alteration. If, however, a negotiable instrument has been so altered that the alteration is not apparent, a person who gives value for it in good faith before maturity, and without notice of the alteration, may enforce payment of it. An alteration is material which alters the operation of the instrument or the liability of the parties, and as we have just said, whether the alteration be prejudicial or beneficial. Thus a defendant endorsed a note for the accommodation of the makers; they afterwards inserted the words "with interest at 10 per cent," without his knowledge. He was not liable on the note to a bona fide holder for value. In an Ontario case it was held that a note is discharged by

the insertion of the words "jointly and severally," even although the holder erased the words before the objecting makers became aware of the change. In another case decided in England, a draft was materially altered by the son of the person who accepted it. The next day the acceptor gave her son full authority to draw, accept and endorse for her. It was held that the bill was voided by the alteration.

If the alteration be made accidentally or by mistake, the instrument is not necessarily voided, in which case, of course, the burden of proof will be on the person who alleges that the alteration was not intentional. It has been laid down, however, that if the alteration is intentional, but is made under a mistaken idea of the rights of the person making the alteration, the instrument is void. Thus it has been held that if a banker cancels a bill by mistake, without any want of due care, he does not incur any liability; but if there is negligence, he will be held liable for any loss which results therefrom. The mere fact that a written contract is lost does not discharge it, because, upon the loss being proved, oral evidence may be made of the terms of the contract. Thus it has been held that where a will is lost, oral evidence may be given that a will was made, and as to its provisions.

83. *Insolvency: proceedings in bankruptcy.*—A debtor may become insolvent, and his assets may be realized and used to pay his debts, in whole or in part. If there is not sufficient to pay his creditors in full, he is not discharged because of his insolvency. Under the Confederation Act, Sec. 91, the subjects of bankruptcy and insolvency are within the exclusive legislative jurisdiction of the Dominion Parliament, and there is no Dominion bankruptcy law. In the United States, how-

ever, where there is a bankruptcy law, a debtor who makes a general assignment under the National Act for the benefit of his creditors is discharged from further liability for his existing debts. If he turns over all his property for the benefit of his creditors, he can begin business again without fear of being called upon to pay old debts. This is not the case in Canada.

84. *By confusion*.—When the qualities of creditor and debtor are united in the same person, there arises a confusion, which extinguishes the obligation.¹ Thus if A owes B \$1,000, and B dies and A is his universal heir, or B has by will left him all that he has, A's obligation is discharged. Or if B had been indebted to A, and A was B's universal heir, the debt would be extinguished.

85. *By compensation*.—When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation. Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quantity. But compensation does not take place to the prejudice of rights acquired by third parties.²

86. *Remedies for breach of contract*.—It would be unfair that where a contract is violated by the act of one of the parties thereto, the other party should suffer loss. The innocent party is therefore relieved from performance, and if he has suffered loss he may bring an action to recover the amount thereof. If the innocent party has in part performed his side of the bargain, he may treat the contract as cancelled, and sue for a reasonable compensation for the part he has performed, as also for

¹ Quebec Civil Code, Art. 1198.

² Quebec Civil Code, Arts. 1188, 1189 and 1196.

damages, if he has suffered any. In some cases, as we have seen, specific performance of the contract in full may be demanded.

87. *Damages recoverable for breach of contract.*—Where a breach of the contract cannot be justified, the innocent party is entitled to recover such damages as he has suffered. He may not have suffered any damage, but in many cases he will be allowed a nominal amount. If his loss can be assessed in money, he is entitled, as was said in an English case, to be placed so far as money can do it in the same situation, with respect to damages, as if the contract had been performed. The damages must, however, be approximate, and they must be capable of being proved with reasonable certainty. Thus if a Jewish merchant in Toronto ordered a barrel of special Passover rum from a merchant in New York, to be delivered in Toronto, and the consignment was delayed in transit, as, for example, by heavy storms, but under such conditions that had the carrier been informed that if the rum was not in Toronto within a reasonable time before the Passover season it would be useless, it could have made special efforts to forward the rum in preference to other consignments not required for a special date, the Toronto merchant could not recover more than a reasonable amount for damages. He would not, under such conditions, be entitled to recover speculative damages, namely, the amount which, in excess of ordinary prices, he might have obtained for the rum because of its special character. It was laid down in an English case that:

Where a party has broken his contract, the damages which the other party should recover should be (1) such as may fairly and reasonably be considered to arise naturally; that is, according to the usual course of things, from the breach, 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 its breach; that (2) if the damages arose out of special circumstances, communicated and so known to both parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances so known and communicated; but (3) if the 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 majority of cases not affected by any such special circumstances.

This reasoning applies fully to the case of the Jewish merchant, and is sound law and sound sense.

PART II: SPECIAL FORMS OF CONTRACT

CHAPTER X

SALES—THE CONTRACT

88. *Definition.*—A sale is a contract by which one party gives a thing to the other for a price in money, which the latter obliges himself to pay for it. Benjamin defines sale as a transfer of the absolute or general property in a thing for a price in money.

That there may be a valid sale there must be:

- (a) Parties competent to contract.
- (b) Mutual assent.
- (c) A thing, the absolute or general property in which is transferred from the seller to the buyer.
- (d) A price in money paid or promised.

The difference between the absolute or general property in the thing sold may be explained in a few words. In the theory of the law, there may be in a sense two owners of a thing, one of whom has the general and the other a special property in it. The transfer of the special property is not a sale of the thing.¹ Thus a factor in New Orleans bought a cargo of corn, with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own

¹ Benjamin, "Sale," 5th Ed., p. 2.

order, and endorsed and delivered them to a banker, to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.¹ Benjamin gives as a further illustration the case where goods are delivered in pawn or pledge; the general property remains in the possession of pawnor (which he may transfer to a third person, subject to the rights of the pawnee), and a special property is transferred to the pawnee.

89. *Distinguishing features.*—A sale must be distinguished from a contract or promise to sell. If A sells outright to B a certain horse, of course there is a binding contract of sale; but if A merely promises to sell B a certain horse, no sale has taken place, and the title to the horse is not vested in B. The title to the horse remains in A. B's right is to demand that the sale be made absolute. Hence 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. The price must be in money, which is either paid or promised. If goods be merely exchanged between the parties, there is no sale, but a barter. If a man does a piece of work and he receives in consideration thereof certain goods, there has been a transfer of the general and absolute property in the goods, but no sale has taken place. So also if a person transfers certain goods or things to another, and receives no consideration in return, there has been a gift and not a sale. There may be a transfer of the possession of property, but not of the ownership, in which case there is a bailment.

¹ Jenkyns vs. Brown, 14 Q. B. 496.

90. *Parties to a contract of sale.*—The general rule is that the parties to a sale must be competent to contract, and to transfer and acquire property. Only the owner of the thing or his authorized representative can give a title, and thus transfer the ownership; otherwise the buyer gets no better title than had the seller. Thus if A buys from B a watch, which B has stolen or found, A may pay the full value and be in good faith, but he cannot claim that he is the owner as against the true owner, who seeks to recover; nor could A make a valid sale of the watch to some other person.

The rule apparently does not apply to money which is stolen: if it is paid over by the thief to other parties who have given value in good faith, they cannot be compelled to repay it; nor would the rule apply to negotiable instruments which are payable to bearer or endorsed in blank, if the person who has signed them has been guilty of negligence which has rendered the wrongful appropriation more easy. But where a blank acceptance was stolen from the desk of the signer and filled up, it was held that he was not liable to a holder in due course: that is, to a person who took the bill for value before maturity, and without any knowledge of the facts. The signer was guilty of no negligence, and had not intended that his signature should be used without his knowledge and without delivery of the instrument by him.

A person may make a valid agreement to sell a thing which is not his at the moment, and which may not even be in existence. Thus a person may sell the crop of wheat which he expects his farm will produce during the next season, or he may contract to sell 1,000 head of cattle, which he must first go out and buy.

But a person who finds or steals the goods of another does not get a good title. The general rule is that the

person to whom he transfers the goods, even though this person is an innocent purchaser for full value, does not get a good title. The English rule is that where goods are sold in market overt (that is, an open, public and legally constituted market), 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.

In Quebec the rule is that if a thing lost or stolen is bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price he has paid for it. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.¹ Apparently the English rule of market overt does not prevail in the United States. Hence, in the United States, if B buys a horse in a public market from one who is not its owner and who has no authority, either actual or apparent, from the owner to sell it, the buyer gets no title which he can oppose to the owner. B has redress only against the seller.

91. *Subject matter of the sale.*—Everything may be sold which is not excluded from being an object of commerce by its nature or destination, or by special provision of law. A general rule may be stated to the effect that a present or actual sale can be made only of things which at the time actually exist and are owned by the seller. This is now the rule in England, though it was not always so. The English rule would probably be followed in the English law provinces. Following that rule, then, one does not *sell* future goods, but makes an *agreement to sell* them—though the contract may be called a sale.

¹ Quebec Civil Code, Arts. 1489–1490.

In the United States and in Quebec, on the other hand, one may make a present sale of future goods which have a potential existence—and this rule was formerly recognized in England. Future goods having a potential existence are, for example, the natural produce or the expected increase of something already owned or possessed by the seller. Thus the hay that will grow next season in his field, the wool that may be clipped from his sheep, the milk that his cows may yield, and so on. Of these he may make an immediate grant or assignment by sale. The buyer's title and right to possession are perfect so soon as the thing comes into actual existence. Future goods, such as the hay or wool or milk which he may derive from the field or sheep or cows, which he may afterwards acquire, are goods of which he cannot make an immediate assignment by sale, but which he can promise or agree to sell. Thus also a person who is actually employed with some firm may sell the future earnings of his present employment, but he cannot make a present sale of the earnings of an employment which he expects to get. In the latter case the earnings have no potential existence. He may promise to sell them, however.

The English rule was laid down in a leading case:¹

A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future; and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to be assigned thus becomes a complete assignment. If a person contracts for value to settle all such real estate as his father shall leave him by will, or purports actually to have by the deed of such real estate, the effect is the same. It is a con-

¹ *Collyer vs. Isaacs*, 19 Ch. D. 34 Q. at 351, C. A.

tract for value which will bind the property, if the father leaves any property to his son.

This is simply a longer way of saying that while a sale of future property which has no existence and does not belong to the seller is invalid, if the seller subsequently does acquire ownership of the things which he purports to have sold, the vendee will then be entitled to treat the contract as a sale.

The distinction may be made clearer by saying that a person may not make an executed sale of a thing which has no actual or potential existence; but he may make an executory sale of something which he does not own and which may not exist: that is, he may make a contract to sell, of which execution may be demanded or enforced. As will be readily seen, this is the kind of contract that is made in the ordinary course of business, where, for example, a wholesale house takes orders for goods which it must buy in order to fulfil its contracts.

If there is an agreement to sell certain specific goods which later are destroyed without the fault of either party, and before the risk has passed to the buyer, the agreement is discharged, and the buyer, who may have paid something on account, can get his money back.

We have spoken so far of goods as things which may be the subject of sale: that is, of corporeal things. Incorporeal things, such as rights, may also be bought and sold. Thus a member of the Toronto Stock Exchange has certain membership rights, and he may sell his stock exchange seat, as it is called. An artist may protect his drawings by copyright, but he may sell to other persons the right to print certain reproductions of his copyrighted pictures. In an American case it was held that a man could sell his knowledge of the existence

and location of an oil-well. A ferryman may sell his franchise to conduct a ferry. A license to carry on mining operations may be the subject of a sale.

It has long been a question of discussion whether a person may sell a mere expectancy based upon chance. In the case of a conditional sale, something which is hoped for is sold, that is, something which in the ordinary course of nature it is expected will come into existence, as a future crop, or the young of animals. If the thing does not come into existence there is no sale, as the subject matter of the contract has failed, provided the seller had nothing to do with preventing the thing from coming into existence. This is different from the sale of a mere hope or chance, because here the chance is what is sold: for example, if a pearl fisherman before starting out sells his chance of what he may get, the contract is binding. As was said in an English case: "If a man will make a purchase of a chance, he must abide by the consequences."¹

92. *Statute of Frauds*.—The principles of the English Statute of Frauds may be said to apply in a general way throughout Canada. The seventeenth section of the English Statute provides that:

No contract for the sale of goods, wares and merchandise for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

This statute was later amended by the act known as Lord Tenterden's Act, which provided that the prin-

¹ Benjamin, 5th Ed. 126-127.

ciples of the statute should apply to agreements to sell as well as to the sale of goods. Later the Sale of Goods Act of 1893 was passed, and this act is in force in some of the English law provinces. The amount fixed in the various provinces to replace the £10 sterling of the English act varies. Thus in Manitoba, Alberta, Saskatchewan, British Columbia, Yukon Territory and Quebec, the amount is \$50, in Ontario, New Brunswick and Nova Scotia, \$40, in Prince Edward Island \$30, and in Newfoundland \$50. Section 4 of the Sale of Goods Act provides:

(1) A contract for the sale of any goods of the value of £10 or upwards is not to be enforceable, 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 of the contract in writing be made and signed by the party to be charged, or his agent in that behalf.

(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 future 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.

(3) There is an acceptance of goods within the meaning of this section, when the buyer does any action in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.

In Quebec the Statute of Frauds, as amended by Lord Tenterden's Act, is embodied in Article 1235 of the Civil Code. The article, however, does not adopt the principles of the Statute of Frauds without making certain changes: for example, the Statute of Frauds fixes

the limit at £10 sterling only in the case of the sale of merchandise, whereas Article 1235 applies the limit of fifty dollars to four different cases. Again, Lord Tenterden's Act apparently does not deny the right to prove by witnesses that some act has been done to interrupt the prescription which results from a partial payment, or payment on account; whereas Article 1235 lays down the opposite rule.¹ Article 1235 reads as follows:

In commercial matters in which the sum of money or value in question exceeds \$50, no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former, in the following cases: (1) Upon any promise or acknowledgment whereby a debt is taken out of the operation of the law respecting the limitation of actions; (2) upon any promise or ratification made by a person of the age of majority of any obligation contracted during his minority; (3) upon any representation or assurance in favor of a person to enable him to obtain credit, money or goods thereupon; (4) upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain.

The foregoing rule applies although the goods be intended to be delivered at some future time, or be not at the time of the contract ready for delivery.

In so far as a contract of sale is concerned, however, the rules in the English law provinces and in the Province of Quebec are practically alike. In the United States there is a conflict of decisions upon the question, whether the rule applies to goods which have to be manufactured to fulfil the contract. In the English law provinces and in Quebec this difficulty does not arise. As we have just seen, the Civil Code provides that the rule is applicable although the goods be intended to be

¹ Mignault, Vol. 6, p. 88.

delivered at some future time, or are not at the time of the contract ready for delivery; and the Sale of Goods Act provides that the rule applies to the sale of goods which may be intended to be delivered at some future time, or which may not at the time of the contract be actually made or fit for delivery, or for the making or completing of which some act may be necessary. Lord Tenterden's Act specially provides that the principles of the Statute of Frauds should apply as well to agreements of sale; so that this principle is in force throughout Canada either by virtue of Lord Tenterden's Act or by virtue of the Sale of Goods Act, accordingly as these are adopted by the various English law provinces, and in the Province of Quebec under Article 1235.

93. *Satisfaction of the statute.*—It is clear, therefore, that where there is a sale of goods of over fifty dollars, proof cannot be made by oral testimony, unless the statute can be satisfied by proof of at least one of the following circumstances, namely:

- (a) That there has been part payment; or
- (b) Acceptance and receipt by the buyer; or
- (c) Some written note or memorandum of the contract signed by the parties or their authorized agent.

What may be acceptance under the rule has been the subject of many decisions. The Sale of Goods Act provides a rule which would be generally acceptable, namely, that there is an acceptance of goods within the meaning of the act when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. This definition brings out the distinction between an acceptance of the goods and a recognition of the contract. If there has been some act on the part of the alleged purchaser which shows that he recog-

nized the fact that there was a contract, an action against him will be maintained without the necessity of written proof. He will be held to have accepted.

This does not mean, however, that he will be deprived of his right to show that he did not accept the goods, or that he will not be able to plead that the goods were not up to sample, or otherwise. It means simply that one of two possible defences is not open to him. If he had not recognized the contract in any way, that is, accepted the fact of its existence, and he had signed no writing, he could plead the fact and get the action dismissed, irrespective of the fact that he might have another plea that the goods were not up to sample, or were not what he ordered. But if it is held that there was sufficient evidence of his having recognized the existence of the contract, then, whether he has signed a writing or not, the creditor may bring action, though the debtor's right to raise the question of the proper fulfilment of the contract is still reserved to him.

Thus in an English case, the defendant, a miller, orally bought of the plaintiff by sample eighty-eight quarters of wheat. The wheat was shipped by the plaintiff's agent on a barge, which arrived at the defendant's mill, and the next morning thirty-eight of the sacks were hoisted up into the mill and examined by the defendant, who then directed the bargeman to send up no more, as the wheat was not equal to sample. The same day he told the plaintiff's agent that the wheat was not equal to sample and that he would not take it. The defendant subsequently returned the thirty-eight sacks to the barge. In an action for the price, or for damages for non-acceptance, the jury were directed that there was evidence of an acceptance sufficient to satisfy the Statute of Frauds, although the defendant was not thereby precluded from

rejecting the wheat if not equal to sample. As a matter of fact, in this case the jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the Statute of Frauds, and gave a verdict for the plaintiff. This decision was confirmed by the English Court of Appeals. It is not essential in every case that the buyer must have had actual physical delivery of the goods. He may have a constructive possession or delivery of them. The parties may have agreed that the seller shall hold the goods as bailee of the buyer, in which case the buyer has the constructive possession of them. They may be in the possession of the buyer for some other purpose, and he and the seller may agree that henceforth he shall retain possession as owner. They may be in the possession of a third party, and it may be agreed that they shall remain in the possession of such third party as bailee for the buyer. In all of these cases no actual physical delivery is necessary, because the buyer has the constructive possession.

The giving of earnest and the part payment of the price, as they are independent of the main bargain, may be proved by oral evidence. The part payment must be accepted as such, and on account of the price. There is authority for the view that the part payment or the something given in earnest to bind the contract "need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller on account, or in part satisfaction of the price, will be equivalent to part payment."¹ And it has been held in England that under the Statute of Limitations there is part payment of the debt where there is an agreement that the debtor should board and lodge

¹ Benjamin, "Sale," 5th Ed., p. 227.

the creditor at a fixed price per week, in deduction of the debt.

It is essential to have some idea of what the note or memorandum in writing must be. The parties need not reduce their contract as a whole to writing; they may make a contract of which only part is in writing. Thus A may agree to build a garage for B, and they may draft a simple writing to that effect, which B signs. This writing may not mention the price. Parol evidence may then be made to show what was the price agreed upon, as the writing is a sufficient note or memorandum to make possible the rounding out of the contract of the existence of which it is proof.

The difference between a mere memorandum and a written contract has been expressed as follows:¹

When a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing in that it may be made at any time after the contract, if before action commences; and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent; and if the terms of the bargain can be calculated from it, although it be not expressed in the usual form of an agreement.

The note or memorandum need not be formal. It should contain the terms and subject matter of the agreement, and the names or descriptions of the parties, and need be signed only by the person who is sought to be charged. Generally speaking, if the note or memorandum consists of several separate papers, they must be attached to each other, so as to indicate that they are in reality but one instrument, or it must be clear from their contents that they relate to one another. Parol evidence must not be admitted to connect them.

¹ *Sievwright vs. Archibald*, 1851, 17 Q. B. at 107.

What may be a note or memorandum has been well explained as follows: ¹

The court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose. A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and its contents were sufficient, would do. The question is not, what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum?

94. *Contracts for work and labor.*—A, who is a maker of cabinets and desks, accepts an oral order from B to make a desk for him, according to certain specifications. A makes the desk and tenders it to B, who refuses to accept it, and upon being sued takes refuge under the Statute of Frauds. What is the position of the parties? A, it is presumed, has supplied all the materials, as well as the work; the result of his work upon his materials is a desk—a chattel. Under the English law it is held that such a contract is a contract of sale between A and B. Conversely, if A supplies no materials, but only the work and labor, the contract is one only of work and labor, in which case B would not be able to plead the Statute of Frauds.

In certain of the American states, A's contract would not be looked upon as a contract of sale, but as a contract for work and labor, and therefore B's plea would not be good. Thus in Massachusetts it is held that since the contract is for a chattel made to a special order, it is for work and labor. In New York the view is that since

¹ Benjamin, p. 246.

the contract is for a chattel not in existence when the contract is made, it is for work and labor. In Quebec the tendency would be, under the decisions, to regard the contract as a mixed contract of sale and for labor, and to allow oral evidence, on the ground that the transaction is commercial in nature, but is not a contract of sale. This is a very general statement of the law, and fuller explanation would require a complete outline of the decisions to date.

95. *When title passes.*—It may be of the utmost importance to determine when title in property which is sold passes from the seller to the buyer. The general rule is that a contract is complete the moment the consent of the parties is expressed, although delivery may not be then made. If the title does not pass to the purchaser at once, the seller bears the risk of the loss of the thing before delivery. His creditors may seize the property, and until the title passes, the seller is entitled to appropriate any gain or increase that may arise. If he dies, the title to the property passes to his heirs or representatives. If the title passes to the purchaser at the moment of the contract by the mere consent of the parties, then the vendor's creditors or heirs have no more right to it than he has. If the thing perishes while in his possession, if he is not at fault, the purchaser must suffer the loss. The English rule is to the effect that unless it is 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. If delivery has been delayed by the fault of one or the other, the goods are said to be at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Whether or not it is intended in a particular case that the property in the thing sold should pass to the purchaser will be a question of fact, and will be decided by what appeared to be the intention of the parties at the time. The risk attaches to the ownership of the goods. The parties may, however, by agreement arrange that one or the other shall bear the risk. An agreement to this effect may be inferred from a course of dealing, or from usage, binding on both. The courts will not find that the buyer has assumed the risk before the property has vested in him, unless his intention to do so is expressed, or is clearly to be inferred from the circumstances.¹ Thus in an English case a contract for the sale of a cargo of ice was under consideration. The contract read in part as follows:

The vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers and navigation, of whatever nature or kind soever, and the said Playford agrees to buy and receive the said ice on its arrival at ordered port . . . and to pay for the same in cash on delivery at 20 s. per ton, weighed on board during delivery.

The ship was lost at sea. The sellers brought action for the price of the ice, and the purchaser pleaded that the cargo did not arrive at the ordered port. It was held that as the ice did not arrive, the property did not pass by the terms of the contract, and would not pass until the ice was weighed on board; that consequently the time for payment had not arrived, and that the defendant was not liable; that the provision with regard to risk was to protect the seller from liability for non-delivery caused by dangers of the sea.² This judgment was

¹ Benjamin, pp. 402-3.

² Castle vs. Playford, 1870, L. R. 5 Ex. 165.

reversed in the Exchequer Chamber, on the ground that the property passed on shipment and delivery of the bills of lading, and that the purchaser had stipulated that upon receipt of the bills of lading the purchaser "takes upon himself all risks and dangers of the seas, etc." Having undertaken all the risks and dangers of the seas, and agreeing to buy and receive the said ice, the defendant was bound to his contract to pay if delivery was prevented by dangers of the sea, and it was immaterial whether the property passed or not.

In another case 1,090 sugar loaves, comprised in four batches, marked and lying apart in a warehouse, were sold by the manufacturer to a broker. Each loaf weighed from thirty-eight to forty-two pounds and was, according to usage, weighed on being taken away by the buyer. The terms were: "Prompt at one month; goods at seller's risk *for two months*." The goods had been paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitely adjusted and settled when the goods came to be weighed and delivered; and part of them had been taken away by the purchaser. The residue was destroyed by fire *after the lapse of the two months* and before being weighed. It was held that the property had passed to the purchaser, the parties having, by fixing upon a provisional estimate of the price, shown an intention that the property should not depend upon the weighing to fix the exact amount, and the goods being specific. The fact that the contract provided that the goods should be at the seller's risk for two months, showed that it was intended that the property should be in the buyer, as otherwise such a provision would not be necessary.¹

The general rule is that when things which are mov-

¹ This decision is reproduced as outlined in Benjamin, p. 404.

able are sold by weight, number or measure and not in the lump, the sale is not perfect until they have been weighed, counted or measured; but the contract may stipulate the contrary. If, however, the subject matter of the sale is complete and in a deliverable condition, then, as we have seen, the title or property in the thing sold passes at once, although delivery may be delayed.

96. *Conditional sale*.—Goods may be sold subject to some condition: for example, if a thing is sold upon trial, the presumption is that the sale is made upon a suspensive condition, unless there is apparent a contrary intention. The title would not pass in this case until the buyer had indicated his approval and his intention to buy. If he retains the thing sold him on approval for an unreasonable time, or for a period longer than that agreed upon, his approval will be implied. If he in turn sells the goods to another, his approval naturally will be implied.

It has been laid down in one or more English cases, that where the contract is to the effect that the buyer may at his option rescind the sale by the return of the goods, and the goods are destroyed or injured while in his possession, but without his fault, he is not liable to pay the price because of his inability to return the goods. It is said that the risk attaches to the person "who is eventually entitled to the property in the chattel." Of course the buyer who has such a right of option should exercise it within a reasonable time.

When goods are ordered from a distance, at what time does the title to them pass to the buyer? A merchant in Toronto writes to a merchant in Montreal, giving him an order to forward one thousand bars of pig iron of a certain kind. The merchant in Montreal must proceed

to select the bars, and to appropriate them to the contract. The mere fact that he selects them cannot be said to transfer the ownership of them; supposing even that he lays them aside in his warehouse, undoubtedly he may change his mind and select another lot. It is probable that the bars are not appropriated to the contract until they are despatched by being placed in a car, or until some other act is done from which it may be inferred that the seller has divested himself of the possession and ownership of them.

Benjamin gives the following example: he supposes that A sells out of his brick yard one thousand bricks to B, who is to send his cart and take them away. Here B, says Benjamin, is to do the first act, and cannot do it until the selection is determined. He may go about the yard from stack to stack and select the bricks, and he may change his mind from time to time, up to the point where finally he determines the selection by putting the bricks in his cart to be taken away. Once that is done, his selection is determined, and he cannot change his mind and replace the bricks he has taken by others. If on the other hand it had been agreed that A was to load the bricks into B's cart, A would be free to select the bricks, and to change his mind as to his selection until he had finally loaded the bricks into B's cart. Lord Blackburn has laid it down that:

It follows from this that where from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the despatch or other act is commenced, for then the appropriation is made finally and conclusively by the authority conferred in the agreement.

And in Lord Coke's language:

The certainty and thereby the property begins by selection. But however clearly the vendor may have expressed an intention to choose particular goods, yet until the act has actually commenced, the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him.¹

In an interesting English case² there was an appropriation by the seller to which the buyer later assented. The seller had a lot of sugar in bulk. The buyer bought twenty hogsheads of it. The seller filled and delivered four hogsheads, and later filled the sixteen remaining hogsheads and set them aside, and gave notice to the buyer to take them away. This the buyer promised to do. It was held that there was an assent to the appropriation of the sixteen hogsheads, and that the property therein passed to the buyer. This decision will be better understood when we say, that when a person buys an unascertained portion of a larger bulk, he acquires no property in any part until there has been a separation of the portion, and until it has been appropriated to the contract by the consent of both parties, though this consent may be express or implied.

Where the goods sold are delivered to the carrier, the presumption is that they are appropriated to the contract, because it is assumed that the parties so intended. It may have been intended, however, and if so it may be shown that the title should not pass until the buyer actually got delivery. For supposing that the seller, while he appropriates the goods to the contract and actually despatches them, keeps control of them by taking the bill of lading in his own name: it is clear

¹ Blackburn on "Sale," p. 128.

² Rohde vs. Thwaites, 6 B. & C. 388.

under these circumstances that the seller has no intention of parting with the title to the goods until he is sure that the buyer is solvent, and can and will pay for them.

Frequently goods are sold and shipped C. O. D. The courts are by no means unanimous in their holdings as to when the title passes to the buyer. It has been held in some cases that title passes to the buyer when the goods are received by the carrier; in other cases that they do not pass until the buyer pays for them. Certainly, however, if the buyer does not pay for them he is not entitled to the possession of the goods.

The general rule is that where things movable are sold by weight, number or measure, as part only of a mass, and not in the lump, the sale is not perfect until they have been weighed, counted or measured. In other words, the part that is sold must be separated from the mass, and the weight, number or measure ascertained before the sale is complete. Ordinarily the buyer should have notice or knowledge that the weighing, measuring or counting has been performed, or he should be present thereat. This case is distinguishable from the case where several persons are owners or tenants in common of a mass of goods. Thus A, B and C may own in common, in equal or unequal proportions, all of the wheat in a certain elevator. Any of them may sell and give a good title to his portion of the wheat, although it is mixed with that of the others. Delivery could be made by merely handing a delivery order to the purchaser, who would be entitled to deal with the portion of the wheat which he had bought. Such a sale is perfect without the portion which is sold being separated from the mass. But if A were to sell one thousand bushels of his portion, the

sale would not be complete until the thousand bushels were measured out, and the measure checked or accepted by the purchaser.

97. *When the seller retains possession.*—As we have seen, a sale of an article may be made, upon which the title to the article passes immediately to the purchaser. The seller may, however, retain possession. Such a transaction must be in absolute good faith, and must not be made simply to enable the seller to say to his creditors that the article in question has been sold to B. If in reality there was no sale, and B did not intend to take delivery, this sale would probably be held to be void, in so far as it would appear to have been made solely to benefit the seller. The purchaser would have to come forward and prove his honesty of performance, that the title actually passed to him, but that as a matter of convenience the seller retained possession.

98. *Goods to be manufactured.*—When a contract is made for goods to be manufactured, a presumption arises that title is not to pass until the goods are ready for delivery. This presumption obtains even when the whole of the purchase price is paid at once, or when the buyer exercises a superintendence or control over the work. In some cases it is held that title does not pass until acceptance by the buyer of the manufactured article, but by the weight of authority it passes when the article is put in a deliverable condition.

It must always be remembered in this connection there is a difference between an actual sale and a mere executory agreement to sell. In the case of an actual sale, the title to the thing sold passes at once to the buyer (this is the general rule) as soon as the contract is concluded, and whether the goods be delivered to the buyer or remain in the possession of the seller.

In an agreement to sell, the property does not pass when the contract is made; the goods remain the property of the seller until the contract is executed.

99. *Sales by sample.*—In the case of a contract for sale by sample there is an implied condition that the bulk shall correspond with the sample in quality; that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. These rules are based upon the jurisprudence, and may be taken to be generally applicable.

The title in goods sold by sample will pass when the goods are put in a deliverable condition, and are appropriated to the contract. The mere fact that a sample is exhibited does not make the sale a sale by sample. The sample may be shown, but the seller may refuse to sell by it, and it may be agreed that the buyer shall inspect the whole at his own risk.

On the other hand, the buyer may be unwilling to trust to the sample, and may demand an express condition or warranty. This follows from the rule that a contract for sale by sample must be express or implied. It may be shown that the sale was a sale by description and not by sample. For example, where the seller accepted a sale of sassafras wood and the buyer inspected it, and he was experienced in buying such wood, but the seller described the goods in the contract as "fair merchantable sassafras wood," the seller was held bound to deliver fair merchantable sassafras wood, as the goods had been sold upon this description and not upon the sample.

In an American case decided by the Court of Ap-

peals of the State of New York,¹ an average sample was taken of a large quantity of beans contained in a number of packages, by drawing samples from all the packages and mixing them together. It was held that the purchaser could not reject any of the packages on the ground that they were inferior to the average, nor recover for the difference in value on that ground. It was laid down that the true test was, whether, if the contents of all the packages delivered were mixed together, the quality of the bulk so formed was equal to that of the average sample drawn.

An interesting case was decided by the Supreme Court of the United States in 1870.² A commission merchant in Boston instructed his brokers to sell a quantity of foreign wool received, but only in case the purchaser came to Boston and examined the wool for himself. The broker sent the prospective purchasers at their request samples of the wool, as a result of which the latter made an offer of fifteen cents a pound, all round, if the goods were equal to the sample furnished. This offer was accepted, with the proviso, however, that the purchasers should examine the wool on the following Monday, and should on that day declare whether they would take it or not. The purchasers went to Boston and examined four bales, as fully as they wished, and were informed that they could examine the remaining bales or have them opened for inspection. This they declined. The goods were bought, and later, when they were opened by the purchasers, it was found that some of the bales had in the middle of them a quantity of rotten and damaged wool which was concealed by the outer layers which were in good condition. The pur-

¹ Leonard vs. Fowler, 42 N. Y. 289.

² Barnard vs. Kellog, 10 Wall. 383.

chasers brought action to recover for their loss. The good faith of the seller was not doubted. The action was based upon the following grounds: namely, that the sale was a sale by sample, and that there was a promise express or implied that the bales should not be falsely packed. The first court held that there was no express warranty that the bales which were not examined should be up to the standard of those which were examined, but that by the custom of merchants and dealers in foreign wools in Boston, there was an implied warranty that the goods were of the same quality throughout, in view of the fact that to examine each bale separately would be a work of great length and practically an impossibility; and that, as a result, this warranty arising out of custom was binding on the seller. In the Supreme Court, however, this decision was set aside on the following grounds: (1) That as the purchasers had gone to Boston to inspect the goods for themselves, the sale could not be said to be a sale by sample; the purchasers had in reality had an opportunity to examine the goods, and must be held to have assented that the sale should take place after such examination as was made; (2) that by the rule of the common law, where a purchaser inspects for himself the specific goods sold, and there is no express warranty and no fraud on the part of the seller, who is not the manufacturer nor the grower of the goods sold, the maxim *caveat emptor*—let the buyer beware—applies; and (3) that as by law no warranty is implied under the circumstances, it is not permissible to make evidence that by custom such a warranty is implied, more especially as in this case it was not shown that the parties had any knowledge of the custom, and therefore were not transacting with a knowledge thereof.¹

¹ This holding is summarized from the outline given in Benjamin, p. 643-4.

CHAPTER XI

SALES: PERFORMANCE OF THE CONTRACT

100. *Delivery of the goods.*—The principal obligations of the seller are the delivery and the warranty of the thing sold: reciprocally, the obligations of the purchaser are to receive the goods and pay the price. The general rule is, where there is no contrary arrangement, that upon delivery the price must be paid. The seller cannot sue for the price before offering to deliver, nor can the buyer sue for the goods before tendering the price.

By delivery is meant the transfer of the thing sold into the power and possession of the buyer. The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed.¹ The English Sale of Goods Act says that delivery means voluntary transfer of possession from one person to another. Delivery in this sense then means a transfer of possession. The word is, however, capable of various shades of meaning and application. If the goods are already in the possession of the buyer when the sale is made, no further delivery is necessary. The delivery in such a case is completed by the seller's expression of consent that the title shall pass to the buyer and that he shall remain in possession. When a sale has been made, the buyer's

¹ Quebec Civil Code, Article 1493.

right is to take possession, and the seller's duty is to give possession. It may be agreed, however, that the seller shall retain possession until some condition is fulfilled, as, for example, until payment of the price in full or in part, or until the buyer calls for delivery; it may be that the parties will agree that the buyer shall take delivery in instalments. The goods may be sold on credit, in which case there is a transfer of title and a transfer of the right of possession. In this case, however, supposing that before obtaining actual possession the buyer becomes insolvent, the seller may refuse to part with possession, in order to retain his lien as his only means of obtaining payment.

When incorporeal things are sold, there must nevertheless be delivery to complete the sale. The delivery of incorporeal things is made by delivery of the titles, or by the use which the buyer makes of such things to the knowledge of the seller.¹

101. *Place of delivery.*—Where delivery shall take place is a matter to be arranged by the parties, or to be implied, according to circumstances. If there is no contract express or implied, the place of delivery is the seller's place of business, or, in the absence thereof, his residence. If the contract is for the sale of specific articles which, when the contract is made, the parties know are in some other place, that place will be the place of delivery, unless it is otherwise agreed. It may, of course, be implied from a course of dealing between the parties, from general usage, or from the nature of the goods, that delivery is to be made elsewhere than at the place of business or residence of the seller. If under the contract the seller is bound to send the goods to the buyer, and no time for doing so is named, he

¹Quebec Civil Code, Article 1494.

must send them within a reasonable time. If the seller is not to deliver until the purchaser has performed some act or fulfilled some condition, the seller will not be held in default for non-delivery until the purchaser has notified him of the performance of the act upon which delivery is to be made. If A, the owner of a ship, buys supplies from B, and the arrangement is that the supplies are to be delivered as soon as the ship is ready to receive them, A must notify B of the name and berth of the ship, and of his readiness to take delivery, before he can complain that delivery has not been made.

Unless it is otherwise agreed, the expenses of delivery, which include the putting of the goods into a deliverable state, must be borne by the seller, and unless it is otherwise stipulated, the expenses of removing the thing are at the charge of the buyer. Hence if the buyer is compelled to pay the expenses of delivery through the fault of the seller, he can recover the amount from the latter. If the seller does not pay the expenses, it has been held that he may be prevented from alleging or proving that he is ready and willing to deliver, and the buyer may be entitled to refuse to accept the goods.

102. *Delivery to a carrier.*—If the seller is, under the contract, authorized or required to send the goods to the buyer, his obligation is fulfilled by delivering them to a carrier who may or may not be named by the buyer, but who is nevertheless deemed to be the agent of the buyer for the purpose of transmission. Hence delivery to the carrier is as a rule delivery to the buyer. There can be no doubt about it if the delivery is made to a carrier who is named by the buyer. This position will not be altered by the fact that the seller makes a contract with the carrier; he will be held to have made it on behalf of the buyer, even though he pays the car-

rier. His contract with the carrier must be reasonable, having regard to the nature of the goods, the necessity for quick transport, the necessity for protection against the weather, and so on.

Under the English law, at least, if the seller omits to exercise such care in instructing and making his contract with the carrier, and as a result the goods are lost or damaged in transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or he may sue the seller for the damages he has suffered. Delivery to a carrier of the goods contracted for, to be shipped by a method different from that provided by the contract, is not such a delivery as is contemplated by the parties. Thus where goods were sold by the plaintiffs to the defendant, and by the contract between them the goods were to be shipped by freight, and were handed by the plaintiffs to a railway company, to be shipped by express to the defendant, and were not in fact delivered to him, it was held that the defendant was not liable for the price of the goods. The fact that the goods were shipped by a faster means of transportation, which might be for the benefit of the defendant, but without his knowledge or consent, could not change the rights of the parties under the contract.¹

The presumption that the carrier is the buyer's agent may be rebutted; for example, if the seller reserves the right of disposal of the goods by taking a bill of lading to the order of himself or a third person, in order to insure payment of the price, the bill of lading must be endorsed by the seller or such third person, and this constitutes delivery, but not to the purchaser. In this case the carrier would be deemed to be the agent of the seller, and if the goods were lost or damaged in transit,

¹ McGowan Cigar Co. vs. O'Flynn, 19 O. L. R. 877.

the loss would be upon the seller. If the seller, in making a sale of goods, should undertake that he would make the delivery himself at some place other than that where they are when sold, the carrier is the seller's agent, and the risks of carriage are assumed by the latter. Though the carrier may be the agent of the seller, the buyer takes the risk of deterioration in the goods, which is necessarily incident to the course of transit, because such risks would arise whether the carrier were the agent of the buyer or of the seller. Thus in an English case it was held that where hoop-iron was sold in Staffordshire, deliverable in Liverpool in the winter, and the iron was rusted and unmerchantable when delivered in Liverpool, the seller has made a good delivery, upon proving that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire.¹

Commonly a contract of sale stipulates for delivery f. o. b. (free on board the cars). In this case the seller must make delivery to the carrier at his own expense. It has been held, however, that the carrier is nevertheless the agent of the buyer in such a case, as he must assume the risk during transit, unless it is otherwise agreed. It has been laid down that if the goods are sent C. O. D., there is a presumption that the carrier acts as the agent of the seller.

103. *Time of delivery.*—If the seller is bound to make delivery of the goods, either to a carrier or to the buyer direct, delivery must be made at the time fixed in the contract. If no time is fixed, delivery must be made within a reasonable time.

What may be a reasonable time will depend upon the circumstances in each case. If it is agreed that delivery

¹ Bull vs. Robinson, 1854, 10 Ex. 342.

is to be made at a time to be fixed later, as, for example, by the buyer, the seller will be entitled to await notice from the buyer, calling for delivery. If a time for delivery has been fixed, then the buyer may refuse to take delivery either before or after such time. If the contract provides for delivery "immediately," "forthwith," "as soon as possible," a reasonable time will be allowed for delivery, and what may be a reasonable time will be a question of fact. If A makes a contract with B to buy certain goods, which are to be delivered at some time between the 1st and the 30th of the next month, B may deliver the goods on the 1st or the 30th day of the month, or on any intervening day.

If the contract does not state the hour at which delivery is to be made, it must be made at a reasonable hour. Delivery cannot be demanded or be made at an unreasonable hour; it should be made or demanded as a rule during business hours. It has been laid down that if delivery is to be made at a specified place, where the buyer must be to receive the goods, the delivery should be made before sunset. The rule is not a hard and fast one, however, so that if the buyer happened to be at the place designated for delivery, and the goods could be easily examined, a tender of delivery, though made at night, would probably be sufficient.

104. *Quantity specified must be delivered.*—The seller must deliver the full quantity sold as it is specified in the contract. The buyer cannot be forced to accept less or more than he has contracted to buy. Thus it was held that where a contract for the sale of goods is an entire one, and the vendor withholds any of them, the purchaser need not accept delivery of the remaining portion, but may repudiate the agreement and recover

back any money paid on account of the purchase price.¹

When a person has purchased goods to be delivered as a whole, he need not accept them in instalments. It is his privilege to reject fulfilment of the contract in any other way than as specified. If, however, he accepts less than the goods he has contracted for, or accepts instalments thereof, he must pay for them at the contract rate. Generally speaking, if the seller delivers a larger quantity of goods than was purchased, the buyer may accept the goods covered by the contract and reject the balance, or he may reject the whole. If he accepts all that are delivered, he must pay for them at the contract rate.

Thus if A purchases ten hogsheads of wine from B and B sends fifteen, A may consider the contract as not performed, for he is unable to tell which are the ten that are to be his, and he is not bound to make a choice of any ten hogsheads, for that would be to force a new contract upon him. The delivery of more than ten is really a proposal for a new contract. Apparently, also, if the seller delivers the goods that have been bought with other goods not covered by the contract, the buyer may accept the goods covered by the contract and reject the rest, or he may reject the whole.

Where a person contracted to deliver one hundred bags of hops on or about January 1, and on December 12 he delivered twelve bags in part performance of his contract, and no time for payment was mentioned, it was held that he could not demand payment for the hops delivered before the expiration of the time fixed for delivery of the balance.² The fact that the buyer in this

¹ Blomquist vs. Tymchorak, 22 W. L. R. 205.

² Waddington vs. Oliver, 2 B. & P. N. R. 61.

case accepted the twelve bags would not deprive him of his right to sue for breach of the contract if the remaining bags were not delivered according to the contract.

The contract may be severable. A tender of the amount of any severable part is to the extent thereof sufficient; thus an instalment contract may provide that each delivery shall constitute a separate contract, in which case each delivery will stand by itself. If the seller makes default in connection with one such instalment, it is not as a rule open to the buyer to repudiate the remaining instalments. Thus if the contract is for the sale and shipment of iron ore at different times, payment to be made upon delivery, and one instalment of the ore shipped does not fulfil the requirements of the contract, the buyer is not justified, under ordinary circumstances, in refusing to accept the remaining shipments, which conform to the terms of the contract. The failure of the seller to deliver a severable portion of the goods or articles contracted for, or the failure of the buyer to take delivery thereof, may, however, give rise to the right to repudiate the contract as a whole. Benjamin, discussing the matter, says:

A contract for the delivery of goods by instalments, though the instalments are to be separately paid for, and the contract is in consequence so far divisible, is, like all other contracts, one that may be repudiated by either party if the other party refuses to perform it. But the question often arises whether a mere partial breach by either party justifies the other in repudiating the unfilled part of the contract. The rule at common law is that, in the absence of an express refusal, the question to be considered is whether the conduct of the party in fault amounts to an implied refusal to perform the contract, for it is not every breach by one party which gives to the others the right of rescission. The breach must be

in a matter going to the root of the contract. Such a breach negatives the readiness and willingness of the party in fault to be bound by the contractual relation any further, and may be accepted as an offer to rescind.

Generally speaking, it will depend upon the circumstances in each case, whether the breach in the fulfilment of part of the contract is a repudiation of the whole, or whether it is a severable breach which gives rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

105. *Quality specified must be delivered.*—Not only must the seller deliver the quantity purchased, but he must deliver goods of the quality specified in the contract. The buyer is entitled to a reasonable opportunity to inspect the goods, in order to determine whether they are of the quality mentioned in the contract. The seller must, when tendering delivery, give the buyer such reasonable opportunity as he desires to examine the goods for this purpose. Ordinarily the goods will be inspected at the place of delivery. The purchaser who takes the goods for the purpose and with the intention of inspecting them does not thereby accept them; and if he finds that they are not of the quality contracted for he may reject them. In such case he is not bound to return them to the seller, though he must allow the seller to re-take them.

Where a purchaser was notified that certain goods which he had bought were lying at a designated wharf ready for delivery on payment of the price, and he went to the wharf and applied for permission to examine the goods, and was shown two closed casks which were said to contain them, but was refused permission to open the casks, it was held that no valid offer of delivery had been made to him.

It has also been held that where a buyer had inspected the goods before the sale, and by the contract the goods were to be held by the seller subject to the buyer's orders and in good condition, he was entitled to further inspection before taking delivery. This further inspection was refused, and the buyer was held entitled to refuse delivery. If, on the other hand, the seller offers the buyer a reasonable opportunity to inspect the goods, and the buyer refuses to inspect them, the seller might be justified in refusing to make delivery.

106. *Symbolic or constructive delivery.*—An actual physical transfer of the thing sold to the buyer is not always essential to constitute delivery and to pass title. Where, for example, the goods sold are ponderous and incapable of being handed over physically from seller to buyer, an actual delivery will be dispensed with. In such a case the delivery of a key to the warehouse in which the goods are lodged will be sufficient. Similarly, the transfer to the buyer of bills of lading which represent the goods is a sufficient delivery. This would not be sufficient, however, if the goods are subject to liens or charges in favor of the bailee or other person who has the physical possession of the goods, and who may retain them until his charges are paid. For example, if A ships goods to B by rail, and A has undertaken to pay the freight, but does not do so, the railway is entitled to hold the goods until its charges are paid. A may have forwarded documents of title to B, but these will not constitute delivery to B until A pays the freight charges.

107. *Warranties: definition and classification.*—A warranty is an agreement of indemnity, relating to the character, quality or title of the thing sold, and forming part of the contract of sale, though collateral to its ex-

press object, by which the seller insures the buyer against loss or against failure of one or more of its terms. Warranties may be express or implied.

The parties may by special agreement add to the obligation of legal or implied warranty, or diminish its effect, or exclude it altogether.

An express warranty, therefore, is an explicit statement by the seller of some material fact concerning the subject matter of the sale, and in virtue of which the buyer is induced to make the contract. Such a warranty is collateral to the main purpose of the contract, and the breach of it as a rule gives rise to a claim for damages, but not to a right to reject the goods and to treat the contract as repudiated. The warranty may be oral or written. If the contract of sale is a complete document in writing, an oral warranty may not be admissible under the Parol Evidence Rule, unless it is fraudulent.

As a rule, antecedent representations made as an inducement to the buyer, but which do not form part of the contract when completed, are not warranties. If the representation is made in the course of the dealings leading up to the bargain, it will be a warranty, if it is incorporated into the bargain as part of it. Thus a man bought a horse at auction without warranty. The day before the sale he examined the horse at the stables, and in the course of his examination the auctioneer said to him: "You have nothing to look for: I assure you he is perfectly sound in every respect," to which he replied: "If you say so, I am satisfied," and made no further examination. The horse proved to be unsound, though the seller did not know it, and therefore there was no fraud. The purchaser brought action, and claimed that the conversation in question was a private

warranty to him, although the auctioneer put up the horse without warranty. It was held that this private conversation, and the representation therein made, did not form part of the contract which was made by the buyer when he bid for the horse. The representation was held to be merely an expression of the seller's opinion and judgment, and that he could not be held responsible for it, if, when he made it, he was in good faith.

A warranty may be made after the sale, in which case, under the English law at least, there must be a new consideration to support such subsequent warranty.

Legal or implied warranty is that which arises by operation of law, without stipulation in the contract; it may also arise from usage or custom, or from the conduct of the parties. Thus it is an implied warranty in the case of a sale of goods by sample that the goods sold shall correspond with the sample in quality. There is an implied warranty that goods sold are in a merchantable state or condition; that there is no latent defect in the thing sold such as will render it unfit for the use for which it was intended, or which will so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price for it, had he known that the defect existed. Where, however, the defects are apparent and are such that the buyer might have known of them himself, the rule of *caveat emptor* will apply.

Generally speaking, if the buyer buys on his own judgment, that is, if he selects or defines the specific thing or class of things which he requires, there is not an implied warranty on the part of the seller that the things bought will fulfil the purpose of the buyer. If,

on the other hand, the buyer tells the seller that he wants certain goods for a certain purpose, and leaves the seller to exercise his judgment and supply the proper goods, then there will be an implied warranty on the part of the seller that the goods are not only merchantable but that they are fit for the purpose expressed. Again, there is an implied warranty that when a thing is sold it is in existence. If A sells B a cargo of fruit which is supposed to be in transit between Havana and New York, and the day before the sale the ship is wrecked and the fruit is destroyed, the sale is void, and B may recover what he has paid. It has been said that in such a case there is an implied warranty that the fruit is in existence when the contract is made. It is also said that the warranty is rather in the nature of a condition precedent which is of the essence of the contract, and not a collateral undertaking.

108. *Implied warranty of title.*—The Civil Code of Quebec lays down a rule generally applicable. The seller, it says, is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale, and against encumbrances not declared and not apparent at the time of the sale. In other words, the seller impliedly warrants his right to sell; that he has a title, and that he may give a free and clear title to the purchaser. If it turns out that the seller had not a good title, then the buyer may sue for a return of the price where he is compelled to surrender the thing to the true owner, as on a total failure of consideration, and may add to his claim a demand for damages, if he has suffered any.

If the thing sold is in the possession of the vendor, there is no doubt as to the presence of an implied war-

ranty of his title and his right to sell. If the thing is in the hands of a third person when it is sold, in the United States apparently there is no implied warranty of title. In England, however, this view is not accepted. The mere fact that a person sells a chattel "implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

The vendor may have only the constructive possession of the things sold, as where he is the owner of an undivided portion of wheat stored in an elevator. The owner of the elevator has the actual possession, but the vendor has the constructive possession. In selling his undivided interest, however, there is an implied warranty of title.

There are one or two exceptions to the rule. If goods are sold by a sheriff or bailiff, as under the judgment of a court, the sheriff is not held to any warranty. So, also, a vendor may merely sell or transfer such title as he may have in the goods, provided he does so without positive knowledge that he has no title, and he will be held to no warranty. The liquidator or curator of the assets of an insolvent debtor is held to no warranty. It has been held that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that the patent has been granted to the seller.

109. *Implied warranty of quality—caveat emptor.*—In so far as the quality of goods is concerned, the maxim *caveat emptor* (let the buyer beware) is the general rule. In other words, if there is no fraud, and the seller has not given an express warranty, or unless a

warranty is implied from the nature and circumstances of the transaction, the buyer purchases at his own risk. This is the more true if the buyer inspects the goods or is given a reasonable opportunity to do so. If after being given such an opportunity, the buyer neglects to inspect the goods, it has been held that it is not the duty of the seller to point out defects. On the other hand, the seller must not assist in deceiving the buyer.

For example, the seller must not hinder the buyer in his inspection of the goods in an endeavor to discover defects. If the buyer purchases goods on his own judgment, or selects or defines the particular goods or class of goods which he wants, the seller need only furnish merchantable goods of the class indicated, although he may know that the buyer wants the goods for some special purpose.

If, however, the buyer indicates that he wants the goods for a specific purpose and asks the seller to supply him with goods fit for that purpose, and he leaves the choice to the seller, a warranty at once arises on the part of the seller that the goods chosen by him will meet the buyer's requirements for the purpose mentioned.

If the goods are bought by sample, the buyer has acted upon his own judgment in that he has examined the sample, but he relies on the seller's judgment to supply a bulk of the goods sold which will correspond with the sample; there is, therefore, an implied warranty on the part of the seller that the goods which he will deliver will be of the same quality as the sample, and that they will be merchantable. If the goods are sold by description, a similar warranty arises that the goods sold are of the kind described. Apparently in such a case there is not a warranty of merchantability,

unless the seller deals in the goods sold. Thus where a man ordered a quantity of "spent madder,"¹ and this substance was not manufactured by the seller, but was merely a refuse product of his manufacture and was sold only as such, the buyer's intention being to produce garrancine, which it was found the madder would not produce, it was held that the purchaser took the risk that the madder might not produce the desired by-product. The seller was not dealer in spent madder.

110. *Remedies for breach of an express warranty.*—Under the English law, in the case of an express warranty, the general rule is that if the goods tendered under the sale are not as warranted, the purchaser's remedy is an action in damages, if the title to the goods has passed to him. If the title has not passed to him, he may, upon discovering the breach of an express warranty, reject them. So if A sells to B a certain engine, and warrants that it will develop 200 h. p.; the engine is actually delivered to B, and B tries it out and finds that it will only develop 150 h. p., B cannot, if the title in the engine has passed to him, tender the engine back and demand the return of what he has paid. B would have an action in damages for breach of the warranty, and his damages would probably be the difference in value between the engine as represented and the engine as it really proved to be.

If, however, A sells B certain wheat stored in an elevator and warrants it to be first quality, and nothing is done by which B is given delivery, and B, having agreed to pay so much a bushel, inspects the wheat and finds it is only of second quality, B may refuse to accept the wheat, because the title has not passed to him,

¹ Turner vs. Mucklow, 1862, C. L. T. N. S. 690.

and there has been a breach of the warranty of quality. In the previous case, however, if A, when he made the warranty that the engine would develop 200 h. p., was aware that it could not do so, B would then be entitled to hand back the engine and demand the return of what he had paid.

111. *Remedies for breach of an implied warranty.*—If the goods sold do not conform with the implied warranties as to quality, fitness, condition, or otherwise, the buyer has several remedies.

(a) He may, if he thinks fit, reject the goods and recover what he has paid.

(b) He may accept and keep the goods and sue for the damages he has suffered by the breach of the warranty.

(c) If he has not paid the purchase price, he may set up the damage he has sustained in diminution of the price.

If the buyer decides to reject the goods and rescind the sale, he must do so within a reasonable time. If the seller refuses to take back the goods, the buyer may bring action to have the sale declared null and for the return of what he has paid, and meanwhile he holds the goods as bailee for the seller: that is, he holds them at the risk of the seller, and if they perish through no fault of the buyer he is not liable for the loss.

112. *Rights of an unpaid seller against the subject of the sale.*—As we have seen, the contract of sale is complete by the consent of the parties to the contract, and unless it is otherwise provided the title in the goods passes from the seller to the buyer. The seller is entitled to payment.

So long as the seller retains the goods in his possession he has a lien on them for the price. His lien is

not effective if the sale was made on credit, unless the time allowed for payment has expired.¹ Thus A sells a carload of pulp to B on sixty days' credit; a bill of sale is made out and delivered to B, but it is agreed that A shall keep the paper in his warehouse for the time being. B, a month later, assigns the bill of sale to C, and then becomes insolvent. Upon the demand of C for delivery of the pulp, A may refuse delivery. It is true that by making a sale on credit he waived his lien, but as B became insolvent and A had possession of the goods, A's right of lien at once became effective, and C could have no greater right to the goods than B.

If at the time that A sold the pulp to B, unknown to A, B was insolvent, and the goods were shipped and a bill of lading was sent to him, an assignment of the bill of lading by B to C, who was named as assignee, would not defeat A's right of stoppage in transit. C is not a purchaser for value, and has only the right of B. If, however, B had sold the pulp and delivered the bill of lading to C before A exercised his right of stoppage, C would be entitled to receive the goods. The seller's lien exists therefore, and he can refuse delivery, where the sale is for cash, or where the sale is on credit and the buyer has become insolvent before the goods are delivered to him.

It must be understood, to repeat, that unless it is otherwise agreed the seller's lien exists only so long as he retains possession. If he delivers the goods to the buyer, or to the buyer's agent, as, for example, to a

¹ The lien extends only to the price. Charges for warehousing or otherwise, which the seller may have to pay, are a personal claim against the buyer, and give no right of retention of the goods.

carrier, the right of lien disappears because the seller has parted with possession.

There is an exception to this rule, in that if the sale is on credit and the buyer becomes insolvent after the goods have been delivered to the carrier and while they are in transit, the seller may retake possession.

Of stoppage *in transitu*, Benjamin says:

This is a right which arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and quality that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the seller has delivered the goods out of his own possession and put them in the hands of a carrier for delivery to the buyer (which is such a constructive delivery as divests the seller's lien) he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying the debts due by the buyer to other people. The statement that this right is based on the reason that one man's goods shall not be applied to the payment of another man's debt is, however, not literally accurate, for, strictly speaking, the goods so stopped are no longer the property of the unpaid seller, and stoppage *in transitu* takes place only where the goods have become the property of the buyer. Where they remain the property of the seller, the latter may withhold them by virtue of his ownership, but this is not the peculiar right of stoppage given by the law merchant . . . the right of stoppage *in transitu* is a right to interfere and prevent the buyer from taking actual possession which he would otherwise have a right to take, and to undo the effect of an unconditional delivery to an agent to forward. This power does not exist except in the case of insolvency.¹

The principle has been very clearly laid down also in an American case, as follows:

¹ Benjamin, p. 870.

Stoppage in transitu is a right which the vendor of goods upon credit has to recall them or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third person has acquired bona fide rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a bona fide right to them. Upon demand by the vendor, while the right of stoppage in transitu continues, the carrier will become liable for a conversion of the goods if he declines to redeliver them to the vendor, or delivers them to the vendee . . . And notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his rights of stoppage in transitu, the notice is sufficient. And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier.¹

It has been held that the mere fact that the seller has received part payment of the price will not defeat his right of stoppage *in transitu*. If the contract is severable and the goods may be delivered by stated instalments, which are to be paid for separately, and payment has been made of an instalment, the seller may exercise his right of stoppage only for the goods which remain unpaid for.

The seller may have to comply with the reasonable demand of the carrier for a bond to protect it, where it has issued a negotiable bill of lading. An interesting question arises as to the rights of the seller to stop goods *in transitu*, where the bill of lading has been endorsed over to some innocent third party for value by the buyer, while the goods are in transit. The view

¹ Reynolds vs. Railroad, 43 N. H. 580.

generally accepted is, that if the bill of lading is transferred by the buyer *for value*, as by way of sale, to an innocent third party, before the vendor has exercised his right of stoppage *in transitu*, the right of stoppage is defeated. But where there is no such document of title, such as a bill of lading issued by the carrier, a sale of the goods by the buyer does not defeat the seller's right, unless the sale has been made with his consent.

113. *Vendor's right of resale or rescission.*—A vendor who has a lien or has exercised the right of stoppage *in transitu* may do one of two things:

(a) He may constitute himself agent of the buyer and resell the goods,¹ if the buyer delays an unreasonable time in paying for them, or he may sell them at once if they are perishable. Notice of intention to resell should always be given, though in some jurisdictions it has not been held to be necessary. A mere notice of intention is sufficient and need not contain a recital of the actual time and place of the resale. If the resale nets to the vendor less than the amount which the buyer agreed to pay, the difference may be recovered by the vendor as damages.

(b) The vendor may rescind the sale and resume the title to the goods if the buyer does not pay for them within a reasonable time. Notice of the rescission and retransfer of title should be given, though it has been held not to be necessary. An intention to rescind should be shown by some word or act, as, for example, the consumption of the goods by the seller. If the vendor exercises his right of rescission he may sue the buyer for loss of profit. He has been allowed to sue for the entire purchase price.

¹ Where the vendor sells as agent, the sale is subject to the usual rules.

114. *Actions by unpaid vendor for breach of contract of sale.*—If the property in the goods has not been transferred to the buyer, as, for example, where goods are sold which have to be weighed or measured before delivery, the goods are still in the seller's possession, and if the buyer refuses to take delivery, he will have only an action for damages. As a rule, he will not be able to recover the full price of the goods, but only the actual damages he has suffered. The rule is that in such a case the proper measure of damages is the difference between the contract price and the market price of the goods at the time when the contract was broken. The idea is that the seller sell the goods, once the contract is broken, and thus determine his loss.

In one case goods were sold, to be delivered in the months of February and March following the contract, which was made in the month of November previous. The buyer became bankrupt in January. On the dates fixed by the contract, namely, in February and March, the goods were tendered, and, not being accepted, were resold at a heavy loss. It was proved that had the goods been sold in January, when the buyer had become bankrupt, the loss would have been considerably less. It was held, however, that the assignees could have demanded delivery according to the contract, which was not rescinded by the bankruptcy; that the seller was not bound to resell before the time for delivery; and that the damages had to be estimated according to the market price of the goods at the times fixed by the contract for delivery.

Benjamin remarks, in connection with this subject:

Although the buyer's insolvency does not *per se* put an end to the contract, yet if the buyer has given to the seller such a notice of his insolvency as amounts to a declaration of his

inability or unwillingness to pay for the goods, the seller is justified in treating the notice as a repudiation of the contract, and, after the lapse of a reasonable time to allow the buyer's trustee, and also, it would seem, a sub-buyer from the insolvent, to elect to complete the contract by paying the price in cash, the seller may, without tendering the goods to the trustee, consider the contract as broken, and prove against the insolvent's estate for the damages.

If the title to the property has passed to the buyer, or if under the contract the price is to be paid before title passes, the seller may bring an action for the price of the goods. This is the seller's only right if the goods have got into the possession of the buyer. The remedy is no longer against the goods, but there is a personal remedy against the buyer. The seller is on a footing with any other creditor of the buyer. In some cases, where the market value of the goods might be hard to ascertain, or where the market value could not be ascertained, probably a tender of delivery, and an action for the price in the case of refusal, would be upheld. In such a case the seller would act as bailee of the goods for the buyer. If the buyer wrongfully repudiates the contract, refuses to accept the goods, or returns them after delivery and refuses payment, he subjects himself to an action for such damages as the seller has sustained.

Where the actual damage sustained is not definitely ascertainable, the court will endeavor to allow such damages as are the natural and proximate result of the breach of contract, or which it may be considered were within the contemplation of the parties when the sale was made. Thus it has been held, in awarding damages for breach of warranty as to the fitness of an engine for certain work, that a loss of additional profits

which the plaintiff anticipated he would have made had the engine been available for his work, by reason of certain competing firms going out of business subsequent to the date of the contract of sale, will not be presumed to have been in the contemplation of the parties, and will not be allowed.¹

It has also been held that the measure of damages for the unwarranted refusal of a vendor to carry out the terms of an agreement to sell a hotel property, includes the expenses to which the purchaser was put in endeavoring to induce the vendor to carry out his contract, or to refund the money paid on account of the purchase price; and the purchaser may be allowed his traveling expenses from his place of residence to the place where the property was situated in the same province.

Again, where a dredge was not delivered within the time specified in the contract of sale, the estimated net earnings thereof for the time delivery was delayed were awarded to the purchaser as damages. The damages will not include money paid by the purchaser as a bonus to insure the completion of scows, necessary for use with the dredge, before the date fixed for delivery of the dredge, as such loss was not within the contemplation of the parties at the time the contract was entered into.²

115. *Remedies of the buyer.*—The buyer may have cause to complain of some breach of the contract. The seller may make default in delivery. The goods may have some defect. Possession may have been promised and refused. Some warranty of quality or title may be breached.

¹ *Alabastine Co., Ltd., vs. Canada Producer & Gas Engine Co., Ltd.*, 8 D. L. R. 405.

² *Brown vs. Hope*, 17 B. C. R. 220.

The buyer's remedy will depend upon whether or not the title to the goods had passed to him. If the title has passed to the buyer, he is, of course, the owner of the goods, and may sue for delivery or may seize the goods in the hands of the seller or of some third person, in order to get possession. If the title has not passed, the buyer may bring an action for damages, if the seller wrongfully refuses delivery of the thing which he has agreed to sell. The damages which the buyer may recover in such a case will generally be the difference between the contract price and the market value of the goods at the time the contract is broken. In other words, the measure of damages is the profit which the buyer might have expected to make. Where, however, the seller knew when the contract was made that the buyer intended to make some special use of the goods, or expected some special profit upon the sale of them, the damages resulting from the breach of contract which the parties would reasonably contemplate, would be the damages which would result to the buyer from a breach of the contract under the special circumstances known and communicated to the seller. If the seller knew of no special circumstances and had not been notified of them by the buyer, then he could not be held to have had in contemplation any special damage to be suffered by the buyer. Thus A sells B a refrigerator for his cold-storage plant, to be delivered in one month. When the contract is made, B informs A that the refrigerator is to be installed in a new plant, which must be ready at the end of the month in question for the transfer of meat and other perishables from the old plant, the lease of which has expired. The refusal or failure of A to deliver the refrigerator on the due date will entitle B to recover special damages, because it must have been in the

contemplation of both parties when the contract was made, that if the refrigerator was not in position at the moment that it became necessary to transfer the perishables from the old to the new plant, B would suffer very special injury.

CHAPTER XII

BAILMENTS

116. *Definitions.*—Bailment has been defined as a delivery of a thing by one person to another for a certain purpose, upon the promise that the bailee shall return the same thing to the bailor, or deliver it to someone in accordance with the bailor's instructions, after the purpose has been fulfilled.

Sir James Stephen gives a definition which for our purpose is more useful: ¹

Where one person delivers, or causes to be delivered to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made, gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made, shall be delivered either to the person making delivery or to some other person appointed by him to receive it; the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee.

The contract may be express or it may be implied. All kinds of movable or personal property may be the subject of a bailment. Although the word is derived

¹ Digest of the Criminal Law, 3rd Ed. p. 215.

from a French word, meaning "to deliver," the delivery may be actual, or it may be constructive or by operation of law. It is not necessary that the bailor be the owner of the property; it sometimes happens that a bailee himself becomes a bailor as toward some new bailee. The new bailee is not regarded as the bailee of the true owner, and his obligations are toward his immediate bailor. Thus A finds an unregistered bond of the X Company, Limited, which has been lost by B. A borrows money from C, and puts up the bond as security. By operation of law, A is B's bailee, and, by actual delivery, C is A's bailee. C could not refuse to return the bond to A when the debt was paid on the ground that A did not own it; but if C did make a delivery to B, he would be protected.

117. *Distinctions.*—A bailment must be distinguished from a sale. A sale transfers the title or ownership of the thing sold. In the case of a bailment, only the possession of the thing changes. This distinction is unsatisfactory, as it is frequently difficult to say whether the title is transferred as well as the possession. It has been held, for instance, that where a farmer delivers wheat to a miller to be ground into flour, this is only a bailment, and the miller's creditors cannot seize the flour or the wheat.

If goods are given in exchange for goods, there is neither a sale nor a bailment, but a barter, or exchange. The difference is that in the case of a barter the identical property or its product is not to be returned, but some other property is to be handed back in exchange. Thus if A delivers to B a bushel of oats for his horses, and B promises to return the oats on the following day, it is not intended that the identical oats are to be returned, and this is a barter. As was held in one case, where the terms are that the bailee shall pay money or deliver some other

valuable commodity to the bailor, and not return the identical subject matter, either in its original or altered form, this is a transfer of property for value, and not a bailment.

The distinction between a bailment and a sale or barter is important when we consider that in the case of a bailment, if the goods bailed are destroyed accidentally, the loss falls upon the bailor; in the case of a barter or exchange, as where A delivered to B certain oats for B's horses, the loss would fall upon B. A frequent instance of a bailment is the storage of grain in elevators. A number of owners may store their grain in the same elevator, the various deliveries being mixed together. The owner of the elevator is the common agent or bailee of them all. In such a case the owner of any part of the grain so stored may sell his interest in the undivided mass, and, as we have seen, a valid sale may be made of such an interest without dividing the portion from the bulk, the order on the warehouseman to deliver the quantity so sold, and the acceptance of this order by the warehouseman or elevator owner, being sufficient.

Instead of being a bailment, however, the transaction may be a sale, where, for example, the warehouseman by agreement with the various owners is entitled to sell any part of the grain stored with him, provided that he substitutes an equal quantity of similar grain of his own, or of other persons.

118. *Classification of bailments.*—Various classifications of bailments will be found in the different text books on the subject. The most practical classification for our purpose, however, may be set out as follows:

- (a) Those which are for the sole benefit of either the bailor or bailee.
- (b) Those which benefit both bailor and bailee.

Further classification may be made, viz.:

(1) Gratuitous bailments.

(2) Bailments for reward.

Class (a) or class (1) would include deposits, gratuitous loans for use, and mandates. Class (b) or class (2) would include what are called pledges and hirings.

A bailment may be in the nature of a deposit, as where A delivers a thing to B to be kept for him. A may lend goods to B to be used by him without charge. A may deliver goods to B to be used by him for hire. Again A may deliver goods to B as a pawn, or as security for money borrowed: this is a pawn or pledge. A may deliver goods to B who is a carrier, or in order that B may do something to them or with them, and B is to be paid for his services. A, on the other hand, may deliver goods to B, to carry them or do something about them or with them, without any charge for his work or carriage. So if A, who is going away for the summer, delivers to B some valuable plants to be kept and cared for by him, this is a bailment for the sole benefit of A, the bailor. It is a deposit. If A borrows B's automobile, this is a gratuitous loan for the sole benefit of A, the bailee. If A borrows one hundred dollars from B, and gives B as security for the loan five shares of stock, this is a bailment for the benefit of both parties, and is a pledge. If A hires a horse and carriage from B, and agrees to pay B two dollars, B gives A the use of his property for compensation, and this is a bailment in the nature of a hiring. If A stores his household furniture with B at ten dollars a month, this also is a bailment, and for the benefit of both parties. A gives B a trunk to take to C, and agrees to pay B one dollar. This is a bailment in the nature of a contract for carriage for hire.

119. *Extraordinary bailment.*—Where goods are en-

trusted by a guest in a hotel to the care of the proprietor, and when goods are delivered to a common carrier for transportation, the liability of the hotel proprietor and of the carrier as bailees is greater than that imposed upon the ordinary bailee. These will be considered more particularly later.

120. *Contract of bailment.*—The persons capable of making a contract of bailment are those who have the usual capacity to contract. Thus an infant could not be a party to a bailment, unless it is a necessary. Ordinarily, the parties to a bailment make their own contract or agreement, and will be bound by it, or by the implied contract between them.

If the contract is not in express terms, an implied contract will be sought in the presumed intention of the parties as disclosed by their acts and deeds, and by the surrounding circumstances. Thus it may be clear from the surrounding circumstances that a given bailment is not gratuitous, but was entered into by the bailee in the expectation of a reward.

The bailee may impose terms and conditions, and if he gives notice of them to the bailor, or enables him to know what they are, the bailor will be bound if he makes the bailment. Where there is doubt as to the nature of the bailment, or as to its terms and conditions, the courts will lean toward finding a bailment for mutual benefit. Naturally the parties may by their contract increase or limit their liabilities.

121. *Use and care of bailed property.*—By law a bailee must give reasonable care to the thing entrusted to him. Where there is an express contract, however, which defines the use and care which the bailee is to make or give, he will be bound strictly by the contract. If he fails in this respect and causes loss or damage, he will be

liable in an action for damages for breach of contract. If he goes further, and acts as though he owned the thing entrusted to him, he may be guilty of conversion. So it was held in an Ontario case that where a person received money to invest in real estate security, he was liable for the want of reasonable care in examining the value of the security, and it was not sufficient that he merely examined the title to the property and found it satisfactory. It was also held in an English case that where a person was entrusted with money to invest in real estate and he invested it on second mortgage, he was guilty of a breach of duty.

122. *Obligations of bailor in a bailment for his sole benefit.*—The bailor, where the bailment has been made for his sole benefit, must recoup the bailee for what he may have spent in the preservation of the thing, the expense so incurred being regarded as an extraordinary and necessary expense, urgent in its nature. The bailor must also notify the bailee of any defect in the thing which may cause injury. He must notify the bailee of unapparent risks. Thus if A requests B to take care of a parcel for him, and B accidentally drops it and the contents of the parcel explode, A will be liable for damages, unless he notified B of the dangerous qualities of the contents of the parcel; and if B undertakes to care for A's horse for a month while A is away and to charge nothing for his trouble, B will be entitled to reimbursement for the extraordinary expense which he may be put to if the horse becomes ill and a veterinary surgeon has to be called in.

123. *Obligations of bailee in a bailment for the sole benefit of the bailor.*—We will suppose that A has gratuitously undertaken to keep certain goods entrusted to him by B. A must exercise reasonable care and dili-

gence in keeping the goods. By reasonable care and diligence is meant such care and diligence as a person would ordinarily use in connection with his own property, and such skill as he is possessed of. In other words, he is bound to take such care as a reasonable, prudent and careful man might fairly be expected to take of his own property of the same kind. Generally speaking, the bailee will not be answerable except for gross negligence, unless he is in bad faith. Of course the care must be in proportion to the nature and value of the article entrusted to the bailee and to the danger of loss. It is conceivable that if the bailee were entrusted with a number of valuable diamonds he would be expected to take more care of them than he would of a lot of dry goods, even of the same value, if for no other reason than that the diamonds are so much more easily lost or stolen. Jones, on "Bailments," says:

Diamonds, gold and precious trinkets, ought, from their nature, to be kept with peculiar care under lock and key; it would therefore be gross negligence in a depository to leave such a deposit in an open antechamber, and ordinary neglect, at least, to let them remain on his table where they might tempt his servants; but no man can proportion his care to the nature of things without knowing them; perhaps, therefore, it would be no more than slight neglect to leave out of a drawer a box or casket which was neither known nor could justly be suspected to contain diamonds.

Gross negligence might consist of the failure to exercise reasonable care, skill and diligence, or of the absence of ordinary care, or of the failure to perform an undertaken duty. If B allows A to place an automobile in his stable for the winter, B will not be responsible if A has left water in the cooling apparatus, which freezes and cracks part of the machinery; but B must not use

the automobile, as to do so would be contrary to the spirit of the bailment, and if he used it and damage resulted he would be responsible. B would be liable for gross negligence if he were to leave the automobile outside the stable overnight and it were stolen.

In an English case, the owner of a painting upon paper pasted upon canvas left it in the hands of an auctioneer. There was no particular agreement that the auctioneer should take care of it and redeliver it safe, and the auctioneer was not to receive any reward. The auctioneer kept the painting in a room next to a stable, in which there was a wall that rendered the picture damp, and caused it to peel. It was held that this was a case of simple deposit, without reward, for the sole benefit of the bailor, and there was no gross neglect or abuse by the auctioneer of the thing deposited.

The bailor must return the thing, with any profit or increase derived from it. Thus if B agrees to care for and pasture A's cow, and during the period of the bailment a calf is born, B must hand back at the expiration of the bailment both the cow and the calf.

124. *Bailment for the sole benefit of the bailee.*—We will suppose that the bailee is a person who has borrowed an automobile. In this case the bailee will be held to exercise greater care than in other cases of bailment. As we have seen, if the bailment is for the sole benefit of the bailor, the bailee is held only for reasonable care and diligence. In the present case, however, he must exercise great care. Great care would be that which a very cautious and vigilant man would take of his own property. The borrower in such case will be liable for the least neglect. If the safety of the borrower's own automobile and of that of his bailor is threatened, and he has to make a choice as to which he will attempt to save, he

should give the preference to that of his bailor. Thus if B borrows A's automobile, and upon going to his garage B finds that there is not room for it, B will be bound to remove his own automobile to make room for A's, unless he can store A's automobile in some other proper place.

Naturally the lender would expect that the borrower would use the automobile himself; the latter would not be entitled to lend it in turn to someone else. The borrower would not be liable for reasonable wear and tear. A bailment of this kind is strictly personal and confined to the borrower, unless it has been otherwise agreed. Hence if the borrower becomes insolvent, the automobile in question could not be retained by the assignee. Ordinarily, if the automobile were injured or lost by some inevitable accident, the borrower would not be responsible. If, however, he had lent it to someone else, in whose hands it was injured or lost by inevitable accident, he would be bound to replace it.

The bailor or lender would be liable for injuries to the borrower from the use of the automobile if they were caused by some latent defect which was known to the lender. If, however, he had known of some latent defect and had notified the borrower of it, the latter would take the automobile at his own risk.

The bailee must not make use of the thing bailed in a way contrary to the implied trust. Thus if he borrows an automobile, he will not be justified in running it in a race or using it to carry merchandise. If he borrows a horse, he must use it as the lender contemplated it would be used. So where B borrows A's stallion for breeding purposes, and while the animal is being driven it drops dead, if B were driving it merely to exercise it, there would be no deviation from the purpose of the bailment, and B would not be responsible for the loss. He might

be responsible, however, if it were shown that he was driving the animal faster or longer than was necessary to give it adequate exercise. He would be responsible if it were shown that he was driving the horse for other purposes.

It seems almost needless to say that the borrower must give equal care to, and will be equally responsible for, the accessories of the thing.

125. *Termination of bailment for sole benefit of one party.*—The general rule is that where a bailment is made for the benefit of one party only, it may be terminated by either at any time. Thus if A has deposited his watch for safe keeping with B for an indefinite time, A may take delivery and B may require A to take back the watch at any moment. Upon A demanding the return of the watch, B must give delivery of it or suffer an action to compel him to do so. The very fact of the deposit implies an agreement to redeliver.

The bailment may be determined or ended if the bailee, the depository in the case we are considering, acts inconsistently with the terms of the bailment. Thus if B, the depository of A's watch, lends it to his son to wear, B has deviated from the intention of the bailment, which was thereby terminated. The rule would of course apply with greater force if the watch had been lent to B for some special personal use, and he allowed someone else to have the possession or use of it.

It is said that where a bailment is made for the sole benefit of the bailor, it is terminated by the death or insanity of either party. The same rule would apply where the bailment was made for the sole benefit of the bailee, except that if the bailment had been made for a definite period, the death or insanity of the bailor would not interrupt the bailment until the period fixed had

elapsed. If B receives from A his watch and agrees to do certain work to it gratuitously, this is a bailment for the sole benefit of A, and B is not entitled to hand back the watch before completing the work he has undertaken to do. If A has to have the work completed elsewhere, apparently he can hold B for the cost of doing so.

If a bailee accepts a bailment and undertakes to redeliver to his bailor, but is evicted by title paramount, he is not, unless there is a special contract or he is in some way to blame for the loss, responsible to the bailor for injury suffered by the latter. Thus if A hands a watch to B for safekeeping, and C should seize the watch in B's hands and claim and prove it to be his own, B would not be bound to redeliver the watch to A.

126. *Creation of a pledge or pawn.*—A pledge is a contract by which a thing is placed in the hands of a creditor, or being already in his possession, is retained by him with the owner's consent as security for his debt. The words pledge and pawn are synonymous, though pledge includes pawn which is generally used in a particular sense. A pawnbroker is a pledgee, but the word pawnbroker is usually used to describe a person who carries on the trade of pawnbroking. The word pledge is frequently applied to the article which is pledged. Where the customer of a bank hands over securities to the bank to guarantee a loan, the pledge is known as collateral security.

It has been held that the relation of pledgor and pledgee arises between a broker and his customer where the former buys stock for the latter, and the latter puts up margin which he agrees to keep good; the same relation does not arise between a commission merchant and his customer for whom he buys grain for future delivery on margin, which the customer promises to keep good

up to the time of delivery. In the former case the stocks are actually bought by the broker, but in the second case the merchant has a mere executory contract of sale. In an ordinary stock transaction on margin, the broker buys the stock outright; if he does not do so there is a bucket-shop transaction.

It is essential to the contract or pledge that there shall be an actual or constructive delivery of the thing pledged to the pledgee. We have already seen that goods covered by warehouse receipts or bills of lading may be transferred from person to person by the delivery of the warehouse receipt or bill of lading, and the pledgee who holds the receipt or bill of lading, although he may not have the actual physical possession of the goods, has nevertheless effective delivery of them. Delivery may be effected by the handing over of the key to the warehouse where the goods are stored. When the pledgee already has the goods, no further delivery is necessary. The pledgee retains his privilege only so long as he holds the goods in his possession, actual or constructive.

The parties may in a written contract describe the transaction as a sale, but if it is clear from the circumstances that no more than a pledge was meant, a pledge, not a sale, will be found.

127. Construction and operation of pledge.—It is clear from the definition already given that a pledge is a delivery of goods to a creditor as security for his debt. The right to the property vests in the creditor only in so far as it is necessary to secure the debt. The general property remains in the pledgor; the special property is in the pledgee until the debt is paid. The pledge, therefore, is a privilege or lien over the goods pledged for the payment of the debt, together with interest and reasonable expenses incurred in caring for the goods pledged. The

lien or privilege subsists only while the thing pledged remains in the hands of the creditor or of the person appointed by the parties to hold it, unless it is otherwise agreed, when the particular debt is paid which the pledge was given to secure, that the creditor can retain it to secure some other debt. Naturally, the pledgor warrants that he has a title to the thing pledged, otherwise the security would be illusory.

The pledgor may sell to a third party his qualified interest in the goods pledged, and any rights incident thereto. If at the maturity of the obligation, the debt is not paid, the pledge may be sold by the pledgee, and the pledgor would be entitled only to any equity remaining. If a pledgee sells or transfers the thing pledged in order to secure payment of the debt, the debtor's ownership in the thing disappears.

If no time has been fixed for the repayment or redemption of the goods, the pledgee may sell after making demand of payment upon the pledgor. The thing pledged cannot be sold or transferred by the pledgor before the maturity of the debt, or before such demand is made. Thus it was held that when stock pledged for an advance is sold before default, such a sale is tortious. Ordinarily if property is pledged, the same property has to be returned after satisfaction of the pledge, and that rule applies to stock if it can be identified. If the pledgee does not choose to sell the pledge upon the maturity of the obligation, he continues to hold it as a pledge, and will be bound to deliver it to the pledgor upon tender of the amount of the debt, with interest and expenses.

Frequently, as in the case of banks, it will be agreed that the thing or security pledged may be sold at private sale. At English common law, the pledgee may sell the pledge at public auction without judicial process,

on giving the debtor reasonable notice to redeem. In Quebec, unless there is a contrary agreement, the pledgee, for instance a bank, would require to obtain judgment and then seize and sell in the ordinary way, when it would be paid by privilege out of the proceeds. The pledgor may redeem at any moment up to the sale. The pledgee in selling should use diligence and prudence in realizing on securities pledged in order to obtain the best price possible. He is bound to take ordinary care of the security, and will be liable if it is lost or destroyed, where he uses less than ordinary care, or uses it in a way not contemplated by the parties, or otherwise than is necessary for its protection.

128. *Termination of pledge or pawn.*—The debtor or pledgor cannot claim the restitution of the thing given in pledge until he has wholly paid the debt in principal debt and costs. Thus if A borrows five hundred dollars from B, and gives B a horse and wagon as security for the debt and interest, A may, at the maturity of the loan, tender B the loan of five hundred dollars and demand his horse and wagon, but B may hold them until he has been paid also the interest on the money, and the expense of keeping the horse and wagon. It would not be sufficient for A merely to offer to pay B the five hundred dollars together with interest and expenses; he must make the actual tender of payment. If, upon such a complete tender being made, B refuses to return the pledge, he would be liable for conversion. The pledge is indivisible, although the debt is divisible. Thus the heir of the debtor, who pays his portion of the debt, cannot demand his portion of the thing pledged while any part of the debt remains due. Thus A deposits five gold rings of equal value with B to secure a loan of five hundred dollars. He repays eighty dollars on ac-

count and demands the return of four of the rings. B may retain all of them until the whole loan is repaid. And if A handed B a watch to secure a loan of one hundred dollars, and authorized B to sell it at public or private sale upon default of payment at maturity, A might after the lapse of ten years plead as against an action by B for the hundred dollars, that the debt was outlawed. B could nevertheless sell the watch and be paid out of the proceeds. If at the maturity of the debt, B sold the watch and received more than the amount of the debt, he would be bound to hand any surplus to A. If, however, the thing pledged sells for less than the amount of the debt, or if being perishable it decays, or being a security it becomes of no value, the pledgee's right to sue and recover on the debt is not interfered with.

129. *Hiring property for compensation.*—This is an example of a bailment for the benefit of both parties. By hiring of a thing is meant that the use of it is stipulated to be given for a certain reward. It is in the nature of a loan for hire or reward. Hence if A makes a contract with B by which he promises to rent B a horse, the contract is mutually enforceable; B may sue A for damages for breach of contract if A refuses to rent the horse, and A may in turn sue B for the price.

130. *Caring for chattels, repairing or transporting them.*—This is another form of bailment for the benefit of both parties. The bailee is compensated for what he does for the benefit of the bailor, while the thing bailed is in his possession. Rights of action similar to those we have just discussed would arise in case of breach of contract.

131. *Rights and duties of the bailor.*—The person who rents goods and chattels is presumed to warrant

his title and peaceable possession. He must furnish things which are reasonably fit and proper for the purpose intended. Generally speaking, he is an insurer against all defects or against such defects as can be guarded against by reasonable care and skill. Thus if A rents a carriage and it breaks down on the journey, he is liable and not the person who is using it. He is supposed to have rented a carriage fit and proper for the journey. The rule was laid down in a leading English case as follows:¹

If a horse or carriage be let out for hire, for the purpose of performing a particular journey, the party letting warrants that the horse or carriage, as it may be, is fit and proper and competent for the journey. In the case of the horse, as here, if the animal falls lame on the journey, I am clearly of opinion the the hirer may abandon him at any place where he turns out unfit, and give notice of that fact to the party letting him out, whose duty it is to send for him.

The lettor or bailor is bound to exercise vigilance and care to discover defects in the thing rented, and if defects exist, should notify the bailee of any danger or risk unapparent to the bailee. Thus in an Ontario case, where a person rented a portable engine and boiler to another, which exploded as soon as it was first used, and while it was in charge of a competent engineer, it was held that as the lettor of the chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff (the lettor, who sued for the value of the engine and boiler), in the absence of negligence on the part of the defendant, could not recover. It was stated by Judge Armour:

The plaintiff was bound to establish beyond reasonable doubt that the defendants were guilty of negligence, and that

¹ Chew vs. Jones (1848), 10 L. T. (O. S.) 231.

such negligence caused the explosion and destruction of the boiler and engine, and the negligence required to be established was ordinary negligence, for the hirer of a chattel is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use in keeping their own goods of the same kind.¹

The bailor is entitled to the compensation agreed upon for the use of his goods. If there is no express agreement as to the compensation, a reasonable compensation will be allowed. If while a thing is being used, it is destroyed, as by inevitable accident, without the fault of either party, the bailor will be entitled to reasonable compensation for the period during which the thing has been used.

132. *Rights and duties of bailee.*—We have already seen that the bailee must take such reasonable care of the property of his bailor in his possession as would a prudent man of his own property. If A sends his horse to B to be kept at B's stable, and, the stable not being locked at night, the horse is stolen, B will not be excused because he shows that he did not lock the stable while his own horses were therein. It could not be said that in leaving the stable door unlocked, even though his own horses were inside, he was acting as a prudent man would in the care of his own property.

If the bailment of the thing is made for a special purpose, we have also seen that the bailee must use the thing for that special purpose, and he is liable for loss or damage arising during or because of any other use or employment of the thing. Thus it has been held that when a person hires from another a horse and wagon with seats for two persons, and he places three seats therein, and the horse during the journey sickens

¹ Reynolds vs. Roxburgh *et al.*, 10 O. R., 649.

and dies, he will be liable for the misuser; or where B hires a horse to drive to the County Fair, but instead he drives to market, where the horse is accidentally killed, B is liable for the value of the horse.

The bailee or lessee is not ordinarily responsible where the thing leased is destroyed by fire without his fault. Thus where goods are leased, under a covenant by the lessee to restore them to the lessor at the expiration of the term in as good order as they then were, reasonable wear only excepted, and the goods during the term were destroyed by fire without the lessee's fault, it was held that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term.

It was held in another Ontario case that it is now settled law that in all contracts of loan of chattels or bailments, if the promise of the borrower or bailee to return the thing loaned or bailed becomes impossible of fulfilment because it has perished, this perishability (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself), excuses the borrower or the bailee from the performance of the promise to redeliver the chattel. Thus where a schooner was rented to be returned in the same good order and condition as when delivered, reasonable wear and tear excepted, and the anchor and chain were lost, it was held that the loss of the anchor and chain was not within the exception of reasonable wear and tear, but that the anchor and chain were among the appurtenances necessary to the ship's being in good order.

Contracts for work and services are like other contracts of letting and hiring. The workman must use

the skill necessary to accomplish the purpose of the bailment. The ordinary workman for hire is responsible for ordinary neglect of the thing bailed, and he must exercise a degree of skill equal to his understanding. Where, however, skill is contracted for as well as care in the performance of work, the bailee for hire will be presumed to have contracted for the due application of the necessary art or skill. If he undertakes work beyond his skill, he will be liable if the work is not properly done.

Story remarks that the degree of skill and diligence which is required rises in proportion to the value, the delicacy and the difficulty of the operation. Similarly, if having the necessary skill, the workman neglects to apply it, he will be responsible for the damages which may result. Or if a particular business or employment requires skill, and the bailor knows when the contract is made that the bailee does not possess such skill, and yet he entrusts the undertaking to him, the bailee is not liable for loss due to his want of skill, if he has reasonably exercised such skill as he has. But where a person holds himself out as skilful in a particular trade, he will be held to the strict exercise of the skill usually expected from other persons engaged in the same trade. Thus if a man undertakes to repair some part of an automobile, he must exercise the skill ordinarily possessed by competent repairers of automobiles.

The bailee is entitled to the compensation agreed upon for his work, but in the absence of an agreement, to reasonable compensation, and he is entitled to hold the thing in his possession until payment is made. Ordinarily if he loses possession he loses his lien. The bailee has such a special property in the thing bailed as will entitle him to restrain any unjustified interference by

third parties, and if third parties injure or destroy the thing in his possession, he, as well as the bailor, will have an action in damages against them.

133. *Termination of bailment arising out of the hiring, caring for, repairing or transporting of chattels.*—The duration of the bailment may be determined by the original contract, or by subsequent mutual agreement. Where there is no express understanding, the bailment may be terminated in any one of the following ways: by rescission of the contract on grounds sufficient to justify the rescission of any ordinary contract; by the total or partial destruction of the subject-matter or by an injury which renders it unfit for the purpose for which it was hired; by an act or series of acts on the part of the bailee which tend to defeat the bailor's title to his property. A bailment of hiring in which the duration is not specified may be terminated by either party by giving reasonable notice. Upon the termination of the bailment, the bailee is bound to redeliver the possession of the subject-matter.

134. *Warehousemen and wharfingers.*—A warehouse is a storehouse for goods. A warehouseman is a bailee who owns or keeps a warehouse in which he keeps goods in storage for hire. A wharfinger is one who owns or keeps a wharf for the purpose of receiving goods for a compensation. The contract between the bailor and the warehouseman is generally evinced by a warehouse receipt which is handed to the bailor. Such a receipt may be of prime importance if a doubt arises whether there has been a sale or a bailment. In its absence, or if it is ambiguous, the circumstances surrounding the transaction will be carefully examined. Thus it was held in an Ontario case that where wheat was left with a warehouseman by a farmer (the owner), and the sale price

was to be thereafter fixed, the fact that the risk of fire was to be borne by the farmer and the wheat to be kept in a separate bin, was strong evidence that no sale was effected.¹

In a Manitoba case it was held that, when wheat is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they cannot be returned, and the *well-understood course of the business* is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract is really one of sale and not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods, or has an option to do either, as the property in the goods has passed to the warehouseman.² But ordinarily where the grain of different owners is stored and mixed in one bin, each bailor becomes an owner in common of his share of the whole. The elevator owner is then bound to keep in his bins sufficient grain to enable him to make delivery of the share of each bailor. Otherwise he may be held for conversion.

Warehouse receipts are negotiable in that they are transferable by endorsement and delivery and carry to the transferee the title in the goods covered by them. The Bank Act defines "warehouse receipt" as follows:³

WAREHOUSE RECEIPT

(1) Means any receipt given by any person for any goods, wares or merchandise in his actual, visible and continued pos-

¹ Isaac vs. Andrews, 28 U. C. C. P. 40.

² Lawlor vs. Nicol, 12 Man. Reps. 224.

³ Section 2 (g).

session as bailee thereof in good faith and not as of his own property, and

(2) Includes receipts, given by any person who is the owner or keeper of a harbor, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods . . . , for goods . . . delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him, whether such person is engaged in other business or not, and

(3) Includes also receipts given by any person in charge of logs or timber in transit from timber limits or other lands to the place of such logs or timber.

Clause (3) was enacted because it had been held in several cases that a "warehouse receipt" for logs lying in certain lakes on the way from the woods to the mill was not valid, as the logs were not in a place kept by the signers of the receipt. The receipt need not be in any particular form, but the receipt and the facts surrounding its issue should conform to and be brought within the definition. The owner's name should be given, as also a sufficient description of the goods, the place where the goods are stored or kept, and, in the case of logs in transit, the place of departure and of destination.

A warehouseman is bound to use reasonable care and diligence in caring for the things deposited with him. He is not an insurer, like a carrier, against all risks. But as he holds himself out to care for things left in his charge, it follows that his care must, unless otherwise agreed, be adequate. Thus the owner of a refrigerator storage warehouse must maintain a temperature in his warehouse suitable for the preservation of perishables entrusted to him. The warehouseman must, for instance, use all reasonable and modern means for preserving his customers' goods from theft, fire, water, heat

and rats. Thus it was laid down in an Ontario case:¹

When the bailment is of that character which is both for the benefit of the bailor and bailee, it is well established that an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility. We disclaim all idea that the party who sends his goods to be warehoused is to enquire into the fitness or safety of the building where they are to be received. He has a right to expect that the building will be reasonably fit for that purpose; that there shall be no gross negligence either in that respect or in protecting the goods against spoliation or destruction. But he has no right, in our opinion, to expect anything beyond ordinary and average care in the one particular more than in the other, and the question for the jury and on which the defendant's liability depends in law, is, whether the evidence shows a want of that ordinary and average care. The fact of the building having fallen from a defect in the foundation is not conclusive evidence against the warehouseman, for that might happen without any negligence on his part.

And so where a warehouseman undertook to store certain dry goods in his warehouse on Kingsland Road, but he stored part elsewhere and this part was destroyed by fire, the bailor having insured them as being at Kingsland Road, the bailor was held entitled to recover as for a breach of contract. The bailee had not kept the goods destroyed where he said he would; and the bailor, having described them to the insurer as being at Kingsland Road, lost his insurance as a result.

A warehouseman has for payment of his charges a specific lien on the goods stored with him.

135. *Innkeepers*.—Innkeepers and carriers are subjected to responsibilities greater than those of ordinary

¹ *Wilmot vs. Jarvis*, 12 U. C. Q. B. 641.

bailees. The position of carriers we shall discuss in a later chapter.

136. *What constitutes an innkeeper.*—Beal defines an inn as a house or place where a traveler, wayfarer or passenger can get food, lodging and other things he reasonably needs while on his way. The Ontario Act respecting innkeepers provides that “inn shall include an hotel, inn, tavern, public house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the innkeeper shall mean the keeper of any such place.” It is clear from this and from the general law that the time-honored words “inn” and “innkeeper” will include any place where travelers resort for lodging and food, whether it is known as hotel, inn, house, or otherwise; the actual relationship between the parties will determine their rights and liabilities. Thus as between a person who rents and occupies a suite of rooms in an hotel for a year, and the proprietor, the relationship of innkeeper and guest hardly exists, because such person is not a transient or traveler. An innkeeper holds himself out as ready, and must be ready (subject to the limits of his establishment) to receive and entertain all travelers who are able and willing to pay for accommodation. It is clear that an ordinary lodging-house keeper is under no such obligation, and is not an innkeeper; nor is the proprietor of a place where spirituous liquors are sold over a counter. “In such a place as this,” says an old judgment, “no one has a right to insist on being served more than in any other shop.” It has been held that a coffee-house or restaurant is not an inn, as it furnishes only food.

137. *What constitutes a guest.*—We have already indicated that a person who, not being a wayfarer or

passenger or traveler, sojourns at an inn, is not a guest of the inn in the sense which we are discussing; but a traveler may be a guest, and it might depend upon the length of his stay whether he ceases to be a guest, and becomes rather a resident or sojourner than a mere guest. A traveler, however, need not stay the night to make him a guest. He may merely get a meal or two. And it was held in an Ontario case that where a traveler was shown to have come to an inn as a guest, and to have stayed there six weeks, paying for his board by the week, two days in advance, and he was dismissed abruptly without cause, he had a right of action against the landlord on the common relation of innkeeper and guest. To put an end to this relation the traveler must be shown to have *rented* a certain apartment in the inn as *tenant* for a certain term.

A guest is a transient whose sojourn is temporary, and uncertain as to its termination. It has been laid down that a person is not necessarily prevented from becoming a guest of an hotel merely because he resides in the same town. The mere fact that a person leaves baggage with the hotel porter at an hotel, and does not intend to engage a room, will not ordinarily make him a guest. He might be a guest if he took a meal at the hotel while his baggage was checked there. And where a person takes his baggage to an hotel, where he deposits it, and where he intends to get entertainment, he becomes a guest, though he may change his mind before receiving any entertainment. An interesting case was decided in Ontario. One L arrived in Toronto and drove to M's hotel, having a portmanteau and other effects with him. He asked for a room, to which his things were taken, and explained that he wanted only to change his clothes before going to see a friend. He

occupied the room for an hour and went to see his friend, with whom he remained. He was handed a key of the room, but did not use it. When he returned next day his effects could not be found. L. contended that he had intended to return that night, but it was shown that he had not expressed his intention to M. It was held that L. was not a guest at the hotel after he had dressed and left the hotel, and that M. was therefore not liable as an innkeeper for the effects.

138. *Rights and duties of innkeeper and guest.*—As we have seen, an innkeeper, by reason of his calling, must receive fit and orderly persons who ask for entertainment, provided he has accommodation. Apparently, however, he is bound to receive only such persons as are bona fide travelers. He must receive and care for the baggage and effects of his guests, though it is possible that he is not bound to receive an unreasonable amount of baggage. At common law he must use reasonable care that his guest shall not be injured in his person. Thus if he allows persons who are drunk or otherwise vicious to be in the hotel, and these cause injury to other guests, he may be responsible.

An innkeeper is responsible as a depositary for the things brought by travelers who lodge in his house. The deposit in such a case is considered a necessary deposit. He is obliged to take more than ordinary care of his guests' goods, and is liable if they are stolen by his servants, by other guests, or by strangers. In some jurisdictions the amount of the innkeeper's liability is limited to a certain sum unless the thing has been lost, stolen or injured through the wilful act or neglect of the innkeeper or his servant, or where the thing has been expressly deposited for safe keeping with him. The innkeeper must be excused if he shows that the loss of

the goods of a guest was not due to his negligence, or that the loss was due to inevitable accident or irresistible force, or if he shows that the loss was due to neglect or carelessness on the part of the guest.

The Ontario Act, which is similar to the acts relating to innkeepers in the other English law provinces, provides that every innkeeper, boarding-house keeper and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder or lodger for the value or price of any food or accommodation furnished to such guest, boarder or lodger, and in addition to all other remedies shall have the right, in case the same remains unpaid for three months, to sell by public auction, on giving one week's notice by advertisement in a local newspaper. His lien may extend in certain cases to goods of third persons which are brought into the hotel by a guest, without notice to him of the interest of third persons in them.

The act further provides that no innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of forty dollars,¹ except in the following cases:

(a) Where such goods or property have been stolen, lost or injured through the wilful act, default or neglect of such innkeeper, or any servant in his employ.

(b) Where such goods or property have been deposited expressly for safe custody with such innkeeper.

In case of such deposit it shall be lawful for the innkeeper, if he thinks fit, to require as a condition of his

¹ In British Columbia the limit is fifty dollars, in New Brunswick one hundred dollars, in Manitoba two hundred dollars, in Quebec two hundred dollars.

liability that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. If an innkeeper refuses to receive for safe custody any goods or property of his guest, or if the guest, through any default of the innkeeper, is unable to deposit such goods or property, the innkeeper will not be entitled to the benefit of the act in respect of such goods or property.

The Manitoba Act provides that no hotel-keeper or boarding-house keeper may retain the trunks or personal effects of anyone for wine or spirituous or fermented liquors supplied to him, or to anyone else by his order.

139. *Termination of the relation of innkeeper and guest.*—Ordinarily an innkeeper cannot eject a guest unless the latter, by his conduct or his refusal to pay for his accommodation, justifies the refusal of the innkeeper to further accommodate him. On the other hand, a guest is no longer a guest when he pays his bill and his name is removed from the hotel register. It has been laid down that the innkeeper remains liable for a guest's baggage for such reasonable time as is necessary for its removal.

CHAPTER XIII

COMMON CARRIERS

140. *Definition.*—A common carrier is one who undertakes for hire to transport from place to place the goods of such persons as choose to employ him. He makes of his business a public calling. He holds himself out, by advertisement or by conduct, as ready to exercise his calling. A common carrier is obliged to receive and convey, at the times fixed by public notice, all persons applying for passage, for the conveyance of passengers is a part of its accustomed business, and all goods offered for transportation, unless, of course, there is a reasonable and sufficient cause for refusal.

The test that can be applied is whether the carrier makes a business of transporting persons and goods, and may be employed by any person. Thus proprietors of stage coaches, barge owners and ferry-men, ship owners and railway companies, are common carriers; the owners of hacks, drays and omnibuses are also included.¹ A sleeping car company has been held not to be a common carrier; that is, where passengers ride in sleeping cars which are not owned by the railway company, though they are run upon its tracks, in charge of servants of the owner of the car, they may regard the railway company to whom the fare is paid as a common carrier, but not so the company which owns the car. Telegraph and telephone companies have been held in

¹ Beal, Bailments, p. 344.

some jurisdictions to be common carriers. In other jurisdictions they have not been held to be so.

A private carrier is one who undertakes the transportation of goods or persons only incidentally, in special cases, or for particular people, though the courts differ greatly upon the distinctions. In certain of the states, for instance, a farmer who occasionally carries parcels for neighbors to and from town on trips which he regularly makes for his own affairs, has been held liable as a common carrier; in other states he has been held to be no more than a private carrier. The distinction is made because the law imposes very severe responsibilities upon the common carrier.

141. *Liabilities of common carriers.*—The liabilities of common carriers are imposed because they exercise a public calling, and because, as a matter of law, they are treated as insurers of the goods of their patrons. Franchises, privileges and immunities of such importance are given to railroads and many other public carriers by the will of the people, that very specific duties and responsibilities are imposed upon them. They must carry the goods of all persons offering who are willing to pay therefor, and they may be sued if without proper justification they refuse to carry the goods. They must not discriminate in their rates in favor of one person or class as against another. They must not refuse the goods of one person and accept those of another. They are bound, in return for the great privileges they enjoy, to keep their equipment and efficiency up to meet the demand upon them for transportation and accommodation of traffic. They are bound to take proper care of the things or persons which they undertake to transport, and to make a safe and proper delivery of goods, as they may agree, or, otherwise, within a reasonable

time. They are not bound to carry by the shortest route, if that be not the ordinary route, but they must convey the goods without unnecessary delay or deviation. There may be reason for delay in some unusual press of business, and where facilities are taxed to the very utmost a carrier is entitled to refuse to accept business which it cannot properly handle. The Railway Act provides that a company shall, according to its powers, accept, carry and deliver without delay, and provide proper accommodation for so doing, all traffic offered for carriage upon the railway. One exception is that it is not bound to carry dangerous commodities. Traffic means the traffic of passengers, goods and rolling stock, and personal property of every description that may be carried on the railway. This would include animals.

The rule does not prevent the carrier from making certain restrictions or conditions relative to the loading and unloading of cars, or the receipt and delivery of traffic, or as to the terms and conditions under which traffic may be carried.

The freight classifications of a Dominion railway are subject to approval by the Board of Railway Commissioners. Under the authority of the board the carrier may be permitted to refuse to carry certain freight: for instance, a valuable race horse, unless the owner submits to its being carried at the same rate as horses of ordinary value, and signs a declaration in the bill of lading that the horse is valued at one hundred dollars, the damages or loss to be limited to this amount, in consideration of a reduced rate.

The company may also insist that certain freight, such as household goods, shall be properly packed or crated. Under the authority of the board, a railway

may now insist that a package be properly secured against damage. In consideration of its waiving its right to have articles securely packed, the company may stipulate that in case of loss or damage its liability shall not exceed five dollars for any one package. Hence, if furniture is shipped under such a special contract, and for reasons unexplained certain boxes are lost, the shipper could recover only five dollars for each box.

142. *Liability as an insurer.*—As we have said, the common law rule is that a common carrier is responsible for all losses which are not caused by a fortuitous event or act of God, by irresistible force, or by some defect in the thing itself. If the loss is caused by an earthquake, by great storms, by lightning, or by some force which acts without the interposition of human agency, the carrier is not responsible. To be an act of God an event must be one the happening of which could not reasonably have been expected. But the carrier, even in the event of loss under these circumstances, must do everything possible and reasonable to diminish the loss. A carrier likewise is not responsible for loss occasioned by the acts of a public enemy, as, for example, by pirates, or by the citizens of a country at war with the country of the railway's origin.

Where a carrier's freight charges are based largely upon the degree of risk entailed in the carriage of goods, according to their classification, and the shipper wrongfully describes the goods, which are as a result not only carried at a lower rate, but are less carefully handled than they might have been, it has been held that the company may be relieved in case of damage. The shipper must not disguise valuable goods by understating their value, as thereby the carrier is induced to give less care and attention to their transportation than it might other-

wise have done, and it will accordingly be released if it can show that it gave reasonable care to the carrying of the goods as qualified. Thus if a person packs diamonds in a box of straw and ships the box as straw only, or as crockery, for example, and the box is lost, the carrier will not be responsible, for it was entitled to know what the box contained, in order that it might take proper precautions for its protection.

The company may refuse to accept a package improperly packed. If it accepts a package which it is apparent is improperly packed, it does so at its own risk. Hence if goods, which it is not apparent are defectively packed, are accepted for carriage and they are damaged as a result, the carrier would escape liability, unless the shipper could show that had ordinary care been exercised, the damage would not have been as extensive. It would be for the company to prove that the packing was defective.

The Railway Act provides that the company must receive, carry and deliver traffic without delay, according to its powers. If the delay is due to causes beyond the carrier's control, it will not be responsible for the consequences. Thus if traffic is suspended owing to severe snowstorms, and it is proved that the company has handled freight as quickly as possible, and in the order of the receipt of the cars, or that it has followed as nearly as possible the instructions given it as to the forwarding of cars containing perishables, it will be relieved of responsibility. In certain cases the contract may provide that it shall not be responsible for damage caused by changes in the weather—by heat or frost, by wet or decay—but if the carrier deviates from the prescribed or customary route, and the goods are damaged by any of these causes while they are being carried off

such customary or prescribed route, or in consequence thereof, the carrier will be held liable. Or where the company's timetable showed that the time for transporting between two places was two hours, and a cargo of fresh meat was in transit for twenty-four hours in the summer, the delay was held unreasonable.

The carrier must provide proper means of transportation; hence if oil is shipped in barrels, it should be carried in covered cars, if the weather is hot, as the company would be liable if the oil were absorbed by the rays of the sun.

The carrier will not be responsible where by some act of public authority loss is caused to the shipper; as, for example, if goods in transit are seized and destroyed by sanitary authorities, though the carrier should notify the shipper, so that the latter may take steps to protect his interests.

If loss occurs owing to the inherent vice in the thing carried, as by deterioration of perishable articles, or the evaporation or leakage of liquids, the carrier would not be responsible, if he had taken the usual and reasonable precautions.

In the carriage of live stock, the carrier's liability is to afford proper accommodation, which may include stock yards and stock pens, stalls in the cars and water facilities. If the shipper sends employees with the shipment, he will be responsible for the due performance of anything that may be necessary to the comfort and general welfare of the live stock on the trip. It will be a question of proof in such cases whether the negligence which causes loss is that of the carrier or of the shipper's servants. Live stock must be carried without delay, according to the company's powers. If loss is caused by delay, the shipper will have an action against the carrier;

but if, for example, the train is snow-bound, it has been held in England that the company need not use extraordinary diligence or means involving additional expense to accelerate the conveyance of the cattle. This decision would probably not be good in Canada, where the winter conditions are much more severe. Here the carrier would probably be held to use every possible means of protecting the cattle.

143. *Limiting liability.*—Under the Railway Act, although a railway company may limit the amount that can be recovered for losses arising through its negligence, it cannot stipulate for total exemption from the consequence of its negligence. The extent to which a railway company may limit its liability, however, is subject to the approval of the Railway Board. It has been held that a condition in the contract which makes it a condition precedent to recovery that notice of claim shall be given within a certain delay, is not contrary to the rule, as it does not necessarily relieve the company from an action for negligence, provided the action is brought within the proper time. But the time allowed must be reasonable. The object of such a clause is to enable the carrier to trace a shipment, or fix the responsibility for its loss or damage as soon as possible after the loss or damage occurs.

Though the carrier may not stipulate, as we have seen, against total exemption from the consequence of its negligence, it may contract that it shall not be liable as an insurer of the goods carried. In this case a shipper who claims for a loss will have to prove negligence.

Where a bill of lading or other document issued by the carrier contains a notice limiting liability, and the shipper signs the document, it will be presumed against him that he knew of the conditions limiting the com-

pany's liability: that is, there is a presumption that the shipper has accepted the conditions. If the shipper is able to read, he will not be allowed to set up that he did not know what the conditions were. In one case, however, where the carrier had limited its responsibility for baggage lost to an amount not exceeding one hundred dollars, in consideration of a reduced rate, the plaintiff was allowed to recover, on proof of damage, on the ground that she was misled as to the effect of the conditions endorsed on the ticket, and by the answers she received from the defendant's ticket agent. It has been held also that where the shipper is unable to read, or speaks a foreign language, unless the conditions have been explained to him, he will not be bound by them.

144. *Termination of the carrier's liability.*—The liability of the carrier is at an end when he has delivered the shipment, or when there is some good excuse for non-delivery. Generally speaking, so long as the goods remain on the railway company's premises, although negotiations may have been entered into for their removal or storage by the assignee or the vendee, delivery is not considered made. If the goods are to be delivered at the consignee's address, and they are refused at that address, the liability as a carrier ceases. But the carrier is bound to take reasonable care of the goods: that is, his exceptional liability as a carrier ceases, and he becomes no more than a warehouseman; he is bound to take only reasonable care of the goods entrusted to him.

It has been held in the United States that a carrier should notify the consignee of the arrival of goods, and that until such notice and a reasonable opportunity to call for the goods has been given, the carrier continues to be a common carrier, although it has unloaded the goods and stored them in its station-house.

If the consignee is to do the unloading, it has been held that the transportation is not ended until the car is placed on a track convenient for the purpose. Delivery by the carrier of only a part of the goods shipped is a delivery only for that part. Delivery must be made at a reasonable time, at the place and to the person designated.

145. *Time of delivery.*—Goods should be delivered within a reasonable time after the making of the contract for their carriage. The time for delivery will depend upon the route, the season of the year, the nature of the goods, and upon other considerations. Where delivery has been delayed or has been rendered impossible by reason of a fortuitous event or irresistible force, the carrier will not be liable in damages for the delay. The consignee may refuse to receive goods out of business hours, or on a stormy day when the removal of the goods would be dangerous.

146. *Place of delivery.*—The place where goods must be delivered will be ascertained from the directions given by the shipper. It may be the residence or the place of business of the consignee, though by custom or usage in a particular place the carrier may deliver at some other place. Generally speaking, a steamship company makes delivery by placing the goods upon its wharf, and a railway company by placing the car containing them on a siding ready for delivery in its warehouse. As we shall see later, when the goods have been so deposited, the carrier's liability is not at an end, until at least the consignee has had an opportunity to remove them. After such reasonable opportunity has been given, if the consignee does not remove the goods, as we have said, the exceptional liability of the carrier as an insurer is at an end.

A shipping contract with an express company generally implies that a package will be delivered to the consignee specially, though under recent orders of the Railway Board express companies are bound to deliver only within restricted areas in the large cities.

147. *Liability as warehouseman.*—When the carrier's responsibility as such ceases, it becomes a warehouseman. Thus when the carrier has notified the consignee that goods addressed to him have arrived and should be taken possession of, and the consignee neglects or refuses to take delivery, the carrier's liability as such ceases, and it becomes an involuntary bailee. For instance, if carloads of iron were switched into a siding for the purpose of being delivered to the consignee, but the consignee refused them, the carrier would be in the position of an involuntary bailee, pending some arrangement with the shipper or owner. The carrier meanwhile would be responsible for loss only if gross negligence on its part could be proved.

As a warehouseman, however, the carrier is not liable if the goods are accidentally destroyed, as by fire, or otherwise. It has been held that if the goods are burned while they are in the warehouse, by the negligence of the carrier in allowing the storage in the building of a large quantity of cotton waste, the consignee could recover, although he had read a public notice to the effect that the company would not hold itself responsible for damage by fire. But where effects saved were allowed by their owner to remain in the carrier's possession, and were partially destroyed by rats, the carrier was not held liable, because it could not be proved that the loss was due to any fault or negligence on its part.

The carrier must be careful to deliver to the proper person. If it delivers to someone who is not the con-

signee, or if it refuses to deliver to a person who establishes his right to delivery, the carrier will be liable. It cannot excuse itself because it has been imposed upon by some third person, or because it has made some mistake. For its own protection, the carrier should demand that a bill of lading or other similar document be produced by the consignee, or by someone who is his authorized agent, or by someone who it appears from the endorsement on the bill of lading is entitled to receive the goods. The carrier may under certain circumstances be unable to determine as between two or more claimants which is entitled to take the goods. In that case, it would be acting wisely to submit the matter to the adjudication of a court.

In Ontario, where a shipper knew that the carrier sometimes delivered goods without a shipping bill being produced, when the goods were not consigned "to order," and he consigned certain goods to a company which was not at the time incorporated, and the carrier delivered the goods to a person who was carrying on business under that name, at what was apparently the office of the company, no bill of lading being asked for or produced, it was held that the carrier was not liable for misdelivery.

148. *Connecting carriers.*—Carriers must continually receive goods which they convey for longer or shorter distances over their own routes, and must, in order that they may reach some remote destination, hand them over to connecting carriers. Generally the contract between the shipper and the first carrier will provide that the latter is not to be responsible for any loss that does not occur while the goods are upon its line, or in its possession, and it is relieved of any liability once the goods are handed to the connecting carrier and receipted for by it.

Under this system, each carrier in succession will be liable for the safe carriage of the goods while they are in its possession, and will upon delivery to a succeeding carrier take a receipt, which generally includes a discharge from liability. The bill of lading may declare that the original carrier is to be the agent of the owner of the goods for delivery to the next carrier, and that he is to be entirely relieved of liability when he has delivered the goods to the next connecting carrier, or has notified the latter that he is ready to do so. Until delivery is made to this connecting carrier, or until notice has been given that it is ready to deliver, and the connecting carrier has been given a chance to take delivery, the original carrier will be liable as such, and not as a warehouseman.

The first carrier must use reasonable care in selecting the connecting carrier. The shipper may himself designate the connecting carrier, and the original carrier must carry out such instructions, unless it proves impossible to do so.

The bill of lading may provide that the provisions limiting liability will apply to every connecting carrier, so that each connecting carrier in turn may take advantage of the clauses limiting responsibility. In case of loss, and where a stipulation has been made against liability after delivery to a connecting carrier, an action should be taken against the carrier on whose line the loss occurs, the first carrier not being responsible unless it can be shown that it delivered the goods to the connecting carrier in a damaged condition. If the connecting carrier has taken delivery without raising any objection, it will be presumed that it got the goods in proper condition. It has been held, however, that the connecting carrier need not, and is not allowed by usage, to open and ex-

amine cases. The connecting carrier is supposed to judge by the appearance of the package.

The principles above laid down are subject to important qualification where the carrier is subject to the authority of the Board of Railway Commissioners of Canada. The board has ruled that when the shipment is from one point in Canada to another point in Canada, or if the goods are shipped under a joint tariff, the carrier which issues the original bill of lading is responsible, though the goods may be lost or damaged while in the possession of a connecting carrier. By a joint tariff is meant an agreement as to rates between two or more companies, where traffic has to pass for a continuous route within Canada over their connecting lines. So that in these cases a carrier is liable whether the loss happens on the line operated by it or on that of some connecting carrier.

As between themselves, the innocent carrier may collect from the one on whose line the loss occurred. If the shipment is to a point outside Canada and there is no joint tariff, it is competent for the carrier issuing the bill of lading to stipulate that it shall not be liable for a loss caused after it has handed over the goods to a connecting carrier. In the absence of such a stipulation, the original carrier will be liable.

149. *Stoppage in transitu.*—We have said that a carrier's liability is ended by delivery, or by some valid excuse for non-delivery. When goods are consigned on credit by one merchant to another, it may happen that the consignee becomes bankrupt or insolvent while the goods are on the way to him, and before they are delivered. It would be unfair that under such circumstances the consignor's goods should pass from his possession and should go toward paying the debts of the consignee.

The shipper is in these cases allowed by law to retake possession, if he is able to do so, while the goods are on their way and before they have got into the possession of the consignee. This right is known as the right of stoppage *in transitu*.

The right to stoppage *in transitu* continues so long as the goods are in the possession of the carrier, though the carrier may have been named by the purchaser or by the vendor, or whether or not the vendor had known the actual destination of the goods. Negotiations may have been started for the removal or storage by the purchaser, but this fact will not defeat the right of the vendor. The consignee's possession, however, need not be actual. It may be constructive, and the right of the vendor may be defeated if the goods are placed in the Customs Bonded Warehouse in the name of the consignee, because once this takes place, the goods are no longer in transit. While they are in transit, however, the carrier, upon being notified by the vendor that he wishes the goods stopped in transit, is not entitled to deliver them to the consignee.

150. *Public carriers of passengers and baggage.*—A public carrier of passengers must carry all persons who apply for passage and are willing to pay the fare, unless they are drunk or disorderly, or afflicted with a contagious disease, and so on. Its liability to passengers is not the liability of a carrier of goods; it is liable only for injuries which may be the result of negligence in the performance of the contract of carriage. It is not liable as a common carrier of passengers independently of negligence; that is, it is not an insurer.

The carrier will be held to a high degree of care as regards the equipment and the roadbed. Thus where an accident happened owing to the subsidence of the soil

under the track, it was held that the burden of proof was upon the company to show that the subsidence was due to some undiscoverable cause. But where an accident was caused by a broken rail, it has been held that a company sufficiently cleared itself of negligence when it showed that the breaking of the rail was due to the severity of the climate in winter, this being a risk which travelers must run; but the company will be liable for defects in the rolling stock which can be detected by an ordinary and reasonably proper and careful examination, though it will not be responsible for a latent defect which a careful and thorough examination would not disclose.¹

Apparently a person traveling upon a free pass, upon which are endorsed conditions denying the company's liability even in case of negligence, will not be entitled to recover in case of accident. Hence it has been held, that where a person accepts a pass with conditions endorsed on the back of it, and carries the pass around with him from year to year, he will be presumed to have assented to the conditions. But if the person is traveling on an unconditional free pass, under the later decisions he is entitled to recover in case he is injured by an accident. Mail clerks, it has been held, carried without charge, may recover for injuries received in the wreckage of a train, as also express messengers carried under a contract between the railway company and an express company. So also where the workmen of the company's contractor are carried, though free of charge, where the company agrees to transport the contractor's materials and men. There will be no liability, however, under the decisions, if the contractor's men, where there is no such agreement, get on board the cars as bare licensees.

¹ Redhead vs. Midland Ry. Co. L. R. 2 Q. B. 412.

In Quebec, the employees on a train are in the position of passengers, and may recover for injuries due to accident, where, for example, a train is wrecked. But under the English law, apparently, a servant who is being carried by the company to his work cannot, at common law, claim from the company for an injury arising from negligence while being so carried. A mere trespasser, like a tramp, who boards a train, is not a passenger. It has also been held that a person who connives with a conductor to get a free ride is not a passenger.

Where a passenger carries his baggage with him in the car, the carrier is not liable for its loss, unless the loss is due to the negligence or misconduct of its servants. Thus where a passenger left his traveling bag in the car while he went out to the station platform to get to the refreshment room, and the bag was stolen in his absence, the company was held liable on the ground that the mere fact that the passenger retained possession of the bag did not, unless there was evidence of a contract to that effect, relieve the company from its liability as a common carrier in case of loss. The company's servants were supposed to take such care as to prevent theft of this kind. It has been held that where a passenger left his baggage in one car and went to another to smoke, and remained there while the train stopped at several stations, the company was liable. The contrary has been held in an American case.

But where an intending passenger, some time before the train started, ran into a passenger car standing at the station, in which there was no other passenger, when it was apparent that there was no one in charge of the car, and deposited baggage which in his absence was stolen, it was held that there was not sufficient delivery of the baggage to the company to render it liable.

The contract of a railway company, where there is no contrary stipulation, is that it will, without additional charge, carry by the same train a certain amount of personal baggage. By personal baggage is meant such baggage as a passenger generally takes with him for his personal use or convenience, according to the habits or needs of the class to which he belongs. It has been held, therefore, that the company will not be liable where loss occurs to baggage which is not personal: as, for example, where merchandise was contained in a checked trunk supposed to contain personal effects only; though if it could be shown that the company had actual knowledge that the baggage checked as personal effects really contained effects that were not personal, it would be responsible in case of loss.

151. *Passenger regulations.*—The rates to be charged must be uniform for all persons of the same class, riding under the same conditions. The carrier may require the purchase of a ticket, and may eject every passenger who refuses to pay his fare. The meaning of this rule is of course that the company may eject a passenger who cannot show that he is entitled to travel. If he is riding on a free pass, for instance, he will not be required to pay a fare. Tickets must be produced as often as they are called for by the conductor. It is a reasonable rule, also, that tickets must be surrendered to the conductor in exchange for checks, and the passenger must keep the check, to be produced upon the demand of the conductor. Where a passenger gets on the train without having first bought his ticket, the company is entitled to charge an additional sum. If the passenger is ejected for refusal or failure to pay his fare, he may regain his status as a rightful passenger by paying the fare, though he would have to pay the whole fare, that is, from the

point where he first boarded the train, and not from the place where he was ejected.

It has been held that reasonable and lawful conditions printed on a ticket which is signed by the holder binds him, whether he has read them or not, if he was able to read at the time, and if there was no misrepresentation on the part of the ticket agent, or anything to put him off his guard. Generally speaking, a passenger will be bound by the conditions printed on the face of his ticket, though unsigned, especially if he had the time, ability and opportunity to read the conditions when he purchased the ticket.

152. *Sleeping cars*.—The railway company over whose lines the sleeping car is run, and to which the ordinary fare for the journey is paid, is toward the passenger as a common carrier; but the sleeping car company to which an additional fee is paid for the special accommodation is not. Not being a common carrier as toward the passenger, it is as a general rule bound to exercise reasonable care to protect passengers who place themselves in its care. In Quebec it has been held that a sleeping car company is held to a high degree of care in protecting the baggage of its passengers while at a station. In an Ontario case, where money was stolen from a passenger while he was asleep, it was held that the burden of proving negligence of the sleeping car company was upon the plaintiff, and that unless he proved some specific act he could not recover. Where a lady who had an upper berth, and while changing her position therein, was thrown out of the berth, probably while the car was going round a corner, and was injured, it was held that there was no evidence that the accident was due to the negligence of the company's servants, and it was held she could not recover.¹

¹ C. P. R. Co. vs. Smith, 31 S. C. R. 367.

153. *Timetables.*—The Railway Act provides that all regular trains shall be started and run as nearly as practicable at regular hours fixed by public notice. Failure to comply with this rule, where it is reasonably possible to do so, would render the company liable for damages which could be shown to have resulted directly from the breach. It has been held that the company cannot relieve itself of liability for negligence in not observing this rule by conditions contained in its timetables. The act further provides that traffic must be carried without delay.

It is not negligence in a railway company to be behind its scheduled time, although, as we have seen, the act does provide that regular trains shall be started and run at regular hours. It has been held, however, that where a person was injured at a crossing where a train was ten minutes overdue, he could not recover on the mere ground that there was a breach of the statutory rule on the part of the railway, unless he proved that the delay was caused by the company's negligence, or that he was misled by the company into supposing that no train was coming. So also it has been held that the mere fact that a train exceeds the timetable rate of speed is not in itself evidence of negligence. Changes in the timetables should be published as openly as the timetables which are altered.

CHAPTER XIV

SURETYSHIP

154. *Nature of the contract.*—Suretyship is the act by which a person engages to fulfil the obligation of another in case of its nonfulfilment by the latter. The person who contracts this engagement is called a surety. In other words, a contract of suretyship is an agreement whereby one person engages to be answerable for the debt, default or miscarriage of another.

Sometimes a distinction is made between suretyship and guaranty. Suretyship is then stated to be an agreement, as we have just remarked, whereby one person engages to be answerable for the debt, default or miscarriage of another; while a contract of guaranty is defined as a promise to answer for some debt, or the performance of some duty, in case the person who is first liable to pay or perform fails to do so. The difference has also been expressed as follows: a surety undertakes to pay if the principal does not; a guarantor undertakes to pay if the principal cannot. Suretyship is the broader term, and includes guaranty, and for the purposes of this discussion the whole subject will be treated as one of suretyship.

Suretyship may be conventional, legal or judicial. The first is the result of an agreement between the parties; the second is required by law; and the third is ordered by judicial authority.

155. *Distinguished from original contract.*—The orig-

inal contract is the contract of the primary debtor, the person who has made the contract and who is bound to pay. The suretyship is secondary, and involves payment by the surety where the primary debtor does not or cannot pay. The surety contract is collateral to the main contract. Thus John Smith writes to Jones & Co.: "If you will advance to A. B. five thousand dollars' worth of goods, in order that he may set up in business, I will guarantee payment in six months from date." The goods are delivered. At the end of the period, if the purchaser has not paid, John Smith can be called upon to pay. This is a suretyship in the form of a guaranty. The surety's contract may be a separate contract of this kind, or it may form part of the original contract.

156. *Formation of the contract.*—Suretyship can only be for the fulfilment of a valid obligation. It may, however, be for the fulfilment of an obligation which is purely natural, or from which the principal debtor may free himself by means of an exception which is purely personal to himself; for example, in the case of minority.

Suretyship cannot be contracted for a greater sum, nor under more onerous conditions than the principal obligation. It may be contracted for a part only of the debt, or under conditions less onerous. If it exceeds the debt or is contracted under more onerous conditions, it is not null, but is reducible to the measure of the principal obligation.

While a person may become surety without the request and even without the knowledge of the party for whom he binds himself, suretyship is not presumed but must be expressed, and cannot be extended beyond the limits within which it is contracted. The contract may be in the form of a continuing guaranty, by which the guar-

antor makes himself responsible for the principal's obligations for a period of time, or until a series of transactions is completed. The contract should generally fix the limit of liability and limit the time.

The offer of the surety should be accepted by the person in whose favor it is made, though the acceptance may be in writing or may be implied from the fact that the third party acts upon it.

The Statute of Frauds lays down that no action shall be brought whereby to charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person, 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 by some other person lawfully authorized by him.

As suretyship is a contract, there must not only be an acceptance, but there must be some consideration, which must consist of money or of some advantage to the principal debtor, or the surety, or some disadvantage to the creditor. Thus the consideration may be the credit extended to the principal debtor; it may be a contract, or a percentage promised to the surety; it may be time for payment granted to the debtor.

The suretyship may not be conventional, but may be implied or required by law. Thus by the custom of a particular trade, a broker may be held to pay where his principal makes default, if in his dealings with a third party he has not disclosed his principal's name; and as between the drawer and endorsee, and as between endorsers and subsequent holders of bills of exchange, there is an implied contract of suretyship.

157. *When the contract may be void.*—The undertaking of the principal must be legal, otherwise the under-

taking of the surety or guarantor is void. The contract may be rendered null under certain conditions. A person may give a guaranty on the understanding that another person is to join in it as co-surety. He does not become liable unless and until that other has signed the instrument. Thus where sureties have executed a bond and made themselves liable jointly with another person, who never executed it, it was held by the Irish Court of Appeal that it could not be enforced against them, though the reason why the creditor had not obtained the execution of the bond by the other party was that he was known to be insolvent.

Or again, where one of four joint and several sureties, in executing a bond, made a material alteration which rendered it void as against the others, it was held that as he had executed it only as a joint and several bond, he also was not bound. And where a person agreed, as surety, to execute a joint and several bond, with the principal debtor, who failed to sign it, the surety was not liable.

158. *Authority of agents and partners.*—A contract of suretyship or guaranty may be made by a person who is represented by an authorized agent. The creditor should, however, before resting upon the security given, make sure that the agent has acted with proper authorization. The general principles of agency would apply, and under given circumstances it would not be necessary that the agent's authority should appear in writing.

In so far as a partner undertakes to bind his firm, as under a surety contract, it must be clear that a contract so made by him, if it is to bind his co-partners, must be entered into by him as agent for his co-partners in the regular course of the firm's affairs, unless he has been specially authorized.

159. *Notice of default.*—It is a safe general rule to follow that upon default of the principal debtor, the surety should be notified, so that he is given some opportunity either to try to enforce payment from the principal debtor, or to make arrangements for payment himself, so as to avoid proceedings.

160. *Action against the principal.*—Under the English law, the creditor is not bound to sue the debtor before suing the surety, and where there is no express stipulation, he need not give notice to the surety of the debtor's default.¹ Under the law of Quebec, the surety is liable only upon the default of the debtor, who must previously be discussed, unless the surety has previously renounced the benefit of discussion, or has bound himself jointly and severally with the debtor, in which case the principal debtor and the surety are jointly and severally bound. This has been interpreted to mean, however, that a surety may be sued, but upon being sued may demand that the principal debtor be first discussed. Of course the contract may require that the creditor proceed against the principal debtor or realize on every collateral security before he attempts to hold the surety, and in a clear case of guaranty, as distinguished from suretyship proper, it may be necessary to show that the principal debtor is unable to fulfil his obligation. After all, this is largely a matter of interpretation of the contract. Generally speaking, it is only necessary for the creditor to show that the principal debtor has not paid, to enable him to proceed against the surety.

161. *Obligations of surety toward creditor.*—The extent of the obligation of the surety or guarantor will depend upon the obligation of the principal debtor, in that the surety or guarantor cannot be held liable beyond the

¹ Smith, "Mercantile Law," 11th Ed., p. 625-626.

amount of the debt guaranteed, or beyond the principal debtor's obligation. What this is may of course be determined by examining the contract between the principal debtor and his creditor. It is necessary to point out, however, that the surety may by his contract have limited his liability to an amount less than the liability of the principal debtor. Generally speaking, the surety's liability will continue while the principal debtor's liability continues, which may be for a longer or shorter period. Usually a contract of suretyship will stipulate the period during which the surety will be liable, and in some cases it will be possible to gather from the circumstances surrounding the contract that the liability is to end at a certain time. But unless the termination of the surety's liability is thus expressed or implied, he cannot be released without the consent of the creditor.

It may be clear that the suretyship is continued, as, for example, where the surety guarantees a running account between the principal debtor and his creditor. Where a particular transaction has been entered into by the principal debtor, and the contract of suretyship does not limit the duration of the surety's liability, it will generally be implied that the surety intended to guarantee only the particular transaction; and if the principal parties had in mind at the time of entering into the contract, that the amount in issue between them would not exceed a certain amount, or that credit would not be extended beyond a certain amount, the surety's liability would in most cases be limited to such an amount, and would cease for any liability incurred beyond that amount, unless, of course, it can be gathered from the contract itself that a continuing guaranty was intended.

162. *Joint sureties*.—Where there are several persons who become sureties of the same debtor for the same debt,

each of them will be held liable for the whole debt; as between themselves, contribution may take place, but as toward creditors, each will be bound for the full amount. The contract may stipulate that each shall be liable only for his proportion. It is possible also for the sureties in special jurisdictions to require the creditor to divide his action, and reduce it in proportion to the share of each surety.

163. *Obligations of principal debtor toward a surety.*—A surety who has bound himself, with the consent of the debtor, may recover from him all that he has paid for him in principal, interest and costs.

The surety, once he pays, is subrogated in all the rights which the creditor had against the debtor. The principal is therefore bound to make good to the surety what has been paid by the latter on his account, as the law implies a contract to this effect.

Where a surety has bound himself without the consent of the debtor, the Civil Code of Quebec lays down that the surety has no remedy for what he has paid beyond what the debtor would have been obliged to pay had the suretyship not been entered into, and the rule would probably be enforced in the other provinces.

In certain cases, where the surety has bound himself with the consent of the debtor, he may, even before he has paid, take action against the debtor to be indemnified, as, for example, if he is sued for the payment, or if the debtor becomes insolvent, or when the debtor has undertaken to secure a discharge for the surety within a certain time.

164. *Termination of suretyship contract.*—The reader is referred to the chapters on Contracts, where the discharge of contracts is discussed. The general rules there laid down apply here, as in other contracts. The con-

tract of suretyship is discharged under the following circumstances, among others.

WHERE THE PRINCIPAL IS DISCHARGED.—If the principal is discharged by the creditor, the surety is thereby also discharged.

BY AGREEMENT.—The creditor may by express agreement release the surety. The agreement may be implied, as where the creditor voluntarily discharges the principal debtor.

BY ALTERATION OF THE CONTRACT.—If the principal contract is altered materially, or a new agreement is substituted for it, without the consent of the surety, the latter is released. It may be that the surety will not be injured by the proposed change, but that does not alter his right to be discharged.

BY EXTENSION OF TIME TO THE PRINCIPAL.—This is not always a ground of discharge. In Quebec, the surety who has become bound with the consent of the debtor is not discharged by the delay given the debtor by the creditor, but he may sue the debtor to compel him to pay. Under the English rule, apparently, the creditor is not entitled to prolong the responsibility of the surety by extending time to the principal debtor.

BY SURRENDER OF SECURITIES.—The suretyship is at an end when, by the act of the creditor, the surety can no longer be subrogated in the rights, hypothecs and privileges of the creditor.

The surety is entitled, upon paying the debt, to receive from the creditor the securities placed by the debtor in the creditor's hands, and if before default the creditor returns the securities to the debtor, the surety is released to the extent at least of the value of the securities thus returned. If the creditor voluntar-

lly accepts an immovable, or any object whatever, in payment of the principal debt, the surety is discharged, even though the creditor should later be evicted. If the creditor released one of, say, two co-sureties, the remaining surety will be released, at least to the extent of the amount which he could have recovered by way of contribution from the co-surety who is released.

BY PERFORMANCE.—A surety is released if the debtor fulfils his contract or pays his debt, or by his (the surety's) performance of the contract to pay or satisfy the obligation assumed.

165. *Other means of discharge.*—The creditor must fulfil his duties, and if he omits to perform any condition express or implied imposed upon him by the contract of suretyship, the surety will be discharged. If the creditor is guilty of any fraud or of any gross negligence whereby the security, to which the surety, on paying the debt, would be entitled, is lost, or if the creditor does something which prejudices the surety's right of contribution against a co-surety, the surety is released. It has been laid down that the concealment of a material part of the principal's contract from the surety may amount to fraud. So also where an employer, on securing a valid bond to guarantee an employee, conceals the fact that the employee has been guilty of dishonesty, this will amount to evidence of fraud. Or where the creditor connives in the default of the principal, the surety will be released.

The death of the surety will not usually terminate his liability. His estate will be liable. In the case of a continuing guaranty, however, if the surety dies, his executor may give notice of his death to the creditor, and the estate will not be responsible for liability in-

curred by his principal after the notice, especially if the surety himself, if living, could have put an end to the suretyship.¹ A continuing guaranty is a guaranty of debts incurred from time to time, rather than of some particular debt. Thus A agrees to guarantee payment of "any debt B may contract in his business as a jeweler, not exceeding one hundred pounds, after this date." A thus binds himself to be answerable for any debts not exceeding one hundred dollars which B *from time to time* may contract in the course of his business. Lord Ellenborough laid down a very sensible rule of conduct rather than of strict law, when he said that "if a person means to be surety only for a single dealing, he should take care to say so." A continuing guaranty, unless it contains an express stipulation to the contrary, is generally revocable by the surety. But the nature of the transaction, for example, where the consideration is indivisible, may make it clear that the guaranty is not intended to be revocable.

The main contract may be illegal, in which case the surety's contract is not binding. It is possible, however, that if the suretyship relates to, say, the *ultra vires* act of a company, or to the contract of a minor, the debtor may escape, but the surety will be held. Such a contract may not be illegal, but merely voidable and not enforceable, yet a third party in good faith could recover from the surety. The contract may come to an end also where the thing guaranteed becomes impossible. Thus if a person whose performance of a certain act is guaranteed dies, the possibility of personal performance dies with him, and the surety is discharged, unless the contract provides otherwise.

¹ Smith, "Mercantile Law," 5th Ed., p. 635.

CHAPTER XV

INSURANCE

166. *Definition.*—Insurance is a contract whereby one party, called the insurer, undertakes, for a valuable consideration, to indemnify the other, called the insured, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.¹

The definition just given is taken from the Québec Civil Code. It covers generally the three main branches of insurance. It was said by Lord Blackburn in a well-known case:²

“I think that on the balance of authority, the general principles of insurance law apply to all insurance, whether marine, life or fire.”

The fundamental principle in insurance is that of indemnity; the person insured contracts that he shall be indemnified against loss or liability under certain circumstances and conditions explained in the policy. He may wish to be indemnified in the case of accident or disease; in case markets decline; in case his house is burned down; and in countless other circumstances.

To indemnify means to make good; the indemnity is a reimbursement of what has been lost.

Life insurance, it has been said, is not a contract of indemnity. In Quebec it is regarded in principle as

¹ Art. 2468, Québec Civil Code.

² Thomson vs. Weems, 9 App. Cas. 684.

a contract of indemnity. That this is so is clear from the article of the code which provides, in effect, that where a creditor insures the life of a debtor in which he has an insurable interest, he cannot recover more than the amount of his actual interest, if that interest may be measured exactly in dollars and cents. In England, under the decisions, it is not so regarded. The leading writers on the subject of insurance take rather the opposite view, and maintain that life insurance is essentially a contract of indemnity, though certain of the authors go no further than to say that policies issued by creditors on the lives of debtors are at least contracts of indemnity. The principle accepted in Ontario, and apparently under the English law, is that life insurance is a contract to pay a sum of money on the happening of a particular event, and may be defeated only by default in the periodical instalments. The policy may be for any amount for which the insured will pay a premium. But a policy of fire insurance provides for an indemnity which is, as far as possible, the exact amount of the loss suffered by the insured.

As indemnity means that a loss must be made good, it is clear that the loss must be direct and immediate. In other words, it must not be remote and speculative. The insurer must have an insurable interest. This question of insurable interest will be discussed at length later.

The old form of assessment insurance is giving way to that of premium insurance. Under the assessment or mutual system, the loss must be divided between all the members of the company or association in such a way that each pays no more than his share of the total amount to be paid, which includes the loss and expenses.

The premium form of insurance is based on the law of averages, the premium being adjusted in such a way

that the total premiums which a company can collect are sufficient to pay all claims and expenses and provides a margin for distribution in the form of dividends. For instance, the premiums in life insurance are based on well recognized computations as to the average length of life of persons employed in different professions and trades, and according to age. In the same way, the premium in the case of fire insurance is increased or diminished according to the nature of the risk. In congested districts of a large city, the rate is higher than in the suburbs, because the chances of fire and loss are greater in the heart of the city than elsewhere. The premium is, therefore, worked out as closely as possible upon the principle of average, and in the light of past experience.

167. *Risk an essential element.*—The definition we have given makes it clear that the existence of risk is an essential element of the contract; legitimate insurance is done on that basis. That being the case, legitimate insurance is not in any sense a gambling contract. There can be no contract unless there is a risk. Until the risk commences, the contract is not in force and the premium does not belong to the insurer, though he may have collected it.

168. *What risks may be insured.*—We have already suggested some of the forms which insurance may take. Insurance may be made against all losses by inevitable accident or irresistible force, or by events over which the insured has no control, subject, of course, to the general rules relating to illegal and immoral contracts. In certain jurisdictions, and in the case of certain companies, some risks may not be insured. For instance, a company's charter may limit the amount of insurance it may do.

Under the insurance acts of Ontario and Quebec, which specify the classes of property which licensed fire insurance companies may insure, it has been held that standing timber cannot be insured by such companies, as they are not mentioned in the list of insurable property; though it has been held also that a company incorporated, for instance, in Ontario, can enter into a valid contract of insurance outside that province where the property insured is also outside the province. The Quebec Insurance Act limits the liability which a company may undertake upon a single risk. Incorporeal things as well as corporeal, and also human life and health, may be the subject matter of insurance.

169. *Good faith.*—The insured must represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium. There must be good faith on the part of the insured as well as on the part of the insurer. Fraudulent misrepresentation or concealment on the part of either is a cause of nullity of the contract in favor of the innocent party. But the obligation of the insured with respect to his representations is satisfied when the facts are substantially correct, if and when there is no material concealment.

Thus a person wished to ship a horse valued at five thousand dollars. In order to reduce the cost of shipment, he took advantage of a special rate to ship the horse upon a declared value of one hundred dollars, and the company under the shipping contract limited its liability to and insured for that amount. Doubt was expressed whether the shipper could recover even the hundred dollars, in that he had practiced a deception in shipping a horse worth five thousand dollars, and declar-

ing it to be worth one hundred dollars. The utmost good faith was not apparent in the representations made by the shipper.

Even where the misrepresentation or concealment is not fraudulent, it is possible that in certain cases where it arises it might nullify the contract in favor of the insured. The rule of good faith extends beyond the duties of the parties at and before the making of the contract. The insured, for instance, may commit a fraud on his insurer, if he wilfully prevents efforts to save goods which would without such efforts be destroyed, or if, relying on his insurance, he takes any steps to prevent the working of fire engines or efforts to extinguish fire. So also if he wilfully neglects to save as much of the insured property as he can. This does not mean to say that the insurer is not liable where loss is caused by the act of the insured or of his servants or agents, where there is no fraudulent intent.

170. *Voluntary and personal contract.*—A contract of insurance is voluntary in that the parties may agree upon any conditions, and these once incorporated in the contract are binding, if they are lawful. The conditions, of course, must be written and must form part of the contract. The contract is personal, in the sense that it does not attach to the property or the chattel. That is the general rule. The personal nature of the contract may be illustrated when we say that, for instance in Quebec, though a landlord has a privilege for his rent upon the furniture and effects of the tenant, he has no privilege on the insurance which an insurer must pay the tenant in case the effects are destroyed by fire.

171. *Life insurance.*—The United States Supreme Court has described life insurance as a mutual agree-

ment whereby the insurer, in consideration of the payment by the insured of a named sum annually or at certain times, stipulates to pay a larger sum on the death of the assured. The company takes into consideration many other things—the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance.¹ The insured is not bound to continue the insurance, but the insurer is bound so long as the insured pays the premium. In its nature, therefore, an insurance contract is not an insurance for one year, with the right to renew from year to year, but has been said to be an entire contract of insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. The failure of the insured to pay his annual contribution, or premium enables the company to void the contract, if it wishes.

Life insurance differs from accident insurance, in that the latter is not an entire contract for life, subject to discontinuance and forfeiture for non-payment of premiums, but is contracted from year to year, or for a voyage, or as the case may be.

Endowment insurance is defined in the Ontario Insurance Act as including any contract of insurance which contains an undertaking to pay an ascertained or ascertainable sum at a fixed future date, provided the assured is then alive. So also an undertaking to pay such a sum on the assured reaching his expectation of life is deemed to be endowment insurance.

Term insurance has been described as a form of life

¹ *Ritter vs. Mutual Life Insurance Co.*, 169 N. S., p. 139.

insurance in which the insurer agrees to pay a stipulated sum if the assured dies before reaching a certain age, or during a specified term of years.

Tontine insurance takes its name from an Italian banker, Lorenzo Tonti. He devised a form of life insurance in which the persons insured agreed that surplus funds should not be disposed of until the expiration of a given period, when those who had continued their insurance would be entitled to have such surplus divided among them.

Policies occasionally provide that they do not cover death by suicide or by execution for a crime. It is implied that the insured in any contract of insurance will not hasten the risk against which he is insured, that is, it is implied that he will not by some deliberate act bring about the risk. Hence where a policy does not expressly except the risk of suicide, the policy will not be void if the assured commits suicide while he is insane, because he does not then commit a deliberate act designed to hasten the risk. If he is not insane and commits suicide, he may be treated as having committed a fraud upon the insurers, who are not liable, and this for reasons of public policy. The policy would be void. In the United States the rule is somewhat different, in that in such a case, if the policy is payable to the insured, his estate, his personal representatives or assignees, it would be void; it would not be void if payable to a specified beneficiary, who takes not by inheritance but by contract.

Intemperate habits may have the result of so affecting the health of the insured that the risk is materially altered. Policies, therefore, sometimes except death due to intemperance or the excessive use of narcotics; the insured may make a promissory warranty that his habits

will not so change from what they were when he applied for insurance that the risk will be materially altered.

172. *Marine insurance*.—A contract of marine insurance is a contract of indemnity. Though where the policy is a valued ¹ time policy, a larger amount than the actual loss may be recovered. Thus if a ship is insured against fire under such a policy, and while it is in force she is so injured by stranding that the cost of repairing her would be greater than her value when repaired, the owners may collect the full amount of the insurance if she is later destroyed by fire. The contract may cover voyages by sea or on inland waters. The insurance may be made on the ship, on the goods, on freight, on profits and commissions, and on anything else which is appreciable in money, and is exposed to the risks of navigation upon a lawful marine adventure.

There is an implied warranty that the ship is seaworthy at the commencement of the voyage. If she is seaworthy at that time, the risk attaches, though losses may occur in the course of the voyage. The ship is not seaworthy if defects exist, say, in the boilers at the time of sailing, which render repairs necessary after she puts to sea, especially if the chief engineer had never before been to sea and was ignorant of the management of boilers in salt water. In such a case the warranty of seaworthiness would be breached. Where there is a reasonable inference from the evidence that a ship was seaworthy when her voyage began, the fact that no explanation can be given of her sinking is not enough to establish an inference of unseaworthiness. If a deviation is made from the usual course of vessels upon the particular voy-

¹ A "valued" policy is one in which the value of the property is fixed and agreed upon by the contract. In the absence of fraud, this valuation is binding.

A "time" policy is so described to distinguish it from a voyage policy.

age (unless of necessity or to save human life), the insurer is not liable for losses occurring after such deviation, unless made with its consent.

173. *Accident insurance—insurance of the person.*—Accident insurance in this sense means insurance against accidental bodily injury and death. The Ontario Act provides that:

In every contract of insurance against accident or casualty, or disability, total or partial, the event insured against shall be deemed to include any bodily injury occasioned by external force or agency, and either happening without the direct intent of the person injured, or happening as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger and no term, condition, stipulation, warranty or proviso of the contract varying the aforesaid obligation or liability of the corporation shall as against the insured have any force or validity.

The definition makes clear the nature of the injury occasioned by "external force or agency." The insurer is to be protected against claims arising out of injury resulting from hidden or secret diseases due to internal and natural causes. Death by drowning or asphyxiation are covered by the definition, though the policy may of course except death from these causes. The injury, besides being occasioned by external force or injury, must be *accidental*. The injury is not accidental if it is caused by the intentional act of the insured. Thus it has been held that death was not due to "violent, accidental, external and visible means," where the insured died from heart disease brought on by his efforts in ejecting a drunken man from his premises. If while trying to eject the intruder he had violently fallen, then it could be said that he suffered an accident, and he could recover. So also where the policy covered bodily injuries, "the

proximate or sole cause of the disability or death," the insurer was held liable where erysipelas, causing death, resulted directly from an accidental fall from a veranda.

The contract generally stipulates that certain specified amounts shall be paid for specified injuries, or for the payment of a specified sum weekly or monthly while the insured is totally or partially disabled. It has been held that the insured need not be absolutely helpless to constitute him totally disabled. Thus an illiterate, middle-aged laborer, by reason of an accident practically, though not absolutely, deprived of his means of earning his living by manual labor, was held to be totally disabled. The courts will give a reasonable interpretation of the clauses as to disability. And so where an indemnity was provided in case of the loss of a hand or a foot, it was held that actual separation of the member was not necessary to recover unless the policy expressly contemplated an amputation.

174. *Reinsurance*.—An insurance company may, and frequently does, find that the risks which it has assumed are so heavy that, in case of a serious loss, it might have to pay out a sum which would, to say the least, greatly inconvenience it. Thus if a company placed \$500,000 insurance on a building, and the building was destroyed by fire, it might be called upon to pay the full amount. To overcome this risk, the company divides up its liability and reinsures; that is, it causes the sum which it has insured to be reinsured to it by a distinct contract with another insurer, so that it will itself be indemnified against its own responsibility. Thus if the insurer divided up the \$500,000 risk among half a dozen or more other companies, each for a portion, in case of loss it could call upon them to pay their portions, and its own liability would be reduced to the amount which it carried.

Ordinarily the reinsurer assumes an obligation under the reinsurance contract only toward the first insurer, and not toward the insured. So if the first insurer becomes insolvent, the insured has no recourse against the reinsurer. The contract of reinsurance may include a promise to assume and pay the losses of policy holders; in which case action may be taken by them direct against the reinsurer by virtue of the contract. Where an insurance company wishes to retire from business, it may transfer its business, together with its liabilities and collateral securities, to another insurance company, which contracts to assume the risks insured.

Generally the reinsurer will stipulate that the reinsured must retain a certain proportion of the risk. The policy of the reinsurance may stipulate that it shall be subject to the same conditions and mode of settlement as the original policy, but it has been held that this does not entitle the reinsurer to the same notice of loss as the insured contracted to give to the reinsured company. If there is a loss, each insurer must contribute rateably. So it has been held that where a policy of reinsurance was for half the amount of the original insurance, and the amount of the original insurance was reduced to less than the amount of the reinsurance policy, the reinsurer was not liable, when a loss occurred, for the full amount of the reduced insurance, but for one-half thereof.

175. *Co-insurance*.—Certain policies, more especially marine and fire policies, frequently provide, in consideration of a reduced premium, that the insured shall bear part of the loss; that is, that he shall not be fully indemnified in case of loss, but to a certain extent he shall be a co-insurer with the insurance company. The co-insurance clause is a matter of stipulation. A who has prop-

erty worth \$10,000 insures it for \$6,000. In consideration of a reduced premium A undertakes that he will be a co-insurer with the insurance company up to 40 per cent of the value of the property, he having obtained from the insurance company insurance up to 60 per cent of the value only. He sustains a loss amounting to \$4,000. The insurance company will pay 60 per cent, that is, \$2,400, and the insured will pay 40 per cent, that is \$1,600.

In marine insurance where the assured insures a thing for less than its insurable value or for less than the policy valuation, he is his own insurer in respect of the uninsured balance. If a ship valued at \$100,000 is insured for \$10,000 only by ten underwriters, who each subscribe for \$1,000, the owner of the ship is his own insurer for \$90,000, and in case of damage to the ship by sea perils to the extent of \$10,000, the liability of each underwriter is only \$100; that is, as the loss is one-tenth of the value, the insured pays nine-tenths of the loss, and the ten underwriters assume the remaining one-tenth of the loss, shared in equal proportions.¹ Such a result in the case of fire insurance would be secured only by stipulation to that effect.

Where there is a partial loss of an object insured by several insurances for an amount not exceeding its full value, the insurers are liable rateably in proportion to the sums which they have respectively insured. Under the English law, where an insured is over-insured by double insurance, the general rule is that each insurer is bound as between himself and the other insurers to contribute rateably to the loss in proportion to the amount for which the insurer is liable under the contract. In Quebec, if there are several contracts of insurance ef-

¹ Lavery, "Insurance Law of Canada," p. 627-628.

feeted without fraud upon the same object and against the same risks, and the first contract insures the full value of the object, it alone can be enforced. The subsequent insurers are free from liability and must return the premium, reserving one-half per cent. This rule is, of course, subject to the special agreements and conditions that may be contained in the policy.

176. *Valued policies*.—A valued policy has been defined as one in which the value of the property is fixed and agreed upon by the parties to the contract, and this valuation is binding on the parties, if there is no fraud. But even under this policy there must be proof of insurable interest. Such a policy is generally distinguished by such words as "value fixed," "of the agreed value of," "worth," or "value at—without further account," used in connection with the amount stated.

177. *Open policies*.—In the case of an open policy, the value of the subject assured is not fixed or agreed upon in the policy. In case of loss, it is to be estimated. A certain sum may be written on the face of the policy, but it is not binding as being the value of the property; it is rather the limit of recovery in case of loss. It is open to the insurer to prove that the amount mentioned in the policy is in excess of the value of the property.

178. *Blanket policies and specific policies*.—Where a policy insures a building with its machinery and stock as a whole and does not distribute the amount between the various items, the policy is known as a blanket or compound policy. If it is distributed and a fixed amount given to each item, the policy may cover the whole property, but it is said to be specific.

179. *Floating policies*.—A wholesale dry goods house, for example, may have a stock which is changing from day to day and from week to week. It wishes to cover

what may be in the warehouse generally, and so a floating policy is issued to cover property or value which cannot be covered by specific insurance.

180. *Subrogation*.—Where an insurer pays the loss, he is entitled to be subrogated or substituted in the rights and remedies which the insured person has against third persons who may have caused him the loss, and against whom, he would have a direct right of action. Insurance is not intended as a means of gain, but as a means of making good a loss to the insured. It would be unfair therefore that the insured should be able to collect the amount of his loss from the insurer, and at the same time be entitled to collect from the person who caused the loss, and to keep the same amount. Hence the insurer is entitled to be subrogated in the rights of the insured, and to pursue the person responsible for the loss or damage. It does not matter that the liability of the third party arises from a contract, or is the result of negligence or of some wrongful act. If the insured, after being paid by the insurer the amount of his loss, recovers from the person causing him the loss, any indemnity over and above the actual loss, the insurer is entitled to recover such surplus from the insured. Under the English law, this right of subrogation comes into existence with the payment of the loss by the insurer. In Quebec apparently there must be a formal transfer of the rights of the insured concurrently with the payment of the insurance money, if the subrogation is conventional, that is, by contract. But in the absence of such a conventional subrogation, if the insurer brings action against the person causing the loss and alleges that damage has been caused by his fault, whether by positive act, imprudence, neglect or want of skill, the insurer may collect. After the loss has occurred, the insured cannot gratuitously release his claim

against the third party causing the loss. If the insurance does not cover the loss, and the insured has sued the third party at fault, he can settle or compromise his case without obtaining the consent of the insurer.

It has been held that where an insured brings action against the person at fault for the full amount of his loss, which is in excess of his insurance on property burned, for example, he is not bound to credit on the judgment the amount for which he was insured, when he has not been paid by the insurance company. It has also been held that the third person causing the loss, if sued by an insured who has been paid by the insurer, cannot set up the payment in satisfaction of the damage caused, for the reason that after all the insured is accountable to the insurer for the sum recovered.

The rule as to subrogation does not apply in the case of life insurance or of accident insurance of the person.

181. *Insurable interest: in general.*—When we say that a person must have an insurable interest, we mean that, in case of loss or destruction of the property insured, he must suffer a direct and immediate loss. It must be noted that it is the risk, or the possible loss or liability which may be suffered by the happening of the event insured against, that is really insured.

A contract of insurance is intended to indemnify against liability as well as against loss, and the courts will lean toward finding, if possible, that there is an insurable interest. The insurable interest must exist at the time that the insurance is placed, and also at the time of the loss. It is not sufficient that the insurable interest has been acquired since the issue of the policy. It does not affect the validity of the policy that the insurable interest has been temporarily suspended, as, for example, where the object insured has been temporarily

alienated without the consent of the insurer. Generally the precise nature of the interest need not be specified, if the subject matter is rightly described. In Quebec, however, in fire policies, the nature of the interest must be specified.

A person with a limited interest may insure, but as a policy of fire insurance is essentially a contract of indemnity, the insured could not hold out of the insurance moneys more than the amount of his actual loss. Any surplus remains in his hands as trustee for any remaining interests, unless he uses the whole money to put the property back into the condition in which it was when he insured it. Thus if a creditor, having a claim for five hundred dollars against a debtor, insures his stock for one thousand dollars and the stock is wiped out by fire, the creditor could collect the entire loss, but after deducting the amount of his claim would be accountable to the debtor for the balance.

182. *Insurable interest in life insurance.*—The insured must have an insurable interest in the life in which insurance is vested. He has an insurable interest in the life of himself; of any person upon whom he depends wholly or in part for support or education; of any person under a legal obligation to him for the payment of money or respecting property or services which death or illness might affect or prevent the performance of; of any person upon whose life any estate or interest vested in the insured depends. A partner has an insurable interest in the life of his co-partner, when, for instance, the latter at the time when the policy issues is in default of the payment of his promised proportion of the capital of the firm. An executor, it has been held, has sufficient interest to insure in his own name the life of a person who granted an annuity to his testator, and which the tes-

tator bequeathed to persons not parties to the insurance.

Where a creditor has an insurable interest in the life of his debtor, under the decisions the interest of the creditor persists though his claim may be secured. It has been held that though the debtor may have paid his debt, the creditor might still recover on a policy issued by him previously, if at the time of its issue there was a bona fide and adequate insurable interest, and if there is no contrary provision in the policy. In Quebec the rule would probably be different. But where the debtor himself issues a policy on his own life in favor of a creditor, and he pays the debt and survives the payment, the benefit of the policy reverts to him. It has been held that if the beneficiary or an heir murders the life upon which a policy has been issued, neither of them, nor anyone claiming through them, can recover on the policy, but heirs can recover who have in no way been in collusion with those who murder the life, and who come into court with clean hands.

The interest must not be merely speculative or contingent. Such a policy would be a mere wager. Thus if A induces B, who has no means, and who, to the knowledge of A, is in poor health and has a poor constitution, to take an endowment policy and to make A the beneficiary thereof, B's interest is so speculative and is so contingent upon A surviving the whole endowment period, that his interest is not insurable. If B dies before the end of the endowment period, A, who had no real interest in the life of B, though he may have paid the premium, cannot recover. He could not even recover back the premium.

The basis of insurable interest in a life is that the interest must be appreciable in money. It is really the in-

surable interest that is insured, and that insurable interest must be more than a mere expectation of benefit or advantage, though the expectancy may amount to a moral certainty. Such an interest is not a vested interest, and there must be a vested interest in the life. It has been held that a moral certainty of succeeding to property will not give an insurable interest. There must be an interest in the preservation of the thing or the continuance of the life, in order that the thing or the life may be insured. The loss must be direct and immediate. This distinction may be made clear perhaps by repeating, for example, that an insured has an insurable interest in the life of some person upon whom he depends wholly or in part for support or education.

A father may insure the lives of his children, under certain restrictions. At common law, however, while a son may have an insurable interest in the life of a father who supports him, he has no such interest in the life of a father who depends on him for support. A sister has an insurable interest in the life of a brother who supports her. Where an employee makes a contract with his employers for a period of years, he is said to have an insurable interest in the life of his employers. The amount of his insurable interest will be roughly estimated as the amount payable to him for the balance of his term of employment.

Generally speaking, a husband who depends upon his wife for support, has an insurable interest, but under the English law the husband is generally not supposed to have an insurable interest in his wife's life. On the other hand, the wife is presumed to have an insurable interest in the life of her husband. The wife can cover her life in favor of her husband, though in the Province of Quebec she could not do so without her husband's

authorization in writing. If husband and wife are divorced, the rule, under the English law at least, is that a policy taken out by the wife on the husband's life would be valid after the divorce, if it was valid when entered into. But as the wife, after the divorce, is not legally a wife, she loses her right to the benefit of a policy of insurance which the husband may have effected upon his life in her favor, prior to the divorce.

183. *In fire and marine insurance.*—In life insurance the insurable interest, while it must exist at the time the policy is entered into, may cease thereafter and the policy remain in force and binding. The interest need not continue to the date of the death of the life insured. In fire and marine insurance, the insurable interest must exist at the time the insurance was effected and at the time of the loss, as we have already said; otherwise the general remarks made under the previous heading, in so far as they apply, may be referred to.

184. *Assignment of insurance contracts.*—Where a property which is insured is sold, the transfer does not transfer the contract of insurance to the purchaser. We are speaking more particularly of fire insurance. A fire policy is a purely personal contract, as has already been said, and does not run with the land, nor does it run with personal property as opposed to real property. In order that the purchaser shall become the transferee of the policy, the consent of the insurer must be obtained. Otherwise the insurance is rendered void by the transfer of interest in the object insured from the insured to a third person. This rule would not apply in the case of rights acquired by succession, or where a transfer of interest takes place by one to another of several partners or owners of undivided property who are jointly insured. In all such cases the policy should be presented to the

insurer, and the consent of the insurer to the transfer be endorsed upon it. It has been held that an assignment of the policy and all claims under it may be made after a total loss has occurred. A new contract arises between the insurer and the transferee when an assured assigns the whole of his interest in the insured property, provided that the assent of the insurer has been secured; but if the insured merely assigns the policy to a mortgagee as collateral security, with the consent of the insurer, a new contract is not created.

The rule is different in the case of life insurance. A person who has bona fide insured his life may assign or make the policy payable to anyone at any time, provided that the policy does not contain a clause requiring the consent of the insurer, or a clause, for instance, requiring that an insurable interest existing at the time of the assignment must be shown, or some other condition. Where, however, a beneficiary is named in the policy, the right of the beneficiary is vested, and the assured cannot assign or transfer that right without the consent of the beneficiary. It has been laid down as a general rule that the policy, and the money to become due under it, belong from the moment of issue of the policy to the beneficiary named, and the insured cannot by any act of his, or by will or deed, transfer the interest of the beneficiary to anyone else. An irrevocable trust is created.¹ If the beneficiary is not named, or it is not clear who the beneficiary is, the money arising from the policy would in general fall into the estate of the insured. If the beneficiary dies, the assured may, as a general rule, nominate a new beneficiary. A person must not assign his policy when he is insolvent; if he is solvent, he may do so freely. If a debtor causes a policy to be issued in

¹ Bliss, "Life Insurance," 2nd Ed., p. 517-518.

favor of his wife and children, the policy cannot be annulled as being in fraud of creditors; they would be entitled to recover out of the proceeds of the policy only the amount equal to the premiums paid in fraud of their rights. This is the rule in Quebec, and a similar rule exists in Ontario.

185. *Construction of the policy.*—The formal insurance contract is as a rule set out in a policy, which in more or less complex sections declares the rights and liabilities of the parties and the conditions of the contract. Special conditions not forming part of the standard policy may be attached to it by means of a slip or rider, and will be read into the contract as though they had been incorporated in their proper place. Where a printed clause in the policy is apparently repugnant to a special clause in the slip or rider, the latter will govern. Where fire or marine insurance is applied for, frequently the policy cannot be immediately issued, and in order that the assured may be protected against loss meanwhile, a covering note is issued, covering the applicant, while full information is being obtained concerning the risk. When this has been done, an interim receipt or the actual policy may be issued. The covering note will generally be subject to the conditions of the company's policy, and, if the policy is issued, will be cancelled. If the policy is not issued, the assured will have to pay a premium based on a short term scale for the period covered. The covering note is of course a contract of insurance, though it is not a policy. A covering note may go further, may acknowledge receipt of the premium, and may contain the undertaking of the company that the applicant is insured for the full time mentioned in his application, and may contain also an undertaking of the company to issue the policy within a certain delay. These covering

notes are frequently called interim receipts: they are rather forms of interim receipts.

Laverty, on "Insurance," says:

The more general form of interim receipt, interim contract or interim guarantee, according to the various titles adopted, in use in this country, acknowledges receipt of the premium and generally states, but not always, the period the insurance is sought for, and holds the insured covered for thirty days, subject to the conditions of the company's printed policy or ordinary fire policy, or policy to be issued, and sometimes the conditions are printed on the back of the receipt. The company has the right to decline the application during the currency of the receipt, and upon such refusal of the application the company's liability shall cease on notification to the applicant. Provision is also frequently made for the return of unearned premium, in the event of refusal to entertain the application.¹

186. *Misrepresentation or concealment.*—The assured must represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium. The insured is not obliged to represent facts known to the insurer, or which from their public character and notoriety the insurer is presumed to know. He is not obliged to declare facts covered by warranty, express or implied, except in answer to inquiries made by the insurer. The answers to inquiries must be substantially correct. Beyond this the insured is not entitled to assume that the assurer has knowledge.

It has been held, however, that the agent's knowledge is the knowledge of the company. The test that will be usually applied is whether the misrepresentation or concealment of a fact, either by error or design, is of a

¹ P. 39.

nature to diminish the appreciation of the risk or change the object of it. If the misrepresentation or concealment, either by error or design, is of such a nature that it is a cause of nullity, the contract may be annulled, although the loss has not in any degree arisen from the fact misrepresented or concealed. Fraudulent misrepresentation or concealment on the part of the insurer or of the insured is in all cases a cause of nullity in favor of the innocent party. Generally speaking, the same rules hold good in marine, fire or life insurance, as indeed in all kinds of insurance.

The utmost good faith is a positive necessity. Often an agent, upon securing a risk, will fill out the application. Hence policies frequently provide that in such case the agent will be the agent of the applicant, and not of the company; otherwise if the agent, through error or for any other reason, made statements in the proposal or application which were not true, the company might be held to be at fault. It has been held that where an insurance company, without personally inspecting the buildings to be insured, issued a policy of fire insurance, in which the buildings were over-valued, having trusted entirely to the statements of the owner, the company will be liable, unless there is strong evidence of fraud, value being very largely a matter of opinion.

What must be disclosed is not always easy to determine. The questions asked by the company will largely determine the answers. Generally the questions will cover all material facts which it is in the interests of the insurer to know; but apart from the questions, the insured must act in good faith, and if he knows of some weak point in the risk not touched upon in the questions, he should disclose it. If the insurance is effected without asking for any representations from the applicant,

the assurer takes the chance that the risk is normal; but the assumption of that risk by the assurer does not relieve the assured from declaring some condition or some illness which, if it were declared, would cause the insurer to refuse the risk.

The insurer may be estopped from saying that the applicant made false representations. Thus where an agent fills in the answers and forwards the application to the head office, the manager should carefully examine the questions and the answers. If he does not do so, and there is an apparent mis-statement or error of the agent in filling in the answers, the company will not be heard to say that the applicant has made a false representation. So also it has been held that where the questions are not sufficient, and it is clear upon the face of the question form that such is the case, and the policy is issued without the matter being rectified, the company will not be heard to say that the assured has concealed certain facts. An applicant is asked, "Have you ever had any property destroyed by fire?" A false answer to this question has been held material to the risk, if the untruth related to previous fires on the same property sought to be again covered by insurance. It has been held also, that if the answer related to other property, it was not material.

In a Quebec case, where this distinction was not followed, the court laid down that an inquiry of this kind sought information as to the moral rather than the physical aspect of the risk, in that companies frequently refuse to insure a person who has had several fires. The court, therefore, held that the answer was material, and that the policy was void.

187. *Warranties*.—The representation of the applicant as to facts bearing upon the risk are warranties.

In other words, he warrants that such and such facts are true, and upon these facts the insurer, after considering the risk, issues or refuses the policy. It is not meant that every statement upon the face of a policy is a warranty. To be a warranty the statement must relate to the risk. The facts must be not incidentally expressed, or expressed by way of recital or identification of the subject insured. A warranty, it has been stated, cannot be created by construction. Warranties and conditions are a part of the contract, and if affirmative, must be true, and if promissory, must be complied with, otherwise the contract may be annulled, notwithstanding the good faith of the insured.

The warranty may be express or implied. An express warranty is a stipulation or condition expressed in the policy (the application forms part of the policy), or so referred to in it as to make part of the policy. An implied warranty is a matter so clearly material to the risk that the insured is by law implied to have given a warranty in respect thereof. Thus an important implied warranty is that an object which is to be insured, for instance, against fire, is described in such a way that it will be clear that it falls under a particular class of article, contemplated by the policy. Similarly, it is an implied warranty on the part of an applicant for life insurance, that he is in good health, and that he is not aware of any illness or disease which, if he disclosed it, would cause the insurer to refuse the risk. A condition that the assured, in case of loss, or his heirs in case of his death, will give notice and furnish proof of loss within a certain specified delay is a warranty in the form of a promise. If this condition is not complied with, it has been frequently held that recovery cannot be had.

It has been laid down as a general principle that in

the absence of statutory enactment, or where there is no doubt that a warranty exists, the materiality of the warranty will not be considered. The truth alone of the warranty will be looked at. Where, however, the application shows that the answers given to the questions are true "so far as known," or "to the best of my knowledge and belief," the answers need be only reasonably fair and truthful to enable the insured to recover.

188. *Waiver*.—By waiver is meant a considered renunciation of a known right. Generally policies provide that their conditions cannot be waived by an agent, but must be waived only in writing by the company, through its duly authorized officers. Waiver will not be presumed. Hence it was held by the Privy Council, that where there was a condition in a policy that "the company shall not be liable until the premium has actually been paid," and the policy was actually delivered, and in the body of it there was a statement that the premium was acknowledged, there was no waiver of the non-liability clause.¹

Waiver will not be found from some isolated action; the actions of the insurer will be examined as a whole to determine his intention. Mere equivocal acts of the company will not constitute a waiver. Thus if the company carries a policy on its books, as though it were in existence, and in making its official reports mentions the amount, as the insured is ignorant of the entries and of the company's acts in this respect, they are not intended to influence his conduct. These acts do not constitute a waiver of forfeiture, provided by the policy, in case a premium note is not paid. It has also been held that where there was a forfeiture clause, in case of non-payment, an action by the company to collect a premium

¹ Equitable Fire & Accident Office vs. Ching Wo Hong, 1907, A. C., 96.

note is not a waiver; but if a company has insured a person against fire for four years, but reserved the right to cancel the contract within fifty days, with or without notice, and after the expiry of that period it demanded and received payment of a four months' note given by the insured, there may be a waiver of the right to cancel the contract.

Waiver will not be established where the insurer does some act which otherwise might amount to waiver, if the insurer did the act with notice or with full knowledge of the facts avoiding or forfeiting the insurance.¹ This is the general rule, subject to the equitable consideration of the courts, and in most of the provinces to statutory relieving enactments. Thus where a policy requires that proofs of loss in a certain form be filed within a certain period after loss, and within that time proofs of loss which are imperfect in form are filed with the company, which refuses payment and alleges as a reason grounds other than the imperfect proofs, the company will be estopped from setting up the lack of proper notice, as it could have notified the assured within the period stipulated to complete his proofs. And where proofs of loss had not been filed within the required time and the company wrote to the assured, requiring him to furnish his proofs; or where, the assured having filed imperfect proofs, the company required him to file additional proofs, there is authority for holding that the company has waived its right to assert any breach of a condition as to the furnishing of proofs of loss.

189. *Special rules of marine insurance.*—Marine insurance is the oldest branch of insurance law, upon which the later forms have been based, with the necessary modi-

¹ Phillips vs. Grand River Fire Mutual Ins. Co., 46 U. C. R., 334. Mere silence does not affect a waiver.

fications. It is a contract of indemnity involving right of subrogation. The main warranties are that the ship is seaworthy and properly documented; that the ship will not deviate voluntarily from the route specified, and that the purpose of the voyage is legal.

In fire insurance, as we have seen, the insurable interest must exist both when the policy issues and when the loss occurs. In life insurance the interest need exist only when the policy issues. In marine insurance it has been laid down by the Imperial Marine Insurance Act, and the principle is generally applicable, that the assured must be interested in the subject matter insured at the time of the loss, though he need not be interested when the insurance is effected; provided that where the subject matter is insured "lost or not lost," the insured may recover, although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss and the assurer was not. That is, a person having an interest, say, in the cargo of a vessel at sea, may insure his interest, and will be entitled to recover, if the ship, at the moment of the issue of the policy, is at the bottom of the sea. That is the meaning of the expression, "lost or not lost." He takes the risk that he may be paying the premium for nothing, in that the ship may be safe. The insurer takes the risk that the ship may be lost. Hence it would be unfair that the assured, having obtained secret information that the vessel had actually been lost, should insure his interest, lost or not lost.

A person who is part owner of a vessel may insure his share, as also that of the other owners, and need not disclose the fact under a policy issued to him insuring the vessel "for whom it may concern." It has been laid down that a person has an insurable interest, or is inter-

ested in a marine adventure, "when he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."¹

A marine loss may be partial or total, and may be a general average loss or a particular average loss. In case of a general average loss, all the parties must contribute to a loss suffered for the common benefit, and the obligation exists whether the parties are insured or not. Some of the parties may be insured, but this fact has no bearing on the adjustment of general average.

The recognized definition of general average is, that all loss which arises in consequence of an extraordinary sacrifice made or expense incurred for the preservation of a ship or cargo, comes within general average, and must be borne proportionately by all who are interested.² In such a case, the respective owners of the ship, the freight and the cargo must contribute. It will be a question of fact in every case whether the expense or loss incurred has been for the common benefit. Thus it has been held that where a ship, at a season of the year when such an occurrence might be expected, is frozen in a harbor and is pulled out by the aid of a tug, the cargo should not bear any of the expense.

Loss by jettison is a general average loss where the peril which makes it necessary is imminent and the preservation of the ship and cargo is involved, but jettison must be first made of things the least necessary, the most weighty, and of the least value.

¹ *Moore vs. Home Ins. Co.*, 14 L. C. J. 77 (Que.)

² Per Lawrence, J., in *Birkley vs. Presgrave*, 1 East at p. 228.

190. *Notice and proof of loss.*—Most policies provide that notice in case of fire or loss must be given the insurer immediately in writing, followed within the specified delay by satisfactory proof in writing of the nature and extent of the loss. If the words "immediate notice," or "notice forthwith" are used, reasonable diligence will be required. In certain of the provinces, equitable rules have been laid down that, for example, where by reason of necessity, accident or mistake, the conditions as to proof of loss have not been strictly complied with, or where proofs of loss submitted are incomplete, and the company does not notify the assured of the fact, no objections to the sufficiency of the notice or proof shall be allowed. Otherwise such requirements will be strictly construed. Where a policy requires notice of a fire loss within a reasonable time, a notice of loss on the twentieth day after the fire is not a compliance.

It has been held in a Quebec case that, though a policy required a notice in writing, and a verbal notice was given to an agent of the company, after which the company sent its expert adjuster to the scene of the fire with instructions to draw up a basis of settlement, the company had received sufficient notice. It has also been held that where a notice has been mailed, the ordinary presumption of delivery will operate, though, in fact, the notice has not been delivered through the mail. Ordinarily a man's contract is binding upon him, and where he undertakes and warrants that he will give notice or proof of loss within a certain time, he must do so, or suffer the consequences. If he cannot show accident, necessity or mistake, as a rule he will be debarred from giving notice or furnishing proofs after the delay mentioned. The conditions of the policy cannot be too strictly complied with in these respects.

PART III: NEGOTIABLE CONTRACTS

CHAPTER XVI

NEGOTIABLE INSTRUMENTS IN GENERAL

191. *Introductory.*—Bills, notes and checks are negotiable instruments—that is, they are instruments or contracts, the legal right to which is transferable from one person to another by delivery of the instrument itself. A check, for instance, is transferable by delivery when it is payable to bearer; by endorsement and delivery, when it is payable to order. Bills, notes and checks are, as the case may be, unconditional promises or orders by one person to another to pay money, at a given or ascertainable time. They are then not only a substitute for money, but evidences of indebtedness. Bonds are negotiable instruments; and these four, bills of exchange, promissory notes, checks and bonds, are classed together as the typical negotiable instruments.

Certain other instruments, though often so called, are not, in the fullest sense, negotiable. Among these are bills of lading, dock warrants, warehouse receipts, certificates of stock of a company. They are salable and can pass from hand to hand, and are thus quasi-negotiable, but they are not true negotiable instruments. They are documents of title.

Speaking of these quasi-negotiable instruments, the Honorable Mr. Justice Maclaren says:

In England warehouse receipts were not fully recognized as negotiable instruments, like bills of lading and other documents of title, until the Factors' Act, 1877. They are negoti-

able only in the lower or secondary sense of the this term in that they may be transferred by endorsement and delivery, or by delivery alone, and may thereby vest in the transferee the rights of the transferer. They are not negotiable in the higher sense, like bills of exchange and promissory notes, which by endorsement or delivery before maturity may vest in the bona fide holder for value not only the rights of the transferer, but the right to claim the full amount for which the instrument is drawn. If the receipt is in favor of a certain person or his order, it must be endorsed by him; if it is drawn in favor of the bearer or endorsed in blank, it is transferable by delivery alone. . . . The bill of lading is a very ancient document, and by the custom of merchants is negotiable, when made to bearer or order or to assigns.

192. *Negotiability*.—When a negotiable instrument is actually negotiated—i.e., transferred for value to a person without notice of any defect in it—the transferee has an absolute right to collect from the persons liable upon the instrument as maker, endorser or acceptor. But if A has bought a horse from B and has contracted to pay B one hundred dollars, B can assign or transfer his claim against A to C. If C sues A, the latter can raise against him any defence that he might have raised against B—e.g., that he had been defrauded, that the money was to have been paid only after he had used the horse for a month, and so on. In effect, C has no better rights against A than B. He has bought B's rights for what they are worth.

193. *Presumption of consideration*.—A negotiable instrument is always presumed to have been given or negotiated for value. And where value has, at any time, been given for a bill, the holder is deemed to be a holder for value, and entitled to collect as against any previous acceptor or any parties who became parties to the bill.

before value was given. In the case of an ordinary contract, the debtor may show by way of defence that there was no valid consideration to support the contract upon which it is attempted to hold him. In other words, if A gives B a writing—"On demand I promise to pay to B \$25. A"—the debt so incurred by A is non-negotiable, because the words "or order" are not added after "to pay to B." B, if he sues A, must prove consideration received by A. But if A gives B a note—"Thirty days after date I promise to pay \$25 to the order of B"—and B discounts the note at a bank, or endorses it and hands it to C in payment of a shipment of goods, the bank, or C, as the case may be, can collect from A. A can raise no defence. If B had held the note until after maturity and had then sued A, B would not have had to prove consideration received by A. The burden of alleging and proving lack of consideration would be on A.

194. *Days of grace*.—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.¹

195. *Bills of Exchange Act*.—Our present Bills of Exchange Act is a revision or consolidation of the Act of 1890 and its amendments. Before that time the laws governing bills and notes varied in the different provinces. In Quebec a mixture of French and English commercial law was enforced. In the other provinces, the English law as it existed when introduced into the particular province and as amended by local statute was

¹ Provided that whenever the last day of grace falls on a legal holiday or non-judicial day in the province where the bill is payable, then, the day next following, not being a legal holiday or non-judicial day in such province, shall be the last day of grace.

applied. There were anomalies and contradictions, and it became evident that in a matter of such vital importance to our commerce there should be a uniform law for the whole of Canada. The English law respecting bills and notes had been codified in 1882, and our Act of 1890 was largely copied therefrom.

In the United States, where formerly there existed conflicts between the laws of the different states governing the subject of bills and notes, a Negotiable Instrument Law has been adopted in most states. This law is in the main in agreement with the English and Canadian acts.

196. *Promissory notes*.—Too careful attention cannot be given to the definitions of the various negotiable instruments.

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.

A note need not be in any particular form of words, so long as the conditions just mentioned as being necessary to its existence are present. The promise must be unconditional, hence a document reading, "I promise to pay, on demand, to A. B. \$50, if I can sell my B. C. Company stock," is not a valid note. Similarly, as it contained a condition, the following instrument was declared invalid—"Four months after date I promise to pay to W. H. or order, \$1,264, value received. This note to be held as collateral security."

A "sum certain in money" must be promised. Hence a promise to pay out of a particular fund is not a promissory note. The fund may prove inadequate or may never exist. Hence a promise to pay out of the net

proceeds of the sale of a cargo is not a promissory note, because it is not negotiable. Yet the instrument will serve as an evidence of the debt and as an assignment of the sum mentioned.

The note is to be "signed by the maker"—which, being interpreted, means that the maker may sign, or someone, under his authority, may sign for him. A corporation signs through its authorized officers. Only the person who signs is liable; and so a person whose signature is forged is not bound. But where an agent signs for a principal he must be careful to sign so as to avoid personal liability. He must not sign "John Smith, agent for J. A. McDonald," but J. A. McDonald, Per John Smith, or the Estate Company, Limited, Per John Smith, President.

Thus where at the left side of a note the words, "The Estate Company, Limited," were printed, and the note was signed "John Smith, President," "James Thompson, Treasurer," Smith and Thompson were held personally liable. To bind the company and not the officers the note should have been signed:

The Estate Company, Limited,
Countersigned by Per John Smith, President.
James Thompson
As Treasurer.

But the mere signature is not enough; to become a note the instrument must be delivered; or, if payable to the maker himself, must be endorsed by him. A note is payable on demand which is expressed to be so payable, or in which no time for payment is expressed. Generally the place at which the note is payable is mentioned, as also whether or not the note is to bear interest. If interest is stipulated, it will run from the date of the note; if not, then only from its maturity. If the rate is

not fixed, only the legal rate of five per cent can be charged.

197. *Bills of exchange.*—A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed 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.

The remarks just made concerning promissory notes are generally applicable to bills of exchange. A bill of exchange is an order, and is in its nature the demand of a right, not the mere asking of a favor, and therefore a supplication made or authority given to pay an amount is not a bill.¹ The person addressed is "required" to pay the sum named. But mere terms of courtesy will not render the bill invalid. Hence it has been held that an order, as follows, "Mr. Nelson will much oblige Mr. Webb by paying J. Ruff, or order, twenty guineas on his account," was held a good bill; as also the following, "Please let the bearer have \$50. I will arrange it with you this forenoon. Yours truly." But the following were held to be bad: "Please to send \$10 by bearer, as I am so ill I cannot wait upon you"; or, "To E. & S.—We hereby authorize you to pay on our account to the order of G., \$600. de W. & S." All of these examples are informal, and it is even difficult often to reconcile the judgments declaring similar informal orders good or bad. It is wise, of course, to avoid informality in business matters, and to follow closely the accepted form of contract. A correct and simple form of bill of exchange may be here set out:

¹ Daniel, Sec. 35.

\$500

MONTREAL, QUE., September 10, 1913.

On demand, pay to the order of A. MacNaughton
and Company, Five Hundred.....Dollars,
value received, and charge to the account of

BALFOUR & COMPANY.

To W. L. BOOKER,
Toronto, Ont.

A bill of exchange is commonly called a draft, and after it has been accepted by the person to whom it is addressed, an acceptance. In the above model bill of exchange or draft, Balfour and Company is the *drawer*, because it draws on W. L. Booker. A. MacNaughton and Company, Limited, in whose favor the draft is made, is called the *payee*, for payment is to be made to it, or to anyone to whom it may negotiate the bill. Booker, against whom the draft is drawn, is called the *drawee*. If Booker accepts the draft, he writes across the draft the word "Accepted," and signs the date, and frequently the bank at which it is payable, and his name.

The instrument must be in writing, and *writing* "includes words printed, painted, engraved, lithographed, or otherwise traced or copied."¹ The writing may be in pencil or in ink. If there is a conflict between the printed and the written words, those written will prevail.

As testimony (that is, parol testimony) cannot in any case be received to contradict or vary the terms of a valid written instrument, the contract of the parties to notes or bills, as it appears upon the face of the instrument, cannot be varied by parol evidence. Hence in an action upon a bill or note, the defendant will not be allowed to prove that, at the making of the instrument, it was verbally agreed that it should be renewed or not paid at

¹ Interpretation Act, R. S. C. Ch. 1, S. 34 (31).

maturity; or that the instrument expressed to be payable at a certain time should be payable only in a given event; or that it should be payable in instalments, or in any other manner than as expressed in the instrument. But it has been held that parol evidence is admissible to show that the date of the bill or note is not the true date, and to show the true date; or that the delivery of the instrument is incomplete and conditional only, so that the contract is not operative; or that the contract has been discharged by payment, release or otherwise.

The definition requires that the bill shall be addressed by one person to another. "Person" includes any body corporate, or its representatives, and the heirs, executors, administrators or other legal representatives of such person. The drawee need not be named, if he is described with reasonable certainty so that the bill can be duly presented.

The instrument is not a bill of exchange until it is signed by the drawer, though he may sign a blank paper which is later filled up, or he may sign it after it has been accepted.

A bill is payable on demand, (a) which is expressed to be payable on demand or on presentation, or (b) in which no time for payment is expressed. A bill is payable at a determinable future time when it is expressed to be payable (a) at sight, or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain. Thus, "six weeks after the death of my father, pay, etc."; "one year after my death"; "on demand after my decease." Similarly, a promissory note, made payable upon the coming of age of a minor, naming the date, is a good note.

Bills of exchange are either *inland* bills or *foreign* bills. An inland bill is one 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. Hence the following are inland bills¹:

- (a) A bill drawn in Canada upon some person resident there and payable in Canada.
- (b) A bill drawn in Canada upon some person abroad, but payable in Canada.
- (c) A bill drawn in Canada upon some person resident there, but payable abroad.
- (d) A bill which on its face purports to come within any of the foregoing classes, but which was actually drawn abroad, though dated in Canada.

All other bills are foreign bills. The distinction may be of importance, because a foreign bill must, in Canada, be always protested if dishonored by non-acceptance or non-payment. An inland bill, except in the Province of Quebec, need not be protested. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.² In the United States, bills drawn in one state and payable in another are foreign bills.

198. *Bills in a set*.—Bills in a set were devised to overcome the delay and uncertainty common enough before the day of trains and steamships, when mails were carried in sailing ships. If the ship was lost, a long delay, perhaps of months, might ensue before the loss could be verified and a new bill of exchange dispatched. So it became the practice to issue bills in a set of three or four parts. After the first of exchange is mailed, a second of exchange may be forwarded by the next mail.

¹ Maclaren, "Bills and Notes," 1909, p. 84.

² Bills of Exchange Act, Sect. 25 (3).

If the first has been lost, the second may be used. If the first arrives and is paid, the second is returned. Where each part is numbered and contains a reference to the other parts, the whole of the parts constitutes one bill. Each bill of the set contains a condition that it shall be payable only if all the other parts remain unpaid. The following is an example of a "First of Exchange":

MONTREAL, Sept. 10, 1913.

Exchange for £200. Stg.

At sight of this First of Exchange (Second and Third unpaid) pay to the order of A. B. & Co., two hundred pounds sterling. Value received.

To the Bank of Montreal,
London, England.

B. C.

199. *Checks*.—A check is a bill of exchange drawn on a bank, payable on demand. Hence it is an unconditional order in writing addressed to a bank by the person drawing or signing it, requiring the bank to pay on demand a sum certain in money to, or to the order of, a specified person, or to bearer.¹

If the drawee of a check is a bank, it should not be addressed to the cashier, manager or agent of the bank, but to the bank itself. Otherwise the bank might be held not liable upon it if accepted or certified. As a check is supposed to be payable on demand, in the absence of other directions, the words "on demand" need not be on the check. It is not invalid if not dated, or if antedated or post-dated, or if dated on a Sunday or other non-juridical day. Nor is it the less valid if the place where it is drawn is not mentioned. When a person gives a post-dated check, he impliedly undertakes

¹ See the definition of a bill of exchange.

that on the day mentioned he will have funds in the drawee bank sufficient to pay the check. But if he obtains goods by giving a check on a bank where he has no account, and does not intend to have an account, he is guilty of the crime of obtaining money by false pretence, and, if convicted, may be sentenced to three years' imprisonment.

As checks are bills of exchange drawn on a bank, they are subject to the same general rules as demand bills. A bill of exchange must be presented for payment at the time fixed for payment—on demand, or at sight, or so many days after sight—or within a reasonable delay thereafter, or the drawer and the endorsers are wholly discharged. In determining what is a reasonable delay, the act says, 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. But failure to present a check within a reasonable time discharges the drawer only to the extent to which he actually suffers damage by the delay. A check should be presented for payment, where the holder and the bank are in the same place, before the banks close on the next business day following the day of its issue. If they are in different places, the check should be deposited for collection by the day after its receipt.

The act is careful to explain what is meant by the discharge of the drawer to the extent of the actual damage suffered. If the drawer handed B a check for one hundred dollars on a bank where he had funds sufficient to pay, but B neglects to present the check for three months, and meanwhile the bank fails and pays ten cents on the dollar, the drawer would be discharged to the extent of ninety dollars. Of course if B could show that he used diligence and that the delay was not unreasonable,

he would not lose his recourse against the drawer. But it has been held that where it was understood that a bank was likely to suspend payment, a delay of one day in presenting a check was unreasonable. Delay in making presentment for payment of a bill of exchange is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. And this applies as well to checks. If the holder presents the check for acceptance, and has it accepted or certified without taking payment the maker and endorsers are discharged, and if the bank fails before the check is paid, the holder has no other recourse.

200. *Acceptance or certifying of checks.*—The duty and authority of a bank to pay a check drawn on it by its customer are terminated by countermand of payment or by notice of the customer's death. Otherwise, when a bank has funds of the drawer sufficient to pay a check, it is bound to pay it or be liable in damages: the holder may be caused damage and inconvenience; the drawer's business reputation may be impaired. But after the holder of a check has had it certified or accepted, the drawer can no longer stop payment of it. By getting the check certified or marked, the holder provides against any possibility of the drawer stopping payment or withdrawing from his account enough money to make payment of the check impossible. Upon acceptance, the bank becomes liable to the holder: it virtually sets aside, in its books, the amount of the check out of the drawer's account, and the accepted check in the hands of the holder is the equivalent of a deposit receipt payable to the holder. The drawer and any en-

dorser are discharged, because the holder has a new debtor, the bank. He accepts the promise of the bank to pay, instead of that of the drawer, and not in addition to it.

A distinction is made where the drawer before issuing a check has it certified. Maclaren says that in this case the bank is in the position of an ordinary acceptor, its credit being added to that of the drawer; whereas, if the holder has the check certified, the bank becomes the sole debtor. And where the drawer has had his check certified, but does not issue it, or where he later becomes the holder, the certificate may be cancelled and the entry reversed, at his request, or by simply depositing the check to his account.

201. *To whom payable.*—Negotiable instruments, from their nature, must be so payable that they are negotiable. They must, therefore, be either payable to bearer and thus pass by delivery from hand to hand, or be payable to the order of some one who by endorsement and delivery negotiates them. Where the payee of a negotiable instrument is a fictitious or non-existent person, it is payable to bearer. Fictitious names in frequent use are "cash," "expense account," "labor." A bill payable to "John Jones or bearer," is a bill payable to bearer. If the bill is payable to order, the payee must be a specified person, but it is not payable to order if it contains words prohibiting transfer or indicating an intention that it should not be transferable. By "specified person" is meant that he should be so indicated as to be clearly identified. Thus the payee may be "John Smith," or "the executors of the Estate A.," or the "Secretary of the Province of Quebec." The payee may be the same person as the maker or drawer, but the instrument is not issued until such maker or drawer has en-

dorsed and delivered it. If the name of the payee is wrongly spelled, or where he is described by his office, he may be identified by parol evidence; but where the payee is not named or is not even described, parol evidence is inadmissible to identify him. If the name of a payee or endorsee is wrongly spelled, he may endorse in the same way and add his proper signature, or may endorse by his own proper signature. 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. If a payee endorses in blank, that is, merely signs his name without adding words indicating that he endorses to a particular endorsee, the instrument thereby becomes at once payable to bearer. If the payee's name is left in blank, a legal holder of the bill may fill the blank with any name he chooses.

202. *Certainty of drawee.*—The drawee of a bill of exchange must be clearly indicated. An instrument regular in form, except that it is not addressed to any drawee, is not a bill of exchange. As in the case of the payee, however, the drawee need not be named, but may be described with such certainty that the bill can be presented to the person intended. Thus, "To our agent in London" is sufficient, but "To....., London, England," is not. Where in a bill the 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 option, either as a bill of exchange or as a promissory note.

203. *Blanks.*—The general rule is that, *prima facie*, a person in possession of an instrument which in some particular is incomplete, has authority to complete it by

filling the blanks. We have already seen that the legal holder of an instrument from which the payee's name has been omitted may insert a payee. Similarly, where a bill expressed to be payable at a fixed 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 the true date of issue or acceptance. But if the holder, in good faith, inserts a wrong date, or in any case if a wrong date is inserted, a subsequent holder in due course is not prejudiced.¹ He is entitled to take the bill as he finds it. Or 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 *prima 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.

But where a signature was obtained ostensibly for a receipt, and a note was written over it, the signer was not liable.² In that case the signature was not delivered in order that it should be converted into a bill. But where a note was signed in blank, and was sent with instructions to be filled up for one hundred and fifteen dollars and it was filled up for four hundred and sixty-one dollars, the maker was held liable for the full amount to a holder in due course. On the other hand, where a blank acceptance was stolen from the signer's desk and filled up, he was not held liable to a holder in due course—he had not delivered the acceptance or in any way lent his signature or authority. And so, also,

¹ A holder in due course is one who has taken a bill, complete and regular on the face of it, provided he became the holder of it before it was overdue and without notice that it had previously been dishonored, and that he took it in good faith and for value, and that at the time it was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

² *Banque Jacques Cartier vs. Lescard*, 13 Que. L. R. 39 (1886).

where a bill is wanting in a material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. So where the maker of a note delivered it with the amount in blank, and it was fraudulently filled up for eight hundred and fifty-five dollars, he was held liable to an innocent endorsee. And where a bill is drawn payable toor order, any holder for value may write his own name in the blank and sue on the bill. Though an alteration is not a filling-up, it has been held that where a person endorsed as payee a note for five hundred dollars, on which there was a blank space to the left of the word "five," which the maker fraudulently filled up with the word "twenty," the endorser was liable for two thousand five hundred dollars to an innocent endorsee. The reason for this decision will now appear.

204. *Alteration of bill.*—The general rule is that where a bill or acceptance or a note is materially altered, without the assent of all parties liable thereon, it is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent endorsers. This rule makes clear the reason for the holding just above mentioned. A subsequent endorser is in the position of having lent his name and credit to the instrument. With these exceptions, the bill or note is void if materially altered, provided, however, that where there has been a material alteration which is not apparent, a holder in due course may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor.

The first part of our general rule makes a bill void if materially altered, with the exceptions mentioned. This was considered to be a hardship, and so the proviso was added to protect holders in due course who may

sue upon the bill according to its original tenor. That is, if A makes a note for five hundred dollars and B fraudulently raises the amount to two thousand five hundred dollars and negotiates it to C who is a holder in due course, C can sue A for the five hundred dollars according to the original tenor of the note.

Two notes were given for patent rights, and the maker endorsed on them the words "the within notes not to be sold." The payee cut from one note the portion containing these words, but without defacing it. On the other he erased the word "not." The plaintiff noticed the erasure when buying the notes, and gave much less than their value for them. It was held that he was not an innocent holder, and the notes were void.¹

A genuine check for six dollars was altered to one thousand dollars so skilfully as to escape detection, and deposited in another bank by the pretended payee, twenty-five dollars being paid him at the time, and eight hundred dollars more after collection from the drawee bank. At the end of the month the forgery was discovered. It was held that the drawee was entitled to recover from the collecting bank.²

¹ Swaisland vs. Davidson, 3 O. R. 320 (1882).

² Dominion Bank vs. Union Bank, 40 Can. S. C. R. 366 (1908).

CHAPTER XVII

TRANSFER AND NEGOTIATION

205. *Methods of transfer.*—In the preceding chapter we have examined the definitions of our subject, and have obtained some idea of the form and contents of bills, notes and checks, and thus of the inception of negotiable contracts. To be of use, they must circulate, and their circulation is governed by rules which must be now dealt with. They circulate by transfer or passing from hand to hand by assignment, by operation of law and by negotiation.

206. *By assignment.*—A check or a bill of exchange does not operate as an assignment of funds in the hands of the drawee available for payment. Hence the drawee of a bill of exchange who does not accept it is not liable on the instrument. Similarly, a check which is a bill of exchange on a banker, unless it is certified, gives the holder no right against the bank to claim or enforce payment. We have seen that an order which is not unconditional in that it calls for payment out of some particular fund, is not a bill of exchange, but may, under a provincial law, operate as an assignment of the amount in question to him in whose favor the instrument is drawn. A bill or a note may be transferred, as for example, to a purchaser or a pledgee, without being endorsed by the holder. The holder thus assigns it. The transfer gives the transferee such title as the transferrer had in the bill and no more, but the transferee can also

demand the endorsement of the transferrer. The transferee is in no better position and has not a better title than the transferrer. By receiving and giving value for it even before maturity, and before endorsement, he does not become a holder in due course. "He holds the bill subject to any defect of title in the transferrer, of which he becomes aware before the endorsement of the bill to him, and if it is not endorsed before maturity, it is subject to any defects of title that existed in the transferrer." A simple form of assignment takes place under the following circumstances: A holds a note of B for five hundred dollars. He entrusts it to C. Later he writes to C, telling him to keep the note in payment of his indebtedness to him (C). The note is thus assigned to C, who, nevertheless, can demand A's endorsement, not in order to hold A, but in order to sue B. The point to observe is that the note has not been transferred by *negotiation*.

207. *By operation of law.*—From the preceding paragraph it will be understood that negotiable instruments may be treated as personal property, transferable by voluntary assignment. They may also be transferred by operation of law. Where a testator holds a note, for instance, it passes to his executor to be dealt with according to the provincial law. Where a person dies without a will—intestate—bills or notes in his possession pass to the administrator of his personal estate, or to the heirs as in Quebec. Similarly, if a person becomes insolvent, and in his estate are found bills and notes, these pass to the assignee, curator or trustee to be collected or dealt with as he may be authorized by the provincial law. On the death of a joint payee or endorsee, the title vests immediately in the survivor. And where transfer by operation of law occurs, the

transferee takes the place of the transferrer, just as in the case of an assignment.

208. *By negotiation.*—As to what is a negotiable instrument, it may be well to cite the words of a great authority:

It may therefore be laid down as a safe rule, that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a bona fide transferee for value.¹

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word.²

Now a bill or note 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. A holder means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof. He need not be the legal owner. But if he is in possession and may legally recover from the person liable thereon, he is a holder, whether he be the owner or a holder for discount or a holder for collection.

As we have seen, a bill or note is negotiable when it is payable to bearer or to a particular person or to order. If payable to bearer, it is negotiated by delivery;³ a bill payable to order is negotiated by the endorsement of the holder completed by delivery. A bill is payable to

¹ See *Crouch vs. Credit Foncier*, L. R. 8 Q. B. (1873), at p. 381.

² *Ibid.*

³ The act defines a "bearer" as the person in possession of a bill or note which is payable to bearer. 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. He does not become the bearer of a bill or note which is transferred or assigned to him before it is endorsed to him.

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. If the holder of a bill or note payable to his order dies, his rights pass, as we have seen, to his executors or personal representatives, who in turn may negotiate the instrument by endorsement thereof. The same would be true of a bill made payable to a dead man by someone not aware of his death.

Where a bill or note is negotiable in its origin it continues to be negotiable, until it has been restrictively endorsed or has been discharged by payment or otherwise.¹ And a bill or a note negotiable in its origin is one which is made payable to bearer or to a particular person or to his order.

209. *Endorsement*.—By endorsement is meant in the act an endorsement completed by delivery. It is the act of writing one's name on a negotiable instrument, with the intent either of transferring the title thereto, or of giving extra security to the holder, or both. The word implies a writing of the name on the back of the bill, but it has been held to be immaterial where it is written. Where there are numerous endorsements and the back of the instrument is filled, frequently an *allonge* is added in the form of a piece of paper attached to the bill. To prevent fraud, the first endorsement on the allonge should be written so that it is begun on the bill itself and completed on the allonge. If the endorsement is given solely to add to the security, it is said to be for accommodation. It is clear from what has been said that the act of endorsement is to be distinguished

¹ Restrictive endorsement will be explained in the sections following.

from the act of negotiation which transfers the instrument.

210. *Requisites of endorsement.*—An endorsement, in order to operate as a negotiation, must be written on the bill itself (an allonge is deemed to form part of the bill) and be signed by the endorser; and must be an endorsement of the entire bill. By “written” is also meant, as we have already seen, words printed, painted, engraved, and so on. Banks often use a stamp accompanied by the signature of the officer using it. The endorsement must be signed by the endorser, i.e., by the endorser or by some one acting for him and under his authority. It must be an endorsement of the entire bill, i.e., it must not be a partial endorsement, and must follow the tenor of the instrument. So if A holds a bill reading, “Pay to the order of B the sum of five hundred dollars,” he cannot endorse it, “Pay to X two hundred and fifty dollars, pay to the order of M two hundred and fifty dollars. Otherwise the maker or drawer might have to defend two actions. But there may be a partial acceptance of a bill; and an endorsement of a bill so accepted, as being an endorsement of the entire bill as accepted, would be valid.¹

Where a person is under an obligation to endorse a bill in a representative capacity, he may endorse it in such terms as to negative personal liability. Thus, a tutor, or curator, or executor, where it becomes necessary to endorse bills or notes payable to the order of some one who died or lost his capacity before endorsing, may endorse in his capacity as such tutor, curator, executor or otherwise, in such a way as to negative personal liability. The endorser should, however, be careful to make it apparent for whom and on whose behalf

¹ Maclaren, p. 207.

he is endorsing, and he will be wise to add also the words "without recourse," or "without recourse to me personally."

Thus it was held by Lord Ellenborough, that a man who puts his name to a bill of exchange makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another; unless he says plainly, "I am the mere scribe," he becomes liable.¹ Similarly where a bill was drawn on "W. A. Geddes, Treas. W. I. C. Co.," and he accepted it, "W. A. Geddes, Treas. W. I. C. Co.," and affixed the company's seal, he was held personally liable. Had he accepted as follows: "W. I. C. Co. per W. A. Geddes, Treas.," the company, as was intended, would have been held liable. So a bill addressed "To the Sec. R. G. M. Co.," and accepted as follows: "The R. G. M. Co. per Jas. Glass, Sec.," was held not to be the acceptance of the secretary, and he was not personally liable. It has also been held that an agreement in writing to endorse a bill is not an endorsement. An endorsement may be to two or more persons jointly, or to a third person, who is to hold it merely as collateral security for a smaller debt due him from the endorser. The maker or drawer may thus pay part of the instrument; if the person receiving payment writes a receipt on the back of the instrument, subsequent holders thereof may sue the prior parties for the balance only.

Maclaren, speaking of the commercial usage in the matter of endorsement, says:

Use the Christian name or initials, as in the bill or special endorsement, if there be no mistake in the name as there given, and no mis-spelling, dropping all prefixes and suffixes, such as Mr., Mrs., Miss, Messrs., Hon., Esq., etc. Where, for

¹ Leadbitter vs. Farrow, 5 M. & S., p. 349.

the purpose of identification, an addition follows, such as Merchant, M.D., M.P., K.C., or the like, it may be well to add this to the signature. A bill to the order of Mrs. John Smith may be endorsed "Mary Smith, wife of John Smith"; or a bill "To the Estate of John Jones, or order," by "A. B., Executor or Administrator late John Jones"; a bill "To the order of the City Treas. Toronto," by "A. C., City Treas. Toronto"; a bill to the order of "The Canada Gas Co.," by "The Canada Gas Co., per E. F., Manager"; a bill "To the order of John Smith & Co.," if by a partner, should be endorsed simply "John Smith & Co.," and if by another person authorized by the firm, "John Smith & Co., per G. H., Atty.," or "Per pro. G. H." Signatures such as the following should be avoided, partly on the ground of ambiguity and partly on account of the danger of the agent or representative making himself personally liable: "A. B., agent for C. D.," "Per proc. E. F., G. H.," "J. K. for the L. M. Co.," "J. K., for L. M. & Co.," "J. K., for the Estate of L. M." ¹

Where there are two or more endorsements on a bill, any endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

211. *Kinds of endorsement.*—There are several kinds of endorsement which have been for many years recognized in law and in commercial practice, and it is well to understand the effect that a particular endorsement may have upon the rights and liabilities of the parties to a negotiable instrument.

We may take the following form of a promissory note and examine the possible endorsements thereof, and the result in each case.

¹ Maclaren, p. 208.

MONTREAL, Sept. 15, 1913.

\$5,000.

Three months after date I promise to pay to the order of John Wilson \$5,000 at the Merchants Bank of Canada, Montreal. Value received.

JOHN SMITH.

212. *Endorsements in blank.*—If Wilson endorses by simply signing his name, the instrument is said to be endorsed in blank, and becomes payable to bearer. It may be negotiated by delivery. If, however, Arthur Jones comes into possession of it by delivery to him, and endorses it as follows, "Pay to the order of W. Hardy," it cannot be again negotiated until Hardy endorses it. Hardy is presumed to have come into possession of the note before maturity. A holder may thus change an endorsement in blank to 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. If, however, he endorses the bill to himself, he must endorse it again in order to negotiate it.

213. *Special endorsements.*—As we have just seen, a special endorsement specifies the person to whom or to whose order the bill is to be payable. It is more than an endorsement in blank, because the endorser not only signs his name, but gives the direction, "Pay to A. B." or "Pay to the order of A. B."

A holder may strike out several blank endorsements; he cannot strike out a special endorsement in order to insert his own name.

214. *Qualified endorsements, or endorsements without recourse.*—If John Wilson endorses as follows, "Pay to Arthur Hardy, without recourse, John Wilson," or simply "Without recourse, John Wilson," his endorsement is said to be qualified. He may use the French expres-

sion, "*Sans recours*," or "At the endorsee's own risk." It is necessary for him to use words showing his intention to qualify his endorsement. His contract on the bill is that he negotiates the bill by endorsement, but he does so on condition that he will not be liable to a subsequent holder.

215. *Conditional endorsement*.—If John Wilson endorses as follows, "Pay to Arthur Hardy, unless before payment I give you notice to the contrary, John Wilson," the endorsement is conditional. A conditional endorsement does not hinder the negotiation of the note. True, the endorser has added a condition to his liability, but the act states that 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. Another example of a conditional endorsement—a condition precedent, the former example being a condition subsequent—would be the following, "Pay to A or order, if he lives until he is twenty-one," or "If he is alive when the bill becomes due." The reason for the rule is that it was deemed unfair that a person who accepted a note as endorsee, for example, should have thrust upon him the burden of finding out whether or not the condition had been fulfilled. He might pay, and, if the condition were not fulfilled, be compelled to pay a second time; or had he refused he might be protested. Maclaren points out that the rule does not entitle the holder to compel payment if the condition is not fulfilled; it merely has the effect of releasing the person who pays without knowing whether the condition is fulfilled.

216. *Restrictive endorsements*.—An endorsement is restrictive which contains terms making it restrictive; thus 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 is 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." By endorsing in any of these ways, John Wilson, the endorser, notifies the world that though he may part with the instrument itself for the purpose mentioned, he does not part with the title thereto. Whoever receives payment is not a holder in due course, but receives payment subject to the claims of John Wilson.

A restrictive endorsement makes the endorsee an agent. He may receive payment and may sue any party on the bill that his endorser could have sued, but he cannot sell or pledge the bill, and he cannot transfer his rights as endorsee unless the endorsement expressly authorizes him to do so. If the restrictive endorsement authorizes further transfer, subsequent endorsees take the note with the same rights and subject to the same liabilities as the first endorsee under the restrictive endorsement.

217. *Endorsement waiving conditions.*—John Wilson may endorse as follows, "Pay to Arthur Hardy, waiving protest, John Wilson." He may waive notice of dishonor or waive presentment. Thus the endorser may relieve the holder from his duties as such to present the note for payment, or to give notice of dishonor, and so on.

218. *Irregular and other endorsements.*—The Canadian Bankers' Association has laid down that a regular endorsement must be neither restrictive nor conditional, and must be so placed and worded as to show clearly that an endorsement is intended; and that an endorsement, other than a restrictive endorsement, which is not in ac-

cordance with this definition of a regular endorsement, or which is so placed or worded as to raise doubts as to whether it is intended as an endorsement, is an irregular endorsement.

We have already seen that where the name of a payee or endorsee is wrongly spelled, he may endorse by writing the name as mis-spelled and placing under it his correct name, or by simply endorsing his correct name. Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of a drawer to a holder in due course, and is said to be an endorser *pour aval*; that is, he has really entered into a contract of warranty for the drawer, by putting his signature at the foot of the bill; for the endorser by signing below the endorsement; or for the acceptor by signing below the acceptance.

It has been laid down that a signature placed upon an instrument, in such a way that it is doubtful in what capacity the person signing intended to sign, makes the person signing an endorser.

An endorsement to the cashier of a bank or corporation, while not regular, is deemed to be on its face to the bank or corporation of which the cashier is an officer, and the bank or corporation may negotiate the instrument with its own endorsement, or by having the cashier endorse it. And where one partner of an English firm did business for the firm in America in his individual name, the firm was held liable on endorsements by him. The signature of the name of the firm is equivalent to the signatures of all persons liable as partners in that firm.

219. *Transfer without endorsement.*—We have already seen, in an earlier section, that where a negotiable instrument drawn to order is transferred by assignment

or otherwise, without endorsement, the person to whom it is transferred may demand the endorsement of the transferor. Such a transfer is not a negotiation of the instrument, which does not become negotiable until it is endorsed. Without such endorsement the endorsee has merely such rights as the endorser had. 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. Thus where a bill was drawn and endorsed by a wife in her own name in the presence of her husband and under his direction, it was treated as the bill of the husband, and he was held liable.

A partnership note is signed "Evans, Harris & Co." by a member of the firm, and this signature operates as the signature of all partners in the firm, whether they are active, dormant or secret; by holding themselves out as partners they are liable as such to third parties. The reason for this is, as we shall later see, when we come to study the subject of partnership, that each partner is supposed to have a mandate from his co-partners for all acts connected with the partnership business.

220. *Delivery*.—The first element of negotiation is, as we have seen, endorsement. The second is delivery. Delivery means the transfer of possession, actual or constructive, from one person to another.

By constructive possession is meant, for instance, the actual possession which a servant or agent may have on behalf of his principal, who thus has the constructive possession. But, as Maclaren points out, delivery does not always imply an actual transfer from one possessor to another. Thus if A holds a note for B, A may become the owner of it by some arrangement between himself and B, and delivery is complete without an actual change of possession, if it can be said that it has been

made by or under the authority of the party drawing, accepting or endorsing, as the case may be. Delivery is the final step which perfects the existence of the contract, and even though the bill or note may have been placed in the hands of an agent for delivery, until it has been delivered it may be recalled. As between immediate parties, as, for example, between the maker and the payee, the endorser and the endorsee, and as regards a holder not in due course, delivery to be effectual must be actually made. It may be also shown to have been conditional or for a special purpose only, and not for the purpose of transferring property in the bill. If, however, the bill is in the hands of a holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is conclusively presumed. So where a debtor made a promissory note in favor of a creditor for the amount of his claim, and died before delivering it, the note is not valid if delivered subsequent to the debtor's death. It has been held, also, that as a letter, when posted, becomes the property of the party to whom it is addressed, if it contains a bill, this is a delivery.¹ It has also been held that where a bill was specially endorsed and enclosed in a letter addressed to the endorsee, and, having been placed in the office letter box of the endorser, was stolen by a clerk before posting or delivery, and the clerk forged an endorsement and negotiated the bill, the property in the bill remained in the endorser. So where A mailed a note payable to bearer, and it was stolen by C, who handed it to X upon receiving the amount of the note, and X did not know that C had stolen it, X is a holder in due course and may recover from A; but as between A and C, there was no delivery, and as they were immediate parties, C

¹ Ex Parte, Cote, L. R. 2 Ch. 27 (1873).

could not recover from A. A would, however, have to show that the note had been stolen.

The person in possession of a bill payable to bearer or endorsed in blank is entitled to receive payment in due course, and though he may be a thief, the finder, or a fraudulent holder, payment in good faith to him is valid.

A bill or note may be delivered to be held in escrow, that is, to be held as a mere blank writing until the happening of some event, or the fulfilment of some condition. Upon the happening of the event or the fulfilment of the condition, the bill or note becomes operative, and delivery is complete.

221. *Holder in due course*.—A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (b) that he took the bill in good faith and for value, and 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.

A holder in due course is to be distinguished from a mere holder. The holder of a bill or note is the payee or endorsee thereof who is in possession of it, or is the bearer thereof. He may or may not be the legal owner. The term is a general one and may mean a holder in due course. A person is a holder if he has possession and is entitled at law to recover or receive the contents of a bill or note from another person. Every holder of a bill is *prima facie* deemed to be a holder in due course, unless it is shown that the acceptance, issue or subsequent negotiation of the bill is affected with fraud or other irregularity, when the burden of proof is on the holder

to show that he is a holder in due course, unless he can show that subsequent to the alleged fraud or irregularity, value in good faith has been given by some other holder in due course. The expression "holder in due course" is the equivalent of the expression "bona fide holder for value, without notice." Where value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time. The holder for value may not be a holder in due course; he may only have come into possession of the bill or note after maturity and dishonor, but he can recover, though he has not given value himself, if he can show that some previous holder has given value.

222. *Regularity of face of instrument.*—The statute requires that to constitute a person a holder in due course, he must take a bill complete and regular on the face of it, under the conditions above mentioned. In other words, the instrument must fulfil the requirements of our definition of a bill or of a note, as the case may be. Thus an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect. If the bill contains an erasure or some ambiguous or uncertain clause, or if it is undated and is payable at a fixed period after date, it is irregular. The transferee should be careful to discover whether the irregularities are due to the instrument having been issued out of the regular course of business, or, if in the regular course of business, whether they can be corrected or explained.

A bill is not invalid merely because it is undated. If a person takes a bill which is not complete, it will not be enforceable against any person who became a party thereto prior to the completion, unless it is filled up and

completed within a reasonable time, and strictly in accordance with the authority given. Though, if after completion it is negotiated to a holder in due course, the latter may enforce it as though it had been filled up within a reasonable time, and strictly in accordance with the authority given. It has been held that a check is not irregular on its face if postdated. The bill must not appear on its face to have been cancelled; the cancellation, if made unintentionally or under a mistake, or under the authority of the holder, is inoperative, but the burden of proof lies on the party who alleges the mistake or lack of authority.

223. *Maturity*.—A holder in due course must become the holder of the bill before it is overdue, otherwise he is not a holder in due course. A note is due when the principal is to be paid. It has been laid down that though the interest may be overdue, this does not deprive a holder of his quality as a holder in due course. A bill payable on demand matures a reasonable time after demand. It is deemed to be overdue when it can be seen from the instrument that it has been in circulation for an unreasonable time. Where a note is payable on demand and has been endorsed, it must be presented for payment within a reasonable time, or the endorser is discharged. If, however, it has been delivered, with the assent of the endorser as a collateral or continuing security, it need not be presented for payment so long as it is held for such security.

In determining what is a reasonable time, regard must be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. It has been held that a bill drawn in Toronto on August sixth by a party dealing in bills, on New York, payable at sight, in favor of a party living in Illinois,

to be sent there as a remittance and for circulation, which passed through a number of hands, and was presented in New York on November tenth, was presented within a reasonable time.¹ With our better transportation facilities, this delay would probably be considerably shortened, this decision having been rendered in 1850. There is no absolute rule. Maclaren states that in France there is a limit for presentment of three months fixed for Europe and Algeria, four months for Asia, six months for America and Southern Africa, and one year for the rest of the world.²

224. *Without notice of dishonor or defect.*—The holder in due course must have taken the bill without notice that it had been previously dishonored, or of any defect in the title of the person who negotiated it to him. In other words, he must have taken the instrument in good faith. It is not necessary that formal notice of any kind should have been given him, if there existed good ground for suspicion that the instrument was irregular, or that he was taking it under improper conditions. He must not wilfully shut his eyes. He must investigate any circumstances which to an ordinary business man would appear suspicious. Thus if A, especially if he is a stranger, offers to give B a note of \$500 upon receiving \$300 and A had stolen it from X, who made it, B cannot be considered a holder in due course, because the difference between the amount of the note and the amount he paid for it was a sufficient indication that there was irregularity in the transfer. He becomes a mere transferee, and a transferee in bad faith, with no better rights than A had against X.

Mere negligence on the part of the transferee is not

¹ Boyes vs. Joseph, 7 U. C. Q. B. 505 (1850).

² Maclaren, p. 239.

enough to deny him the status of a holder in due course, as it is not altogether a question of diligence or negligence in making inquiry in every suspicious case. Good faith is presumed, and a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. As Lord Blackburn has pointed out, there is a difference between honest blundering and dishonest refraining from inquiry. What the court will attempt to discover is whether the transferee acted fairly and honestly. If the transferee receives notice of a defect in title, or of previous dishonor, he does not become a holder in due course; and notice to an agent has been held to be notice to the principal, though if a bill is negotiated to the agent and notice is given to the principal, it has been held that a reasonable time must be given for communication between them. Notice may not have been given directly. The endorsee may have come into knowledge of the facts. Thus if he takes a check from the payee, knowing that the drawer claimed that it had been delivered only conditionally and that he had stopped its payment, he is not a holder in due course. The erasure of the name of one of the sureties of the note is an irregularity in the note which should put the purchaser upon inquiry.¹ Similarly, the erasure of the endorsement of the payee by a thief has been held to be an irregularity sufficiently patent to have put the purchaser on his guard. In another case, where a bank accepted a bill which had been given for coal to be delivered, it was held that the bank becomes a holder in due course, though it turned out that the coal was not subsequently delivered. As we have already said, good faith is presumed; it would be impos-

¹ *McCramen vs. Thompson*, 21 Iowa, 244.

sible to do business if the history of every negotiable instrument had to be investigated.

225. *Consideration*.—A holder must have taken the bill for value; if he has not paid value he is not a holder in due course. Value means valuable consideration. Valuable consideration may be constituted by any consideration sufficient to support a simple contract, or by an antecedent debt or liability. The consideration may be some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.¹ Every party whose signature appears on the bill is *prima facie* deemed to have become a party thereto for value, whether the bill or note contains the words "value received" or not. Where a note is received as collateral security, the holder has a lien on it, and he is deemed to be a holder for value to the extent of the sum for which he has a lien; that is, he has a right to retain possession of the bill or note until his claim is satisfied.

226. *Negotiation of bill*.—The bill must have been negotiated to the holder in due course. That is, it must have been transferred to him in such a way as to constitute him the holder. If a bill is payable to bearer, it is negotiated by delivery; if payable to a specified person or to order, it is negotiated by endorsement and delivery. A holder who derives his title through a holder in due course, and who is in good faith and not a party to any fraud or illegality affecting the instrument, has all the rights of such holder in due course, as against prior parties. It would be unfair that a person deriving his title from a holder in due course should find himself unable to further negotiate the note, owing to some informality or illegality due to the act of a

¹Currie vs. Misa, L. R. 10 Ex. 162.

prior holder. Thus if A gives a note for five hundred dollars to B, and C steals it and forges B's signature and thus transfers it to D, and E hears of the circumstances and accepts the note from D, paying value for it, E can recover from A, because his predecessor D was a holder in due course; but if E transferred it to C, the latter, being the thief, could not collect from A.

227. *Rights of a holder in due course.*—A holder in due course holds a bill or note free from any defect of title of prior parties, as well as from personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the instrument. Among these personal defences would probably be included the defence of fraud, illegality, want or failure of consideration, threats, or a plea of compensation or set-off. They would not include want of capacity, want of authority, the defence of forgery, or the like.

We have said that every holder is presumed to be a holder in due course. This presumption would be overcome if one or more of these personal defences were proved. Upon such a defence being raised, the holder must then prove that he is a holder in due course—that is, a bona fide holder for value, without notice of any defect. Thus a note given for an illegal consideration, for example, to induce a witness not to give evidence in a criminal prosecution, may be collected by a bona fide holder for value before maturity. A note fraudulently made by a partner in the partnership name, binds the firm in the hands of a bona fide holder for value. But a promissory note made by a married woman, separate as to property, in favor of a creditor of her husband, is absolutely null, and no action, it has been held in Quebec, can be maintained thereon by a bank which has discounted the same in good faith before maturity, in ig-

norance of the cause of nullity. The rigor of this rule has been relaxed, in that a third party in good faith, like the bank in question, can now recover. The good faith of the third party will, however, be very zealously scrutinized. Though it has been held in England, in Quebec, in Manitoba, in Illinois and in Wisconsin (the principle is of general acceptance) that where an illiterate man was led to believe that he was becoming a party to an agreement, but the instrument proved to be a promissory note, and he was not guilty of negligence, he is not liable on the note even to a holder in due course.

CHAPTER XVIII

CONTRACT OF PARTIES

228. *Maker's contract.*—The maker of a negotiable instrument, by making it engages that he will pay it according to its tenor. By paying according to its tenor is meant that he will pay according to the contract made by him, and as it appeared on the face of the instrument when he delivered it. He is precluded from denying to a holder in due course the existence of the payee and the capacity of the payee to endorse at the time of endorsement. For all practical purposes, the maker of a note, for example, corresponds with the unconditional acceptor of a bill of exchange. His contract is interpreted strictly against him, because so far as the instrument itself shows, his contract thereon is made voluntarily. He is the primary debtor. Endorsers are secondarily liable until the note has been dishonored and notice given to them. Ordinarily a promissory note made payable at a particular place must be presented for payment at that place, but the maker is not discharged by the omission to present the note for payment on the day that it matures. If he is sued upon the note without its having been presented, he may plead the fact, and though he will not escape liability on the note itself, the costs of the action will be in the discretion of the court.

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. The note may be made by two or more makers, and they may be liable thereon jointly or jointly and severally, according to its tenor. 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; that is, each can be sued for and be forced to pay the whole amount of the note. If they are jointly liable only one action can be taken. As the maker of a note is in these respects similar to the acceptor of a bill of exchange, the rules above mentioned apply in so far as they are applicable to both.

229. *Acceptor's contract.*—The drawee, that is, the person upon whom a bill of exchange is drawn, until he accepts is not liable on the bill. By accepting he signifies his assent to the order of the drawer, and his acceptance is irrevocable; but only delivery of the instrument so accepted by him gives effect thereto, unless after having accepted, but before delivery, he gives notice to the person entitled to the bill that he has accepted it. His acceptance then becomes complete and irrevocable. Having accepted and delivered the bill, he of course becomes liable to the holder, according to the terms of his acceptance. But his acceptance must be in writing, and must be signed as such. His acceptance is invalid if it expresses that he will perform his promise by any other means than the payment of money. The mere signature of the drawee, however, written on the bill without additional words is a sufficient acceptance. It has been held that though the acceptance and signature of the drawee are usually written across the bill, it will be valid though written below the drawee's name, or above it, or parallel to it, or even on the back of the bill.¹ If written on the back of the bill, it may be

¹ Daniel, Sec. 498.

doubtful whether an endorsement or an acceptance is intended, unless the word "accepted" is used in connection with the signature. The acceptance may be upon a blank paper and may be delivered to be filled up as a bill, when it will be binding. It may be accepted before it has been signed by the drawer, or while otherwise incomplete. It may be accepted when it is overdue, or after it has been dishonored by protest, refusal to accept, or by non-payment. But a bill accepted when overdue is payable on demand. When a bill payable at sight or after sight is dishonored 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.

Under our law a promise to accept is not an acceptance, though the drawee who gives such a promise could be held liable on his contract, though not as an acceptor. The act is explicit in stating that the acceptance must be written on the bill, and while at one time a verbal acceptance was binding, it is not so now. 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. If it is not so accepted, the holder should treat it as dishonored by non-acceptance. If he does not treat the bill as dishonored, the holder loses his right of recourse against the drawer and endorsers.

230. *Facts which acceptor admits, and facts which he does not admit.*—The acceptor of a bill, by accepting it, is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill. If the bill is payable to the bearer's order, the acceptor is precluded from denying the then capacity of the drawer to

endorse, but not the genuineness or validity of his endorsement. If the bill is payable to the order of a third person, the acceptor cannot deny to a holder in due course the existence of the payee and his then capacity to endorse, but is not precluded from denying the genuineness or validity of his endorsement. By this is meant that the acceptor, by the act of acceptance, admits and warrants to a bona fide holder that the payee has capacity to endorse, but he does not warrant the validity or genuineness of the endorsement.

231. *Kinds of acceptance.*—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A general acceptance will be implied where the acceptor has written his name, with the word “accepted,” across the face of the bill. A qualified acceptance in express terms varies the effect of the bill as drawn. An acceptance is qualified which is:

- (a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated.
- (b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
- (c) Qualified as to time.
- (d) The acceptance of some one or more of the drawees, but not of all.

While a bill of exchange is an unconditional order to pay, the acceptance is none the less valid if conditional. The acceptor is liable upon the fulfilment of the condition. Thus an acceptance is conditional where it is in the following terms: “If a certain house shall be finished”; “when in funds from the estate of C”; “as soon as he should sell such goods”; “on condition that it be renewed.” But an acceptance to pay at a specified place

is not on that account conditional or qualified. A distinction is drawn between an acceptance which changes the place of payment, which is a qualified acceptance, and an acceptance which merely adds another place, which is not a qualified acceptance.

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 dishonored by non-acceptance. If 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 is deemed to have assented. Where a qualified acceptance is taken, and the drawer or endorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, the drawer or endorser is discharged from his liability on the bill. This rule does not apply, however, where notice has been given of a partial acceptance. The holder who takes a qualified acceptance really does so at the risk of releasing the drawer and endorser, unless they assent, as above explained.

232. *Who may accept.*—The drawee to whom a bill is addressed must accept it. The authorized agent of the drawee may, however, accept for him. The rule suffers an exception or two. The drawer of a bill, or an endorser, may insert in the bill the name of a person who shall be called the referee in case of need, to whom the holder may resort, that is, in case the bill is dishonored by non-acceptance or non-payment. But it is at the option of the holder to resort to the referee in case of need, as he thinks fit. And where a bill of exchange has been protested for dishonor by non-acceptance, or has been protested for better security, and is not overdue, any person who is not a party already liable on the bill may,

with the consent of the holder, intervene and accept the bill after protest for the honor of any party liable on it, or for the honor of the person for whose account the bill is drawn. The acceptor for honor is only secondarily liable on the bill. By accepting, he engages that he will, upon the bill being properly presented, pay it according to the tenor of his acceptance, if it is not paid by the drawee. But in order to hold the acceptor for honor, the bill must be duly presented to the drawee for payment, and be protested if not paid. Notice of these facts must be given to the acceptor for honor.

233. *Effect of acceptance and refusal to accept.*—When a bill is accepted, it may be held or may be negotiated until it matures. Upon maturity it is presented to the acceptor for payment. If he does not pay, the bill is dishonored for non-payment. Notice of dishonor must be given to the drawer and to each endorser, otherwise they are discharged. But where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission are not prejudiced by the omission. In the Province of Quebec, whether the bill is an inland or a foreign bill of exchange, it should be protested, to hold the drawer and any endorsers. Elsewhere in Canada only a foreign bill need be protested under these circumstances.

234. *Drawer's contract.*—The drawer is the person who addresses the bill. His contract, as we have seen, is not complete until delivery. The drawer of a bill by drawing it engages that on due presentment it shall be accepted and paid, according to its tenor, and that if it is dishonored he will compensate the holder or any endorser; he is compelled to pay it if the requisite proceedings on dishonor, as we have above stated them, are

duly taken. When drawing the bill, however, he may negative or limit his own liability to the holder, or he may waive as regards himself some or all of the holder's duties; for instance, he may waive notice and protest. If he stipulates that he will not be liable on the bill, then the holder must look to the acceptor alone and to any endorser who may be liable. If he limits his liability as to the amount, he will be liable only to that extent. The drawer very infrequently makes such a stipulation, but as we have elsewhere seen, an endorser very frequently adds to his endorsement the words, "without recourse," "no personal liability." The drawer of a bill therefore warrants that there is a drawee who will and can accept.

235. *Endorser's contract.*—The endorser of a bill by endorsing it engages that on due presentment it shall be accepted and paid, according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent endorsee, who is compelled to pay it, provided that the proper proceedings on dishonor are duly taken. Of course in the case of an endorser of a note, there is no presentment for acceptance. But to hold the endorser of a bill there must be presentment to the acceptor, as a preliminary. Whether the instrument be a note or a bill, it must be presented for payment on the due date, and if it is dishonored notice must be given to the endorser, with protest where necessary, in order to hold the endorser liable. Payment by the endorser does not discharge the bill or note. He may again negotiate it by striking out his own and subsequent endorsements, and if it is endorsed to him he must re-endorse.

236. *Warranties of endorser.*—Where an endorser endorses without qualification, he warrants to all subsequent holders, and is precluded from denying, the genuineness and regularity of the drawer's signature and all

previous endorsements. He is also precluded from denying, and therefore warrants, to his immediate or a subsequent endorser that the bill was, when he endorsed it, a valid and subsisting bill, and that he had then a good title to it. So where a partner, having authority to draw and endorse, raised money for firm use by drawing bills in fictitious names, and endorsed them in the firm name, his co-partner was liable to an endorsee. Nor could an accommodation endorser¹ in an action by a holder in due course plead that the signature of the maker is forged. It has also been held that the endorser of a note made by a corporation cannot allege that it is *ultra vires*. Where a person endorses "without recourse" or merely transfers or assigns the instrument, he does not warrant that it is valid—he transfers no better rights than he himself has—but he does warrant that he knows of no defect which will invalidate or impair the validity of the instrument. He does not incur the liability of an ordinary endorser.

237. *Liability of endorsers among themselves.*—When 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. Each endorser therefore obliges himself to compensate the holder or a subsequent endorser who pays, if the usual formalities upon dishonor have been complied with. An agreement may exist as between the endorsers that they shall not be liable in this order. They may agree upon any order of liability. A bona fide holder may, however, call upon the endorsers for payment in the order of their signatures, even though

¹ An accommodation party to a bill or note is a person who has signed it as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person.

he knew, when he took the instrument, that there was an agreement between them that they would be liable in some other order.¹ Gerstenberg and Hughes give the following example. A bill reads, "Pay to the order of B \$100. A." The following endorsements are found on the back thereof—"Pay to C. B"; "Pay to E without recourse. D"; "E." At maturity the bill is presented by the holder, F, and A refuses to pay. F notifies all the endorsers. He may sue any or all of them except D, unless there is a breach of one of the implied warranties spoken of in the previous section. If he recovers from E, E may recover from C, B or A. B may recover from A. It is usual for a holder who has a mature unpaid instrument to join all parties liable on the instrument as defendants in one suit.

238. *Liability of other parties.*—As we have seen, an accommodation party to a bill may sign as drawer, acceptor or endorser; to a note as drawer or endorser. He is liable to a holder for value, though as an accommodation party he has signed without receiving value, whether or not the holder who takes the bill or note knew that he was an accommodation party. He is not liable to the person whom he accommodates. He may set up any defence that the person accommodated could set up. If the holder knows of the relation between the accommodation party² and the party accommodated, and gives time to the latter to pay, the former is released. A second

¹ Elder vs. Kelly, 8 U. C. Q. B. 240.

² An accommodation party has been well defined in an American case—*Cheever vs. Railroad*, 150 N. Y. 59—as follows:

An accommodation party is one who has no interest in the consideration, but signs as maker or indorsee merely to lend his credit to the instrument; he may do this for a consideration or as a friendly act. He is liable to the holder, but the paper must not be diverted from the purpose for which the accommodation is given. But if wrongfully diverted paper is taken by the holder bona fide and without knowledge of imperfections his rights cannot be defeated.

accommodation endorser, who has paid a note, may, it has been held, recover from a prior accommodation endorser. But it has been held that a manufacturing corporation has no power to bind itself as an accommodation party. The plaintiff must show both that he paid value and also that he did not know of the accommodation character of the instrument.¹

Where a person gives a guarantee, on a note, for instance, that it will be paid, he becomes a warrantor of the obligations of the drawer or endorser, as the case may be. He has signed, otherwise than as drawer or acceptor, and under the act, thereby incurs the liabilities of an endorser to a holder in due course. He is liable without notice of dishonor or protest. He is bound by any notice given to the person whose liability he warrants.

239. *Damages*.—A person who promises to accept a bill, and does not do so, may be liable in damages. Where a bill or note is dishonored, the measure of damages deemed to be liquidated damages will be the amount of the bill or note, interest from the time of presentment in case of a bill payable on demand, and from maturity in the case of a time bill or a note, together with the expenses of noting and protest. Among the expenses would also be included re-exchange. In case of a bill which has been dishonored abroad, in addition to the damages just mentioned, 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 paid. Re-exchange has been defined as the act of drawing a sight draft on the drawer to make good the loss on the dis-

¹ National Bank vs. Snyder Co., 117 App. Div. 370.

honored bill. The amount of the re-exchange is the amount of the loss resulting from the dishonor of a bill in a country other than that in which it was drawn or endorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the *then rate of exchange* on the place where the drawee or endorser sought to be charged resides) must be drawn, in order to realize, at the place of dishonor, the amount of the dishonored bill, and the expenses consequent on its dishonor.

CHAPTER XIX

PRESENTMENT AND NOTICE OF DISHONOR

240. *Presentment for acceptance.*—Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument: a sight bill being payable on the third day after acceptance, and a bill payable after sight being payable on the third day after the expiry of the time after sight stated in the bill. A bill payable at sight is not under our law payable on demand. So also 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. In no other case, says the act, is presentment for acceptance necessary in order to render liable any party on the bill. The drawer and endorsers are entitled to have the bill presented for acceptance in the cases above mentioned; otherwise they are discharged as toward the holder. 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. If a bill is payable at sight 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.¹

A word should also here be said as to how the due date of a bill is determined. 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. The term "month" in a bill means the calendar month.

241. *When, where and how made.*—A bill is duly presented for acceptance when it is presented, by or on behalf of the holder, to the drawee, or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue. If it is accepted after maturity, it becomes a demand bill, and subject to the rule that, in order to hold the endorser liable, it must be presented for payment within a reasonable time after its endorsement; and a reasonable time after its issue, in order to hold the drawer. What is a reasonable hour for presentment will depend on the circumstances. If presentable at a man's office, it should be during ordinary office hours; or during banking hours, if at a bank; if at his house, probably at any reasonable hour when he would ordinarily be there.

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.

¹ 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 (Section 120.)

Where, in such a case, one or more do not accept, the acceptance becomes at once qualified, and the drawer and endorsers will be discharged unless the holder has notified them, or has treated the bill as dishonored.

Where authorized by agreement or usage, a presentment through the post office is sufficient. Where the drawee is dead, presentment may be made to his personal representative. But presentment is excused, and the bill may be treated as dishonored for non-acceptance, where the drawee is dead, or is a fictitious person, or a person not having capacity to contract. It is also excused when, after the exercise of reasonable diligence, presentment cannot be made, for instance if the drawee cannot be found. It is not excused simply because the holder has reason to believe that the bill, on presentment, will be dishonored. 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 dishonor, are determined by the law of the place where the act is done or the bill is dishonored.

242. *Presentment for payment.*—If the bill is not duly presented for payment, the drawer and endorsers are discharged. They are entitled to have every formality strictly observed. As toward the acceptor himself, as he is primarily liable, presentment for payment is not necessary to hold him liable. But if he has been sued on the bill, without having been given a chance to pay it by having it presented to him for payment, the court may award the costs in its discretion. Where, however, a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary.

Presentment for payment is made by the holder, or

by some person authorized to receive payment on his behalf, at the proper place, and either to the person designated by the bill as payer, or to his representative or some person authorized to pay or to refuse payment on his behalf. Delay in making presentment for payment is excused when caused by circumstances beyond the control of the holder, and not imputable to his misconduct or negligence. But when the delay ceases to operate, presentment must be made with reasonable diligence. Thus where a note was lying at a branch bank where it was payable, and the new agent was not aware of the fact until noon of the day after maturity, when he had it protested and notice given, it was held this was sufficient to bind the endorser.

Presentment for payment is dispensed with where, after the exercise of reasonable diligence, the presentment cannot be effected, or where the drawee is a fictitious person (in which case the instrument may be treated as a promissory note). It is also dispensed with 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 it will be paid if presented; or 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. Presentment may also be waived, expressly or impliedly. It is not dispensed with merely because the holder has reason to believe the bill will not be paid when presented. If the acceptor is dead, the bill may be presented to his executor or representatives.

If payment is made, the bill or note, as the case may be, is delivered. If payment is refused, the drawer and endorsers are notified that the payment has not been

made, and are protested where necessary. Presentment for payment is necessary in order to hold the endorser of a note liable; and the rules as to presentment, with the exception of course of those relating to presentment for acceptance, apply, in so far as they may, to notes as well as to bills.

243. Time and place of presentment for payment.—

A bill or note is duly presented for payment if, when not payable on demand, it is presented on the day it falls due. The day on which it falls due is the third day of grace, unless that be a non-business day. It would in that case fall due on the next business day. A demand bill must be presented for payment within a reasonable time after its issue to render the drawer liable, and within a reasonable time after its endorsement to render the endorser liable. Checks and demand notes must be presented for payment within a reasonable time after issue.

Presentment is to be made at the place specified in the bill or acceptance. Hence where a bill was payable at the office of the acceptor at Swansea, and was presented to him personally at Newport, it was held that an endorser was not liable.¹ If no place of payment is specified and no address is given, it must be presented at the drawee's or acceptor's place of business, if known, and, if not, at his ordinary residence, if known; in other cases, at the last known place of business or residence. If the instrument is at the bank or other place of payment at maturity, presentment is complete.

244. Presentment waived and dispensed with.—

Where a bill is presented at the proper place, and after the exercise of reasonable diligence, no person authorized to pay or refuse payment can there be found, no further

¹ *Beirnstein vs. Usher*, 11 T. L. R. 356 (1895).

presentment to the drawee or acceptor is required. The drawee or acceptor is supposed to arrange for payment, and either to be on hand himself, or to have someone at the place of payment to represent him. If not, or if the place of payment, his office for instance, is closed during reasonable hours, no further presentment is necessary. If the place of payment is specified as a city, town or village, where there are many banks or none at all, and no place of payment therein is specified, the bill or note may be presented at the debtor's known place of business or known ordinary residence, or, in lieu thereof, at the post office or principal post office. 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. But so soon as the cause of the delay ceases to operate, presentment must be made with reasonable diligence. Presentment may be waived by the endorser writing after his name, "Protest waived," "Presentment waived."

245. *Payment for honor.*—Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. Upon paying the amount of the instrument and the notarial expenses incidental to its dishonor, he is entitled to receive the instrument and the protest. In order that a payment for honor *supra* protest shall operate as such and not as a mere voluntary payment, what is called a notarial act of honor must be made and be attached to the protest or form an extension of it. It is based upon a declaration of the person who pays, declaring his intention to pay for honor,

and for whose honor he pays, and is in the following form:

On the 21st day of September, one thousand nine hundred and —, I, Herbert Barton, Notary Public for the Province of Ontario, dwelling at the City of Toronto in said province, do hereby certify that the original bill of exchange for five hundred dollars annexed to the protest thereof on the other side hereof written, was this day exhibited to A. B., of Toronto, Manager, who declared before me, that he would pay the amount of the said bill and protest charges for the honor of C. D., the last endorser thereof, holding the drawer and endorsers and all other persons responsible to him, the said A. B., for the said sum and for all interest, damages and expenses. I have therefore granted this notarial act of honor accordingly. Which I attest.

(SEAL)

HERBERT BARTON, N. P.

Where a bill has been paid for honor, and the formalities just mentioned have been observed, what happens is this, that all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated in, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party. So it has been held that if the holder is a holder in due course, or if any party subsequent to the party for whose honor the bill has been paid was a holder in due course, the payer for honor acquires their rights in this respect. He must, as one of his duties, give notice of dishonor.¹

246. *Notice of dishonor.*—When a bill has been dishonored by non-acceptance or by non-payment (by non-payment in the case of a note), notice of dishonor must be given to the drawer and each endorser; a drawer or endorser who is not so notified is discharged, though a

¹ Goodall vs. Polhill, 14 L. J. C. P. 146 (1845).

holder in due course subsequent to the omission is not prejudiced. Notice must be given not later than the juridical or business day next following the dishonor of the bill.

247. *By whom notice is given.*—Notice may be given 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. Hence when a note payable at a bank is sent there for collection, the protest may properly be made and notice be given by the bank, although it has no interest in the note. Each party who receives notice of dishonor has the next following business day to send notice to parties whom he in turn may wish to hold liable.

248. *Sufficiency of notice.*—The return of a dishonored bill to the drawer or an endorser is a sufficient notice of dishonor. The notice need not be signed. If insufficient, the notice may be supplemented and validated by verbal communication. It may be given in writing or by personal communication, and in any terms which identify the instrument and intimate that the bill has been dishonored by non-acceptance or non-payment. A misdescription of the instrument will not vitiate the notice unless the person to whom it is given is misled thereby.

249. *Time within which notice must be given.*—Notice of dishonor must be given on the day when presentment has been made, or on the next following business day. This rule is satisfied if the notice is either served or posted within this delay. Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, conduct or negligence. Thus the death or sudden illness of the holder or his agent who has the bill, will be a good excuse;

or delay caused by the endorser having given a wrong or illegible address.

250. *Place of notice.*—Notice of dishonor of a bill or note is sufficiently given if addressed in due time to the person entitled to such notice at his customary address or place of residence, or at the place at which the bill is dated, unless any party so entitled to notice has under his signature designated another place. Where notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, even if the notice miscarries in the post.

251. *Notice waived and excused.*—Notice of dishonor is dispensed with, when after the exercise of reasonable diligence, notice cannot be given to or does not reach the drawer or endorser who is sought to be charged. It may be excused by waiver express or implied. The waiver may be in writing or oral. Thus it has been held that where an endorser asked for time and promised to pay, it was a waiver of notice. Notice of dishonor is dispensed with as regards the drawer, where the drawer and the drawee are the same person; where the drawee is a fictitious person, or a person not having capacity to contract; where the drawer is the person to whom the bill is presented for payment; where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; and where the drawer has countermanded payment. It is dispensed with as regards the endorser where 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 but endorsed the bill; where the endorser is the person to whom the bill is presented for payment; and where the bill is accepted or made for his accommodation.

252. *Protest.*—The protest of bills and notes is done by a notary public who establishes and certifies that the instrument has been presented and dishonored. The notary's certificate is authentic and makes proof itself of its contents, and hence while protest is necessary only for foreign bills of exchange, elsewhere than in the Province of Quebec, where inland bills also must be protested, a formal protest in other cases makes it easy to prove dishonor and notice to the drawer and endorsers. Protest is not necessary to render the acceptor of a bill liable. It is dispensed with by any circumstances which would dispense with notice of dishonor, as just above set out. Delay in noting or protest is excused by reason of circumstances beyond the control of the holder, where these are not due to his fault, misconduct or negligence. A bill which has been protested for non-acceptance or a bill of which protest for non-acceptance has not been waived, may be subsequently protested for non-payment. A bill must be protested at the place where it is dishonored.

To facilitate the making of protests in country districts, the act also provides that protest may be made at some other place in Canada situated within five miles of the place of presentment and dishonor of the bill. Though when a bill is presented through the post office and is returned by post dishonored, it may be protested at the place to which it is returned, on the day of return or on the next day.

CHAPTER XX

DEFENCES

253. *Definition.*—Defences are described as personal defences and real defences.

Personal defences include conditional or equitable defences, and are good when pleaded by a person as against his immediate successor, or as against someone who is not a holder in due course.

The real or absolute defences attack the instrument itself and strike at the very foundation of the contract. The real defences are good against all the world.

Personal defences are defences not necessarily attached to or inherent in the instrument. They include defences such as fraud, threats or violence, illegality where the illegality does not void the contract, release, want of title in the person transferring, renunciation of claim or payment, want or failure of consideration, and others.

254. *Fraud and threats of violence.*—Fraud enters where a person is induced to act by some misrepresentation or untrue statement intentionally made for the purpose. Violence or fear and threats, commonly included under the word duress, will vitiate a contract. Thus a note given to a person in consequence of threats to prosecute the maker for forgery and obtaining money under false pretences, cannot be recovered by such person. So also where a defendant's son had committed forgery, and the notes sued upon were given to the plaintiff to

prevent the scandal becoming public, they were held to be void. But it has been held that where a master gave a female servant his note for \$1,500 over and above her wages, on condition that she would not marry but would remain in his service as long as he wanted her to, the note was not void for being in restraint of marriage for an unreasonable period.¹ It has also been held that where a creditor secured secretly the notes of the insolvent for the balance of his claim, this was a fraud on the endorers of the composition notes, and they were entitled to the benefit of this payment. And again, where an illiterate man thought that he was making his mark to a receipt and the plaintiff concealed the fact that it was really a promissory note, the plaintiff could not recover. It has been held, however, that where an educated man admits his signature but sets up such a defence, he must make very clear proof.

255. *Partial or total want of value or consideration.*—Valuable consideration for a bill or note may be constituted by any consideration sufficient to support a simple contract. It may be an antecedent debt or liability. Every party whose signature appears on a bill or note is presumed to have become a party to it for valuable consideration, but he may prove the contrary. If a total failure of consideration is proved, and the plaintiff and defendant are immediate parties, the defence is good, or if they are remote parties it is good, if value has not been given for the bill. A total failure of consideration is in its effects like an original want of consideration. There would be a total failure of consideration where a person undertook to sell a certain thing to another, and it turned out that he had absolutely no title to the thing. It has been held that where a note

¹ *Crowley vs. Sullivan*, 9 O. L. R. 27 (1904).

was given for logs, on condition that no claim should be made for the logs, and they were revendicated (that is, seized at the instance of the owner for non-payment, etc.), there was a total failure of consideration, and the note became null. There may be only partial failure of consideration. It is probable that in most of the provinces, partial failure may be set up as a defence to the extent of the consideration that is lacking.

256. *Illegality.*—Whether the consideration be illegal in whole or in part, the bill is none the less altogether void. Considerations are said to be illegal which violate the rules of morality, or which are prohibited by law, or which are contrary to public policy. Nor will the illegality be cured by renewing or by substituting a new instrument for the old. Thus an agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a note. A note given to raise money for corrupt purposes at an election where the maker was a candidate, is null. The plaintiff cannot recover on a promissory note given by the proprietor of a bucketshop, in settlement of speculative transactions between them.¹

257. *Release, renunciation or payment.*—A bill is discharged by payment by or on behalf of the drawee or endorser. Payment in due course means payment made, at or after maturity of the bill, to the holder thereof, in good faith, and without notice that his title to the bill is defective. Payment is what the holder accepts or recognizes as such. It is the discharge of a contract to pay money; but payment need not be a payment of money; it may be a payment of goods, or any other thing which the

¹ Bucketshop transactions are speculations on the rise and fall of prices of stocks where shares are not bought outright by the broker, and where there is no intention of delivery. The transactions are purely gambling transactions, and as such are prohibited in Canada.

creditor is willing to accept. But to have the effect of discharging a bill, payment must be made at or after maturity and must be made to the holder, that is, the payee or endorsee, or the bearer. If an endorsement is forged or is not authorized, the bill is not discharged, and the acceptor is not released. It has been held that a renewal bill or note does not discharge the original, unless the parties have so agreed. Payment before maturity does not discharge the bill. The holder may still negotiate it. An accommodation bill is discharged if paid in due course by the party accommodated. Where the acceptor of a bill becomes the holder of it, on or after maturity, in his own right, the bill is discharged. When the holder of a bill, at or after its maturity, actually or unconditionally renounces his rights against the acceptor, the bill is discharged. The holder may renounce the liabilities of any party to a bill before, at or after maturity. A renunciation must be in writing, however, unless the instrument is delivered up to the debtor.

258. *Discharge of persons secondarily liable.*—As we have seen, the maker of a note and the acceptor of a bill are primary debtors. Drawers and endorsers are only secondarily liable. A discharge of a debtor operates as a discharge to parties who are liable to pay only if he fails to pay. Thus if the holder discharges the maker of a note, he cannot hold the endorser, because by releasing the maker he is depriving the endorser of his chance to collect from the maker.

259. *Real defences.*—As we have already explained, real defences strike at the root of the contract. Where the contract, by reason of, for instance, the minority or insanity of the maker of a note, could not be entered into, the contract on the note never existed. Thus a

note given in satisfaction of a gambling contract would be void. An instrument if materially altered without the assent of all parties liable on it is voided, except as against a party who himself has made, authorized or assented to the alteration, or subsequent endorsers; but if the alteration is not apparent, a holder in due course may enforce payment of it, according to its original tenor, as though it had not been altered. The defence of payment at or after maturity is also a real defence.

260. *Cancellation*.—A holder may convert a blank endorsement into a special endorsement; he may also strike out one or more blank endorsements, in which case any endorser subsequent to one struck out is discharged. A holder or his agent may intentionally cancel a bill or note, and if the cancellation is apparent thereon it is discharged. Liability of any party liable on a bill or note may be discharged by the intentional cancellation of his signature by the holder or his agent. The usual mode of canceling a bill is to write the word "paid" or "discharged" across the bill or note. If the cancellation is made unintentionally, or under a mistake or without the authority of the holder, it is inoperative, though the burden of proof is on the person who alleges that the cancellation was made unintentionally or under a mistake.

261. *Forgery*.—Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of anyone, whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything. Signing the name of a non-existent or fictitious person or firm with fraudulent intention has been held to be forgery. A forged signature cannot be ratified, though

where a signature is placed on an instrument without authorization, but under circumstances not amounting to a forgery, it may be ratified. Where a signature on a bill is forged, or is placed thereon without the authority of the person whose signature it purports to be, the forgery or unauthorized signature is wholly inoperative. 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, unless the party against whom it is sought to retain payment of the bill is precluded from setting up forgery or want of authority.

In order to protect a bank which may pay a check or bill payable to order on demand, where one or more endorsements may be forged or unauthorized, the statute provides that where a check payable to order is paid by the drawee upon a forged endorsement out of the funds of the drawer, or is paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery of the amount so paid, or any defence to a claim by the drawee for this amount, unless he, the drawer, gives notice in writing of the forgery to the drawee within one year after he has acquired notice thereof. In other words, an endorser whose signature to a check has been forged, and out of whose account the amount of the check has been paid by the bank, must make claim upon the bank at once. If he waits for one year, he has lost any right to bring action, and the check will be considered to have been paid in due course. Where a partner in a commercial firm fraudulently accepts a bill in the firm name for his private debt, the firm cannot set up a fraud against a holder for value without notice. The partner was presumed to have authority from his co-partners to do all acts connected

with the partnership business. It has been held, however, that where a defendant's name was signed by his nephew, for whom he was in the habit of endorsing, and where he had acknowledged his liability and asked for time, and only denied his liability after his nephew had absconded, it was held that he could not dispute his liability.

If a bill bearing a forged or unauthorized 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 the payment is made can recover the amount paid from the person to whom it was paid, or from any endorser who endorsed subsequently to the forged or unauthorized endorsement. But notice of the endorsement being forged or unauthorized must be given to each such subsequent endorser, within a reasonable time after the person seeking to recover has acquired notice that the endorsement is forged or unauthorized.

PART IV: CONDUCT OF BUSINESS THROUGH REPRESENTATION

CHAPTER XXI

PRINCIPAL AND AGENT

262. *Definitions and distinctions.*—Mandate has been defined as a contract by which a person, called the mandator or principal, commits a lawful business to the management of another, called the mandatory or agent, who by his acceptance obliges himself to perform it. The acceptance may be implied from the acts of the agent, and in some cases from his silence. Or again, an agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal. There are general agents and special agents.

A general agent has authority to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature; or to act in the ordinary course of his business, trade or profession as an agent, on behalf of his principal—as a solicitor, a factor, a broker.

A special agent is an agent who only has authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent.

A factor or commission merchant is an agent who is

employed to buy or sell goods for another, either in his own name or in the name of his principal, for which he receives a compensation commonly called a commission. He is a bailee and is entrusted by his principal with the possession or control of the goods. Ordinarily he is entitled to receive payment and to give a valid and binding discharge. If his principal resides in another country, he is personally liable to third persons with whom he contracts, whether his principal's name be known or not. The principal is not liable on such contracts to third persons, unless it is proved that the credit was given to both principal and factor, or to the principal alone. He has a lien upon the goods in his hands for any balance of account in his favor. If he voluntarily relinquishes possession, his lien is lost.

A broker is an agent who exercises the trade and calling of negotiating between parties the business of buying and selling or any other lawful transactions. He may be the mandatory of both parties and bind both by his acts in the business for which he is engaged by them. He is not entrusted with the possession or control of the goods or other property which he may have contracted to buy or sell.

An auctioneer is an agent whose ordinary course of business is to sell by public auction to the highest bidder, goods or other property of which he may or may not have the possession or control. He sells for cash, unless he has authority to accept payment in goods or in negotiable paper, or to sell on credit. The adjudication of a thing to any person on his bid or offer, and the entry of his name in the sale book of the Auctioneer, completes the sale to him and satisfies the statute of frauds, i.e., enables the auctioneer or seller to bring action without the necessity of making other written

proof of the sale. Unless authorized, he cannot warrant the goods, and he cannot rescind a sale.

A *del credere* agent is a mercantile agent who, in consideration of an extra remuneration, which is called a *del credere* commission, guarantees to his principal that third persons with whom he contracts on behalf of the principal shall duly perform their contracts. In effect he makes himself a surety for the due performance of the contract by the person with whom he deals.

263. *How constituted.*—It has already been said that agency is a contractual relation. The relation will not exist unless there is the consent, express or implied, of both principal and agent. The rule suffers exception where, in case of necessity, the relation is imposed by operation of law. So that agency will exist where there is an express appointment by a principal, or by someone duly authorized and acting on his behalf; and an express acceptance by the agent or by someone on his behalf similarly authorized. But the assent of the principal may be implied from his acts; or when another person occupies such a position that, as a matter of common usage, he would be understood to be acting with the approval and on behalf of the principal. Thus a coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. It was held that the master was liable on the contract. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present, giving directions as to the work. It was held that the husband was liable on the orders, although he had expressly

forbidden his wife to pledge his credit, and it had been agreed between them she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement. The assent of the agent may also be implied when he so acts on behalf of another person that in an action by the latter he could not be heard to deny that in fact the agency existed. But where a person assumes to act for another, the consent of that other will not be implied merely because he raises no objection, unless the circumstances support a presumption that he has authorized the act.

264. *Agency by estoppel.*—Yet a person will be held as a principal toward third parties who in good faith contract with someone who is not his agent, under the belief that he is so, when by his words or conduct he gives reasonable cause for such belief, as, for example, when by his words or conduct he represents or permits it to be represented that another is his agent. He is estopped from denying that such person is his agent, on the ground that he has really held him out to be so. The necessity for the rule is obvious. A might know that B was acting as his agent in a certain matter and be quite satisfied if B made a profit for him, but be ready to deny the fact of agency if B made a loss. That third parties in good faith may be protected, the person who holds another out as his agent in such a way, may not deny liability as a principal if reverses come.

So it has been held that no estoppel by conduct to deny an agent's authority is established on the part of the principal, merely because one of its directors, who had no particular management of the property in question, upon being shown a contract for the sale of pulp wood from the principal's land made by an agent who was employed for another purpose and for that alone, said nothing until

he returned to the head office, where he lost no time in informing the other directors as to the sale, resulting in the principal's solicitors at once taking the necessary steps to protect the principal's interest.¹

It has also been held that where one learns that another had been without authority purporting to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority as regards obligations afterwards entered into by such third person on the faith of the pretended agency.²

265. *Agency by necessity*.—Under certain conditions a person may without express authority bind another. The authority may even be denied. If a husband deserts his wife and leaves her unprovided, she may, as an agent of necessity, pledge his credit for necessities in keeping with her station in life, as he is bound by law to provide for her. Nor may he revoke her authority in this respect. But it must be shown that the articles obtained by the wife are necessities, and that the husband is in default to supply them. The same rule is generally applicable in the case of children. If a boy's father refuses to supply him with necessary clothing, a purchase thereof by the boy binds the father. Or if A ships a horse by railway, consigned to himself at a station on the company's line, and he has not arranged for its reception, the railway company must reasonably care for the horse, and for that purpose is an agent of necessity of the shipper. A conductor in charge of a train, in case of accident, would be an agent of neces-

¹ B. N. A. Mining Co. vs. The Pigeon River Lumber Co., 2 D. L. R. 609.

² Ewing vs. Dominion Bank, 35 Can. S. C. R. 133.

sity of the company in summoning medical assistance. The captain of a ship may be an agent of necessity to buy supplies, or even to sell the cargo.

266. *Who may be principal.*—As agency is a matter of contract, the general rule is that any person who has capacity to contract has capacity to enter into an agency agreement. Hence an infant or a lunatic may be held bound under a contract entered into with his authority by his agent, if under the circumstances he would be bound had he himself made the contract. If an insane person appoints an agent at a time when he has not been adjudged insane, and the agent was ignorant of his insanity, the appointment is binding on him. As between such a principal and third parties he will be bound where, though at the time of the appointment of the agent he was sane, he later became insane to the knowledge of the agent but not to the knowledge of the third parties. The third parties under such circumstances are entitled to protection; but an insane person is also so entitled, and agency contracts made on his behalf by an agent with persons aware of his condition may be set aside by the insane principal, or rather, by his representatives. A person insane, or whose intellect is clouded, by reason, for instance, of a paralytic stroke, could not give a valid power of attorney, though in a lucid interval he might.

Generally under the English law, a married woman, being separate as to property and entitled to deal with her property and affairs as freely as if she were unmarried, may act as an agent and may appoint agents by whose contracts in her behalf she will be bound. In Quebec, a married woman who executes a mandate given her, binds the mandator, but she could not be sued unless her husband were made a party to the action;

nor would an action upon her agency contract succeed unless her husband were a party to the contract. Though if she were a public trader, duly authorized by her husband, she could, in the course of her business, appoint an agent, in which case her husband also would be bound, if they were common as to property. If separate as to property, she may do and make alone all acts and contracts connected with the administration of her property, which might include the appointment of agents.

267. *When a business may be a principal.*—A corporation acts through its agents, the directors, who in turn may appoint other agents for the carrying on of the company's operations. But a corporation cannot through an agent do or accomplish any act *ultra vires* of its charter. A partnership business is carried on, as will later appear, on the basis of a reciprocal relation of principal and agent among the partners. Probably a partner may appoint an agent to perform certain of his duties, though the consent of his co-partners would in some circumstances be necessary. In the case of an unincorporated society or association, an agent would ordinarily be appointed by the members, not by the society, which lacks corporate existence. And the members who appoint him or ratify his appointment or contracts would be bound.

268. *Who may be agent.*—Bowstead states the general doctrine as follows:

All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their own behalf, are competent to contract or act as agents. Provided that the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any

third person, is dependent on his capacity to contract on his own behalf:¹

But a principal may appoint any person as his agent, and, within the scope of the agent's authority, will be bound by his acts, whether the agent is competent or not. If he appoints an infant, an insane person, a married woman, a partnership or a corporation, he is master of his choice and is bound thereby. The agent is looked upon merely as an instrument. Suppose A appoints B, who cannot read, as his agent, with authority to make and sign a contract for him. A cannot set aside the contract on the ground that B could not read it; he must abide by his own choice of an incompetent person.

269. *What acts may be done by an agent.*—The general rule is that a man may appoint an agent to do for him anything which he has power in his own right to do. Thus he may appoint an agent to execute a deed, to make a contract. The appointment may be to act in all the principal's affairs, or in some particular matter; it may be limited by instructions as to the agent's conduct, or his conduct may be left to his own discretion. Though where he acts at his own discretion, he must none the less act according to the general usage in the business in which he is employed. While an agent can be appointed by bare words, without a writing, he cannot bind his principal in some matters, as for example by a deed, unless he is appointed by deed. But where a duty is imposed on a person personally, because the exercise of his special discretion, skill or knowledge is desired, or by statute, an agent cannot replace him. Thus if A undertakes, because of his special knowledge of the pulp business and because of his influence, to negotiate a purchase of pulp, or the placing of a com-

¹ Agency, p. 8.

pany's pulp products, he cannot delegate his powers for these purposes to an agent.

270. *Co-agents*.—When several agents are appointed together for the same business, they are jointly and severally liable for each other's acts of administration, unless it is otherwise stipulated. And where they are appointed to act jointly and severally, one or more of them could execute the mandate independently of the others. But if they are appointed to act jointly, in all ordinary cases they must all concur in the execution of the act, unless they are authorized to bind their principal by the decision of a majority, or of a quorum.

271. *What acts may be ratified*.—By ratification is meant the adoption by one person of the act of contract done in his behalf by another without his authority. The person doing the act may have had no authority or he may have exceeded his authority. When ratified, the act or contract is as valid as if performed or made by the principal himself. Hence a person may ratify any act which is not radically void. The act or contract must be ratified as a whole and not in part. The principal cannot ratify the part that may be beneficial and reject what is not. But the person who ratified an act must be the person on whose behalf it is done; he must have existed at the time and be an ascertainable person with capacity to do the act in question, though he need not be known in any way to the person who assumes to act as his agent.

The law concerning ratification of contracts can best be shown by concrete examples. Take, for example, the case of A, who, authorized, insures the goods of B, the policy of which B ratifies and accepts. A's contract on his behalf is thus ratified and he must pay the premium and may claim under the policy.

A purchases four diamonds from X on behalf of P, and tells X that P will pay for them. X extends the credit to P, who upon hearing of the contract ratifies it. If A loses one of the diamonds and tells P all about the contract and his loss of the one diamond, P would not be permitted to retain the three unless he paid for all. Having ratified the contract, he would be bound by the act of his agent and would have to stand the burden of the latter's negligence.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank, as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at two different times, and the bank's representative ratified the act of such person in the second seizure and detaining of horses, and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing the horses.¹

But ratification of an agent's unauthorized agreement for the sale of land does not arise from the fact that the sum paid the agent by the purchaser was, without the principal's knowledge, included in the amount of a check given the principal by the agent for money actually due from him, which sum the former returned to the purchaser's agent as soon as he learned of its inclusion in the check.²

The S Company had sold goods to the A Company. The amount was in dispute. The A Company arranged a settlement with B, the agent of the S Company, and sent a check to the S Company for the amount, with a letter stating that it was in full settlement of their claim

¹ Thien vs. Bank of B. N. A., 4 D. L. R. 388.

² Margolis vs. Birnie, 5 D. L. R. 534.

pursuant to the agreement made with B. The S Company cashed the check, but wrote that they did not intend to be bound by the settlement made by B, although they would credit the amount on account. Then the S Company sued the A Company for the balance. It was held they could not recover. They could not repudiate the settlement and at the same time use the check sent in pursuance thereof. Even though the act of B was unauthorized, retaining and using the check was a ratification.

But a person cannot ratify an unauthorized act which was done by the agent in his own name and behalf. Thus where A is authorized to buy wheat on the joint account of himself and B, with a limit as to price, and A, intending to buy on the joint account of himself and B, and expecting that B will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit, B cannot ratify the contract.¹

We have said that a person may ratify any act which is not radically void. Bowstead asserts that:

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done.

As an example, he cites a case where A, an agent of a corporation, assaults B on its behalf. The corporation ratifies the assault. The corporation was held civilly liable to B for the assault.² But such cases are exceptional, and it may be laid down as a general rule that illegal acts and contracts may not be ratified. Thus,

¹ *Kneightly vs. Durant* (1901), A. C. 240.

² *Eastern Counties Ry. vs. Broom*, 1851, 6 Ex. 314.

if A signs B's name to a note, intending to defraud, A has committed the crime of forgery. The signature is void *ab initio*. B cannot ratify the signature.¹ Though if B, knowing of the forgery, leads a third party to believe that it is his signature, and the third party is as a result induced to act upon such representation to his loss, B will not be heard to set up that the signature is a forgery if the third party sues him upon it.² In some of the American states, however, a forged signature may be ratified. But it has been held by the Supreme Court of Canada that a forgery cannot be ratified.³ Ratification of a forged signature must be distinguished from that of an unauthorized signature made by the agent without intent to defraud. Such a signature the principal may ratify.

272. *Conditions necessary for ratification.*—The person who ratifies an unauthorized act must, at the time of ratification, know all the material circumstances surrounding the act, unless he takes the risk incident to incomplete knowledge. Thus, if a bailiff wrongfully seizes and sells goods and pays the proceeds to his principal, the principal will not be bound unless he knew of the irregularity—unless he intended to assume any risk. And if his agent makes a contract that is void, the principal is not held to have ratified if he is in good faith and is not aware that it is voidable. But if an act, to be valid, must be done within a certain time, the ratification should take place also within such time, at least in so far as concerns a third party who would be otherwise prejudiced. The ratification should follow the act or contract within a reasonable time.

¹ *Brook vs. Hook*, 1871, L. R. 6 Ex. 89.

² *McKenzie vs. British Linen Co.*, 1881, 6 A. C. 82 H.L.

³ *Merchants Bank vs. Lucas*, 18 S. C. R. 704 (1890).

273. *Ratification express or implied.*—Ratification may be express or implied. It will be implied when the principal's conduct leads to the belief that he has ratified or intends to adopt or recognize the act. Where an agent exceeds his authority, even the silence or acquiescence of the principal may be sufficient evidence of his intention. If he adopts part of the act, he will be held to have adopted and ratified it in its entirety. Ordinarily the ratification of a written contract need not be in writing; though if an agent unauthorized executes a formal deed, the ratification should be by a deed. Directors of a company may ratify acts of agents if they have the authority so to do; otherwise the ratification of the shareholders may be sought. The shareholders may ratify acts *ultra vires* of directors if *intra vires* of the company.

274. *Scope of agent's authority.*—The nature and extent of an agent's authority to act may be defined by a formal deed or an informal writing or by oral instructions. Where an agent has had a course of dealings with third parties, the scope of his authority may be deduced therefrom; it may also be inferred from the circumstances surrounding the transaction, from the custom of trade, or the conduct of the principal himself. Thus, if A has usually or frequently employed B to purchase goods for him and has customarily ratified B's acts in this respect, B becomes his implied agent for all acts done within the apparent scope of his authority. Where the scope of the agent's authority is defined in writing, it will generally be easy to deal with him within the terms of his authority; it will be more difficult where his powers can only be inferred. In either case, in any important transaction, too careful inquiry cannot be made as to the extent of the agent's mandate.

Even where the authority is expressly given, there may be uncertainty if it is given in words of uncertain or ambiguous meaning; or if doubt arises as to the implied powers which ordinarily would be collateral to the express powers. If the authority is express, and the agent acts strictly within its terms, the principal will be bound, though the agent may have acted with an eye to his own rather than to his principal's interest.

The apparent authority is the real authority. And where the third party had knowledge of the terms of the agent's special authority, he will not be able to hold the principal for the acts of the agent which exceed such authority. If the authority is inferred from a course of dealings or the conduct of the principal, then the liability of the principal toward third persons will be based upon the extent of the agent's usual or customary authority. Innocent third persons are entitled to deal with an agent so accredited where he acts within the seeming course of such employment. Hence the rule that one partner may bind his co-partners in all acts done in the usual course of the partnership business. Thus, also if A sends B with ready money to buy certain goods, and B gets the goods and charges them to A, A is not bound. But if A is in the habit of dealing on "tick" with C, and B buys goods from C for himself and charges them to A, A will be bound, if C is in good faith. Or if A allows his clerk B, as a general rule and in the course of business, to accept drafts or indorse notes, and B does so on an occasion and does not account for the money, A may be held liable.

275. *General and special agent.*—A principal may attempt to restrict by private instructions the actions of a general agent, i. e., an agent appointed by the principal to transact all his business of a particular kind.

The agent may exceed these instructions, and yet, as towards third parties treating with him as a general agent, bind his principal. As Lord Blackburn has said:

Where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing, in order to prove what was the scope of the agent's authority.¹

But if the agent is a particular agent, employed for one special act or transaction, then the third party must be careful to discover the exact extent of the agent's authority. Even the general agent, with the wide powers which the term implies, must act according to the custom of trade or the usage of the particular business. Any departure therefrom will be sufficient to put the third party on his guard. Thus a broker is supposed to sell stock for cash. If he is authorized to sell shares for a client, he cannot sell on credit, unless the authorization so provides. Yet a principal can scarcely object where an agent executes his mandate in a manner more advantageous to him than that specified, and in such case the agent will not be held to have exceeded his powers.

276. *Authority in ambiguous terms.*—If an agent's instructions fairly admit of more than one interpretation, and he in good faith adopts one or the other of them, the principal will be bound—though he may not have intended the construction which has been acted upon. Thus, where an agent is instructed to dispose

¹ *National Bolivian Navigation Co. vs. Wilson* (1880), 5 A. C. 176.

of fifty shares of stock at one hundred dollars a share, or over, he is entitled to sell at one hundred dollars, though the market price may be rising. It has also been held by the House of Lords that where an agent was authorized to buy and ship five hundred tons of sugar, and he was told that if he could secure a suitable vessel, fifty tons more or less did not matter, he had fairly and properly executed his mandate by securing a shipment of four hundred tons.¹

277. *Power of attorney.*—Where an agent acts under special written authority, he is said to act under “power of attorney.” The writing may be signed before a notary under seal, or may be executed before witnesses. Its terms will be strictly interpreted to include only the powers mentioned and those which are an essential corollary thereof.

The following is a form of power of attorney which might be adopted by a financial firm when giving a power of attorney to one of its branch managers, and of course the form could be altered to provide for any action on the part of the agent. This is a general, rather than a special power of attorney.

KNOW ALL MEN BY THESE PRESENTS, that we, ARNOLD SEVERN AND JAMES McDONALD, carrying on business together in co-partnership in Montreal and elsewhere under the firm, name and style of SEVERN & McDONALD.

Have made, ordained, deputed, constituted, and by these presents do make, ordain, depute, constitute and appoint,

GEORGE A. BENNETT, of the City and District of Montreal, Manager.

To be our true and lawful attorney, for us and in our name:

To take the complete charge and management of the Montreal office of the constituents, and to do, transact, manage and

¹ Ireland vs. Livingston (1872), L. R. 5 H. L. 395.

carry on all and every trade, business, transactions and affairs of them, the said constituents, in connection therewith;

To make, draw, sign, accept, transfer and endorse, negotiate, pledge, retire, pay or satisfy all Promissory Notes, Bills of Exchange, Drafts, Checks and Orders for payment or delivery of money and securities; to pay and receive all moneys, to give acquittance for the same; to arrange, balance and settle all books, accounts and dealings; to sign scrip, endorse certificates, negotiate, obtain and sign loans, either alone or jointly with others, and deposit and hypothecate stocks, bonds and other securities to guarantee and secure such loans and advances from time to time; to draw on the account of the undersigned with the Bank hereinafter named, and to overdraw the same if he shall think fit; to guarantee the endorsements and checks of customers; to buy, sell, transfer, accept transfer of, assign and otherwise deal with, for and on behalf of the constituents, all stocks (including the stocks of banks), bonds, debentures and debenture stock and other securities; and further to manage and transact all manner of business whatsoever with the Bank of, or with its Manager, or other Officer duly authorized, the whole as amply and effectually to all intents and purposes as they the said constituents could do or have done in their own proper person if these presents had not been made—the said constituents hereby relieving the said Bank from the responsibility, whether in law or in equity, in connection with the disposal of moneys paid or advanced to the said Attorney under these presents, and from any inquiry and investigation as to the purpose for which such money is required, or with regard to any transaction connected in any way with such payment or advance;

To ask, demand, sue for, recover and receive, of and from all and every person or persons, and to arbitrate, adjust, compound and settle all and every such sum and sums of money, debts, rents, goods and chattels, dues, duties, claims and demands whatsoever, as now are or hereafter shall become due, owing, belonging or payable to the constituents, and for and in

their name and on their behalf to give proper receipts, acquittances and discharges for same respectively, as to the said Attorney may seem just;

To constitute and appoint, and in his place and stead, to put one or more Attorney or Attorneys, and such appointment or appointments again at his pleasure to revoke, and other or others in his or their place to substitute;

The said constituents ratifying and confirming, and promising and agreeing to ratify and confirm, all and whatsoever their said Attorney or his substitute or substitutes in and about the premises shall lawfully do or cause to be done by virtue of these presents.

This letter of Attorney shall be and remain in full force and effect until the said constituents shall have duly notified in writing the said Bank, or such other person or persons to whom these presents may come, that they, the said constituents, have revoked the same, and the receipt of such notice shall have been acknowledged.

IN WITNESS WHEREOF, we, the said constituents, have hereunto set our hands and seals, this day of , in the year of our Lord one thousand nine hundred and , at Montreal, in the Province of Quebec.

Signed, Sealed and Delivered

by one
of the constituents, in the
presence of:

Per:

278. *Implied powers.*—The agent, as was hinted in the preceding section, has implied authority to do what may be necessary or incidental to the due and effective execution of his mandate; and in so doing will bind his principal. Thus, if an agent is employed to go through the country and sell goods, he has implied authority to hire a carriage to get to stations or to customers. If by careless driving he causes an injury to horse or carriage, his principal will be bound towards the owner

thereof. A person who is authorized to buy goods for his firm, has implied authority to pay for them and to give receipts, and arrange discounts. But it has been held that where an agent is instructed to find a purchaser and to make a contract for the sale of a house, his duty ends there, and he has no implied authority to receive the purchase money. A lawyer authorized to sue upon a note has implied authority to take payment and give a discharge. But an agent who is entrusted with goods which he is to sell, cannot pledge them under any implied authority. The general rule to be observed is that acts done by way of implied authority in connection with either a special or a general mandate, must be not only incidental to, but must be in accordance with, the usage or custom of the particular business. Thus, an insurance broker who is authorized to issue a policy, has no authority to cancel the contract on the policy: his ordinary duty as a broker is to make contracts of insurance, and not to cancel them, once they are validly entered upon. As to an agent's authority implied from special customs, Bowstead says:

Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed. Provided that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority, or to act in accordance with any usage or custom which is unlawful. The question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular, a usage or custom which changes the intrinsic character of the contract of agency, or a usage or custom whereby an agent who is authorized to receive payment of money may receive payment by way of set-

off, or by way of a settlement of accounts between himself and the person from whom he is authorized to receive payment, is unreasonable.

279. *Must execute accepted mandate.*—To the extent of the powers and authority given him, the agent must execute his mandate. That is his contract, whether the authorization be expressed or implied, though he is not obliged to carry obedience to the point of committing a fraud or some wrongful or unlawful act. He can refuse to be made merely an instrument for wrongdoing. Strict performance will be exacted where he is paid for his work. If the mandate is gratuitous, however, the courts will, as may appear just in the circumstances, moderate the rigor of the liability arising even from his negligence or fault—for it must be understood that an agent, who through his negligence or fault in executing his mandate causes loss to his principal, will be held liable for such loss. Apparently, though, where an agent undertakes gratuitously to do a thing and does not do it, he will not be liable for his mere non-performance.

280. *Delegation of agent's authority to a sub-agent.*—The fundamental rule is that an agent, who in theory is employed because of his special skill, knowledge, reputation or influence, must carry out in person the mandate which he has accepted, unless he has express or implied authority to the contrary. He is appointed because the principal has confidence in him and his peculiar ability. And so where he is appointed to act under circumstances which require the exercise of discretion, for example, he may not, as a general rule, appoint anyone else to exercise that discretion in his place. Thus a broker, an auctioneer, the liquidator or the directors of

a company ordinarily must personally carry out their mandate.

The rule, like other rules, suffers exception. Where expressly or impliedly an agent has undertaken to carry out a mandate in person, he cannot delegate his authority; but in other cases his right to do so may be implied. Many forms of agency, especially mercantile agencies, cannot be carried out by the agent in person, and it is not intended that they should be. So it has been laid down in a leading case, that:

The exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a "sub-agent" or "substitute"; and, on the other hand, to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract or agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise, which impose upon the agent the necessity of employing a substitute.¹

In other words, the principal may know when he appoints an agent that the latter will employ substitutes; or it may be the custom or usage of the trade or business that sub-agents should be engaged; or the act or duty may be performed without the exercise of any particu-

¹ *DeBusche vs. Alt.* (1878), 8 Ch. D. 310.

lar skill or discretion—in these, and under many other circumstances, the agent is free to employ others to fulfill his contract for him.

281. *Relations of agent, sub-agent and principal.*—The authorities are somewhat at variance in ruling upon these relations, and the Quebec law differs in details from the English law. It may be said, however, that where an agent appoints a sub-agent, without the express or implied authority of the principal, the latter will not be bound by the acts of such sub-agent. On the other hand, the agent is answerable for the acts of the person whom he without authorization substitutes for himself. In an English case, an agent was held liable for the acts of his sub-agent who was appointed with the principal's knowledge.¹ Certainly he would be liable where, being authorized to appoint an unnamed substitute, he appointed someone who was notoriously unfit.

282. *Duties of agent.*—An agent must act with all the skill, care and diligence that could reasonably be expected of anyone engaged in his particular business. There are well recognized standards of conduct and performance in most callings, and to these he will be expected to adhere; more especially when he is being paid for his services. If he is acting gratuitously, the rigor of the rule is somewhat relaxed, and such skill and diligence will be exacted as he possesses, or which he would exercise in the conduct of his own affairs. He is bound to keep his principal's money and property separate and intact, to keep and render accounts of his administration, to keep proper books and vouchers, and to deliver and pay to his principal all that he has received under the authority of his mandate. He must pay in-

¹ *Skinner vs. Weguelin*, 1882, 1 C. & E. 12.

terest upon money of his principal which he employs for his own use.

283. *Fiduciary obligations.*—As we have already seen, an agent stands in a relation of confidence toward his principal; and from a person in a position of confidence is always exacted the utmost good faith and fair dealing. He cannot act for both parties to a transaction and accept a commission from each without their full knowledge and consent. Otherwise the interests of one or the other are likely to be in jeopardy; and an agent, owing to his position of trust, must not and cannot place himself in the way of temptation. If he is instructed to sell a property, he may not himself become the purchaser—at least before he has obtained the consent, based upon as full knowledge of the facts as he has himself, of his principal, who otherwise could repudiate the transaction as irregular.

Nor could an agent authorized to buy certain property for his principal be himself the vendor, unless again after full disclosure. His profit would be secret and illegal; and the transaction could be set aside by the principal though he had not thereby lost a cent. So also where an agent, authorized, for example, to buy one thousand bushels of wheat, stipulates with the vendor for a profit in consideration of his getting the sale in preference to another, such a profit is in the nature of a bribe, and the principal may repudiate the contract of purchase. Perhaps the reasoning behind the rule is that, if the vendor can afford to give a secret bribe to the agent, he can afford to sell just so much cheaper to the principal, who under the circumstances is entitled to any shading of prices. So also if an agent is employed to buy a property and he purchases for himself, he is regarded as a trustee for his principal: he cannot

set up any title so acquired against the absolute right of the principal to have the mandate fulfilled.

The courts are very strict in refusing to countenance any act of an agent which conflicts, however slightly, with his position of trust. For example, where T, while professing to act as M's agent and stipulating for a commission, by a devious course of conduct, took from M an agreement of sale to himself (T), of certain land, resold it to G, at a price higher than that at which he represented to M that he had sold it, paid over to M a smaller sum, less the agreed commission, and divided the balance with St. A, who was alleged to have been his partner in the transaction. It was held that M was entitled to recover, not only the profit made by T, including the commission, but the amount paid to St. A. All moneys paid by G to T were received by T in trust for his principal, M.¹

Similarly, a secret arrangement between the respective agents of the vendor and of the purchaser of property, that a price larger than that which the vendor is willing to accept shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be countenanced by the court, and the purchaser, having paid the full price demanded, without knowledge of the secret arrangement, is entitled to recover such surplus.²

A principal must refund to the party with whom his agent contracted on his behalf, any profit in the transaction represented by the money he has received through the fraud of his agent, whether the principal authorized the fraud or not.³

¹ *Morison vs. Thompson*, L. R. 9 Q. B. 480.

² *Peacock vs. Crane*, 3 D. L. R. 645.

³ *Canadian Financiers, Ltd., vs. Hong Wo*, 1 D. L. R. 38.

284. *Liability of agent to principal.*—An agent is an instrument only and represents another. As toward his principal he incurs no personal liability whatever by his due and proper execution of his mandate. The third person with whom he dealt may not fulfill his contract, may become insolvent or repudiate his agreement—that is no affair of the agent. By common usage, of course, an insurance broker is liable to an insurance company for premiums payable upon policies written by him; and a *del credere* agent, from the nature of his contract, guarantees fulfilment of the transaction which is the subject of his agency.

But an agent will in all cases be liable to his principal for the damages resulting from his negligence or carelessness, his unauthorized acts or other breach of duty.

Hence, in an action on a fire insurance policy, the insurer may recover from its agent (as damages for the latter's neglect of duty as the insurer's agent, to give the insurer sufficient information of the hazardous nature of the risk, resulting in too small a premium being charged) the difference between the accustomed premium which would have been charged on a proper discovery of the material facts known to the agent, and the lower premium which was in fact charged upon his negligent classification of the risk.¹

A person was employed to secure additional insurance on a certain property. A correct specification of what was required was given him. He received the policy from the underwriters and forwarded it to his clients without reading it. The policy contained an erroneous statement of the prior insurance carried by them. As a result, when a fire occurred, they were

¹ *Stoness vs. Anglo-American Insce. Co.*, 3 D. L. R. 63.

forced to compromise their claim against the insurer. It was held that the agent was liable for the damages suffered by them.¹

And again, if an agent neglects to keep his principal's money separate from his own, and in fact deposits it in his private account at his bank, and the bank fails, the agent has been held liable.²

And an auctioneer who sells property under conditions requiring the payment of an immediate deposit, has been held liable in an action for negligence if he permits the highest bidder to go away without paying the deposit.³

An agent will not be liable where he has done an authorized act which in itself may be imprudent and which may result disastrously to the principal. Nor will he be liable where damage results from his actions when he has literally followed his instructions; or where, in the absence of instructions, he has exercised his best judgment and was entitled to use his discretion, or has acted under the best obtainable advice or according to the usage of the particular business. So if a principal orders to be done on his premises a work, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, the principal himself is bound to see to the doing of that which is necessary to prevent the mischief. He cannot relieve himself of his own responsibility by employing someone else (whether servant or independent contractor) to do what is necessary to

¹ *Rudd Paper Box Co. vs. Rice*, 3 D. L. R. 253.

² *Wren vs. Kirton* (1805), 11 Ves. 377.

³ *Hibbert vs. Bayley*, 1860, 2 F. & F. 48.

prevent the act he had ordered to be done from becoming wrongful.¹

And it has been held that an agent who had no authority to bind an insurance company, until it had approved an application for insurance, is not liable for failure to effect insurance upon property before it was destroyed by fire, where he agreed with the applicant only to submit his application to the company for approval, which he did without negligence, and it did not appear that he unconditionally agreed to place and effect such insurance.²

A gratuitous agent is liable for gross negligence in the course of his agency, but not for mere want of skill, unless he is in a situation from which skill may be implied. But an omission to exercise such skill as he actually possesses or has held himself out to possess, or such skill as may reasonably be implied from his profession or employment, or to exercise such skill and diligence as he is in the habit of exercising in regard to his own affairs, is deemed to be gross negligence for the consequences of which he is responsible to the principal.³ So that where a customer deposited certain securities with his bankers for safe keeping, the bankers receiving no reward for taking care of them, and the securities were stolen by a clerk in the banker's employ, it was held that as the bankers acted gratuitously, they were not liable, as there was no evidence of gross negligence on their part.

285. *Measure of damages.*—Where by his negligence or some other breach of duty an agent causes loss to his principal, the latter's claim against him will be for

¹ Cockshutt Plow Co., Ltd., vs. MacDonald, 8 D. L. R. 112.

² Baxter vs. Jones (1903), 6 O. L. R. 360.

³ Wilson vs. Brett (1843), 11 M. & W. 113.

the amount of the actual loss sustained, i. e., such loss as would naturally result, or such as the agent, in the circumstances, might reasonably have known and expected would result. Hence if an agent employed to insure his principal's goods neglects to do so, and they are destroyed by fire, he will be liable as fully as would the underwriters have been had he effected the insurance. In another case, a commission agent in Hong Kong was instructed to buy a quantity of a certain kind of opium. He bought and shipped an inferior kind. It was held that the proper measure of damages was the loss actually sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the kind ordered and of that shipped.¹

286. *Agent not liable on agency contracts.*—An agent who acts in the name of his principal and within the bounds of his mandate, is not personally liable to third persons with whom he contracts. When we speak of an agent acting within the bounds of his mandate, we include, of course, acts in excess of his authority which the principal ratifies. If he contracts personally, though on behalf of his principal, he may be sued in his own name, though the principal may be known to the third person contracting. So it has been held that where an agent buys goods at a sale by auction, and gives his own name which is entered as that of the buyer, he is liable unless it is clearly proved that to the knowledge of the auctioneer he did not intend to bind himself. In such a case it is proved that he did not "contract personally." But where an agent acts for an undisclosed principal he is in all cases personally liable. He will even be liable for damages for non-

¹ Cassaboglou vs. Gibb, 1882, 11 Q. B. D. 797.

performance of his contract. His offer later to disclose his principal will not help him. So that if an auctioneer, acting for an undisclosed principal, sold a potato crop still in the earth, to be removed at the expense of the buyer, he would be held to have contracted to give authority to enter the field for the purpose of digging and removing the potatoes. He would also be considered to have warranted that he had authority to sell.

It follows that if an agent makes a contract with a third party ostensibly on behalf of his principal, but in reality beyond the scope of his authority, he is in the position of having warranted to such third person that he had the authority he seemed to have. And if he had not such authority, then he has deceived the third person and has committed a breach of warranty for which he may be sued. If he wilfully misrepresents facts regarding the thing or matters which are the subject of his agency, he has deceived and is liable in damages. If he knowingly declares himself to be and acts as the agent of a non-existent or incompetent person, he will be personally liable. There is no cause of action for breach of implied warranty where there is no misrepresentation of the fact of authority, e. g., where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal.¹

But where in the course of his agency he signs a deed in his own name, thus becoming a party thereto, though he may be described as representing a principal who is named, he will be personally liable. If the principal is undisclosed, not only will he be personally liable, but he alone could sue the other party thereto to enforce the

¹Smith's Mercantile Law, 11th Ed., p. 191.

contract, on the principle that a person who is neither a party to a deed nor mentioned therein, cannot sue upon it.¹ So also where a person makes a contract, professedly as agent but actually for himself as principal, he is personally liable.

And an agent will be bound to repay money to a third person where it has been paid to him for the use of his principal, and (1) the agent has contracted personally and the credit is not given exclusively to the principal, or (2) the agent has obtained payment by fraud or threats, or (3) the agent, having had payment but before delivery to his principal, is notified by the third party that the latter intends to demand repayment because of error, fraud, threats, and so on.²

287. *Actions by agents.*—The general rule is that an agent cannot sue on a contract professedly made on behalf of a principal. There are certain exceptions to the rule. Naturally where he contracts personally, or on behalf of an undisclosed principal, he may sue in person. But a factor, who according to our definition has a special property in the subject matter of the agency, in that he has a lien, for any balance due him, on the price of goods sold by him, may personally sue therefor. Generally speaking, he will also be liable toward third persons where his principal resides in a foreign country. It has been held that both a factor and an auctioneer may sue personally for the price of goods sold by them for their principals. If an agent has by error paid away his principal's money, he may sue in his own name to recover. Or he may sue in damages anyone who causes injury to goods of his principal which are in his possession. Suing thus, these sue as trustees for their

¹ Thomson vs. Playfair, 2 D. L. R. 37.

² Bowstead, Loc. Cit., 421-2.

principals. But it has been held (and rightly so) that an agent cannot sue to recover money promised him by a third person as a bribe, though he may not have been influenced in any respect thereby.¹

288. *Remuneration of agent.*—The chief right of an agent against his principal is to receive his remuneration or commission. The amount to which he is entitled depends upon the express or implied contract between himself and his principal. Where there is no express contract, an implied contract will be sought in the custom or usage of the particular trade or business entered upon, from the circumstances surrounding the employment, or from the conduct of the principal. In the absence of custom or usage, according to the English rule, it is said that there is an implied contract to pay reasonable remuneration.² The Quebec rule is embodied in an article which provides that mandate is gratuitous unless there is an agreement or an established usage to the contrary.³ Where an agent has carried out his instructions and has, say, brought a purchaser to a vendor, his principal, and the principal then does not complete the sale, it has been held that the agent is entitled to his commission. But he will not be entitled to commission, in the absence of a special contract to that effect, where the precise event which his services were sought to bring about has not resulted therefrom. And where by express contract a commission has been named, no implied contract based on custom or usage can be urged against the express contract. Thus, if an agent, A, contracts with a wholesale dry goods firm that he shall receive a commission of five per cent on "all sales effected or

¹ *Harrington vs. Victoria Dock Co.* (1878), 3 Q. B. D. 54.

² *Bowstead, Agency*, p. 192.

³ *Civil Code*, Article 1702.

orders executed by him," it has been held that if one or more purchasers become insolvent before payment, he is entitled to his commission though it may be the custom of the trade that an agent will not receive commission in respect of bad debts. If the principal revokes the appointment he pays no commission, though the agent is entitled to be indemnified for his labor and expense. And so it has been held that where all that a real estate broker, who had an exclusive right to sell property, did toward making a sale was to advertise it in a newspaper before the owner effected a sale thereof, the agency was revoked, and the agent could recover only for the services actually performed, and not the compensation agreed upon in case he should make a sale.¹

In the absence of a contrary agreement, an agent is entitled to commission only on the transaction which he brings about—he cannot extend his right to some subsequent transaction. Thus if an agent is authorized to find a lessee of a house and he does so, he receives his commission; if the tenant later buys the house, the agent cannot claim a commission on the sale. The sale does not arise directly from his agency.

Under certain circumstances, also, the agent may be deprived of his commission. If he has been employed for an illegal purpose, he can claim no reward; or if he has been guilty of misconduct—bad faith or fraud, for example, or if he has been grossly negligent and as a result his employer receives no benefit through his agency, or if he betrays his trust and acts against his principal.

289. *Agent's right to indemnity.*—A principal must indemnify his agent for all obligations contracted by

¹ Cadwell vs. Stephenson, 3 D. L. R. 759.

him toward third persons, within the limit of his powers, or even where he has exceeded his powers and his acts have been ratified. The principal must likewise reimburse the expenses and charges which the agent has incurred in the execution of the mandate. This is true even where, without fault on the part of the agent, the business undertaken does not turn out successfully. An agent is also entitled to receive repayment of all advances he has made on behalf of the principal in the regular course of employment. Such advances the principal is presumed to have asked him to make.

The principal's request may be inferred, where the advances are made in the *regular course of trade*, or even on the spur of some pressing exigency not provided for by any ordinary rule, since the employer may fairly be taken to have authorized the employee to do, under any circumstances, that which a prudent man would conceive necessary for the safeguard of his interests, e. g., to insure a cargo, which is in extraordinary danger on account of the lateness of the season. But if an agent think fit to make a payment out of the regular course of business, he will not, unless he can show circumstances from which his principal's authority may be inferred, or his principal adopts it, be entitled to repayment. Moreover, though he is entitled to be repaid his regular expenses, yet if he conduct himself so negligently as to incur expenses which would not have been necessary had he acted rightly, he will be allowed nothing on account of them.

Upon proper advances made by the agent the principal must pay interest. The principal must also indemnify the agent who is not in fault for losses caused him by the execution of the mandate, but not for losses caused by his disobedience or negligence. Hence if A authorizes an insurance broker, B, to execute a policy of fire insurance, and he revokes B's authority before

the contract is completed, but B goes ahead, has the contract completed and pays the premium, he cannot recover the premium from A, because he has acted without authority. But where an agent, in ignorance of the extinction of his mandate by the death of his principal, or for other cause, continues the execution of his mandate, he must be indemnified, for all such acts as are within his powers, by the principal or his legal representatives.

290. *Lien of agents*.—As we have seen, the principal is bound to reimburse the expenses and charges which the agent has incurred in the execution of the mandate, and to pay him the salary or other compensation to which he may be entitled. To secure payment, the agent has a privilege and right of preference, a lien, for the payment of what is due him, upon the things placed in his hands and upon the proceeds of the sale or disposal thereof. There are certain conditions to the existence of his lien—he must have obtained possession lawfully in the course of the agency; there must be no agreement adverse to his right; he must not have received the goods for a purpose or under instructions incompatible with a right of lien. Such a lien is known as a possessory lien—which means that the agent has a right to retain the property until his claim has been satisfied. But the fact that he exercises his right of lien does not prevent him taking action upon the debt. In such case, he holds the goods which are under lien as a collateral security.¹ He may lose his lien by parting voluntarily with the goods, unless he is fraudulently induced to give up possession, or unless he gets an agreement that though he parts with the goods his lien

¹Smith: Mercantile Law, Ed. 1905, p. 766.

continues in force. Or he may by contract express or implied, waive his lien.

291. *Acts performed within the powers of the mandate.*—The general rule is that the principal is bound in favor of third persons for all the acts of his agent, done in execution and within the powers of the mandate. In particular instances—as in the case of a factor whose principal resides in a foreign country, or in case of an agreement or of the usage of trade—the agent may alone be bound for his acts, but these cases are exceptional. So that where the agent acts strictly within the scope of his authority, he binds his principal toward third persons who deal with him in good faith, even though he may have acted adversely to his principal's interests. So if A is authorized in writing by B to buy and sell cheese, and A buys a large quantity of cheese in his principal's name from C, sells it and pockets the proceeds without paying C, B will be held toward C, because, though A acted fraudulently, he was, so far as C knew, acting strictly within his actual authority. Though C must be in good faith, it is not required of him; in the presence of such an express authority, to go behind it to discover whether the agent is buying for himself or for his principal. The apparent authority is the real authority.

Similarly, every act which an agent does in the course of his employment, and within the apparent scope of his authority, is binding upon the principal. But the agent must not actually be unauthorized, to the knowledge of the third person, to do the act. If the third person knows that the agent is exceeding his authority, he will not be allowed to take advantage of the principal. Thus the general manager of an amusement company engages a hall and orders the printing of advertising mat-

ter in preparation for the appearance of a foreign orchestra. The regulations of the company provide that all transactions shall be for cash. The company is liable, unless the third persons had notice that the manager acted beyond his authority. His acts were within the apparent scope of his authority as general manager. The test is, then, that the extent of the agent's authority is (as between his principal and third persons) to be measured by the extent of his usual employment—by employing him the principal holds him out as his representative for the matter of the employment, and third persons in good faith are entitled to treat with him in connection with matters in the usual course of such employment. So it has been held that where the manager of a business which was carried on in his name, the real principal being undisclosed, ordered goods for the business, and in so doing exceeded his authority, the undisclosed principal was bound.¹

292. *Acts exceeding the scope of authority.*—For such acts the principal is not bound, unless in fact he has authorized or has ratified them. What acts are, and what acts are not, within the scope of the agent's authority or in the course of his employment, will have to be determined in each case. The courts will generally go so far as to hold that an agent may adopt measures necessary or usual for carrying the main intention of the principal into effect in the best manner.² Thus it has been held that an agent who is employed to get a bill discounted, may, perhaps, unless expressly restricted, indorse it in the name of his employer; that an agent appointed to receive rents and make leases can fix the period of the lease; that a broker who is em-

¹ *Watteau vs. Fenwick* (1893), 1 Q. B. 346.

² *Smith, Loc. Cit.* 160.

ployed to issue a policy of insurance may settle the loss. On the other hand, it has been held that a bank is not bound where one of its managers, without authority, guarantees payment of a draft, it not being within the ordinary scope of his authority so to do. Nor is a principal bound who instructed an agent to find a tenant for a property, but not to grant a lease without consulting him, where, without consulting him, the agent granted a lease for twelve years.

The principal is not bound toward third persons who deal with an agent who to their knowledge is exceeding his authority. Thus a broker has possession of certain goods upon which he has a lien for advances. He pledges the goods to a person who knows that in so doing he is exceeding his authority. The pledgee acquires no right; he cannot even retain the goods for the amount of the broker's lien, the lien not having been transferred under the circumstances.

293. *Termination of agency.*—The relation of principal and agent arises from contract, express or implied. The relation is terminated as other contracts are terminated. Thus:

(a) By the accomplishment of the particular business or transaction. So if a solicitor is retained to conduct a case, unless it is otherwise agreed, his mandate ceases upon the rendering of the judgment. Or an auctioneer is instructed to sell certain goods: upon the completion of the sale his authority ceases.

(b) By the expiration of the time for which the mandate is given. This may depend upon the terms of the contract. It may depend upon usage or the custom of trade. Thus a broker is authorized to sell certain goods. By the custom of trade his authority to sell may lapse

with the expiry of the day during which the order is given.

(c) By the destruction of the subject matter of the agency.

(d) By the happening of some event which renders the agency unlawful, or upon the happening of which it has been agreed the authority shall cease.

(e) By notice of revocation given by the principal to the agent, subject to the agent's right to damages in case of breach of contract.

(f) By notice of renunciation given by the agent to the principal. The agent may be liable for damages if his renunciation is unjustifiable.

(g) By the death of the principal or of the agent.

(h) By some change in the condition of either party by which his capacity is affected, as by lunacy, unsoundness of mind, interdiction, bankruptcy, or, where the principal is a corporation or company, by the dissolution of the corporation or company.

It may be stated as a general rule, that acts of the agent done in ignorance of the death of the principal or of any other cause whereby the mandate is extinguished, are valid. Nor does a revocation by the principal affect third parties who may deal with the agent in good faith, without notice that the agent's authority has ceased.

CHAPTER XXII

MASTER AND SERVANT

294. *Definition.*—The relations between master and servant are in many respects similar to those between principal and agent. Frequently the words “servant” and “agent” are used interchangeably. Strictly speaking, they are not interchangeable; though every servant is, in executing the duties required of him under his contract with his master, the agent of his master. An agent is a person authorized to do some act or acts in the name of another who is his principal. He acts for and represents his principal in dealings with third parties where obligations are created between the principal and such third parties.

A servant, while he is acting as a servant only, and not as an agent, performs operative acts, menial labor, office work, and so on, in the performance of which he does not come into contact with third persons in a representative capacity. My coachman, in the performance of his usual duties as such, is my servant, and not my agent. But if I send him to buy a horse for me in my name, he becomes my agent for that purpose, though he is none the less my servant. So that a person may be both an agent and a servant at the same time. It is said that in order that there may be a *contract* of hiring and service there must be a mutual agreement, express or implied, by which one person is bound to hire and remunerate and another is bound to serve for some deter-

minate time. There will be no *contract* of hire and service if the understanding is that the employer is to pay only while the servant remains, it being optional whether the servant will serve or the master employ.

295. *Contract of hire and service.*—If a special agreement is entered into, then the terms of the agreement must be observed and adhered to by both master and servant. Where the agreement calls for service for a year or longer, generally the agreement must be in writing and signed by the parties. But a binding agreement of service cannot be made for a longer period than nine years. It has been held that where services have been rendered without an express contract to pay for them, it is a question of fact whether or not there was an implied contract to pay for them, and the onus is upon the one seeking payment. Usually, however, where there is no express contract for hire and service, and the service is performed, there arises a presumption of contract. In which case the wage would be the customary wage paid for the particular kind of work in the locality. Where the services are in such a case rendered as between near relatives, the presumption is rather to the contrary. It then becomes necessary to prove an express hiring.

296. *Independent contractor.*—In order to be an independent contractor, a workman must be free from control, and must not be subject to the orders of anyone as to the manner in which the work is to be done. A wishes to have a building torn down to make way for a new one. He contracts with B that B shall tear down the building, take full control of the work, employ his own men and use his own methods. B is experienced in this kind of work, and A exercises no control or supervision. The work begins, and owing to the re-

moval of parts of the roof which formed a counterweight for a heavy stone cornice, a part of the cornice falls into the street and kills a passerby. A is not responsible; B is, if negligence on his part is proved. If B had not been a competent person, and had not had experience in this class of work, A might be held liable for his negligence in employing an incompetent workman. If after the work began, and before the accident, A had intervened and the work was henceforth done under their joint supervision, then the accident would be considered to have occurred through the negligence of both.¹

So it has been held that the act of committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, is to be differentiated from the act of turning over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. It may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate. There is good reason for holding him liable for injury caused by an act certain to be attended with injurious consequences if safeguards are not provided, no matter through whose fault the omission to take the necessary measures for such prevention may arise. Hence, if the owner of lands upon which works are to be constructed, from the construction of which injury to adjoining premises must be expected to result, omits to take the necessary measures to prevent such mischief, he may be held liable.²

Nor can the employer expect to escape liability by

¹ *Dallontania vs. McCormick and the C. P. Ry.*, 4 O. W. N. 547, 8 D. L. R. 757.

² *Cockshutt Plow Co., Ltd., vs. MacDonald*, 8 D. L. R. 112.

pleading that work has been entrusted to an independent contractor, if the thing contracted to be done is unlawful, or creates a public nuisance, or by statute must be done efficiently and it is done inefficiently.¹

297. *Fellow-servant and vice-principal*.—Who is a fellow-servant? In the English law provinces it will be of importance to know. A fellow-servant is one who is engaged with others for the same master in operative work. Their duties may not be similar, but they are fellow-servants if they are engaged in the same general business of their common employer. One may be of a higher grade than another, and these may not be engaged in the same particular work. In that they are performing operative acts for the general furthering of the business, they are fellow-servants.

In the English law provinces, then, where an employee is injured by the act or fault of a fellow-employee, the master is not liable. In the Province of Quebec, this fellow-servant rule is not followed. The master is responsible, though the accident be due to the neglect or carelessness of the fellow-employee, whether he be a foreman or an ordinary workman.

A vice-principal, on the other hand, is one whom the master charges, in his stead, to provide warning of extraordinary danger, safe tools, for the employment of competent workmen, the repair of machinery and maintenance of guards on dangerous machines, and so on. If the person so charged is careless in the performance of these duties and a workman is injured, it is as though the master himself were negligent; and he is liable in damages, as a result. The vice-principal is not a fellow-servant. The master's duties in these matters are said to be non-assignable: he does not rid himself of responsi-

¹ Berg vs. Parsons, 156 N. Y. 109.

bility by charging another with the performance of his own duties.

298. *Master liable for servant's acts.*—The general rule is that the master is responsible for the negligent acts of his servant done in the course and within the scope of his employment. The servant will also be liable. The master would not be responsible for the acts of his servant done contrary to his positive instructions. He will be responsible where in the performance of his duties the servant is injudicious and causes damage, or is drunk and causes damage.

Thus if a servant, in the discharge of his duties, is driving a horse which runs away and dashes through a shop window, the master is liable. It would not be a sufficient plea that the servant was exercising reasonable care. A street-car conductor in the course of an argument with a passenger strikes and injures a passenger. The company is liable, because carriers must protect passengers from assaults or injuries by employees as well as by other passengers.

A man was driving a wagon just in front of a street car. He turned out for it at a street intersection, where many people were standing in the roadway waiting to board the car. He shouted for them to get out of the way, and drove through the crowd in such a reckless manner as to strike a person who was attempting to board the car which was then opposite the wagon. The person struck was thrown down and the car ran over and crushed his foot. It was held that the master was clearly liable.¹

299. *Servant's personal liability.*—A servant may render himself personally liable in certain cases. As we have just seen, he is liable with his master where he

¹ Baillargeon vs. St. George, 4 D. L. R. 894.

negligently causes injury to third persons or to property. He will be liable where, while acting as his master's agent, he does not, in dealing with third persons, disclose the fact of his agency. If he contracts in his own name for his master, he should describe himself as "agent for," or "per," "pro," and so on. If he wilfully causes damage, whether acting within the scope of his employment or not, he is liable as a principal. So also if he, jointly with his master, commits any fraud or crime.

300. *Workmen's compensation acts.*—We have indicated that at common law, in all the provinces, a workman who is injured in the course of his employment, has an action in damages against his employer. In several provinces the common law rules have been altered by workmen's compensation acts. Under these acts, speaking generally, the employer is liable to compensate the workman for injuries which result:

(a) From defects in "ways, works, machinery, plant, buildings, or premises" connected with the business.

(b) From negligence of those who have the superintendence of the work.

(c) From negligence of those to whose orders the workman was bound to conform and did in fact conform.

(d) By reason of an act or omission by an employee in compliance with rules or by-laws of the employer.

(e) By reason of the negligence of any person in the employer's service and in charge of any points or signals, machine, train or car.

If the accident is caused by the workman's wilful misconduct or serious negligence, he is not allowed compensation. The accident may have been caused by a fellow-employee. The injured workman may proceed

against him or against the employer, but not against both.

The Quebec Workmen's Compensation Act makes the employer liable (except in agricultural industries) for all accidents occurring to the workman by reason of or in the course of his employment, unless the accident was caused intentionally by the workman. If the workman or the employer is guilty of inexcusable fault, the courts may diminish or increase the compensation accordingly. Thus it has been held in a Quebec case that the fact that a workman, despite warnings, persists in remaining in a place of danger where he is killed, is inexcusable fault on his part for which the damages should be diminished. It does not follow, however, that the accident was intentionally induced by him so as to deprive his representatives of the right to indemnity. The Quebec act does not require, as do certain of the other acts, that notice of the accident or death be given within a stated period, but action must be brought within a year from the accident.

In Alberta and New Brunswick the court, in its discretion, fixes the compensation. In New Brunswick the payments are limited to a period of ten years. In the other provinces (except Quebec) the estimated earnings for the three years preceding the injury are the basis of computation, or the sum of one thousand five hundred dollars, whichever is the larger amount.

In Quebec, the workman is entitled to a rent equal to fifty per cent of his yearly wages, if he is absolutely and permanently incapacitated; in case of permanent partial incapacity, to a rent equal to half the amount by which his wages have been diminished. For temporary incapacity, he is entitled to one-half his daily wage, beginning on the eighth day after the accident and while

his incapacity lasts. If his yearly wage exceeds one thousand dollars, he has no claim under the act; but has his recourse at common law. If his wage is between six hundred dollars and one thousand dollars, then as to anything over six hundred dollars he receives only one-fourth of the compensation previously mentioned.

301. *Alien Labor Act.*—The Alien Labor Act is a veiled measure of retaliation against the United States, in that the act applies only to immigration from countries which have enacted similar legislation applicable to Canadians who go to such countries. The act provides:

That it shall be unlawful for any person, company, partnership or corporation in any manner to prepay the transportation, or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada under contract or agreement, parol or special, express or implied, made previous to the importation or immigration of such alien, to perform labor or service of any kind in Canada.

To contravene this provision is to commit a penal offence, the fine which may be imposed being not less than fifty dollars, nor more than one thousand dollars. Imprisonment for a term not exceeding six months, and the payment of a fine of not more than fifty dollars for each alien landed, may be ordered in the case of the master of any vessel who knowingly violates the act.

The act does not apply in certain stated cases. Foreigners already living in Canada temporarily may contract with foreigners to act for them here as private secretaries, servants or domestics. A new industry is to be favored and to be guarded against loss for lack of skilled workmen. Hence a company engaged in a new industry not at present established in Canada, may

bring in skilled labor if it cannot be obtained here. There may be workmen of the class desired in Canada, but they may not be obtainable because they are already engaged. The Dominion Carriage Company erected a shop in which to build steel box-cars. It needed a number of riveters, and although there were riveters working in Canada, it could not secure their services. It brought in several from the United States. Its action was upheld by the Court of Appeal of Quebec. The act does not bar professional actors, artists, lecturers, singers, or persons employed strictly as personal or domestic servants. Nor does it prevent any person assisting some member or members of his family, or some relative or friend to come here to take a position if the newcomer's intention is to become a citizen of Canada. The act does not affect the powers of the government of Canada or of any province to encourage immigration by circulating advertising matter in a foreign country. This private persons may not do.

PART V: PROPERTY

CHAPTER XXIII

PROPERTY IN LAND

302. *Preliminary remarks.*—In the provinces other than Quebec, generally speaking, the law of England relating to real property, modified by local statute, is in force. In Quebec the principles of the French law are followed, these having been greatly modified by statute. By the Treaty of Cession, the French law relating to property and civil rights was expressly reserved to the inhabitants of the Province of Quebec. It will be advisable therefore to discuss separately and in general terms the real property laws of the English law provinces and those of the Province of Quebec.

303. *Definitions.*—The objects of property are things as distinguished from persons. Things are either real property or personal property. Things real, we say, are permanent, fixed and immovable, as lands and tenements. By tenements are meant houses and other buildings, as also in the strict legal sense everything that may be held, provided it is of a permanent nature. Things personal are goods, money and other movables which the owner may carry about with him wherever he may go; they include, besides ordinary movable things, shares of stock, bonds, and rights or intangible property, the evidence of the existence or ownership of which may be tangible.

An estate or property in land may be real property

or personal property. By an estate in lands, tenements and hereditaments, is meant such interest as the tenant has therein. If the estate, therefore, is for the life of the possessor or will pass to his heirs, the possessor is said to have a freehold estate. Such an estate is known in law as a real estate or real property. Other estates are known as personal estates or personal property, and are known as estates less than freehold. As one authority puts it: "Such interests only as may continue for the period of a life are estates of freehold; all interests for a shorter period, or, more properly speaking, for a definite space of time are chattel, that is, personal interests."

Property may be corporeal or incorporeal. If tangible, it is corporeal; if intangible, it is incorporeal. Thus it is said that the owner of a piece of land is the owner of corporeal property. If he grants the right to another to pass over his property, that other's right is incorporeal property.

304. *Duration of estates in land.*—We have said that an estate in land is such interest as the tenant has therein, but different estates may exist at the same time in the same land. The quantity of interest which a tenant has in land will be measured by its duration and extent. His right of possession may subsist for some uncertain period during his life, or during the life of another; it may determine upon his death, or it may pass to his descendants; it may be circumscribed within a certain number of years, months or days; it may be infinite and unlimited, as where it is vested in him and his representatives for all time. The quality of an estate refers to its tenure; it may be in common or in joint-tenancy, or conditional. An estate may also be regarded with relation to the time when the enjoyment thereof begins.

305. *Freehold estates*.—At common law an estate at freehold is such estate as requires actual possession of the land. This definition is now subject to some qualification: for example, possession in the strict sense of the word cannot be had in an incorporeal tenement, and yet a freehold estate may exist in it.¹

Estates of freehold are divided into estates of inheritance or estates in fee, or estates not of inheritance, or life estates, which may be for the life of the owner or for the life of some other person. At common law estates of inheritance were known as estates in fee-simple, and descended to the heirs of the owner, both in the direct and in the collateral lines, or as estates in fee-tail, and descended in a direct line only, and might be limited to particular heirs, as, for example, to the eldest male heir.

Estates of freehold for life only may be conventional, that is, expressly created by the acts of the parties, or may be merely legal, that is, created by construction and operation of law. Estates for life created expressly by deed or will occur, for example, when a lease is made of lands or tenements to a person to hold for the term of his own life, or for that of some other person, or for more lives than one. The general intention is that such estates for life endure as long as the life for which they are granted. In some cases, however, estates for life may terminate upon the happening of some event before the expiry of the life for which they were created. They are nevertheless estates for life, because it is uncertain whether or when the event or contingency will arise. For example, an estate may be granted to a woman during her widowhood. She may remain a widow, but if she marries the estate is determined and gone. It is a

¹ Armour's "Real Property." Ed. 1901, p. 87.

general principle of law that, in the case of the tenant for life, the sudden determination of his estate, as by his death, shall not prejudice him or his representatives. Hence if the tenant for his life sows crops on the land subject to his estate, and he dies before the harvest is reaped, his executors take possession of the profits of the crop.

As examples of legal life estates, we may mention estates by dower¹ and estates by the curtesy. Where a man marries a woman seized of an estate by inheritance, and children are born alive capable of inheriting her estate, the husband holds the lands for his life as tenant by the curtesy. On the other hand, where a husband is seized of an estate by inheritance, and dies, his widow has for her life the estate of dower in one-third part of all lands and tenements which the husband was seized of or owned in fee-simple during the marriage.

By joining with her husband before his death in a deed conveying the lands or tenements, or by the execution of some other deed for the purpose, the wife may release her dower estate, and in fact will almost without exception be required to do so. In some jurisdictions the dower estate has been done away with, as we have seen.

Partnership property purchased by a partnership for the business and paid for with partnership money is not subject to dower. This follows from the rule, which will be explained under the title of partnership, that a partner's interest is his share in the surplus

¹ Dower is the right of a widow to a one-third life-interest in her husband's real estate. In Quebec legal dower consists in the use for the wife and the ownership for the children of one-half of the husband's real estate owned at the marriage or which accrues to him during marriage from his father or mother or from other ascendants. The right of the wife to dower does not exist under the laws of Manitoba, Alberta, Saskatchewan, the Yukon and Northwest Territories.

remaining after partnership liabilities have been paid.

Frequently it may be agreed by contract before marriage that the wife shall accept some provision in her favor in lieu of dower. Without her consent, the husband may not dispose of his property in such a way as to deprive his wife of her dower estate. By his will, however, he may expressly or impliedly indicate that the benefits given her under the will are in lieu of dower. The widow may then choose between her dower estate and the testamentary gift. If she accepts the testamentary gift, she bars her claim for dower.

306. *Estates less than freehold*.—There are four sorts of estates that are less than freehold:

(a) An estate for years, in which case the contract is for the possession of lands or tenements for some definite period; it may be for a year or years, a month or a number of days, or otherwise.

(b) An estate from year to year. Where no certain term is mentioned, and a tenancy continues for another or other successive period or periods of similar duration after the expiration of the original period, the tenancy can then only be terminated by a reasonable notice by either party. Thus where a tenant holds property, say for a month, and remains in possession and continues to pay rent from month to month, he is presumed in law to have acquired an estate from month to month. This presumption is based upon the assent of both parties to the continuance of the relationship.¹

(c) An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor. Such an estate may be terminated at the will of either the lessor or the lessee. Yet if the

¹ Bishop vs. Howard, 2 B. & C. 100.

tenant sows a crop upon the land, and before the crop is harvested, the lessor exercises his right and puts the lessee out, the lessee is nevertheless entitled to enter upon the land and carry away the crop. The reason for this is that the tenant was entitled to use the land, and could not know when the landlord would exercise his right, and could not therefore provide against it. It is laid down, however, that if the tenant at will himself determines the lease, the lessor shall have the profits. The law will, however, where rent is paid with reference to an aliquot part of the year, construe the tenancy as one from year to year.¹

(d) An estate at sufferance is where, by lawful title, a person comes into possession of lands, or, after the expiration of the time agreed upon, retains possession without any title at all. Thus if a man leases a property for a year, and at the expiry of the year continues in possession without any fresh permission of the owner, he is said to have the estate at sufferance. If the landlord consents to such possession, the estate of the lessee becomes one from year to year. The question may frequently arise whether the tenant is a tenant at will or by sufferance; if at will, his tenancy must be determined by notice to quit or by some demand of possession on the part of the lessor. If he is a mere tenant at sufferance, the landlord not having consented to the holding over of the estate, the landlord need give no notice before taking steps to eject. The tenant at sufferance is not entitled to profits, as, for example, to crops which he has sown but has not reaped before he is ejected. The tenant at sufferance is to be distinguished from the mere trespasser. The former came originally into pos-

¹ Armour's "Real Property," p. 144.

session by original deed; the trespasser came into possession without title.

307. *Severalty and joint estates.*—Estates treated with respect to the number and connection of their owners may be estates in severalty or joint estates. A person who holds lands or tenements in severalty or is sole tenant thereof, holds them separately and in his own right only, without any other person being joined or connected with him during his estate therein. This is the most usual way of holding an estate. An estate may be held in joint-tenancy; as where lands or tenements are granted to two or more persons as trustees or executors, or with the apparent intent that they shall take as joint-tenants. Their holding may be for life, for years, at will, in fee-simple or in fee-tail.

Joint estates are divided into several classes:

(a) Estates in joint-tenancy. The joint-tenants must have one and the same interest. Thus one joint tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be a tenant for life and the other for years.¹ The title of joint-tenants must be created by one and the same act. Joint-tenancy must arise not by descent; but by act of law, or by purchase or acquisition by the act of the party. The act must be one and the same, as otherwise the tenants would have different titles. There must be unity of time, that is, the estates must be vested at one and the same period. There must be a unity of possession, that is, each has the entire possession as well as possession of every part of the whole. Their interest or estate is undivided. It is important to note also that in the case of joint-tenancy, there is a right of survivorship, in that upon the

¹ Armour's "Real Property," p. 242.

death of one joint-tenant, his right accrues to the survivors. In a word, to construe a joint-tenancy the unities of time, title, interest and possession must exist.

(b) An estate in common occurs where tenants in common hold by several and distinct titles, or by unity of possession; that is, there is a unity of possession, but possibly not a union of interest, of title and of time. One may hold by descent, the other by purchase. The estate of one may have been vested for years, and that of the other for days only.

(c) An estate held in co-parcenary is where lands of inheritance descend at common law from ancestors to two or more females or heirs of females. Thus where a person, seized, for example, in fee-simple of property, died, and his next heirs were two or more females or their representatives, they would all inherit, and were called co-parceners. Though the unities of interest, title and possession might exist, and the properties of co-parceners were in these respects similar to those of joint-tenants, co-parceners differ from joint-tenants in several respects, in that, for example, co-parceners claim by descent and joint-tenants claim by purchase; there is no unity of time, for a man might have two daughters to whom his estate would pass in co-parcenary, and if one died before the other, the survivor and the heirs of the other, or if both died, their heirs, were nevertheless co-parceners. The estate vested in each at different times.

(d) An estate by entirety is an estate held by husband and wife at common law. Husband and wife are considered to be one person; hence if an estate were given to a man and his wife, they were not properly joint-tenants nor tenants in common. Upon the death of either, the entire property vested in the survivor. At common law, also, no husband nor wife could alienate

such land without the consent of the other. Various married women's property acts have modified these rules, and as under these a married woman may acquire, hold and dispose of real property separate from her husband, apparently she may convey her share separately from her husband.

308. *Special applications of joint-tenancy and tenancy in common.*—It has been said that partnership estates resemble estates in common and also joint estates. If a partnership uses its funds to buy real property for partnership purposes, the partners are as among themselves tenants in common; from the point of view of third parties they are regarded as joint-tenants. Thus if a partner dies, nominally the title to his share in the real property passes to his heirs, but in reality the whole property is subject to payment of partnership debts. The heirs, if they hold at all, hold in trust, subject to the liquidation of the business, upon which they receive, if there is any surplus, a certain sum in money, or its equivalent.

At common law, if a man mortgaged real property to secure a debt and the debt was not paid at maturity, the owner's estate in the property was gone, and the mortgagee's estate, being no longer conditional, was absolute. In that view of the law, a mortgage is really a grant of land to the mortgagee, with a proviso for redemption upon payment of the money advanced. In many instances this rule has been altered by statute and by the weight of equity decisions, so that a mortgage is frequently viewed now rather as a security for money advanced or for the performance of some other act.¹ Thus under the Torrens system, a mortgage is not a conveyance of the land, but a registered charge upon the

¹ Armour's "Real Property," p. 175.

land for the payment of the money.¹ The parties may always by express stipulation regulate the liability of the mortgagor. The general result is that the mortgagor has the title to the property, and the mortgage is a charge or lien in favor of the mortgagee, who has his remedy against the property to secure payment.

309. *Estates classified with reference to their qualified nature.*—Where an estate is unconditional or unqualified, it is said to be absolute. Where an estate is qualified, it is said to be an estate upon condition; that is, its existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.²

Estates upon condition may be upon condition implied or upon condition expressed. In the case of an estate upon condition implied, the grant is subject to some condition inseparable from its essence and situation, and the condition need not be expressed in words. Armour gives as an example the case where a grant is made to a man of an office, generally, without adding other words; a condition is implied that the grantee upon his failure duly to execute the office is subject to be ousted by the grantor or his heirs, and to be replaced by another. This principle is then applied to estates in lands and tenements. Thus if a tenant does anything incompatible with the estate which he holds, he may be subject to be deprived of his estate. If the condition is expressed in the grant itself, there is an estate upon condition expressed, as where an estate is granted subject to some express condition or qualification, upon performance or breach of which the estate may com-

¹ The Torrens System of Lands Transfer came to Canada from Australia. It is in force in Manitoba, Alberta, Saskatchewan, British Columbia and Ontario.

² Armour's "Real Property," p. 159.

mence, or be enlarged, or be defeated. If the condition is a condition precedent, something must be done or happen before the estate can vest or be enlarged. If the condition is a condition subsequent, then the estate, although already vested, may be defeated by the failure or non-performance of the condition. Thus if a man leases property for a term of years, a condition may be expressed that if within a certain period the lessee pays a certain sum, the fee will pass upon the fulfilment of this condition precedent. If an estate is granted by one who reserves to himself a rent, and it is a condition that if this rent is not paid at the times fixed he may re-enter, this is an estate upon a condition subsequent, in that the estate may be defeated if the rent is not paid as agreed.

A condition and a limitation must be distinguished. Where there is a condition, some uncertain event must happen before the estate can vest, or an estate may come to an end before its natural maturity by the happening of some uncertain event. Conditions generally are made to defeat or determine estates. In the case of an estate on limitation, however, words are used such as "during the continuance of," "so long as," "while," to limit the estate. Such a condition is not made to defeat or determine the estate; in fact, it allows the full period assigned for the duration of the estate. Thus if land is granted to A *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made \$500, the estate determines when the contingency happens. An estate on conditional limitation is created where real property is conveyed to a person with words of condition or limitation, and with the understanding that upon the happening of the conditioned event the title shall pass from him to another.

As we have seen, at common law mortgages were in the nature of an estate on condition, the condition being that if the money were not paid, the title to the land would pass to the mortgagee. The general rule now recognized is that the mortgagor retains the title to the land, and the mortgagee has a lien thereon.

310. *Estates classified as to the time when enjoyment begins.*—We have been considering estates with regard to their duration, or the quantity of interest of their owners. It is necessary to view them with regard to the time of their enjoyment; that is, as to when the taking begins.

Estates may therefore be classified as:

- (a) Estates in possession.
- (b) Estates in expectancy, or future estates.

The ordinary estate is the estate in present possession. Estates in expectancy or future estates may be:

- (a) Remainders.
- (b) Reversions.

An estate in remainder is an estate which is limited to take effect and be enjoyed after another estate is determined. Thus if A, who holds land in fee, grants it to B for ten years, and provides that at the end of the ten years it shall pass to C and his heirs forever, B is tenant for years, and C secures an estate in remainder in fee. Armour remarks that in this case an estate for years is created and carved out of the fee, and is given to B, and the residue or remainder of it is given to C. An estate in remainder is the creation of the parties, and does not arise by operation of law.

A reversion is created by operation of law. A reversion Coke describes as the returning of the land to the grantor or his heirs, after the grant is over. Thus A is the owner of land in fee-simple, and conveys it to B for

the life of C. A has a reversion, in that by law when C dies, B's estate ends, and reverts to A.

An executory estate is created by a disposition of lands by will, whereby no estate vests at the death of the testator, but only upon the happening of some future contingency. Thus A, who owns land, gives his son B an estate in fee, which is to begin upon B's twenty-first birthday.

311. *Titles to real property.*—We have now to discuss the title to real property—that is, the means of acquiring and holding the ownership thereof.

In order that there may be a complete title, there must be possession, right of possession, and right of property. The lowest degree of title consists in mere naked possession, or actual occupation without apparent right or pretence of right to remain in possession. The actual possession may be with one person while the right of possession is in another, and he who has the right of possession may always exert it, unless barred by lapse of time.

Generally speaking, title may be acquired by descent or by purchase. By title by descent is meant such title as goes to an heir where the owner dies without leaving a will. By purchase in its widest sense is meant such possession as a person has by his own act or agreement, and not by descent. It includes every other method of coming to an estate. Thus if A gives land to B, B is in law a purchaser; he comes to the estate by consenting or agreeing to the gift. A father may settle land upon his unborn son, and the latter is considered a purchaser, for he takes an estate which he would not have acquired by descent. The act or agreement which is evidence of a *purchase* is usually expressed in a deed or devise. But title may pass under the authority of a judgment of the courts.

A deed is a writing which the parties sign, seal and deliver. By his deed, once made, a man is bound.

Three forms of deed are in common use:

- (a) A quit-claim deed, which is a mere release.
- (b) A bargain and sale deed, which is a mere naked transference of title, without covenant as to the grantor's title, and
- (c) A warranty deed, sometimes called a full covenant and warranty deed.

The latter not only conveys the property in the fullest sense, but it contains covenants which go to warrant the grantee that his title is perfect, and that any encumbrances that may exist are fully disclosed in the deed.

Under various short forms acts there is provided a short form of warranty deed. If this deed is used and reference is made in it to the statute, thus showing an intention to adopt it, this symbolical short form will be held to include all that the long form under the statute might include. The short form deed naturally makes for quicker recording at the registry offices. The following is an example of such a short form deed:

THIS INDENTURE made in duplicate the First day of November, in the year of our Lord One thousand nine hundred and thirteen.

In pursuance of the Short Forms of Conveyances Act

BETWEEN:

JOHN A. BROWN, unmarried, of Toronto,
in the County of York, Province of Ontario, Merchant,

Party of the First Part,

and

THOMAS SIMPSON, of the same place,
agent,

Party of the Second Part.

WITNESSETH: That in consideration of the sum of One thousand dollars (\$1,000.00) of lawful money of Canada now paid by the said Party of the Second Part to the said Party of the First Part, the receipt whereof is hereby by him acknowledged, the said Party of the First Part **DOTH GRANT** unto the said Party of the Second Part in fee simple:

ALL AND SINGULAR that certain parcel or tract of land and premises situate lying and being (here describe the property). **TO HAVE AND TO HOLD** unto the said Party of the Second Part, his heirs and assigns to and for his and their sole and only use forever.

SUBJECT NEVERTHELESS to the reservations, limitations, provisos and conditions expressed in the original Grant thereof from the Crown.

THE said Party of the First Part **COVENANTS** with the said Party of the Second Part **THAT** he has the right to convey the said lands to the said Party of the Second Part notwithstanding any act of the said Party of the First Part.

AND that the said Party of the Second Part shall have quiet possession of the said lands free from all encumbrances.

AND the said Party of the First Part **COVENANTS** with the said Party of the Second Part that he will execute such further assurances of the said lands as may be requisite.

AND the said Party of the First Part **COVENANTS** with the said Party of the Second Part that he has done no act to encumber the said lands.

AND the said Party of the First Part **RELEASES** to the said Party of the Second Part **ALL** his claims upon the said lands.

IN WITNESS WHEREOF, the said Parties hereto have hereunto set their Hands and Seal.

SIGNED, SEALED AND DELIVERED,		} (Signed)
In the presence of		
(Signed) George Davis		} (Signed)
“ John Parker		
		John A. Brown
		Thomas Simpson

COUNTY OF YORK,
PROVINCE OF ONTARIO,
To Wit:

I, JOHN PARKER, of the City
of Toronto, in the County of
York, Manager, make oath and
say:

1. THAT I was personally present and did see the within instrument and a duplicate thereof duly signed, sealed and executed by John A. Brown and Thomas Simpson, the Parties thereto.

2. THAT the said instrument and duplicate were executed by the said Parties at the City of Toronto.

3. THAT I know the said Parties, and am satisfied that they are of the full age of 21 years.

4. THAT I am a subscribing witness to the said instrument and duplicate.

SWORN BEFORE ME AT THE CITY OF
TORONTO, IN THE COUNTY OF YORK,
THIS 1ST DAY OF NOVEMBER, A.D. 1913.

(Signed) Arthur Johnson,

A COMMISSIONER FOR TAKING AFFIDAVITS
IN H. C. J., &c.

312. *Involuntary alienation.*—Title may be involuntarily alienated, as, for example:

(a) By escheat. This is a survival of the old feudal tenure. If an owner of land dies without leaving heirs capable of inheriting, the title to the land is escheated. Under the feudal law it fell back to the feudal lord: in modern times it falls back to the state.

(b) By accretion. Whatever becomes united to or incorporated with a thing belongs to the proprietor. Thus deposits of earth and augmentations which are gradually and imperceptibly formed on land contiguous to a river are called alluvion. The person on whose land the soil is deposited gains by so much, and the person from whose land the soil is detached loses by so much.

(c) By estoppel. A person may lose his title by estoppel, as where he is by his own acts or representations precluded from asserting his right or interest as against a third claimant.

(d) By prescription. Prescription is a means of acquiring, or of being discharged, by lapse of time. A person may acquire a right to the title of land by long use; that is, by continued peaceable and uninterrupted enjoyment of the right for a certain fixed period, frequently for a period of twenty years.

Formerly the possession or enjoyment had to be adverse to a right of the owner of the title. With unimportant exceptions, the rule of adverse possession has been done away with in some jurisdictions, the tendency being to make the time for bringing an action to recover land run from the time when the right first accrues, regardless of the nature of the possession.¹ Upon this principle the possession of a relative is not the possession of the heir, and the possession of one tenant in common or a joint tenant is not the possession of his co-tenant.

313. *Legal and equitable estates.*—By ownership is meant that an owner of a thing shall have the most complete use and control of it, and the enjoyment of all the benefits derivable therefrom. Frequently, however, the title to property may be in one person and the beneficial interest or equitable estate in another or others. Such a provision is often made under a will, as, for example, in the case following:

I give, devise and bequeath to my wife one-third of all my property, real and personal, the same to be in lieu of all dower and rights of succession, and I hereby appoint her the executor of this will.

I direct that my said executor divide the remaining two-thirds

¹ Armour's "Real Property," p. 429.

of my estate into four equal shares, and I give, devise and bequeath said shares to her to be held by her in trust for the benefit of my children, one share for each child, to pay the income of each child's share to that child until he or she attains the age of thirty years, and then to pay over to that child the principal of such share. During the minority of any child, such portion of the income of that child's share is to be used by my executor for that child's support, maintenance and education as she deems best, and the remainder of such income is to be accumulated with or without interest until majority, and my said executor shall not be held accountable for any failure to obtain interest on such accumulations.

Under this will the wife is given the legal estate and the beneficial interest in one-third of the property. She has the legal estate in the other two-thirds, but the children have the beneficial interest. She is the trustee for her children as to these two-thirds.

The person in whose favor a devise is made under a will may die before the testator, in which case the devise lapses. Where a devise comprising the legal or beneficial ownership only lapses, a vacancy is created in the disposition to that extent. Hence if a testator devise lands to the use of A in fee, in trust for B in fee, and A dies before the testator, the legal estate comprised in the lapsed devise to A devolves to the testator's heir, charged with a trust in favor of B, whose equitable interest under the devise is not affected by the death of his trustee.¹

314. *Lands, tenements and hereditaments.*—By *land* is meant, in legal sense, any ground, soil or earth whatsoever, including meadows, pastures, woods, moors, waters, marshes, heaths and so on. It includes castles, houses and other buildings, which consist of land, which

¹ Kingsford, *Canadian Law of Wills*, Ed. 1913, p. 209.

is the foundation, and the structures thereupon. It includes whatever is affixed to the earth in the course of nature, or by the act of man. We have mentioned water as being a species of land. Sir Edward Coke takes care to explain that in the language of the law water is land, and therefore, he says, a person cannot bring action to recover possession of a piece of water by the name of *water* only; he must bring his action for the land at the bottom of the water, and must describe it as twenty acres of land covered with water. For, he says:

Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed and immovable; and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other.

It is to be remarked that land in its legal sense extends upwards as well as downwards. Hence a man may not erect a building which overhangs another's land. And as the land of a man extends downwards to the center of the earth, a neighbor may not dig down in his own land and then underneath that of property which does not belong to him. If he does so, he trespasses.

The word tenement is of greater extent, and while in its ordinary sense it applies to houses and other buildings, in its legal sense it includes all the forms of real property and everything that may be held, whether rent charges, easements, rights in common, even franchises, and rights of various kinds.

By hereditaments is meant, as Sir Edward Coke explains, not only lands and tenements, but anything that may be inherited, whether corporeal or incorporeal, real,

personal, or mixed: thus furniture or an heirloom, though it is neither land nor tenement, but a mere movable, as it is inheritable, is an hereditament.

The general distinction between hereditaments and tenements will be seen when we say that if A grants to B a right of way over his land during the life of B only, this is not a hereditament but a tenement, as it does not descend to B's heirs upon his death.

Hereditaments are corporeal or incorporeal. If corporeal, they consist of tangible things which the senses may perceive, and which may be seen and handled. If incorporeal, they cannot be seen or handled. They exist in the imagination, and are creatures of the mind. An incorporeal hereditament is a right attached to or issuing out of corporeal property. It is not the corporeal thing itself, whatever that may be, whether lands or houses or other property, movable or immovable; it is something collateral to these, as, for example, rent, or a franchise, an easement, or *profits à prendre*. So also an annuity to a man and his heirs is an incorporeal hereditament. By rent is meant a compensation or return given for the possession of some corporeal property, a familiar example being the right of the landlord to collect compensation for the use of his property.

Franchises are in the nature of a royal privilege or special right conferred by and derived from the Crown, which alone has the right to grant them. The Crown may grant a franchise to a railway, or to persons who wish to operate a ferry or build a bridge, or to be created a corporation. These are but a few common examples.

An easement is the right which one man has to go over another man's ground. If an owner of land grants to his neighbor a right of way across a corner of his property, this is an easement, or way. The easement there-

fore gives no right to any profit of the soil charged with it. On the other hand, a *profit à prendre* is the right of a person to take something out of the soil or something of value from the land of another. Thus a right to cut or remove timber, or to graze cattle, or mining rights, may be *profits à prendre*.

315. *Water rights*.—Water rights may be divided into: (1) those associated with natural and well-defined streams; (2) those associated with surface waters not well-defined; and (3) those associated with percolating or subterranean waters.

Navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbors and roadsteads, and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain. The general rule is that an owner of land whose title extends to the high water mark of navigable streams is entitled to the reasonable enjoyment of the water in front of his property. It has been held in Quebec that in the absence of the consent of the owner, or in the absence of compliance with the statute, a person has no right to drive piles in the bed of a navigable river, owned by another, for the erection of a boom. So also it has been held that a municipal corporation may not place a dam at the outlet of a lake for the purpose of raising the level thereof, when such action diminishes the enjoyment of mill owners having rights to the waters flowing from such lake, by depriving them of their usual quantity of water at certain seasons. It has also been held that where a water power company leased from the Crown a water power location on a river, the lease conferring the right to flood any Crown lands along the river and its expansions, the company had no right to flood mining claims,

by the raising of the waters of the river by a dam, where the mining claim was located before the granting of the lease to the company, although it was granted after the company made its application for the lease.

In the case of a stream which is not navigable, the bed usually belongs to the owners of land on either side to the middle line of the river. On the other hand it has been held that a grant by the Crown of land described as bounded by a river which is navigable and floatable, though it contains no special reservations in regard to the bed of the river, conveys no title to the bed of the river. It has been held that one whose land is separated from navigable water by marshy ground is not a riparian proprietor in respect of the navigable water; but the owner of farm lands adjoining a river may protect his lands against the inroads of the river by the construction of wing-dams or bank-lining so far as may be necessary, but he cannot erect or maintain such structures so as to injure the lands of proprietors on the opposite bank of the river, nor so as to alter the channel of the river to the detriment of the lands of his opposite neighbors.¹

Land formed by alluvion or gained by the recession of water belongs to the owner of the contiguous land to which the addition is made, and conversely land encroached upon by navigable waters ceases to belong to the former owner, on the principle that one who derives an advantage should also bear the burden. But, when the boundary of the land along the shore is clearly and rigidly fixed by deed, survey or otherwise, the principle does not apply, and the owner thereof, who cannot gain by alluvion or recession, does not lose by encroachment.²

316. *Ownership of land under and near water.*—A

¹ Lorraine vs. Norris, 6 D. L. R. 122.

² Volcanic Oil & Gas Co. vs. Chaplin, 6 D. L. R. 284.

riparian owner is entitled not only to the use of the water for domestic purposes, but to the right of access to or from his property, or wharves erected thereon, and if piers are erected on or about his property, and his riparian rights are abridged or taken away, he is entitled to compensation for the injury. But ownership of land under water does not necessarily constitute ownership of the waters. The general rule is that an owner of land under and adjacent to a stream may restrain up-stream owners from doing anything to prevent the flow of the stream over his land in its natural bed, substantially undiminished in quality, and unpolluted.

A mill owner cannot acquire by prescription, in the face of a statute to the contrary, the right to foul a stream by depositing sawdust and mill refuse therein. Injunction will be granted to prevent the continuance of the dredging of sand from the bed of a navigable river opposite or near the property on the bank, if it is shown that there is a real danger of the bank being worn away as a result.

By statute, booms may be laid on rivers to facilitate the floating and driving of timber, but not so as to encroach upon the common law right of the public to use such rivers for the same purpose, without undue interference. Hence it has been held that where a company which had laid a boom refused to open it and allow the timber of another through, under the pretence that it was mixed with its own and could not be sorted, was liable for the damage arising from the undue detention of the timber.

317. *Surface waters.*—Various rules for the disposal and control of surface water are recognized. The general rule is that every owner of land is entitled to get rid of it as best he can. Lands on a lower level are subject

toward those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The owner of property on a higher level is therefore not entitled to converge the water into a stream and cause it to flow upon lower lands of an adjoining proprietor. In some jurisdictions the owner of the lower land may build a dam to ward off such water. In others, as in Quebec, he may not raise any dam to prevent the flow, but the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. Apparently, however, the owner of the higher land may retain the water or may allow it to take its natural course. If he has a spring on his property he may use it and dispose of it as he pleases. He could not accumulate the water and dig a ditch so as to increase the flow and thus increase the servitude of the lower property.

Waters which flow beneath the surface of the ground may be taken and used by a proprietor, whether or not his use deprives his neighbor of benefits he might otherwise expect therefrom. It is a well-known principle that if a man digs a well upon his property and has a good flow of water, and later his neighbor digs a well upon his property, the result of which is to draw the water away from the well of the first, the latter has no remedy. The same would be true in the case of oil-wells supplied by oil percolating in the soil, and probably also in the case of natural gas.

318. *Fruits*.—Natural fruits are those which are the spontaneous product of the soil. The produce and the increase of animals are also natural fruits. The industrial fruits of the soil are those obtained by the cultivation or working thereof. Civil fruits are the rent of houses, interest on sums due and arrears of rent, includ-

ing the rent due for the lease of farms.¹ Crops which must be sown yearly, or those which grow upon vines or shrubs which, though they spring up each year from old roots, need training and culture, are industrial fruits. Strawberries and blackberries, corn, potatoes, hops, have all, in this sense, been held to be industrial fruits. Under the English law, industrial fruits are regarded as personalty and a sale of them must conform to the rules of the Statute of Frauds relating to the sale of personal property over fifty dollars. Apparently the sale of the lands on which they are growing would not, unless it were so agreed, include such crops. In Quebec, crops uncut and fruits unplucked are regarded as immovable. According as they are cut or plucked they become movable. The same would apply to trees. A crop may nevertheless be sold apart from the land, and in this sense is a movable, the sale of which would be subject to Article 1235 of the Code which embodies the principles of the Statute of Frauds.

319. *Border trees*.—Standing trees are a part of the realty. If the trunk of a tree is wholly on one man's property, but its roots extend into and its branches overhang the property of a neighbor, the latter may cause the branches and roots to be cut at the dividing line. The tree and its fruits nevertheless belong to the former. If the trunk of the trees stands on the dividing line, the general rule is that the tree and its fruits belong in common to the neighboring owners. Neither can destroy the tree, but each is entitled to use the branches and fruit on his side, though in doing so he must not injure the trunk. These rules apply generally in Quebec also.

320. *Fixtures*.—A fixture is a chattel which has become permanently annexed to land or realty and is there-

¹ Quebec Civil Code, Arts. 448, 449 and 450.

fore regarded as realty. That a chattel may become a fixture, there must be:

- (a) Actual or constructive annexation;
- (b) An intent to make it a permanent part of the realty.

Apparently, also, the conversion of a movable, by incorporation, into an immovable, can only take place when both the movable and the immovable into which it is incorporated are the property of the same owner; and this rule applies, not only between the owner of the movable and that of the immovable, but also as between the latter and third parties, e.g., hypothecary creditors. A key, because it is localized in use, has been held to be a fixture. So also storm windows, though they are up for part of the year only. Presses, boilers, vats, utensils necessary for working forges, paper mills and other manufactories are fixtures. Manure and the straw and other substances intended for manure, are immovable by destination.¹ Coal towers forming part of a coal plant and dependent on the power house for power, have been held to be immovable objects by destination, although they may be moved over a short distance on tracks built for the purpose, seeing they were placed on the property for a permanency and incorporated therewith.²

So also tools and implements used for making maple sugar, consisting of vessels and utensils which the proprietor has placed for a permanency on the premises, are immovable by destination. If the thing cannot be removed, it is regarded generally as a fixture. Thus gas and water pipes are fixtures. So also would be things which are placed by the proprietor and fastened with

¹ Quebec Civil Code, Art. 379.

² Nova Scotia Coal & Steel Co. vs. City of Montreal, 3 D. L. R. 750.

iron and nails, imbedded in lime or cement, or which cannot be removed without breakage, or without destroying, or deteriorating the property to which they are attached.¹ The mere fact, however, that machinery is attached by screws or cleats to the floor of a factory is not proof positive that it is to be regarded as part of the immovable. But where machines are essential parts of a factory, or mill, though not fastened to the floor, they may be regarded as fixtures. In a Manitoba case it was held that buildings erected by a squatter on Crown lands became the property of the Crown and part of the realty, and could not, therefore, be seized and sold under an execution against the goods of the squatter.² Gas and electric fixtures, it has been held, are not fixtures. Refrigerators in apartment houses may or may not be fixtures; their construction and that of the house must be considered.

The purchaser of realty takes also the fixtures as we now understand them. The tenant who during his lease incorporates fixtures with the immovable, as with nails, lime or cement, may remove them at the expiration of the lease, if he leaves the premises in the state in which he found them. But the proprietor may retain them upon paying their value. As between landlord and tenant the question of what are and what are not fixtures may be of prime importance. Where there is doubt, the presumption will be in favor of the landlord. Tenants' fixtures must be something of a personal character. Generally things so affixed to the freehold that they cannot be removed without doing serious injury to the freehold become a part of it. A well, trees, stone and brick buildings—things sunk in the soil itself—become

¹ Quebec Civil Code, Art. 380.

² Dixon vs. Mackay, 21 Man. R. 762.

part of the soil, and immovable. 'They are not tenants' fixtures: they cannot be removed. But temporary buildings supported on posts or boulders may be removed; they have not been affixed to and become part of the soil. The machinery of a manufactory, partitions, counters, shelving are trade fixtures and removable. But if the partitions have been made for a permanency, they become a component part of the building. A tenant who claims the right to remove fixtures must exercise his right promptly. These rules as to fixtures are of general application throughout Canada.

321. *Rights of adjoining owners: fences and party walls.*—The rule at common law was that a man must fence in his property to keep his cattle from wandering upon the property of a neighbor. In some cases, this common law rule has been changed. For example, under the Dominion Railway Act, a Railway Company must erect and maintain upon the railway fences of a minimum height of 4 feet 6 inches on each side of the railway, and gates at farm crossings, in order to keep cattle from straying upon the right of way. In many cases also, by statute, neighboring proprietors must share in the expense of building and repairing a common wall or fence.

In cities and towns where buildings are placed very close together, the law relating to party walls is of great importance. The wall of a building may be independent in form, but in the course of time may come to depend more or less on the wall of an adjoining building, or two buildings may be put up whose side walls support each other; in both of which cases an easement or servitude for the continuance of the support may arise. Generally where a proprietor wishes to build a wall adjacent to another, and wishes to use the other for the support of his wall, he may acquire the right to do so by paying

a price which may be fixed by statute or by agreement. Thus it has been held in a Quebec case, that where a building is so constructed that a wall of a neighboring building is used for all the purposes of an exterior wall except support, one wall of the new building being such that, without the neighboring wall, it would not stand the weather or afford sufficient protection to satisfy the building regulations; and for further protection, the two walls are joined together at the top by metal flashings; and it appears that the owner of the new building expected that, when it had settled into position, it would receive support also from the neighboring wall, the owner of the neighboring wall is entitled to compensation for the use of his wall as a party wall. And it was held by the Supreme Court that a neighboring proprietor may acquire a common wall either by formally making known his intention to do so, or by performing acts which constitute on his part an intention to make use of the wall.

The most common instance of a party wall is where the foundation is built over the dividing line so that part of it is on each property. Each proprietor may therefore use the foundation on his side, and has the right of support of the entire wall.

322. *Support of wall.*—At common law every owner of land is entitled to the continued lateral support of adjacent land, and one proprietor cannot dig upon his land so close to that of his neighbor that the latter's land caves in. Of course, where a person has erected a building on the line of his property, an adjacent owner is entitled to excavate for a foundation for a building to be placed alongside, but he should notify the owner of the building of his intention, and he will also be bound to support the existing wall so that it will not fall down.

323. *Easements.*—An easement or servitude is a

charge imposed on one real estate for the benefit of another belonging to a different proprietor. It is in the nature of a privilege in favor of a dominant tenement, over another piece of land called a servient tenement. It may arise from the natural position of the property, or from law, or may be established by the acts of man. Thus lands on a lower level are subject toward those on the higher level to receive such waters as flow from the latter naturally. An easement or servitude may arise as follows: for instance, A owns two adjacent parcels of land, upon one of which is a spring; he connects the other parcel with the spring by means of a pipe, and continuously, openly and notoriously uses the pipe as a means of conveying water to the other piece of property, which he later sells to B. If nothing is said in the deed of conveyance, B will obtain an easement or servitude on the land of A, which will maintain his right to use the pipe.

If A sells a piece of land to B and there is no means of getting to or from it, except over other land of A, B will be entitled to pass over A's land to get to the land he has bought. Similarly, if A leases to B the right to cut timber on a portion of his property, B has an easement or right to pass over A's property for the purpose of getting in to cut the timber and of removing it. The reservation of his right is implied as a matter of necessity.

If a person puts up a building on the line of his property, and places windows in it, he cannot, by the lapse of time, acquire the right to prevent his neighbor building against his wall and thus shutting out light and air. It is said that the easement of servitude of light and air can be acquired only by express grant, and not by prescription.

CHAPTER XXIV

TRANSFER OF OWNERSHIP OR POSSESSION OF PROPERTY

324. *Contract of sale.*—The contract for the sale of real property should always be in writing, and should conform to the laws of the jurisdiction wherein it is made. In the Province of Quebec, deeds relating to land are usually drawn in solemn form before a notary public. In the other provinces, they are frequently drawn and signed by the parties before two witnesses, one of whom must make oath before a notary or a commissioner of the High Court of Justice, that the deed was executed by the parties in his presence, and that he is one of the subscribing witnesses. Usually before the deed is signed the buyer will submit the deeds of title relating to the property to an attorney, with instructions to search the title to see whether the chain of title is complete, and whether the property is encumbered otherwise than may be declared by the vendor.

Where a promise of sale has been made, but the promisor refuses to execute the deed, the promisee may demand that the promisor execute a deed of sale in his favor according to the terms of the promise, and in default, that the judgment itself shall be equivalent to a deed. The promisee may on the other hand sue for damages for non-performance.

Should the vendee die after the contract is made but before the deed is signed, ordinarily the purchase price

will be payable out of the estate of the deceased, and the title will go to the heir. Should the vendor die, under similar circumstances, his executor may pass the title and take payment of the price.

325. *Conveyances*.—The usual methods of transferring property are by deed or by will—the transfer by deed being called a conveyance, and that by will a devise. Errors in the deed can be corrected upon application to the courts.

Registry offices are established in order that deeds of transfer of property, and transfers by will, may be duly registered, so that persons interested may trace the chain of title, and may see what encumbrances exist against the property. A deed should be signed by the grantor, or by someone under his authority who has a proper power of attorney. In those jurisdictions where a right of curtesy exists, a husband should always join in a deed granted by his wife in order to bar his right of curtesy, and where his wife has a right of dower, she should join in a deed granted by her husband to bar this right. This would be necessary, of course, in connection only with lands subject to either right.

326. *Mortgages on real property*.—As was explained in Section 308, a mortgage of real estate, at common law, is virtually a deed or conveyance of the property by the debtor to the creditor to secure the payment of a certain sum of money or money's worth, with a proviso that it shall become void upon the payment of the debt and accumulated interest. The mortgagor, in that view of a mortgage, retains merely the possession and the equity of redemption. It was pointed out that under the Torrens system of lands transfer, and in fact, in the more modern theory, a mortgage is regarded only as a charge upon the property, the title to which does not

pass from the mortgagor when the mortgage is imposed. Stated in another way, a mortgage in this sense, or a hypothec as it is called in Quebec, is a real right upon immovables made liable for the fulfilment of an obligation; by virtue of which the creditor may cause them to be sold in the hands of whomsoever they may be, and have a preference on the proceeds of the sale in order of date.

In Quebec this real right or charge is called a hypothec, as we have said. The effect of a hypothec, like that of a mortgage under the Torrens System, is merely to charge the land for payment, without involving any change of title. The common law mortgage of English origin does not exist in Quebec.

A word may also be said in explanation of the Torrens System. A proprietor who wishes to mortgage his land applies for a certificate of title at the Land Titles Office. After an investigation, if the title is found secure against ejectment or against claims by any other person, a "certificate of title" is issued him, which operates as a government guarantee that his title is complete and unassailable. Should the Land Titles Office issue by mistake a certificate of title to the wrong person, the government must make good any damages to the real owner who has been so injured. If the mortgage is then executed, it is filed with the certificate of title at the Land Titles Office. The transaction is recorded on the certificate of title, and on a duplicate thereof which remains in the office. The registration of the mortgage is then complete. The registration officer certifies the fact of registration on the deed of mortgage and on a duplicate of it which also remains in the office.

Several mortgages may exist upon the same property, and ordinarily the registration will establish their

order of priority. When the mortgage is paid, a deed of acquittance should be executed and registered. In the English law provinces, it is customary to require also the execution of a formal bond, which creates a personal obligation, in addition to the lien against the property. If the mortgage is not paid at maturity, the creditor may foreclose and bring the land to sale to pay his debt, with interest and costs, and may proceed against the debtor under the bond for a personal judgment for any balance that may remain due. Frequently the property mortgaged will be insured against loss by fire in favor of the mortgagee as additional security.

327. Other liens.—In searching a title, it is necessary to determine whether there are charges against the property other than encumbrances like mortgages. The property may be subject to a lien in favor of contractors, or suppliers of material, or of mechanics. Frequently taxes remain as a lien on property until paid, and it is important to see whether taxes have been paid to date. In the Province of Quebec, it is wise to make sure that the seigniorial dues, which were commuted half a century ago, have been paid. A complete search will make it clear whether succession duties have been paid.

328. Landlord and tenant.—A contract between landlord and tenant is evidenced by a lease, which, as we have seen, secures to the tenant an estate for years, and a reversion to the landlord. Wherever possible, the lease should be in writing. Usually a lease for a longer period than a year, though the period varies in different jurisdictions, can be opposed by a subsequent purchaser, unless it has been registered.

As the lease is a contract between the parties, it may contain various stipulations as to the use, occupation

and maintenance of the premises leased. The usual covenants are that the lessee will pay the rent at the times mentioned, and that he will surrender the premises in as good condition as when he got them, subject to reasonable wear and tear; that he will not assign or sublet without the written consent of the landlord; that one or the other will pay the taxes and assessments and repair the premises; and that the lease may be renewed for a longer period. There is an implied covenant in every lease, that the parties are capable of contracting, and that the lessee will not be disturbed in his enjoyment. It is an implied covenant that the tenant will take reasonable care of the premises, make good any breakages, and deliver up the property at the expiration of the lease in as good condition as when he took it, reasonable wear and tear being excepted.

In the English law provinces, unless it is specially stipulated in the lease, neither landlord nor tenant is bound to make repairs. If the landlord has not contracted to make repairs, he cannot be forced to do so; nor can the tenant make them and deduct the cost out of his rent. The tenant is of course bound to make good any breakages, as we have said. The house may be unsanitary or in need of repair, but the landlord is not responsible unless he has agreed to be so.

In Quebec, on the other hand, there is an implied warranty on the part of the landlord that there are no faults or defects in the premises leased that will prevent or diminish their use. The lessor is bound to deliver the premises in a good state of repair in all respects, and during the lease must make all necessary repairs which the tenant is not bound to make. The repairs which the tenant must make (where it is not otherwise agreed) are repairs to hearths, chimney-backs, and grates; to

the plasterings of interior walls and ceilings; to floors, when partially broken, but not when in a state of decay; to window-glass unless it is broken by hail or other inevitable accident for which the tenant cannot be held; to doors, windows, shutters, blinds, partitions, hinges, locks, and so on. But the tenant is not bound to make these repairs when they are rendered necessary by age or by irresistible force. Generally speaking, all other repairs are landlord's repairs. Landlords are bound to inspect the premises which they lease, in order to discover what repairs may be necessary. They are liable in damages for loss or injuries resulting from their failure to make the repairs to which they are bound.

CHAPTER XXV

PROPERTY IN LAND

QUEBEC LAW

329. *Distinction of things.*—All property, incorporeal, as well as corporeal, is movable or immovable.

Property is immovable either by its nature or by its destination, or by reason of the object to which it is attached, or by determination of law. Lands and buildings are immovable by their nature. Windmills and watermills, built on piles and forming part of the building, are also immovable by their nature, when they are constructed for a permanency. Crops uncut and fruits unplucked are also immovable. According as grain is cut and as fruit is plucked, they become movable, in so far as regards the portion cut or plucked. The same rule applies to trees; they are immovable so long as they are attached to the ground by their roots, and they become movable as soon as they are felled.

Movable things which a proprietor has placed on his real property for a permanency, or which he has incorporated therewith, are immovable by their destination, so long as they remain there. Thus things are considered as attached for a permanency which are placed by the proprietor and fastened with iron and nails, embedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached. Rights of emphyteusis,¹ of usufruct of im-

¹ Emphyteusis is a contract by which the proprietor of an immovable conveys it for a time to another, the lessee subjecting himself to make improvements, to pay the lessor an annual rent, and to such other charges as may be agreed upon.

movable things, of use and habitation, servitudes and rights of action which tend to obtain possession of an immovable, are immovable real rights by reason of the objects to which they are attached.

Movable property, of which the law ordains or authorizes the realization, becomes immovable by determination of law, either absolute or for certain purposes. For instance, sums accruing to a minor from the sale of his immovables during his minority remain immovable while his minority lasts. On the other hand, property may be movable by its nature, or by determination of law. Generally speaking, things which can be moved from one place to another, either by themselves, as animals, or by extrinsic force, as inanimate things, are movable by nature. Boats, scows, ships, floating mills and floating baths, and generally all manufactories not built on piles and not forming part of the realty, are movable. Materials arising from the demolition of a building or of a wall, and those collected for the construction of a new one, are movable so long as they are not used, but things forming part of a building or wall, and which are only temporarily separated from it, do not cease to be immovable, so long as they are destined to be placed back again.

Property belongs either to the Crown or to municipalities or other corporations, or to individuals. Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the sea-shore, land reclaimed from the sea, ports, harbors and roadsteads, and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown Domain. Similarly, estates which are vacant, or are without an owner, and those of persons who die without representatives, or

whose succession is abandoned, belong to the Crown. The property of municipalities and other corporations is that to which these bodies have an acquired right. A person may have in property a right of ownership or a simple right of enjoyment, or a servitude to exercise.

330. Ownership.—Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by other regulations. No one can be compelled to give up his property, except for public utility, and in consideration of a just indemnity previously paid. Ownership in a thing gives the right to all it produces and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession. The natural and industrial fruits of the earth, civil fruits, and the increase of animals, belong to the proprietor by right of accession. A mere possessor only acquires the fruits if his possession is in good faith; otherwise he is obliged to give the produce, as well as the thing itself, to the proprietor who claims it. A possessor is in good faith when he possesses in virtue of a title, the defects of which, as well as the happening of the resolutory cause which puts an end to it, are unknown to him. Such good faith ceases only from the moment that these defects, or the resolutory cause, are made known to him by proceedings at law.

Whatever becomes united to or incorporated with a thing belongs to the proprietor. Ownership of the soil carries with it ownership of what is above and what is below it. When improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature, and the good or bad faith of the possessor. Thus,

if they were necessary, the proprietor of the land cannot have them taken away; he must pay what they cost, even when they no longer exist, except in the case of bad faith, when they may be set up in compensation of rents and profits. If they are not necessary and were made by a possessor in good faith, the proprietor must keep them, if they still exist, and must pay either the cost or the amount by which the value of the land has been augmented. If the possessor was in bad faith, the proprietor may keep the improvements, upon paying their cost or actual value, or he may permit the possessor to remove them at his own expense, if he can do so with advantage, and without deteriorating the land. Deposits of earth and augmentations which are gradually and imperceptibly formed on land contiguous to a stream or river are called alluvion, and become the property of the owner of the land on which they are deposited. Islands and deposits of earth formed in the beds of navigable and floatable rivers and streams belong to the Crown, if there is no title to the contrary. But islands and deposits of earth formed in rivers which are not navigable or floatable belong to the proprietors of the land on the banks where they are formed. If the island be not formed on one side only, it belongs to the proprietors of the banks on both sides, the division being made by a line supposed to be drawn in the middle of the river. If a river or stream, by forming a new branch, cuts and surrounds the field of a proprietor contiguous to it, and thereby forms an island, the proprietor retains the property in his field, although the island be formed in a navigable or floatable river or stream.

331. *Usufruct*.—*Usufruct* is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserv-

ing the substance thereof. Usufruct may be established by law, or by the will of a man. It may be established purely or conditionally, and it may be established upon property of all kinds—movable or immovable.

The usufructuary has the right to enjoy all the fruits, whether natural, industrial or civil, which the thing subject to the usufruct can produce. Natural fruits are those which are the spontaneous produce of the soil. The produce and the increase of animals are also natural fruits. The industrial fruits of the soil are those obtained by the cultivation or working thereof. Civil fruits are the rent of houses, interest on sums due and arrears of rent, as also the rent due for the lease of farms. Natural and industrial fruits attached by branches or roots, at the moment when the usufruct is opened, belong to the usufructuary. Those in the same condition at the moment when the usufruct ceases belong to the proprietor, without recompense on either side for plowing or sowing, but also without prejudice to the portion of the fruits which may be acquired by a farmer on shares, if there be one at the termination or commencement of the usufruct.

The usufructuary cannot fell trees which grow on the land subject to the usufruct. Whatever he may require for his own use must be taken from those which have fallen accidentally. If, however, among the latter there be not a sufficient quantity of a suitable kind for the repairs to which he is obliged, and for the keeping in repair and for the working of the estate, he has a right to fell whatever may be required for these purposes, conformably to the usages of the place, or to the custom of proprietors. He may fell trees for fuel, if there be any of the kind generally used in the locality for that purpose. The usufructuary may enjoy his right

by himself, or lease it, and may even sell it or dispose of it gratuitously. He enjoys all rights of servitude, of passage, and generally all the rights of the proprietor in the same manner as the proprietor himself. Mines and quarries are not comprised in the usufruct of land. The usufructuary may, however, take therefrom the materials necessary for the repair and maintenance of the estate subject to his right. But if the quarries before the opening of the usufruct have been worked as a source of revenue by the proprietor, the usufructuary may continue such working in the way in which it has been begun. The usufructuary cannot, when the usufruct ends, claim an indemnity for the improvements he has made.

The usufructuary is liable for the lesser repairs, the proprietor for the greater repairs, unless these result from the lesser repairs, after the commencement of the usufruct. The greater repairs are those of main walls and vaults, the restoration of dams, and the entire roofs, and also the entire reparation of dams, prop-walls and fences. All other repairs are lesser repairs. The usufructuary is liable, during his enjoyment, for all ordinary charges, such as ground rents, and other annual dues. If during the continuance of the usufruct a third person commit any trespass or encroachment on the land, or otherwise attack the rights of the proprietor, the usufructuary is obliged to notify him of it, and in default thereof he is responsible for the damage which may result to the proprietor.

Usufruct ends in several ways as, for example, by the death of the usufructuary, if it is for life; by the expiration of the time for which it was granted; by the confusion or reunion in one person of the two qualities of usufructuary and proprietor; by non-user of the right during thirty years, and by prescription acquired by

third persons; by the total loss of the thing on which the usufruct is established; and by reason of the abuse the usufructuary makes of his enjoyment by committing waste, or by allowing the property to depreciate for want of care.

332. *Use and habitation*.—A right of use is a right to enjoy a thing belonging to another, and to take the fruits thereof, but only to the extent of the requirements of the user and of his family. This right may, of course, be enlarged or limited by contract. When applied to a house, the right is called a right of habitation.

333. *Real servitudes*.—A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor. It arises from the natural position of the property or from the law, or it is established by the act of man.

Certain servitudes arise from the situation of property. Thus lands on a lower level are subject toward those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land. He who has a spring on his land may use it and dispose of it as he pleases. He whose land borders on a running stream, not forming part of the public domain, may make use of it as he pleases for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs. He whose land is crossed by such a stream may use it within the whole space of its course through his property, but subject to the obligation of allowing it to take its usual course when it leaves his land. Every proprietor may oblige his neighbor to settle the bound-

aries between their contiguous lands, at their common expense.

Certain servitudes are established by law, and have for their object public utility or that of individuals. Those established for public utility have for their object the foot road or tow path along the banks of navigable or floatable rivers, the construction or repair of roads or other public works.

The law subjects proprietors to different obligations with regard to one another, independently of any other stipulation. Thus in town and country, walls serving for separation between buildings up to the required heights, or between yards and gardens, and also between enclosed fields, are presumed to be common, if there be no title, mark or other legal proof to the contrary. The repairing and rebuilding of the common wall are chargeable to all those who have any right in it, in proportion to the right of each. Every co-proprietor may build against a common wall, and place therein joists or beams to within four inches of the whole thickness of the wall, without prejudice to the right which the neighbor has to force him to reduce the beam to half the thickness of the wall, in case he should himself desire to put beams in the same place, or to build a chimney against it. Every co-proprietor may raise the common wall at will, at his own cost, upon paying an indemnity for the additional weight imposed, and bearing for the future the expense of keeping it in repair above the height which is common. Every owner of property adjoining a wall has the privilege of making it common in whole or in part by paying to the proprietor of the wall one-half the value of the part he wishes to render common, and one-half of the value of the ground on which such wall is built. One neighbor cannot make any recess in the

body of a common wall, nor can he apply or raise any work there without the consent of the other, or on his refusal without having caused to be supplied by experts the necessary means to prevent the new work from being injurious to the rights of the other. No neighbor can plant trees or shrubs or allow any to grow nearer to the line of separation than the distance prescribed by special regulations, or by established and recognized usage. Either neighbor may require that any trees and hedges which contravene this rule shall be uprooted. He over whose property the branches of his neighbor's trees extend, although the trees are growing at the prescribed distance, may compel his neighbor to cut such branches. If the roots extend upon his property, he has a right to cut them himself.

One neighbor cannot, without the consent of the other, make in a common wall any window or opening of any kind whatever. The proprietor of a wall which is not common, and which adjoins the land of another, may make windows or openings covered with iron gratings, and fixed glass, but such windows must not be placed lower than nine feet above the ground or floor of the room they are intended to light, if they are on the ground floor, nor lower than seven feet from the floor if they are in the upper stories. One neighbor cannot have direct views or prospect windows, or galleries or balconies overlooking the fenced or unfenced land of the other; they must be at a distance of six feet from such land. He cannot have side openings or oblique views overlooking such land, unless they are at a distance of two feet. Roofs must be constructed in such a manner that the rain and snow from off them shall fall upon the land of the proprietor, without his having a right to make them fall upon the land of his neighbor.

A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neighbors for the use of his property, subject to an indemnity proportionate to the damage he may cause. The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road. It should be established over the part where it will be least injurious to him upon whose land it is granted. If the way thus granted ceases to be necessary, it may be suppressed, subject to an equitable arrangement of indemnity paid or annuity agreed upon.

334. Registration of real rights.—Registration in a proper registry office gives effect to real rights, and establishes their order of priority. Real rights subject to registration take effect from the moment they are registered against creditors, whose rights have been registered subsequently or not at all. If, however, a delay be allowed for the registration of a title, and it be registered within such delay, the title takes effect even against subsequent creditors who have obtained priority of registration. The preference which results from the prior registration of the deed of conveyance of an immovable obtains only between purchasers who derive their respective titles from the same person. The registration of real rights must be made at the registry office for the division in which the immovable affected is either wholly or partly situated.

All acts *inter vivos* conveying the ownership of an immovable must be registered at length, or by memorial. In default of such registration the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration, and whose title is registered.

Registration has the same effect as between two donees of the same immovable where one donee has registered the gift and the other has not. Every conveyance by will of an immovable must be registered either at length or by memorial, with a declaration of the date of the death of the testator, and a description of the immovable. The transmission of immovables by succession must be registered by means of a declaration setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and, lastly the designation of the immovable. All judgments declaring the dissolution, nullity or rescission of a registered deed of conveyance or other title by which an immovable has been transmitted, or permitting the exercise of a right of redemption or of revocation, must be registered at length within thirty days after they are rendered.

Registration at length is effected by transcribing on the register the title or document which creates or gives rise to the right, or an extract from the title made and delivered by notaries, or by the prothonotaries of the Superior Court, from the originals of authentic instruments lawfully in their custody.

Registration by memorial is effected by means of a summary, setting forth the real rights which the party interested wishes to preserve, which is delivered to the registrar and is transcribed upon the register.

CHAPTER XXVI

TRANSFER OF PROPERTY BY WILL

335. *Definitions and classifications.*—A will is an instrument by which a person makes a disposition of his property, to take effect after his death. It is revocable during his life. It does not take effect or give third parties any rights until after the decease of its maker.

A will may be made in notarial or authentic form. It may be holographic, as when it is wholly written and signed by the testator without witnesses being necessary. This form of will is valid in Quebec, and in Manitoba and Alberta. The more common form of will is that which is written by another person, but signed by the testator in the presence of two witnesses—this form of will being known as that derived from the law of England and being valid in all the provinces. A nuncupative will is a verbal will permitted in some cases, as, for example, where the testator was *in extremis* at the time of making it. The term “nuncupative will” is also often applied to an informal written will made by a soldier on active service or a sailor at sea. A soldier in barracks is not on active service. Where a verbal will is allowed at all, it generally must be reduced to writing within a specified time after the testator has expressed its terms.

A codicil is a supplement, by which the testator alters or adds to his will. A codicil must be executed with the

same formalities as the will itself, to which it is accessory.

336. *Who may make wills.*—Generally speaking, every person of full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will. It is now a general rule that married women may freely dispose of their property by will. Minors cannot make a valid will,¹ nor can an idiot. Testamentary power may be lost by reason of mental weakness arising from advanced age, or produced temporarily or permanently by excessive drinking, or by any other cause. A person who has been from nativity blind, deaf and dumb, is intellectually incapable of making a will, as he lacks those senses through which ideas are received into the mind. Blindness or deafness alone do not produce such incapacity. A person born deaf and dumb, but not blind, may be shown to have capacity and to understand what is written down. Where a will is made and signed by a testator at the point of death, strong proof may be required that its contents were known to the testator, and that the will was his spontaneous act. He may have been able to understand the will when it was made; but it is not essential that at the moment he signs the will he shall be mentally competent to understand it. That is, if he is mentally competent when he gives instructions for his will, and it is prepared in accordance with his instructions, and at the time of signing he understands that he is executing the will the preparation of which he had given instructions, the will is valid, although at the time of signing it he may not be able to understand its provisions in detail.²

¹ In Newfoundland a person seventeen years of age may make a valid will.

² Kingsford, Canadian Law of Wills, p. 21.

337. *Execution of wills.*—A will should conform to the following general rules:

(a) A will must be in writing; it may be typewritten, printed, or written in pencil or ink—subject to the rule governing holograph wills.

(b) It should be signed by the testator. A mark may be sufficient, even if the testator is able to write. The testator's initials would suffice. Frequently the testator's signature may be made by some other person, under his direction, if made in his presence. The signature should be at the end of the will. In order to identify the various pages, it may be wise to require the testator to sign or initial each page.

(c) The will should state that it is intended to operate as the last will and testament of the testator.

(d) The signature of the testator should be "acknowledged," in the simultaneous presence of the witnesses. It has been held that when the witnesses either saw or might have seen the signature, an express acknowledgment of the signature is not necessary. A mere statement that the paper is his will, or a direction to them to put their names under his, or even a request by the testator or by some person in his presence to sign the paper, is sufficient. It is a wise precaution that the witness should see the signature made, and should themselves sign in the presence of one another and of the testator. It has been held that if the witness cannot write, his hand may be guided by another person, or another person may write the witness's name while the witness holds the top of the pen. Generally speaking, there should be an attestation clause, which records the observance of all the circumstances, as, for example, that the signature was made, or acknowledged, by the testator in the presence of the witness, all being

present at the same time, and that they subscribed their names in his presence. The witnesses should be disinterested persons. By this is meant that legatees and executors should not act as witnesses. If they do sign, the will is not rendered invalid, but any bequest to them is void. A bequest to the wife or husband of a witness would be void. Except in Quebec, witnesses may be minors, if old enough to know what they are doing and to give evidence in court.

338. *Revocation of wills.*—The law of Quebec provides that wills and legacies cannot be revoked by the testator, except:

(a) By means of a subsequent will revoking a former will, either expressly, or by the nature of its dispositions.

(b) By means of a notarial or other written act, by which a change of intention is expressly stated.

(c) By means of the destruction, tearing or erasure of a holographic will, or of that made in the form derived from the laws of England, deliberately effected by him, or by his order, with the intention of revoking it, and in some cases by reason of the destruction or loss of the will by a fortuitous event becoming known to him.

(d) By his alienation of the thing bequeathed.

The revocation of a will or of a legacy may also be demanded on the ground of the complicity of the legatee in the death of the testator, or by reason of grievous injury done to his memory. The subsequent birth of children to the testator does not effect a revocation, and enmity springing up between him and the legatee does not establish a presumption of revocation. Subsequent wills which do not revoke the preceding ones in an express manner annul only such dispositions therein

as are inconsistent with or contrary to those in the later wills. A revocation contained in a subsequent will retains its full effect, although such will should remain inoperative by reason of the incapacity of the legatee, or of his refusal to accept. The revocation contained in a will which is void by reason of informality is also void. In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether, upon the revocation of a will which revokes another will, the former will revives. Every testamentary disposition lapses if the persons in whose favor it is made do not survive the testator.

The rule of the English law is that every will made by a man or woman shall be revoked by his or her marriage, with certain exceptions. But the birth of a child after the making of a will does not revoke it. Apparently also a will made in contemplation of marriage is revoked by the subsequent marriage.¹ This last rule is subject to exception in some of the English law provinces, as, for example, in Ontario, where it is provided that every will made by any person dying on or after the thirteenth day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases:

(a) Where it is declared in the will that the same is made in contemplation of such marriage.

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband, and filed within one year after the testator's death in the office of the Surrogate Clerk at Toronto.

(c) Where the will is made in the exercise of a power of appointment, and the real estate or personal estate

¹ Kingsford, "Canadian Law of Wills," p. 79.

thereby appointed would not in default of such appointment pass to the testator's heirs, executor or administrator, or the person entitled is the testator's next of kin under the Devolution of Estates Act. The Ontario Act further provides that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances; and that no will or any part thereof shall be revoked otherwise than as provided under (a), (b) and (c) above, or by another will executed as required by the act, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by burning, tearing or otherwise destroying the same by the testator or by some person in his presence, and by his direction, with the intention of revoking it.

339. *Intestate succession.*—Succession is the transmission by law, or by the will of man, to one or more persons, of the property and the transmissible rights and obligations of a deceased person. In another sense the word "succession" means the universality of the things thus transmitted. Intestate succession is that which is established by law alone. Testamentary succession is that which is derived from the will of man. The former takes place only in default of the latter. In other words, intestacy is generally the result of a person dying without leaving a valid will. It may also occur if a person makes a will, which, though it is properly executed, becomes wholly inoperative, as where the sole legatee and executor predeceases the testator. A person may by will dispose effectually of the beneficial interest in part of his property, but may make no express or implied gift of the residue; or the testator may except certain property from the residuary gift, or the residuary gift may fail to take effect wholly or partially

by revocation, lapse or otherwise. In these cases there is a partial intestacy. When a man dies intestate, the law undertakes to declare who shall be his heirs. These rules vary greatly, but a general rule may be stated that property, in case of intestacy, where the heirs cannot agree among themselves, descends as follows:

- (a) To lineal descendants, in default of which,
- (b) To the parents, and if there are no descendants or parents,
- (c) To brothers and sisters, and in default,
- (d) To other remoter relatives.

If a testator leaves no relatives, his property goes to the Crown. Children share equally, though they may be the children of two husbands or of two wives. A child born after his father's death shares equally with the others. Generally an adopted child does not share at all. Children of deceased children take their parent's share—though this is not true of children of a deceased nephew or niece. Children born before marriage do not in Ontario inherit from either the father or mother. A second or third wife who survives her husband takes the share which the first wife would have taken.

If a husband dies, leaving children, one-third goes to the wife, the remainder to the children in equal degree. The children of a deceased child take in his place. In Quebec, in case of community of property, the wife takes one-half, and has the enjoyment of the children's half until they are eighteen years of age.

If a husband dies, leaving no children and no descendants of deceased children, then in New Brunswick, British Columbia, Nova Scotia and Newfoundland, the wife takes half and the remainder goes to the husband's heirs. In Manitoba, Alberta and Saskatchewan, the wife takes

the whole. In Ontario, the wife receives \$1,000 and one-half of any remainder. If after paying expenses and debts, the estate does not exceed \$1,000, she takes the whole. In Quebec, in case of community of property, the wife takes one-half.

If a wife dies, leaving children, her husband takes a one-third interest in her separate property, both real and personal, and the children the remainder; except in New Brunswick, where if a wife dies leaving children by a former husband, the surviving husband takes one-third, and the other two-thirds go to the children of both husbands equally; but if there are children of the surviving husband only, then he takes one-half and the other goes to the children, and if there are no children the husband takes all the personal property. In Quebec the husband enjoys the use of the community property belonging to the children until they are eighteen years of age. In Prince Edward Island, the whole goes to the husband for life; after his death, to the children.

If a wife dies, leaving no children, then in Nova Scotia, Ontario, New Brunswick, British Columbia and Newfoundland, one-half goes to the husband, and the remainder to the natural heirs of the wife. The same is true in Quebec, where there is community of property. In Manitoba, Alberta, Saskatchewan and Prince Edward Island, the husband takes all.

If a married person dies, leaving children, but no surviving consort, the children share equally in the whole estate.

In Quebec it is laid down that children or their descendants succeed to their father and mother, grandfather and grandmother, or other ascendants, without distinction of sex or primogeniture, and whether they are the issue of the same or of different marriages. If a

person dies without issue, leaving his father and mother, and also brothers and sisters, or nephews or nieces in the first degree, the succession is divided into two equal portions, one of which devolves to the father and mother, who share it equally, and the other to the brothers and sisters, nephews and nieces, of the deceased. If the deceased leaves no issue, nor brothers nor sisters, nephews nor nieces in the first degree, nor father nor mother, but only other ascendants, the latter succeed to him, to the exclusion of all other collaterals. If the father and mother of a person dying without issue, or one of them, have survived him, his brothers and sisters, as well as nephews and nieces in the first degree, are entitled to one-half of the succession. If both father and mother have previously died, the brothers, sisters, and nephews and nieces in the first degree of the deceased succeed to him, to the exclusion of the ascendants and the other collaterals.

The division in these cases of the half or of the whole of the succession going to the brothers, sisters, nephews or nieces, is effected in equal portions among them, if they be all born of the same marriage; if they be the issue of different marriages, an equal division is made between the two lines, paternal and maternal, of the deceased, those of the whole blood sharing in each line, and those of the half blood sharing in his own line only. If there be brothers and sisters, nephews and nieces, on one side only, they inherit the whole of the succession, to the exclusion of all the relations of the other line.

If the deceased, having left no issue, nor father, nor mother, nor brothers, nor sisters, nor nephews nor nieces in the first degree, leaves ascendants in one line only, the nearest of such ascendants takes one-half of the succession, the other half of which devolves to the nearest

collateral relation of the other line. If there be no ascendants, the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the maternal line. Relations beyond the twelfth degree do not inherit. In default of relations within the heritable degree in one line, the relations of the other line inherit the whole. When the deceased leaves no relations within the heritable degree, his succession belongs to his surviving consort, where the consorts were separate as to property, in default of which the succession falls to the crown.

340. *Executors and administrators.*—A testator may name one or more testamentary executors, or may provide for the manner in which they may be appointed. He may provide for their successive replacement.

An executor is the representative of the deceased for all matters relating to his estate, subject to the authority conferred upon him. In the English law provinces, where a person dies intestate, or neglects to name an executor in his will, or the executor named in the will refuses or is unable to act, the administration of the property of the deceased may be committed to an administrator, who may be the husband or wife, or the next of kin, or a near friend, as the case may be. If the heirs can all agree upon the distribution of the estate, it may not be necessary to appoint an administrator. The duties of an administrator, as also his obligations, are similar to those of an executor.

The testator may amend, restrict or extend the powers, the obligations and the seizin of the testamentary executor, and the duration of his functions. He may constitute the testamentary executor an administrator of his property, in whole or in part, and may give him

the power to alienate it with or without the intervention of the heir or legatee. If the testator desire that the replacement of executors should be made by the courts or judges, the powers necessary for such purpose may be exercised judicially. In Quebec, when testamentary executors and administrators have been named by the will, and in consequence of their refusal to accept, or of their powers having ceased without their being replaced, or of unforeseen circumstances none of them remain, and it is impossible to replace them under the terms of the will, the judges and the courts may exercise the powers necessary to do so, provided it appears that the testator intended the execution and administration of the will to continue independently of the heir or of the legatee. In the case of an intestate succession, the beneficiary heir in Quebec is charged to administer the property of the succession, and to render an account of his administration. Usually executors are not required to furnish a bond. Administrators are frequently required to.

341. *Duties of administrators and executors.*—Executors and administrators take possession of the property of the deceased and do whatever is necessary to wind up his estate. They are seized as legal depositories of the movable property, and may claim possession of it, even against the heir or legatee. In Quebec and Prince Edward Island the will must be probated (where probate is essential) before the active duties of the executor in carrying out the provisions of the will are assumed. Elsewhere, the mere public reading of the will gives him the necessary authority. The general duties of executors and administrators are:

(a) To attend to the obsequies of the deceased.

(b) To give such public notice of their appointment as may be required by local statute.

(c) To procure the probate of the will and its registration when necessary.

(d) To cause an inventory to be made, after notifying the interested parties to be present, where an inventory is necessary.

(e) To reduce the entire estate to possession.

(f) To become a party to support the will where action is brought to contest it.

(g) To pay the debts and discharge the particular legacies.

(h) To pay the succession duty taxes and other taxes.

(i) To sell movable property, with the proper consent and authorization, in order to make up any deficiency in the funds necessary to pay the debts of the succession.

(j) To receive payment of debts due, and to sue for their recovery; and to complete contracts which the deceased would have been bound to complete had he lived.

(k) To procure and file an account.

(l) To have his account proved and settled.

(m) To distribute the estate.

An executor will be bound to carry out the directions of the will. He should open a separate bank account in his representative capacity, and pay bills out of this account. Banks and trust and safe deposit companies in which the deceased had money or security should be notified of his death. They will require a certificate from the Succession Duty Office that the succession duty has been paid, and, where probate is necessary, that the will has been probated, before turning over securities or transferring stock to the executor. Insurance companies and benefit and mutual societies should be similarly notified, and proofs of death should be carefully prepared and filed, as provided by insurance policies.

In order that the final account may be complete, an accurate record of receipts and disbursements should be kept, and vouchers should be obtained for every payment. It will be well for the executor to insist upon sworn proofs of claim before paying. Contracts into which the deceased may have entered should be carefully scanned, in order to determine what were his rights and liabilities. An executor will do well to make a written memorandum of all that he does, and to record important transactions or conversations. Fire insurance companies should be notified of the change of ownership, and policies should be transferred to the estate. It will be well to consult counsel when in doubt.

In Quebec an executor's duties are performed gratuitously, unless the testator has provided for his remuneration. His expenses would, of course, be chargeable to the estate. In the other provinces, generally speaking, an executor is entitled to a fair and reasonable allowance for his trouble and expenses.

CHAPTER XXVII

PERSONAL PROPERTY

342. *Classifications and definitions.*—The nomenclature differs in Quebec and in the other provinces. Under the English law it is said that there are two classes of personal property—real chattels, as, for example, leasehold interests in lands, and personal chattels, which include all other personal property. Personal chattels may again be choses in possession or choses in action. The word *chose* means thing. By choses in possession are meant corporeal personal property, which may be recognized by the senses. By choses in action are meant incorporeal personal property, as, for example, legal rights of various kinds, as the right to sue and recover a debt, copyrights, trade-marks, a right to share in the profits of a company. Choses in possession may prove the existence of choses in action: for example, a stock certificate proves the right of the holder to a share in the profits, or to dividends. In Quebec the expressions “choses in possession” and “choses in action” are rarely if ever used, and are replaced by the expressions corporeal and incorporeal property; and property is either immovable property or movable property.

343. *Trade-marks and trade-names.*—The Trade-mark and Design Act provides that all marks, names, labels, prints, packages, or other business devices which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing

any manufacture, produce or article of any description, manufactured, produced, confounded, packed or offered for sale by him—applied in any manner whatever, either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description containing the same, shall, for the purposes of the act, be considered and known as trade-marks.

A general trade-mark means a trade-mark used in connection with the sale of various articles in which the proprietor deals in his trade, business, occupation or calling generally. A specific trade-mark concerns a trade-mark used in connection with the sale of a class of merchandise of a particular description.

A trade-mark may be registered, and after registration the proprietor thereof has the exclusive right to use it to designate articles manufactured or sold by him. A trade-mark may be assigned from one person to another, but the assignment should in turn be noted in the register of trade-marks in Ottawa. A general trade-mark, once registered, and designed to be the sign in trade of the proprietor thereof, endures without limitation. A specific trade-mark, when registered, endures for the term of twenty-five years, but may be renewed before the expiration of the term by the proprietor, or his legal representatives, for another term of twenty-five years, and so on from time to time. The proprietor of a particular trade-mark may bring action against any person who uses it or any fraudulent imitation thereof, or who sells any article bearing the trade-mark or any imitation of it. But no action may be taken unless the trade-mark has been registered. Upon the sale of any article bearing a trade-mark, the vendor war-

rants that the trade-mark is genuine, and is not forged or falsely applied.

Where a particular name has been applied to a special line of goods manufactured by a company for so long a time that the designation so given by the company, although originally only a mere geographical name, has acquired a secondary meaning as identifying such goods, although not registered as a particular trade-mark, a registration in opposition thereto of such name, with the prefix of the name Canadian, is not permissible under the Trade-Mark Act, and will be cancelled upon petition.¹ In other words, a particular name which, though it is fanciful, is not descriptive, deceptive or previously appropriated, may be adopted by a dealer or manufacturer, and as he is the first to use it he is entitled either to register it or to prevent others from registering it in competition with him.

Generally speaking, words such as Imperial, Selected, Standard, are not subject to registration. Words merely descriptive are not subject to registration. It has been held that the word Fruitative, considered as an essential feature of a specific trade-mark applied to the sale of a medicine, is not a mere descriptive word, and not invalid as a trade-mark. On the other hand, it has been held that the terms Kid Nee Kure and Kleanwell Massage Gloves are descriptive. It has been held in an Ontario case that the claim of any person who seeks to adopt and use exclusively as his own a merely descriptive term will not be favored by the court; for if any person employing a word or term of well-known meaning and in ordinary use to describe his goods were entitled to appropriate it and prevent others from using it, he would acquire a right of more value than either a

¹ Bucyrus Co. vs. Canada Foundry Co., 8 D. L. R. 920.

patent or a registered trade-mark.¹ On the other hand, it has been held in the United States that the adoption of the words Hunyadi Water does not give an exclusive right to the user, for the reason that the word Hunyadi is the name of a town in Hungary from which waters with curative properties are obtained.

The goodwill of a business is the good opinion of customers concerning the business, and the probability that they will continue to patronize. It is a valuable asset, and may be sold with a business. The sale of a business does not necessarily include the sale of the goodwill. If the seller has included in the sale of his business the goodwill thereof, with the right to use his name, he cannot set up a rival business under the same name. If he does not sell the right to use his name, he may begin business again under his own name, but he is precluded from representing that he carries on the old business, or is the successor to it. The seller of the goodwill of a business is under an implied obligation not to trade under the old name, or to canvass the business of the trade he has sold. He is not, however, precluded from carrying on a competing business.

344. *Names*.—It is said that a man may choose his own name. He usually bears his father's surname and the Christian name given him at his birth. The law disregards middle-names, and words like *junior* or *senior*, which are merely descriptive, and not part of the name. If one chooses to change his name, the statutes generally provide a method by which the change is recorded and the identity of the person maintained. One person may not use the name of another for fraudulent purposes, nor may a man use his own name for fraudulent purposes. Thus if one Scott manufactures a rifle, which

¹ Dominion Flour Mills Co. vs. Morris, 25 O. L. R. 561.

he marks Scott's Rifle, some other person of the same name may not also manufacture a rifle and mark it in the same way, for the purpose of selling it to the public.

345. *Patents.*—Any person who has invented any new and useful art, machine, manufacture or composition of matter which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof for more than one year previous to his application for patent therefor in Canada, may, on a petition to that effect being presented to the Commissioner, and on compliance with the other requirements of the Patent Act, obtain a patent granting to him the exclusive property in such invention. A patent will not issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem. Any inventor who elects to obtain a patent for his invention in a foreign country, before obtaining a patent for the same invention in Canada, may obtain a patent in Canada, if the patent is applied for within one year from the date of the issue of the first patent for the invention. If within three months after the date of the issue of a foreign patent, the inventor gives notice to the commissioner of his intention to apply for a patent in Canada for his invention, no other person who has commenced to manufacture the same device in Canada during the period of one year is entitled to continue the manufacture of the same after the inventor has obtained a patent in Canada, without the consent or allowance of the inventor. Where there are conflicting applications for a patent, it will be submitted to the arbitration of three skilled persons, two of whom will be chosen by the applicants (one by each) and the third by the commissioner. The decision

or award of the arbitrators, or of any two of them, delivered in writing to the commissioner, is final.

The term limited for the duration of patents of invention is eighteen years.

346. *Assignment of patent.*—A patent may be granted to any person to whom the inventor, entitled under the act to obtain a patent, has assigned or bequeathed the right of obtaining it, or, in default of an assignment or bequest, to the legal representative of the deceased inventor. Every patent issued is assignable in law, either as to the whole interest or as to any part thereof, by any instrument in writing. The assignment should, however, be registered in the Patent Office.

Patents, and all the rights and privileges connected with them, cease and determine at the end of two years from the date thereof, unless the patentee, or his legal representatives, within that period or an authorized extension thereof, commences, and after such commencement continually carries on in Canada, the manufacture or construction of the thing patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

347. *Copyrights.*—Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an International Copyright treaty with the United Kingdom, who is the author of any book, map, chart, or musical composition, or of any original painting, drawing, statue, sculpture, or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print, cut or engraving, may record the copyright thereof. The right to record the copyright is also

granted to the legal representatives of such person. The result is that the owner of the copyright has, for twenty-eight years from the recording thereof, the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and selling the copyrighted work, and of allowing translations into other languages to be printed and sold.

It is a condition of obtaining a copyright, however, that the work copyrighted shall be printed and published, or reprinted and published, in Canada; or in the case of works of art, that they shall be produced or reproduced in Canada. A book published anonymously may be copyrighted by being entered in the name of the first publisher thereof, either on behalf of the unnamed author, or on behalf of the first publisher. The act provides that one copy of the work copyrighted shall be deposited in the Library of the Dominion of Canada, and one in the British Museum.

The right of an author of a literary, scientific or artistic work to obtain a copyright, and the copyright when obtained, are assignable in law, either as to the whole interest, or any part thereof. The assignment should be registered at the department.

When the term of twenty-eight years expires, the author, if still living, or, if dead, his widow or children, have the continued right to the copyright for a further period of fourteen years, but the title of the work should be registered a second time within a year from the expiration of the term of twenty-eight years.

348. *Lost property*.—The general rule is that a person who finds lost property may retain it as against all persons but the true owner. But property merely mislaid is not lost property. If a person leaves a parcel on the seat he has occupied in a street car, he may be said

to have mislaid it rather than lost it. The street car company is entitled to take possession and to hold it as a bailee for the owner. If, however, the parcel were found on the street, or possibly if it were found on the floor of a car, or on the floor of a department store and not on the counter, it would be considered lost property, and the finder would be keeper, unless the true owner turned up and claimed what he had lost. The rights of the finder are nevertheless frequently subject to special laws, as to the public notice to be given, the owner's right to claim the article, the indemnification of the finder, and so on.

Under the definition of "theft" in the Criminal Code, a finder of lost articles will render himself liable to prosecution for theft by conversion, if after finding the goods he discovers the name of the owner and does not restore them, but converts them to his own use, although at the time of finding them he neither knew the owner nor believed nor had reasonable grounds for believing that the owner could be found. The rule would be even more strict in the case of the finder of goods merely mislaid.

349. *Treasure trove*.—Treasure trove has been described as money, coin, or bullion, buried or hidden, and of which no one can prove himself owner, and which is discovered by chance. Generally the ownership of treasure trove rests with him who finds it upon his land. In some jurisdictions, as in Quebec, if a person finds treasure upon the property of another, it belongs half to the finder and half to the owner of the property. In the United States, treasure trove is treated generally as lost property, and belongs to the finder as against the owner of the land where it is discovered. In England, under the later decisions, this view is not accepted. The ownership is said to be in the owner of the land, and

not in the employee of the owner, or in some stranger who may happen to find the treasure. Thus under the American rule, if a person bought an old safe and handed it over to another to be repaired, and the latter found between the outer wall and the lining of the safe a sum of money, the finder would be entitled to keep the money as against the owner of the safe. Under the English rule, as just explained, the owner of the safe would be the owner of the treasure.

350. *Acquisition by occupancy.*—Property that has never belonged to anyone, or that has been abandoned by the previous owner, may be appropriated by him who takes possession. Wild animals living in a state of nature, and fish in the ocean, belong to him who captures them. Goods jettisoned at sea and abandoned would belong to him who picks them up.

351. *Property in animals.*—Animals are either wild or domestic. The right of hunting and fishing are governed by particular laws of public policy, subject to the legally acquired rights of individuals. Ordinarily, the owner of lands on which wild animals are found may hunt, kill or capture them. If captured, they belong to their possessor. If they escape, they become once more wild, and may be taken by anyone. If they return to their former possessor, they are regarded as being still his property. A wild animal may therefore by its own act divest its possessor of ownership in it. The owner of wild or domestic animals which are vicious, and which he knows to be so, keeps them at his peril.

352. *Title to personal property: accession and confusion.*—The title to personal property may be acquired in various ways:

(a) **TITLE BY NATURAL INCREASE.**—The natural and industrial fruits of the earth, civil fruits and the increase

of animals, belong to the proprietor by right of accession.

(b) **TITLE BY ACCESSION.**—Whatever becomes united to or incorporated with a thing belongs to the proprietor. That is, if movable property belonging to one person is, without his consent, united with the land of another, and thereby becomes a fixture, the movable thing becomes immovable and belongs to the owner of the immovable. This results from the fact that the land is regarded as the principal thing; the movable thing is merely an accessory. The owner of the movable thing may have an action for damages for the conversion. The same general rule holds good where one movable thing is inseparably united with immovable property of another person. The Civil Code of Quebec lays down the general rule. When two things belonging to different owners have been united so as to form a whole, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing to him to whom it belonged. Which may be the principal part will depend upon circumstances. For example, that part is reputed to be the principal one to which the other has been united only for the use, ornament or completion of the former. If the things united are so similar in value and otherwise that it cannot be said that one is the accessory of the other, the things will be regarded as belonging to both owners in common. But if there is a reasonable difference in value or in bulk, the more valuable or more bulky will generally be deemed to be the principal. A workman may apply to the material of another skill and workmanship so important that they greatly exceed the value of the material employed. The skill and workmanship will then generally be considered as the principal part,

and the workman will be entitled to retain the thing, on payment of the value of the material to the proprietor, if the result is the making of a thing of an entirely new description. If, however, the workmanship does not exceed the value of the material used, although a new thing be formed, the workman is not entitled to retain the thing made.

(c) **TITLE BY CONFUSION.**—When a thing has been formed by the admixture of several materials belonging to different proprietors, and no one material can be regarded as the principal matter, if they can be separated, the innocent owner of part may demand their division. If the things are inseparably mixed, then if the owners are in good faith each will be entitled to a part of the mass, in proportion to the quantity, quality and value of the materials belonging to him. It would seem to follow that if the confusion is wilful, the person who has caused it will forfeit any share, unless he can clearly and decisively prove how much of his materials went into the mass, and how much belonged to others.

353. *Gifts.*—A gift is a transfer of property by the consent of the giver without consideration other than his desire to make the gift and his pleasure in doing so. It is an act by which the donor divests himself by gratuitous title of the ownership of a thing in favor of the donee. It is essential to a gift that the donor divest himself of his ownership in the thing given. Gifts are said to be either *inter vivos* or *mortis causa*.

A gift *inter vivos* is a gift which takes effect immediately by the transfer of the absolute possession of the thing to the donee. The donee's acceptance renders the gift irrevocable. Delivery is essential. The delivery may be symbolic, as by the handing over of a warehouse receipt. If the donee already has possession of

the thing, he acquires title without further delivery, if the donor makes it clear that he intends to transfer the title of the property. The delivery of a deed of gift would be a sufficient delivery in such case, or, in the case of movables, of a mere private writing. It has been held that where a check was given by way of gift, with the intention of transferring the money which it represented, and the check was not cashed before the death of the donor, the gift was not effective.

A gift *mortis causa* is made during the supposed mortal illness of the donor. It is made in contemplation of imminent death. It becomes absolute if the donor dies of the illness in question, without having revoked it. If he recovers, he may revoke it. Delivery must be made in the lifetime of the donor. Gifts purporting to be *inter vivos* are void as presumed to be made in contemplation of death, when they are made during the supposed mortal illness of the donor, whether he die or not. Circumstances may tend to render them valid. Thus if the donor recovers and leaves the donee in possession for a reasonable time, it would appear that the gift is valid as made.

PART VI: BUSINESS ASSOCIATIONS

CHAPTER XXVIII

PARTNERSHIP

354. *The nature of partnership.*—There are almost as many definitions of partnership as there are writers upon the subject. When analyzed it is found, however, that they all embody a fundamental idea, of persons voluntarily associating to carry on business together with a view to profit. While Lindley, in his great work on the subject, gives a list of some nineteen definitions, we need give only two to show the variation in the expression of the idea. In the English Partnership Act, 1890, "partnership" has been defined as "the relation which subsists between persons carrying on a business in common with a view to profit." By "business" is meant, as the act further provides, "every trade, occupation, or profession." Though the definition does not say so, it is contemplated from the name itself that there shall be a division of the profits. Under this definition, however, Lindley points out that "even before the act, persons who carried on a business in all other respects as partners, but with the object of applying the profits toward some charitable purpose, instead of dividing them among themselves, would have been partners." This definition will be found applicable, for all practical purposes, throughout the English law provinces.

The Civil Code of the Province of Quebec hardly

attempts to define partnership:—"It is essential," reads Article 1830, "to the contract of partnership that it should be for the common profit of the partners, each of whom must contribute to it property, credit, skill or industry." This statement of the essentials of the contract may be amplified by reference to Pothier's definition: "Partnership," he says, "is a contract by which two or more persons place or oblige themselves to place, in common, something for the purpose of making in common, an honest profit, of which they reciprocally bind themselves to render an account." We may conclude, that in all ordinary partnership contracts certain essential elements will be present: (a) the agreement of competent parties, (b) that each partner contributes something towards the capital, whether money, property, credit, skill or industry, (c) that the business is carried on with a view to profit in which the partners can hope to have a share in proportion to what each has contributed to the capital.

355. *Agreement of competent parties.*—The partnership relation arises out of a contract to that effect, into which the partners enter voluntarily. One cannot be forced into the relationship; he cannot be made a partner without his consent. One partner cannot bring in another person as a partner without the consent of his existing partners. Hence if A and B are partners, and A, without B's consent, contracts with C that C will share half of B's profits and losses in his partnership with B, C does not thereby become a member of the firm. The contract should be, as a matter of precaution, but need not be, in writing: a contract of partnership verbally made is valid, though proof of its existence and of its terms will be more difficult. By such a contract the parties bind themselves reciprocally toward one another;

and each expects to receive out of the partnership as much as he brings into it.

The necessity for the consent of the parties is apparent when we understand that each partner, as we shall see later, has authority to bind the partnership in favor of third persons, in all partnership matters. It is important, therefore, that a person entering into the contract of partnership shall be free to choose the partners to whom he will allow so great a measure of authority to bind him and his associates.

The mutual rights and duties of partners may be revised and varied when they all consent. The consent may be expressed in writing, or may even be implied from the conduct and dealings of the partners.

Stress has been laid upon the necessity of consent. But a person may consent to a contract which he is advised is not a partnership contract, and yet find himself bound as a partner. That is, he may not intend to make himself liable jointly and severally as a partner, but if the contract into which he enters has in it the essential elements of a partnership, he will be held toward third parties as a partner. If, for example, a number of carters associate to buy, at wholesale prices, quantities of hay, which they simply distribute among themselves, they are not partners, even if they so describe themselves. If, on the other hand, they intend to sell the surplus hay to other carters at an enhanced price, i. e., *for a profit*, they have formed a partnership, though they may not have intended to incur any partnership liability.

As a general rule, it may be stated that any person capable of making a binding agreement, may enter into a contract of partnership. Certain classes of persons, e. g., minors, married women, persons insane

or interdicted, are under a disability as to contracts in general, including that of partnership.¹

A further disability may conveniently be referred to here. If a partnership is composed of a person who lives in a foreign country and of another person who lives within Canada, and war were to break out between that foreign country and Great Britain, the partnership would be thereby dissolved. When war breaks out, the citizens of the belligerent countries are required to have no dealings with one another.

356. *Business must be carried on for a profit.*—That a business carried on by associates for some purpose other than the making of a profit, is not a partnership, is clear from the remarks already made. The partnership method of doing business had its origin with traders who felt that by grouping and consolidating their efforts and resources they could assure greater safety, a larger business and more ample profits. They combined for purposes of trade and commerce.

If, therefore, men associate in a group to build and endow a hospital, to found a club or a purely co-operative association, or to form a musical society, the making of a profit, or commercial gain, is not their object. The club, association or society may fulfil the object for which it is formed, may elect officers, own property and have a banking account, but the members are not partners, nor has the society or club an existence distinct from its members. A dozen or more young men form an athletic association. They elect officers and charge an admission fee to games. Their purpose in associating is not pecuniary gain. They are not liable as partners. In case it is necessary to sue for the price of goods sold

¹The reader is referred to the Chapters on "Contracts" for an examination of these disabilities.

for the use of such a club, it will be found necessary to sue, not the club, but the individual members who made the purchase and received delivery, or those who authorized or concurred in the purchase.¹

357. *Partners must own and share in the profits.*—The partners contribute to the partnership their property, labor or skill; it follows that as they own in common the business so formed, they own in common the profits derived from it, though they may determine among themselves the proportion in which each shall share in the profits. It is essential to the existence of a partnership that its members be co-owners of the profits. A partner must share in the profits *as profits*—he can do so only in that he is a co-owner of the partnership business—that he carries it on in common with his partners. A and B agree together to buy a piece of land and to share the profit arising from the sale thereof. They are not carrying on a business; they are owners in common—tenants in common—of a piece of land: they are not partners.

An agreement to farm an estate on shares does not involve the carrying on of a business. A lets his farm, with its stock and implements, to B, who agrees to cultivate it on shares for a year. As a result, B will receive a share of the profits for his work and the balance will go to A. This is not a partnership. A has *leased* his farm, the rental being his share of the profits.

A partnership depends upon the idea of a sharing of profits and losses. Yet the liability of one partner for the acts of another depends upon their relations as principal and agent. Each partner is presumed to have a mandate from the others for the performance of all acts

¹ The case would of course be different if the club, society or association were an incorporated body, or otherwise acquired a distinct personality.

relating to the partnership business. Now A and B enter into an agreement whereby A is to furnish B with money to purchase a carload of hogs which A is to take possession of, as security, sell them, reimburse himself, and have half the profit; but in any event B is to pay back all money furnished by A. B, without A's knowledge, buys on his individual credit a lot of hogs from X, which form part of the lot which A sells in accordance with the agreement. The hogs are sold at a loss, and B reimburses A, but does not pay X as a partner of B for the price of the hogs purchased by B on his individual credit.

Hence if a person shares in the profits of a partnership, in order to determine whether he is a partner or not, we must determine whether he shares in the profits *as profits* because he is a co-owner of the business; or whether he receives a share of the profits as compensation for services rendered, or in repayment of a loan, or in payment for goods sold and delivered, or otherwise. Participation in the profits does not now give rise to a necessary implication of the existence of a partnership. At one time it did.

In England the question was settled by the decision in *Cox vs. Hickman*,¹ where it was held by the House of Lords that although the sharing of profits was very strong evidence of the existence of a partnership, it was not conclusive, and that the real intention of the parties as shown by the whole transaction must be given effect to. Said the House of Lords, "Persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents."

About the same time the Court of Appeal of Ontario,

¹ 18 H. L. C., 268.

in *Hill vs. Bellhouse*,¹ rendered a similar decision, and approved of the doctrine already laid down by Story, to the effect that: "The question is whether the circumstances under which the participation in the profits may exist may not qualify the presumption and satisfactorily prove that the portion of the profits is taken, not in the character of an agent, as a mere compensation for labor and services. . . . If the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled."

Similarly the Court of Appeal of the Province of Quebec, in the leading case of *Reid vs. McFarlane*,² in conflict with some of the decisions previously rendered by the same court, declared:

Sharing in profits does not constitute in itself, alone, the contract of partnership. It is necessary to find in it the other essential elements of partnership, namely, the contribution for the common benefit, and the intention of the parties to form a partnership. For a contract cannot be a lease, a hiring or a loan between the parties and, at the same time, a partnership as respects third parties. What the court has first to determine is the nature of the contract of the parties *inter se*. If it reaches the conclusion that it is a partnership, the creditors will have a recourse. Otherwise they will be deprived of it.³

Upon this important subject, the laws of England, Canada and the United States agree.

A, the owner of a grocery store, arranges with B that B shall run the business and receive as consideration one-half of the profits. A and B are not partners. B is really receiving only a wage, and by his own exertions creates a fund out of which he is paid.

¹ 10 U. C. C., p. 122.

² 2 K. B. (Que.) 130.

³ Where a person held himself out as a partner the rule would not apply. This phase of the matter will be discussed later.

A has lent B \$1,000 on the understanding that the loan will be repaid in instalments out of the profits of B's business, and the loan is so repaid. A is not a partner of B.

A is the widow of B who was a partner of C. After her husband's death A receives an annuity out of the business conducted by C. A is not thereby made a partner in the business.

A, a seaman, sues B, the captain of a ship, to recover wages due him. Their contract provides that the product of the voyage is to be divided between them in certain proportions. A and B are not partners; hence the action will lie. The relation existing between them is that of master and servant.

The contract by which the owner of an article charges another with the sale of it, with the stipulation that the latter shall have for his remuneration the surplus of the price obtained in excess of a specified sum, constitutes a "mandate for the reward," and not a partnership.¹

A lease by which it is to be stipulated that the rent will be a share of the profits resulting from the business of the tenant, does not constitute a partnership between landlord and tenant.

358. *Business must be lawful.*—Pothier's definition, already cited, speaks of the "making in common an *honest profit*." The definition of partnership enacted by the Legislature of the State of New York describes the partners as combining "for the purpose of engaging in any *lawful* trade or business."

Similar words are not used in all the definitions—in a sense they are superfluous, for the courts will not countenance or enforce contracts made for unlawful purposes. Hence every true and enforceable partnership contract

¹ Prefontaine vs. Barrie, 13 Que. L. R., 312 (K. B.).

must be for a lawful purpose, with a view to an honest profit.

If illegality is alleged, it must be proved, and will not be presumed. Either it must be shown that a partnership is illegal because its object is unlawful, or that while the object is legal, the attainment of that object is to be sought by unlawful means.¹ Hence a partnership will be held illegal if the purpose for which it is formed is "forbidden by the current notions of morality, religion, or public policy." A partnership formed for the sale of obscene literature would be illegal, as would a partnership for the purpose of making a profit from smuggling or theft. Persons carrying on a gambling house would not be heard by the courts in an action by one of them against the others for a division of profits. A classical case is cited by Lindley.² Two highwaymen in the eighteenth century brought a dispute over their plunder before an English court. They had formed an agreement to divide their plunder, and one sued the other for an accounting and for his share of the plunder, which amounted to some £2,000. The action, as might be expected, was dismissed, and the solicitors who prepared the case were heavily fined for their contempt of court.

Similarly, a partnership formed for a purpose forbidden by law is illegal. If, for example, two doctors formed a partnership to practise their profession in Ontario where they were not qualified under the statute, the contract would be illegal.

A partnership would become illegal, and cease to exist, from the moment that some event happened or some statute was passed making it unlawful for the business of the firm to be carried on. Thus if war

¹ Lindley, "Partnership." Eighth Ed., p. 110.

² 1 Loc. cit., p. 113.

breaks out between two countries, a partnership composed of persons residing respectively in the belligerent countries will be dissolved, because "whilst two countries are at war it is, by the law of each country, illegal for persons resident in either to have dealings with persons resident in the other."¹ A partnership for the sale of liquor would become illegal upon the passing of a statute prohibiting the sale of liquor.

It will be understood of course that an isolated illegal act of a partnership will not render the partnership illegal; nor will one or more illegal clauses in the contract.

359. *Association must be unincorporated.*—A partnership and a corporation are quite distinct—so much so that each is governed by different principles of law, the former by the laws relating to partnerships and the latter by the laws relating to corporations or companies. A partnership by becoming an incorporated body relinquishes its status as a partnership, and becomes an artificial legal person separate and distinct from its shareholders.² The change is a radical one. Where, as partners in the firm of Smith and Jones, both Smith and Jones were individually liable for all the debts of the partnership (though the debts might be ten times the amount of the contribution of either partner to the capital of the partnership); as shareholders in the firm of Smith and Jones, Limited, they are liable only for the amount that may remain unpaid upon the shares of the company for which they have actually subscribed and which they thus agreed to buy.

Where, as partners, Smith and Jones would have been

¹ Lindley, *Loc. cit.*, p. 111.

² In Quebec a partnership is regarded as a moral being distinct from its members. It is nevertheless not a corporation.

sued by a creditor and described as "A. Smith and B. Jones, of the City of Montreal, wholesale grocers, and there carrying on business together as such, in co-partnership, under the firm name of 'Smith & Jones,' " they would not as shareholders be named in an action against the company. The creditor's action would be directed against "Smith & Jones, Limited, a body politic and corporate,"—not against its shareholders—but against the company itself—which is, to use the words of a famous decision, "an artificial being, indivisible, intangible, and existing only in contemplation of law."¹ The corporation is a person—a fictitious person, it is true—with a capacity to incur obligations, acquire rights, sue and be sued. Yet it will be understood that shareholders in a corporation are, after all, really partners in that they have each a definite interest in the business, but with limited liability.

Moreover, a corporation is immortal. A partnership is dissolved by the death of a partner, by the efflux of time, or by a partner's withdrawal. A corporation persists though its shareholders may change from day to day.

The main advantages accruing from the incorporation of a business previously carried on as a partnership are, therefore, that the individual liability is limited to the amount actually invested, that the individual interest represented by a stock certificate may be sold or transferred freely without in any way affecting the existence of the corporation, and that the business goes on though the individual shareholder may die.

360. *Partnership as a "person" or "moral being."*—It was inferred previously in this chapter that a part-

¹ Dartmouth College vs. Woodward, 4 Wheat (U. S.), 518.

nership has no separate existence apart from its members. That view may now be slightly amplified.

The English law does not recognize the separate existence of the partnership ¹—it is not a “person” distinct from its members. Collectively the partners are a firm, it is true; but the firm is not an artificial legal entity. Legally speaking, the partners are not debtors or creditors of the firm, but of one another. In commercial practice, however, a partnership is treated as a distinct person, a legal entity like a corporation. Lord Lindley says of the two views of the matter:

Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i. e., as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the common stock; and each partner is made debtor to the *firm* for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions; but are always either debtors to or creditors of the firm. . . . The partners (according to this view) are the agents and sureties of the firm; its agents for the transaction of its business; its sureties for the liquidation of its liability so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets. But this is not the legal notion of a firm. The firm is not recognized by English lawyers as distinct from the members composing it.²

And again:

The law, ignoring the firm, looks to the partners composing it; any change among them destroys the identity of the firm;

¹ One or two exceptions to this general rule will be noticed later.

² Lindley “Partnership,” Eighth Ed., p. 138.

what is called the property of the firm is their property, and what are called the debts and liability of the firm are their debts and liabilities. In point of law, a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employee.¹

As toward his co-partners, each partner is both a principal and an agent—each has a mandate from the other for the performance of partnership business. He is not a surety toward the creditors of the firm—he is, with his associates, the firm itself.

By the custom of merchants, then, it may be said that a partnership is regarded as a distinct person or entity.

In the Province of Quebec, a partnership is, in law, treated as a moral being, a legal entity or third person, capable of having rights and incurring obligations distinct from those of the partners. The legal view of a partnership in Quebec is similar to the commercial view thereof in England. Hence a partnership may, in Quebec, acquire and own property, contract, oblige itself and oblige others toward it. "It has practically the powers of a corporation, and is ruled by practically the same principles, namely, that of a judicial person existing outside of the individuality of its members."²

361. *Partnership capital*.—Capital and property are not synonymous terms.

The fund which is formed of the contributions of the partners to the business is its capital. This capital may consist of money, land, goods, secret processes, patents, trade-marks, good will, skill or industry. The capital is a fixed sum, whereas the property of the partnership

¹ Lindley, "Partnership," Eighth Ed., p. 136.

² Henderson & Davidson, "Canadian Law of Partnership," p. 18.

may vary in amount as the partnership prospers. The capital may of course be increased or diminished by agreement. Once contributed, and the partnership organized, the capital belongs to the partnership—it must be held and applied by the partners exclusively for the purposes of the partnership, and in accordance with the partnership agreement.

Losses of capital will, unless there is a contrary agreement, be shared equally. Upon a final settlement, the capital remaining will be divided among the partners in proportion to their contributions thereto. They may have contributed unequally to the capital, but unless there is an agreement to the contrary, profits and losses will be shared equally. If, on the other hand, by agreement the profits are to be shared in a given proportion, it will be inferred (in the absence of any agreement) that the losses are to be borne in the same proportion. Lindley remarks that “an agreement for inequality may be conclusively inferred from the mode in which the partners have dealt with each other, and from the contents of the partnership books.”¹

A partner who has contributed to the capital only labor and skill, unless the contract otherwise provides, may be called upon to share with his co-partners any loss of capital, though upon a dissolution of the firm he would not be entitled to receive a share of the capital. Labor and skill are not “capital” in the same definite sense as are money, land or goods.

362. *Partnership property.*—The expression “partnership property” includes everything which belongs to the partnership, or, rather, to the partners as partners. The expressions partnership stock, partnership assets, joint stock, are also used to describe partnership prop-

¹ “Partnership,” 8th Ed., p. 411.

erty. It includes the original capital and any further or other capital or property whatsoever acquired by the firm—whether goods and merchandise, furniture, books, bills of exchange, promissory notes or other evidences of indebtedness, claims against third parties, shares, bonds, patents and so on.

There may be a doubt at times whether property standing in the name of a partner belongs to him individually, or belongs to the partnership. It may have been purchased in his name; but if it appears that it was paid for out of partnership funds, clearly he holds it only in trust for the firm. As there may be no written proof—in the deed or otherwise—of the trust, it will frequently be necessary to establish the facts from the firm's books or from the circumstances of the transaction. On the other hand, it may be found that partnership money was lent to the partner in order that he might purchase for himself. If possible, the intention of the partners will be got at as the true test.

363. *Title to firm property.*—In the mercantile sense above noted, and in the view of the law of Quebec, a partnership exists and has rights and obligations and may acquire and own property, and is distinct from the partners of whom it is composed. It is a third person.

Even under the English practice, movable property—choses in possession and choses in action—are held and dealt with in the partnership name. For instance, a note is signed or a draft or chattel mortgage made in the partnership name. To that extent the partnership acts as an artificial person. The distinction is enforced, however, in the acquisition, holding or transfer of immovable property. As the partnership is not, in law, a legal person, land cannot be sold to or transferred by it in the firm name. The partners must themselves ap-

pear in the deed as purchasers or vendors—that is, the partners, not the firm, must buy or sell the land. The deed would read that: “A. J. Jones, B. Jones and C. Jones, of the City of Toronto, grocers, and there carrying on business as such in co-partnership under the firm name and style of ‘Jones & Company,’ do grant, bargain and sell,” or as the case may be.

In the Province of Quebec, also, the partners would appear in the deed in the same way; but in the eye of the law the transaction would be a sale or purchase by the firm through its agents, the partners.

364. *Partnership real estate*.—Under the English law, and generally in the English law provinces, land, or any interest in land, belonging to a partnership (unless the partners otherwise agree) is treated, as between the partner, as personal or movable, and not as real estate. The reason for this is that upon the dissolution of a firm, the partners, or any of them, are entitled to have the land sold and converted into money for division. Hence land is treated, in equity, as personalty (personal estate) or money. This doctrine is known in law as the “equitable doctrine of conversion.” By agreement the partners may decide that land shall not be treated as personalty and that it shall not be sold or converted.

One effect of this doctrine is that the widow of a deceased partner has no claim for dower against firm realty or her husband’s share therein. For dower is a real right against land—whereas by the doctrine of conversion land is treated as between the partners (including the representatives of a deceased partner, and also as between the heirs of a deceased partner and his executors or administrators) as being no longer realty but personalty. Under the American rule, firm realty is

not treated as personalty further than may be necessary to pay firm debts. The widow of a deceased partner could therefore claim her dower out of her husband's share of the surplus.

Although each partner may do all acts relating to the partnership business, one partner cannot alone sell firm realty. All the partners must join in the deed. Nor where a contract is made by one partner for the sale of partnership land, to which the other partner refuses to consent, can the purchaser insist upon taking the share of the contracting partner in the land with a proportionate abatement in the price.¹

Moreover, partnership realty may stand in the name of one partner; and where two partners occupied premises, the freehold of which was vested in one of them, and the assessment of the premises was sufficient to give a qualification to each, both parties were held qualified to vote.²

365. *Partner's interest in firm property.*—Because a partner is described as having a certain share in a partnership, it is not meant that he owns a similar proportion of the firm's property. He has an interest in all the property, both real and personal, of the firm. But he can pick out no object or objects as belonging to him; his undivided share or one-third share in any object he cannot transfer. His share or interest is only his proportion of any surplus that may remain after the firm has been dissolved, the assets realized and all the debts paid and discharged. His "share" may then prove to be worth nothing.

If, on the other hand, he and another have bought

¹ Crain vs. Rapple, 20 A. R. 291.

² South Grenville Election. Ellis vs. Fraser, H. E. C. 163; see also Queen vs. Loanisse, 28 O. R. 495.

a carriage, each paying half the price, they own the carriage for a half-interest each. Either may sell his half-interest, or may find it sold at the instance of a creditor.

Upon the death of a partner, then, he leaves to his heirs and representatives merely this eventual interest or share, whatever it may be, in the surplus of the assets over the liabilities of the partnership.

366. *Rights of surviving partners in firm property.*—The English law and that of the Province of Quebec differ upon this important subject.

The rule adopted in the Imperial Partnership Act would probably be accepted in the English law provinces of the Dominion,¹ and reads as follows:

Rule 38: After a dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners *continue*, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete the transactions begun but unfinished at the time of the dissolution, but not otherwise. Provided that the firm is in no case bound by the acts of a partner who has become bankrupt, but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself, or knowingly suffered himself to be represented as a partner of the bankrupt.

The Quebec law is found in Section 1897 of the Civil Code:

The mandate and powers of the partners to act for the partnership *cease* with its dissolution, except for such acts as are a necessary consequence of business already begun; nevertheless, whatever is done in the usual course of dealing and business of the partnership, by a partner acting in good faith and in ignorance of the dissolution, binds the other partners and in the same manner as if the partnership still subsisted.

¹ Henderson & Davidson, "Canadian Law of Partnership," p. 66.

This is the rule of the French law. Under the law of England and the United States the surviving partner is entitled to liquidate the property of the partnership—the firm property vesting automatically in him for that purpose.¹ In reality the firm title persists and is controlled by the surviving partner until the winding-up is complete. In Quebec, on the other hand, it has been held that a partner cannot confess judgment on behalf of a partnership after dissolution, nor make an admission binding upon his former partners, nor borrow money in the name of the firm for the purposes of the partnership business. Nor has one partner the sole right to receive the letters addressed to the former partnership, even though he has acquired all its debts.²

Under the English rule, then, the surviving partner, in whom the firm property vests, liquidates the business and sells off the property. Under the Quebec rule, if the interested partners cannot agree upon a liquidator, the courts will appoint one, and he is thereupon seized of all the assets of the firm.

The representatives of the deceased partner may demand a partition and an accounting.

367. *Firm creditors and separate creditors.*—Firm creditors are preferred upon firm assets before creditors of the individual partners. The general rules of law applicable in Quebec and in the English law provinces are in harmony on this question. The Civil Code of Quebec expresses sufficiently the general rule:³

The property of the partnership is to be applied to the payment of the creditors of the firm, in preference to the separate creditors of any partner; and in case such property be found

¹ Henderson & Davidson, "Canadian Law of Partnership," p. 102.

² Ibid, p. 102-103.

³ Article 1899.

insufficient for the purpose, the private property of the partners, or any one of them, is also applied to the payment of the debts of the partnership; but only after the payment out of it, of the separate creditors of such partners or partner respectively.

In Quebec, however, in commercial as distinguished from civil partnerships, partners are jointly and severally liable for firm debts. That is, a creditor may sue each or all of them for the full amount of his claim and recover from the one best able to pay. If one of the partners of a firm dies, the creditor may sue the surviving partners for the whole debt due him. He need not sue the representatives of the deceased partner.¹

In the English law provinces, it may be stated as a general proposition that the liability of partners is joint, not joint and several. That is, a creditor has only one action. In that action he must join all the partners whom he intends to hold; a previous action might be pleaded as a bar by a partner whom he omitted and subsequently sued. Yet each partner sued is liable for the full amount of the claim, and the judgment that may be obtained is joint and several in that it can be executed or realized against any one of the joint debtors. In some of the English law provinces also, upon the death of a partner, his estate would be jointly and severally liable, subject to the prior payment of his separate debts. That is, that while a creditor would have a single action against the surviving partners, he would have another action against the estate of a deceased partner.

The liabilities we have been discussing are those arising out of contracts. In cases arising out of torts—that is, wrongful acts or omissions of partners in con-

¹ *Stadacona Bank vs. Knight*, 1 Q. L. R., 193.'

nection with partnership business, causing loss or injury to third parties—the liability is joint and several.

368. *Good faith toward co-partners.*—Partners, as toward one another and as toward the firm, stand in a position of trust and confidence. Each is entitled to bind his firm—his co-partners—in all matters relating to partnership business. By a single act of carelessness or fraud he may involve his partners in ruin. He must act as toward his partners and their interests always as though he were acting in his own best interest. In his use of his powers, of the firm property and firm name, he must act with the most scrupulous care. His conduct must in all things “bear to be tried by the highest standard of honor.” Nor, until the partnership is dissolved and completely wound up, must this care and scrupulous conduct cease.

369. *Duty to exercise care and skill.*—The Civil Code of Quebec enacts that “each partner is liable to the partnership for damages caused by his fault.”¹ The rule would be generally applicable. And in a contract between several persons for the keeping of a ferry, for example, with power to any one of the partners to sell or convey his right therein, the assignees of any partner cannot act so as to injure the business. The other co-partners have a personal and direct action against such assignees, as well for the damages arising from their breach of the original contract, as for the rescission of the contract for the future.²

Reasonable care and skill are required of a partner; and he would not be held for damages due to an error of judgment or lack of discretion, unless bad faith or negligence were proved against him.

¹ Henderson & Davidson, Loc. Cit., p. 79.

² Laviolette & Delisle, K. B., 8 L. C. R. 174.

He must conform strictly to the contract of partnership into which he has entered; and will be liable in damages for any violation thereof which causes injury to his co-partners. He cannot urge, for example, in defence, that he has found that his co-partner is undesirable, or that the business is unprofitable. Again, if by the contract he is deprived of any right of management, and he assumes to manage and causes loss, he will be liable in damages to his co-partners. If he persistently refuses to abide by his contract, the other partners may take an action to force a dissolution of the partnership.

370. *Must receive no private benefits.*—A partner is not entitled to enrich himself at the expense of the firm or of his co-partners. The necessity for absolute good faith forbids. It follows that a partner must account to the firm for any benefit derived by him without the consent of his co-partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection. He must continually act for the benefit and advantage of the firm, and is bound "to share with his co-partners any benefit he may have been able to obtain from other people, and in which the firm is in honor and conscience entitled to participate."¹ So that where a partner, charged with the buying for his firm, bought goods when they were cheap, in his own name, and later, when the price had advanced, secretly sold them to his firm and made a profit for himself, he was held to account to the firm for the profit.² And where one partner authorizes his co-partner to sell partnership property at a given price, and a larger price is received, he does

¹ Lindley, p. 366. Eighth Ed.

² Bentley vs. Craven, 18 Beav. 75.

not lose his right to a share of such excess. Again, where two partners renewed in their own names the lease of the partnership premises, and thereupon dissolved the partnership in an endeavor to exclude the third partner from all benefit in the lease, it was held that in the partnership accounts the new lease should be treated as a firm asset.¹

371. *Must carry on no separate business.*—The rules applicable in the various provinces are not in exact accord on this subject. In several of the English law provinces the English rule would be followed, viz., that a partner who, without the consent of the other partners, carries on any business of the same nature as, and competing with that of the firm, must account for and pay over to the firm all profits made by him in that business. In the Province of Quebec, a partner cannot carry on privately any business or adventure which deprives the partnership of a portion of the skill, industry or capital which he is bound by his partnership contract to employ therein. If he does so, he must account for the profits of such business. As a general rule, however, it may be said that a partner must employ in the partnership all the capital, skill or industry which his contract binds him to employ. Unless his contract otherwise provides, he will be required, generally speaking, to devote himself entirely to the firm business; if the contract calls for only part of his skill, industry or capital, he must abide by his contract; but he is not accountable for profits he may derive from a business to which he devotes the remainder of his capital or industry, unless such business competes with that of the firm.

372. *May take part in the management of the firm.*

¹ Featherstonhaugh vs. Fenwick, 10 Mews Dig. 634.

—*Prima facie*, each partner has a mandate from his co-partners for the management of the firm business in the usual way. Whatever is done by one of them binds the others. This would be true although the shares of the partners might be unequal. Third parties who deal with a partner in the usual course of firm business may therefore hold the firm responsible for the obligations contracted through him, unless they had notice that his real authority was less than they otherwise were entitled to assume.

Frequently the partnership contract gives the management of the business entirely to one or more of the partners. As between themselves this contract is binding; but the third parties who might deal, without notice, with a partner thus excluded from the management, would be entitled to hold the firm.

373. *Rights and powers of a majority.*—In Quebec, unless by the contract it is so determined, a majority of the partners in a firm cannot act against the wishes of a minority. Each partner is entitled to object to any act of his co-partners in the management of the business before it is concluded. Such an objection would of course not be permissible where the partners had agreed that the will of a majority should govern.

In the English law provinces, generally speaking, the will of the majority would govern in the case of differences arising in the ordinary course of business; but the majority could not change the nature of the business or expel a member unless the articles of partnership so provided.¹

¹ In England, as in the United States, the opinion of the majority would prevail. The Article of the Quebec Civil Code (C. C. 1851) is drawn from the Roman and French law. The French Commentators, however, are divided upon the question, with the balance of authority against the right of the majority to prevail.

374. *Partnership accounts.*—Partners stand in a position of trust and confidence toward one another. As we have seen, each has a mandate from his co-partners for the performance of partnership business. So that each is entitled to demand and each is bound to give a true account of all firm transactions. It follows that each partner must furnish the firm's accountant with full particulars of transactions relating to the partnership business with which he has had to do; or, in the absence of an accountant, must himself keep such accounts. Otherwise, in the event of trouble with his partners or with creditors, there will be weighty presumptions against him which he may find it difficult to dispel.

Actions for an accounting are frequent upon the dissolution of the partnership, and may be brought by any partner, or by or against the heirs and legal representatives of a deceased partner.

Where a partner assigns his share in a partnership, the assignee, as a general rule, cannot, while the partnership continues, demand an accounting or interfere in the management of the business. After the dissolution, he may be entitled to an accounting from the dissolution, to determine what is the share of the partner whose interest he holds as assignee.

375. *Contribution.*—A partner is not bound to bear a larger share of the firm's obligations than he contracted for with his co-partners. Thus if A, B and C are in partnership and become insolvent, as between themselves they must contribute equally (or as the case may be) in paying the creditors. So if half the debts are collected out of firm assets, and C is forced to pay the other half, he can demand of A and B one-third each of the sum he has had to pay.

Mr. Justice Lindley takes the view that a partner may claim contribution though the partnership transaction be tainted with illegality, though not where the partnership as such is illegal or where the partner has knowledge of the illegality of the transaction:

The claim of a partner to contribution from his co-partners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership; or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution, when he knew or ought to have known of its illegality. In any of these cases he can obtain no assistance against his co-partners, and must abide the consequences of his own wilful breach of the law. But if the partnership is not itself illegal, and if the partner claiming contribution has not himself been personally guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act.¹

376. Indemnity.—As each partner is the agent of the other for partnership business, it follows that he must be indemnified for expenses and liabilities incurred by him prudently and in good faith in the course of his management, or for the necessary preservation of firm interests or property.

377. Compensation.—The articles of partnership may provide that the partners, or one or several of them, shall be paid for their services to the firm. Such a provision is not uncommon in the case of a managing partner. Yet if the articles do not so provide, no partner is entitled to compensation for the services he may render, whether in the form of salary or commission. It would not matter that one partner had done practically all the work. He is in the hands of his co-partners, who, from

¹ Lindley, "Partnership." Eighth Ed., p. 441.

a sense of honor, may compensate him, but who cannot be compelled to do so. Nor would the rule be different if one partner, owing to the illness of a co-partner, were forced to do more work than usual. Where, on the other hand, a partner wilfully neglects his duties, and his co-partners are thus forced to do his work and carry his responsibilities, it is probable that the co-partners would be entitled to compensation for their services. But it has been held that in the absence of a special agreement, a partner is not entitled to be paid for his services in winding up the partnership business.¹ Where, as in Quebec, a liquidator is appointed, the court will fix his remuneration.

378. *Interest on balances.*—A partner who advances money to or for the firm beyond the amount of his subscription to the capital will be entitled to interest thereon from the date of the advance.

If he is in default to pay money which he has agreed to contribute, or if he has withdrawn partnership money and used it for his particular benefit, he must pay interest on such amounts to the firm. In some of the provinces, a partner who is indebted to the firm in respect of money borrowed, or in respect of a balance in his hands, is not liable for interest unless there has been a fraudulent retention or an improper application of the money.² Nor will the partners, in the absence of specific agreement, be entitled to interest on the capital they have subscribed.

The subject of interest should be carefully regulated by the partnership contract.

379. *Partner's lien.*—Upon the dissolution of a partnership, each partner is entitled to demand that the

¹ Butler vs. Butler, 29 U. S. R. 145; Liggett vs. Hamilton, 24 S. C. R. 665.

² Henderson & Davidson, Loc. Cit., p. 69.

firm's assets be applied to the payment of firm debts, and that the surplus, after deduction of debts due the firm by the partners, be divided. This right, in effect a lien, though it exists during the life of the partnership, becomes exigible only upon the dissolution or when a partner's rights are to be determined. Upon the death or bankruptcy of a partner "his lien continues in favor of his representatives or trustees, and does not terminate until his share has been ascertained and provided for by the other partners. But after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business." ¹

A few illustrative cases may be cited.

If one of two partners dies, for instance, and the executors of the deceased partner allow the survivor to continue the business of the firm, there will be no lien in their favor on property acquired by him in the course of business, in addition to or in substitution for partnership property, and in the event of the bankruptcy of the surviving partner, goods brought into the business by him will belong to the creditors in the new business, not to the creditors of the former partnership. ²

But a surviving partner, who insisted on carrying on the business against the will of the deceased partner's representatives, would probably be estopped from setting up that property so acquired in the new business was part of the assets of the former partnership. ³

The lien may be lost by the conversion of partnership

¹ Lindley, *Loc. Cit.*, p. 414.

² *Payne vs. Hornby*, 25 Beav. 280.

³ *Henderson & Davidson, Loc. Cit.*, p. 90.

property into separate property, or by the sale of it to a third party. Hence—if, at the dissolution, the partners agree to divide the partnership property among themselves and to pay the debts by each contributing a sum in cash, and the property is divided, but A and B, two of the partners, do not pay their share of the debts, C, a third partner, cannot demand that A and B bring back their share of the property for the exercise of his lien upon it—he has lost his lien.

The lien will not exist when a partnership is illegal—the partnership itself, as we have seen, does not then exist.

380. *Agency of a partner.*—Among themselves, partners may stipulate as to who shall actually manage the firm's business. But third parties who deal with the firm or its members in good faith are entitled to protection, and to assume therefore that each partner has an implied power to bind the partnership for all obligations contracted in its name and in its usual course of dealing and business. The partner may not actually have the power, and the transaction may not benefit the firm, yet the firm will be bound where the third party is in good faith and is not aware of the lack of authority of the partner with whom he deals.

A few cases dealing with the question of a partner's agency, will show the general attitude of the courts in this matter.

If one partner, for example, borrows money professedly for the purpose of the firm, but acknowledges that he is desirous of concealing the transaction from the other members of the firm, this is a circumstance sufficient to rebut the presumption of implied authority, and the person advancing the money cannot recover

from the firm if it turns out that the partner had not special authority.¹

In one instance, the court has held that the implied power of a partner does not extend to giving the partnership name to secure the debt of a third person.² So where a note was endorsed in the firm name, and the plaintiff who discounted it knew that it was endorsed as security for a third person, and had no reason to believe that it had any connection with the partnership business, the firm was held not liable.³

No agreement between partners limiting their authority is binding on third parties. Hence where certain parties agreed that no sale of pig iron of over \$100 in value should be made without the consent of all, and one partner made a contract for the sale of a greater amount in the firm name, without consent, it was held that the transaction was within the scope of the partnership business, and that the purchaser who bought in good faith could recover.⁴

381. *Implied authority of a partner.*—His implied authority is for all acts done in the "usual course of dealing and business" of the firm. So that he may buy goods for use or sale; render and settle accounts; draw, accept or indorse bills of exchange; make and indorse promissory notes; bind the firm by checks, not post-dated, drawn on the firm's bankers in the partnership name; vary contracts; insure the firm's property; fix rates of interest; pledge firm property to secure advances; bind the firm under a penalty to observe a contract which the firm has authorized him to make; sell

¹ McConnell vs. Wilkins, 13 A. R. 438.

² Wilson vs. Brown, 6 A. R. 411.

³ Federal Bank vs. Northwood, 7 Ont. R. 389.

⁴ Cuvillier vs. Gilbert, 18 L. C. J. 22.

goods; borrow money; pay firm debts; sue or defend for the firm; open a bank account in the firm name; assign a debt.

But his implied authority does not enable him to open a bank account for the firm in his own name; to accept bills in blank (though a bona fide holder for value without notice could recover thereon); to sell firm realty or bind his co-partners by a deed; in general to bind the firm by guarantees or bonds in its name; to lease firm realty; or to hypothecate firm realty to secure advances.¹

382. "*Holding out.*"—As we have seen, every partner is both a principal and an agent as toward his co-partners—for acts done in the usual course of business. More generally stated—an agent acting within the scope of his authority (and then only) binds his principal. Now if a person holds another out as being his agent, i. e., if a partner holds another person out as being also a partner with him (when in reality he is not), he will be bound by the acts of that person within the scope of the partnership business. And he will be estopped from denying that such person is his partner or agent, unless the person so held out has done some act not connected with the partnership business. Similarly persons who hold themselves out as partners, or who give reasonable cause for belief that they are partners in a particular firm, will be held toward third parties who in good faith believe them to be partners. Chief Justice Eyre, in a leading case,² expressed the doctrine as follows:

Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners. . . .

¹ These examples are taken largely from Lindley, *Loc. Cit.*, pp. 164-182, and of course are not exhaustive.

² *Waugh vs. Carver*, 2 H. Black, 235, at p. 246.

But if (one of them) will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transactions between them, but upon principles of general policy to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it to two of them, to whom, without the others, they would have lent nothing.

383. Notice of withdrawal.—Partners who retire from a firm must also be careful that they do not omit to give sufficient notice of their retirement, or they may be considered to have held themselves out as partners. Thus in a case decided by the Supreme Court, one of the defences set up was, that even if the defendant, who permitted his name to be continued in the firm after retirement, was liable at all, he was only liable for debts incurred in respect of the class of business (that of a general store) which the firm carried on while he was a member, and not in respect of transactions in real estate and investing in securities carried on by the remaining partner after his withdrawal. It was held, however, that as no public notice of dissolution had been given, and as the defendant was aware that his name still appeared in the firm, and was also aware of the general nature of the new business carried on in the firm name, he was liable.

As to sufficiency of notice, it may be said that a special notice should be sent to each customer of the firm. The general public are sufficiently notified by a notice published in the newspapers. It will in most provinces be also necessary to file a certificate of dissolution of the partnership.

384. *Dissolution of partnership.*—A partnership may be dissolved under the following circumstances:¹

1. By the efflux of time—the expiration of the term agreed upon.

2. By the termination or accomplishment thereof where the partnership was entered into for a single adventure or undertaking.

3. By the withdrawal of a partner at will, if the partnership is entered into for an indefinite period. If the term is definite, as for a number of years, the premature withdrawal of a partner dissolves the partnership, but leaves him open to an action for damages.

4. By the death or the bankruptcy (financial death) of a partner, subject to a contrary agreement. The interdiction of a partner would have the same result.

5. By the business of the partnership becoming impossible or unlawful.

6. By the bankruptcy of the firm.

7. By order of the courts before the expiration of the term agreed upon, when—

- (a) A partner fails to fulfil his contract, or
- (b) Is guilty of gross misconduct, or
- (c) Because of insanity or physical weakness he is unable to attend to his duties, or
- (d) When his condition and status are essentially changed, or
- (e) When the business can only be carried on at a loss, or
- (f) “Upon just cause shown”; “in other cases of a like nature”; or “whenever in any case circumstances have arisen which in the opinion of the court render it just and equitable that the partnership be dissolved.”

¹ No attempt has been made to make the list exhaustive—rather to group a few of the more common grounds of dissolution.

- (g) When a partner transfers or assigns his share.
- (h) By seizure of a partner's share at the instance of one of his creditors.

385. *Limited partnerships*.—Limited partnership was borrowed from the French law. The definition of Pothier is generally applicable and explanatory:

Partnership en commandite (or limited partnership) is a partnership which a merchant contracts with another individual for a business which will be carried on in the name of the merchant alone, and to which the other party contributes only a certain sum of money to serve as part of the partnership capital, upon condition that he will have a certain share in the profits, if there are any; and that he will bear, on the other hand, a certain share of the losses, but in any event only to the extent of his contribution.

386. *Its nature*.—In other words, there are one or more general partners and one or more special partners. The general partners are responsible toward third parties for all debts of the firm; whereas the special partners are responsible only to the extent of their contribution to the capital. The general partners alone are authorized to transact business for the firm. If the special partners interfere in the management of the business, they may be held as general partners, though they may examine the firm's books and advise as to its policy and management. The special partner cannot, while the partnership exists, draw out the money he has contributed to the capital; though he may receive interest thereon, if the capital sum is not thereby impaired, and of course he is entitled to his share of any profits. The advantage of being a special partner lies in the fact that a man can invest his money in a partnership where he has no time to give to its management and wishes to limit his liability.

387. *How formed.*—The rules in the various provinces vary, and it is impossible here to detail them. Care should in every instance be taken to conform to the local statute. A main provision will, however, be found to be the registration of a declaration setting out the names of both general and special partners, the date of commencing and terminating the partnership business, the general nature of the business, and so on. If these statutory conditions are not strictly followed, the special partners may be held as general partners.

CHAPTER XXIX

COMPANY LAW

388. *Nature of corporations.*—A definition frequently referred to is that of Marshall, C. J., in the case of *Dartmouth College vs. Woodward*.¹ A corporation,² he says, is “an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.” A corporation is then an artificial person, created by law—by the exercise of the sovereign power. It is, as has already been said, an entity distinct from the persons or shareholders who compose it. The company’s assets belong to it, not to its shareholders; to the company, not to its shareholders, do its creditors look for payment.

The incorporation of companies, by special act of Parliament or of a provincial legislature, or by Letters Patent, has in the last few years become a very frequent practice, and the reasons are not far to seek:

(a) Where a person does business alone, or in partnership with others, he is liable for all the debts of the business, and he may find himself financially ruined.

¹ 4 Wheat (U. S.) 518.

² By “corporation” is meant, in this discussion, a company incorporated by Letters Patent, or by special statute, of the Dominion, or of a province.

By incorporating his business, he limits his liability to the amount of the stock of the company which he holds, though if his stock is not paid for in full, he will be liable for the unpaid balance.

(b) If a partner dies or becomes bankrupt or insane, the partnership is dissolved, possibly with loss to himself, or to his heirs or representatives, as the case may be. Whereas his stock in a corporation passes as he may provide, and the corporation persists. A shareholder may sell or deal with his shares as he likes.

(c) In a partnership, each partner is an agent of his co-partners, and can transact partnership business, and bind the firm, perhaps at great loss to his associates. In a company, the management is delegated to directors, whose powers are limited by statute or by the will of the shareholders. The shareholder as such cannot act for the company, or bind it in any way.

(d) Where new capital is desired, a company may, under the Companies Act, increase its capital and invite the general public to subscribe. It may issue bonds, debentures and other securities for the purpose of borrowing money.

Companies were at one time in the course of their development in England created by a separate grant from the king or from Parliament. This cumbersome method has given way to incorporation by Letters Patent and by special act. Companies formed in Canada at the present time for the construction and working of railways, or for the business of banking or insurance and loan companies, are created by special act. With these and one or two other exceptions, the secretary of state may, by Letters Patent, grant a charter to any number of persons not less than five, who shall petition therefor, constituting them a body corporate for any

purposes or objects to which the legislative authority of the Parliament of Canada extends.¹ Similarly, the lieutenant governor of a province may by Letters Patent grant a charter for any of the purposes, with certain exceptions, to which the legislative authority of the province extends.

So that we have companies created by special statute of the Parliament of Canada or of the legislature of a province; and companies created by Letters Patent issued by the secretary of state of Canada, or by the lieutenant governor of a province. In view of the existence of the Dominion Companies Act and of the companies acts of the various provinces, it will be necessary to confine the following discussion to those general principles of company law which would be applicable to most companies. In the main, the provisions of the Dominion Companies Act will be followed.

389. *Provincial powers.*—As companies may be incorporated under Dominion or provincial charter, it is important to examine into the powers of companies incorporated in either case. The British North America Act,² gives to each province the exclusive right to make laws in relation to the incorporation of companies with provincial objects, as distinguished from Dominion objects. Yet as Mr. Lefroy says, commenting on the act,³

The Dominion Parliament can alone incorporate companies with powers to carry on business throughout the Dominion, and the business of companies so incorporated may have to do with property and civil rights, yet it cannot empower them to carry on business in any province otherwise than subject to and con-

¹ See the Dominion Companies Act. S.

² See Secs. 91 and 92 of the act.

³ Legislative Power in Canada, Secs. 55, 56, 57.

sistently with the laws of that province (unless the business is such that power to make laws in relation to it is exclusively in the Dominion Parliament, under one of the enumerated heads of Section 91 of the British North America Act).

The fact that Dominion Legislatures may have passed acts relating to companies of a particular description, such, for example, as building societies, and defining and limiting their operations, does not interfere with the power of the Dominion Parliament to incorporate such companies, with power to operate throughout the Dominion.

The fact that a company incorporated under an Act of the Dominion Parliament, with power to carry on its business throughout the Dominion, chooses to confine the exercise of its powers to one province, cannot affect its status or capacity as a corporation, if the Act incorporating the company was originally within the legislative power of the Dominion Parliament.

On the other hand, it has been held by the Supreme Court of Canada,¹ that a fire insurance company incorporated by a provincial legislature is not inherently incapable of entering, outside the boundaries of its province of origin, into a valid contract of insurance relating to property also outside of those limits.

390. *The charter.*—A corporation or company exists by reason of the consent of the state, the evidence of which is its charter. The charter may be granted to not less than five persons of the age of majority who make a petition therefor, setting out the names, occupation and residence of the petitioners, the purposes for which incorporation is sought, the chief place of business of the company, the amount of the capital stock, the names of the first or provisional directors, and concluding with the prayer that the petitioners, and such others as may thereafter become shareholders in the company,

¹ Can. Pac. Ry. Co. vs. Ottawa Fire Insce. Co., 39 S. C. R. 405.

be created a body corporate and politic for the purposes mentioned in the petition.

The expression "a body corporate and politic" is intended to convey full corporate powers and privileges, in so far as they are not restricted by the company's charter and the provisions of the Companies Act.

The petition of the applicants for incorporation will be carefully examined before a charter is issued; and more especially with respect to the proposed name, which must not conflict with the name of any other known company, and with respect to the powers applied for. Perhaps the most frequent complaint is that the powers asked for, or some of them, are such as can be exercised only by a corporate body created under some special act. For instance, in an application for the issue of Letters Patent to a manufacturing or realty company, powers are not infrequently applied for which are granted only to a bank, a loan company or a railway company incorporated under a special act, and with special powers. In such case, the objectionable objects or powers must be eliminated; or the application must be abandoned and steps be taken for incorporation under a special act.

The petition must be accompanied by the incorporation fee exacted by the government. If the petition is granted, public notice must be given thereof in one or more newspapers. A meeting of the incorporators is held to elect directors, by-laws are adopted, and steps may be taken to raise capital by the sale of stock. Frequently, in this early stage of the company's career, contracts are passed between it and the promoters, and property, rights and privileges are turned over to the company by those interested in its formation. The

company's organization is then complete, and it is ready to commence business.

391. *By-laws*.—A corporation's powers are, as we have just seen, those granted by its charter and by the general law. Of these powers the world at large has constructive notice. But the private affairs of a company are regulated by by-laws, and a company may make by-laws, not contrary to law or inconsistent with its charter, to regulate, for example, the allotment, payment and forfeiture of stock; the declaration and payment of dividends; the amount of stock qualifications of the directors and their remuneration; the appointment, functions, duties, remuneration and removal of all agents, officers and servants of the company; the calling of meetings and the procedure thereat—and, generally, "the conduct, in all other particulars, of the affairs of the company."¹ A by-law must be reasonable; it must not work unequally toward members of any class of shareholders affected by it. So that if a by-law discriminates as to terms of payment of stock between certain individuals and other shareholders, it is upon its face invalid.² Similarly, the by-laws may be altered or added to from time to time; but not so as to permit a fraud upon a minority.

A by-law is sometimes confused with a resolution. A by-law is intended to operate generally. It is used to provide for the general regulation of the company's affairs. A resolution is adopted ordinarily for special matters, as the appointment of an agent, the publication of notices, the policy of the company, the making of calls. Questions are submitted to a general meeting in the form of a resolution, proposed by the chair-

¹ Sec. 44 of the act.

² The North-West Electric Co. vs. Walsh, 29 S. C. R. 33.

man or other shareholder. The directors exercise their powers by resolution. For example, a resolution is passed by them to the effect:

That a call of ten dollars a share be, and the same is hereby, made on the members of the company, such call to be payable on the day of .

That the proposal of A to supply this company with iron ore be and the same is hereby accepted, and that the secretary do give A notice of this resolution.

The following by-laws are suggested as examples:

BY-LAW NO. 1. HEAD OFFICE.

The Head Office of the Company shall be in the City of Montreal, in the Province of Quebec.

BY-LAW NO. 2. SEAL.

(SEAL) The Company shall have a Seal, an impression of which is stamped in the margin opposite this By-law. The Seal, whenever used, shall be authenticated by the signature of the President and of the Vice-President, or of such other officer or officers of the company as shall from time to time be directed by the Board.

BY-LAW NO. 3. ANNUAL GENERAL MEETING.

The annual general meeting of the shareholders of the Company shall be held at the office of the Company, or elsewhere as the Directors may decide, on the second Tuesday of the month of May in each year, to receive the report of the Directors for the past year, and to transact all other business.

BY-LAW NO. 4. FINANCIAL YEAR.

The Company's business and financial year shall begin on the 1st day of May in any year, and terminate on the 30th day of April of the succeeding year.

BY-LAW NO. 5. SPECIAL GENERAL MEETINGS.

Special general meetings of the shareholders of the Company shall be called by the President or by two Directors, whenever it is deemed necessary or advisable by him or by them, for the

transaction of any business specified in the notice calling such a meeting.

Upon the requisition in writing of three shareholders, however, the Directors shall convene a special general meeting of the shareholders; such requisition must specify the object of the special general meeting proposed and the nature of the business to be brought before it, and shall be deposited with the President of the Company at its Head Office.

BY-LAW NO. 6. NOTICE OF MEETING.

Notice of the time and place for holding the annual general meeting of the Company shall be given by the Secretary to each shareholder of record on the books of the Company, by posting same by registered mail; duly addressed to each shareholder at his last address recorded in the books of the Company, at least ten full days before the date of the proposed meeting.

Notice of a special general meeting shall be similarly addressed and posted at least three full days before the date of such proposed special general meeting.

The non-receipt of the notice by any member, or the accidental omission to give any such notice to any of the members, shall not invalidate the proceedings of any general meeting.

BY-LAW NO. 7. QUORUM OF SHAREHOLDERS.

Three shareholders personally present and holding or representing by proxy not less than fifty per cent (50%) of the stock of the Company issued and outstanding, shall be a quorum for the transaction of business at any general meeting of the Company.

BY-LAW NO. 8. VOTES.

At all general meetings of the Company every shareholder shall be entitled to as many votes as he holds shares in the Company, and may vote by proxy.

Proxies for the purpose of voting must, however, be held by shareholders present at the meeting.

No shareholder shall be in arrears in respect to any call if he desires to vote at a meeting of the Company, either personally or by proxy.

BY-LAW NO. 9. PROXIES.

Every proxy shall be an instrument in writing, signed by the shareholder giving it, or by his duly authorized Attorney, and shall be filed with the President of the Company at least one hour before the time fixed for the meeting, together with the Power of Attorney, if the shareholder is so represented on said proxy.

BY-LAW NO. 10. DIRECTORS.

The affairs of the Company shall be managed by a Board of three Directors, two of whom shall form a quorum, and each of whom must own stock in the Company in his own right.

The Directors shall hold office for one year, or until their successors are appointed.

BY-LAW NO. 11. POWERS OF DIRECTORS.

The Directors from time to time may make by-laws not contrary to law or to the Letters Patent incorporating the Company, to regulate:

(a) The allotment of stock; the making of calls thereon; payment of calls; the issue and registration of certificates of stock; the forfeiture of stock for non-payment; the disposal of forfeited stock and of the proceeds thereof; and the transfer of stock;

(b) The declaration and payment of dividends;

(c) The appointment, functions, duties and removal of all officers, agents and servants of the Company and their remuneration;

(d) The time at which, and the place where, meetings of the Board of Directors and of the Company shall be held; the quorum; the requirements as to proxies, and the proceedings at all such meetings;

(e) The conduct in all other particulars of the affairs of the Company.

BY-LAW NO. 12. MEETINGS OF DIRECTORS.

Regular meetings of the Directors shall be held on the second Wednesday of each month at 2.30 P.M., without formal

notice; and special meetings shall be held as often as the business of the Company shall require.

Special meetings shall be called by the President, or by any two Directors; and one day's notice of such special meeting shall be given in writing by the President to each Director.

BY-LAW NO. 13. VOTING AT MEETINGS OF DIRECTORS.

Questions arising at any meetings of Directors shall be decided by a majority of the votes of those present.

In case of an equality of votes, the President, or the Chairman, shall have a casting vote, in addition to his original vote.

The voting shall be by show of hands.

BY-LAW NO. 14. PAYMENT OF DIRECTORS.

The remuneration of Directors for attendance at Board meetings, and the repayment to them of expenses incurred by them in carrying on the work or furthering the interests of the Company, shall be in the discretion of the Board.

BY-LAW NO. 15. OFFICERS.

The Officers of the Company shall be a President, a Vice-President and a Secretary-Treasurer.

The Officers shall be shareholders of the Company and shall be chosen by and from among the members of the Board of Directors. They shall hold office during the pleasure of the Board.

BY-LAW NO. 16. DUTIES OF OFFICERS.

The President shall preside at all meetings of the shareholders and Directors, sign all certificates of stock of the Company, and execute all deeds and agreements ordered by the Board of Directors. He shall also be the General Manager, and shall have general supervision of the affairs of the Company, and attend generally to its executive business.

In the absence of the President, the Vice-President shall perform the duties above assigned to the President. He shall countersign all certificates of stock, and shall perform such other duties as may be required of him by the President or by the Board.

The Secretary-Treasurer shall perform such duties as may be assigned to him by the Board.

BY-LAW NO. 17. SALARIES.

The Board of Directors shall from time to time fix the remuneration, salary or wages to be paid to the officers and employees of the Company.

BY-LAW NO. 18. SOLICITORS.

The Solicitors of the Company shall be Messrs.
of .

BY-LAW NO. 19. CHANGE OF BY-LAWS.

The Board of Directors may from time to time repeal, amend and re-enact the By-Laws, but such change, unless in the meantime confirmed at a general meeting of shareholders, duly called for that purpose, shall only have force until the next annual meeting of the Company, and, if not confirmed thereat, shall from that time cease to have any force or effect.

BY-LAW NO. 20. AUDITORS.

Once at least in every year the accounts of the Company shall be examined, and the correctness of the profit and loss account and balance sheet ascertained, by one or more auditor or auditors, who shall be a chartered accountant or accountants.

The Company at each ordinary general meeting shall appoint an auditor or auditors to hold office until the next ordinary general meeting.

The first auditors of the Company may be appointed by the Directors before the first annual meeting, to hold office until such first annual general meeting.

BY-LAW NO. 21. CHECKS, ETC.

The President or the Vice-President may endorse for deposit all Bills of Exchange, Checks and Promissory Notes in the name and on behalf of the Company.

All Checks, Promissory Notes or Orders for the payment out of moneys by the Company, shall be made and signed on behalf of the Company by the President and be countersigned by another Director, who may be the Vice-President.

BY-LAW NO. 22. STOCK BOOK AND CERTIFICATE.

A stock transfer book shall be provided in such form as the Board of Directors may approve for the entry of all transfers of stock. Stock certificates shall be issued and shall be signed and executed by the President and Vice-President, and the Seal of the Company shall be affixed thereto.

BY-LAW NO. 23. TRANSFERS.

The transfer books may be closed during such time as the Directors may think fit, not exceeding in the whole sixty days in each year.

BY-LAW NO. 24. INCORPORATION.

The Directors may adopt and ratify any contracts or undertakings entered into on behalf of the Company by the organizers or promoters thereof or any of them, and are hereby authorized and directed to pay all necessary and reasonable costs and expenses in any way incurred in connection with the promotion, incorporation and organization of the Company.

BY-LAW NO. 25. ALLOTMENT OF STOCK.

In accordance with the provisions of Section 46 of the Dominion Companies Act, the Board of Directors are hereby empowered, at such times and in such manner as they may decide, to make such allotments of shares of the capital stock of the Company as may be expedient.

BY-LAW NO. 26. RESERVE.

Before payment of any dividend or distribution of profits there may be set aside out of the net profits of the Company, such sum or sums as the Directors may from time to time, in their absolute discretion, think proper, as a reserve fund, for any purpose which the Directors may think is in the interests of the Company.

BY-LAW NO. 27. BANKING.

The Directors are hereby authorized from time to time:

- (a) To borrow any sum or sums of money from the
 , or from any other person or corporation whatsoever,
upon the credit of the Company, either by way of overdraft,
discount, loan, or otherwise, and on such terms as they may

think proper, and to hypothecate, mortgage, pledge, and give to the said lender all or any stocks, bonds, debentures, negotiable instruments, agreements to supply securities and all other agreements, securities and documents necessary or required by or on behalf of the said lender in respect of all advances and liabilities now or hereafter existing, and also without limitation of the foregoing, to hypothecate, give, pledge and grant to the said lender warehouse receipts, bills of lading, assignments, securities, and promises and agreements to give security, under the Companies Act or the Bank Act, and for any of the purposes aforesaid to mortgage, hypothecate and pledge the movable and immovable property of Company.

(b) To authorize from time to time, by resolution or By-law, such Director or Directors, officer or officers, clerk, cashier or other employee of the Company, as the Directors appoint, to transact its banking business with the said Bank, and to sign and execute on behalf of the Company all such checks, promissory notes and negotiable instruments, documents, agreements, securities, promises and pledges as aforesaid, and to delegate in and by resolution or By-law to such person the powers hereby conferred upon the Directors.

And, further, that this By-law shall continue in full force, virtue and effect as between the Company and the said Bank, until notice of the revocation or cancellation thereof be given to the said Bank in writing.

392. Powers.—Under the various companies acts, companies have broad general or ancillary powers. The Dominion Companies Act provides that a company upon incorporation forthwith becomes vested with all the powers, privileges and immunities, requisite or incidental to the carrying on of its undertaking. In effect this means that a company may carry on any other business which it may consider can be conveniently or advantageously carried on in connection with its business. Its powers and objects are of course limited to those granted

by its charter and permissible under the general law; whatever its special charter powers may be, the general powers under the Companies Act are not denied it. Care should be exercised in drafting the objects clauses, for wide as are the general powers under the acts, they may be found not wide enough to cover all the transactions in which the company may desire to engage. It is advisable even to restate in the petition the more important powers granted by statute; and it is absolutely essential to state precisely any desired powers which are not mentioned in or are denied by the statute. The Dominion Act, for example, provides that a company shall not use any of its funds in the purchase of stock in any other corporation, until the directors have been expressly authorized by a by-law passed by them for the purpose, and sanctioned by a vote of not less than two-thirds in value of the capital stock represented at a general meeting of the company duly called for the purpose. Whereas if the company's charter authorizes the purchase of such stock, it is not necessary to pass such a by-law.¹

393. *Ultra vires acts.*—An *ultra vires* act is one which is not within the powers directly or indirectly conferred upon the company. Thus contracts with respect to objects and purposes “foreign to or inconsistent with the powers of the company” are *ultra vires* the company. The inability of companies to make such contracts rests on an original limitation of their powers by law to the purposes of their incorporation, rather than on some express or implied prohibition making acts unlawful which otherwise they would have a legal capacity to do.”² Hence acts are not *ultra vires* which may

¹Sec. 44 of the Companies Act.

²Parker vs. Clark, Company Law, Ed. 1909, p. 92.

reasonably be regarded as incidental to a company's specified objects and powers. Nor can the consent of all the shareholders validate an *ultra vires* act. An *ultra vires* contract, so long as it has been executed, cannot be enforced. Yet where such a contract has been entered into between a company and some other person and has been in good faith executed by that person, he can call upon the company to account for all benefits therefrom derived by it. An outsider who deals in good faith with a company and, for example, lends it money which by its charter it may borrow, is not bound to know for what purpose it is to be used; and he may recover though the company uses the money for an *ultra vires* purpose. It would be different if he knew that the money was to be otherwise used.

The issuance of stock at a discount, the payment of dividends out of capital, and the purchasing of a company's own shares, or shares of another company, are all held by law to be *ultra vires*. Another example was furnished by English courts which held that it was *ultra vires* for a company, unless thereto specially authorized, to take over the undertaking of another company. It has been held by the Privy Council that an *ultra vires* act is not validated where a company consents to a judgment which orders the doing of such an act.

CHAPTER XXX

COMPANY LAW (*Continued*)

394. *Promoters and their contracts.*—The promoter of a company is one who undertakes to bring it into existence. His undertaking generally involves the formation of a syndicate and the securing thereby of initial capital; the securing of contracts for the turning over to the proposed company of property, patents, good-will and privileges; the securing of a board of directors; the appointment of bankers, brokers and solicitors; the drafting of a prospectus where advisable or necessary, and the issue of the charter. And he thus makes himself responsible for all obligations incurred in these matters, though his liabilities in these respects are generally assumed by the company when formed. Where there are several promoters working together they are not necessarily partners, and will not therefore be held jointly and severally for the acts of one another, unless it appear that they acted as partners or under a reciprocal mandate. Yet as between themselves they may, *prima facie*, enforce a contribution where one has been compelled to pay.

A promoter must not make a secret profit at the expense of the company. It was said by Lord Cairns, in an English case: ¹

The promoters of a company stand undoubtedly in a fiduciary position. They have in their hands the creation and holding

¹ *Erlanger vs. New Sombrero*, 3 App. Cas. 1236.

of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation.

And Lord Blackburn also remarked:

I think that those who accept and use such extensive powers are not entitled to disregard the interest of the corporation altogether. They must make a reasonable use of the powers which they accept from the legislature; and, consequently, they do stand, with regard to that corporation, when formed, in what is commonly called a fiduciary relation to some extent.

It follows that, as he is in a fiduciary position, a promoter may not, directly or indirectly, without the express knowledge and consent of the company, make a profit at its expense. If he does make a secret profit, he may be forced to account for it to the company. The expression "secret profit" requires a word of explanation. Where a promoter, *bona fide*, is the owner of a property and he forms a company to take it over at an enhanced price, it can hardly be said that he has acted in violation of his fiduciary capacity. But if when he bought, it could be said that he did not buy the property for himself, but in reality for the proposed company which upon its formation could say the property had been bought for it, then, unless the company has full knowledge of and consents to his profit, he will be considered to have made a secret profit at the expense of the company.

395. *Prospectus*.¹—The purpose of issuing a prospectus should be to inform the public to which it is addressed fully and fairly of the proposed venture, so that a fair and correct estimate thereof may be made—that the public may have "the same opportunity of judging of everything which has a material bearing on the true char-

¹ See Volume VI, "Corporation Finance."

acter of the venture as the promoters themselves possessed.”¹ This requirement has, however, been interpreted to mean that, to support an action in rescission of a contract for shares, there must be some active misstatement of fact or such a fragmentary statement of fact that the withholding of that which is not stated renders that which is stated false.² But material facts *must* be stated. And a company will be held liable in such cases where it has knowledge that shares have been taken in view of the representations in a prospectus. The prospectus must specify the date of, and the names of the parties to, any contract entered into by the company or the promoters, directors or trustees thereof before the issue of the prospectus. Otherwise, as regards purchases of stock, the prospectus will be deemed fraudulent. In some of the provinces, especially in Ontario, the requirements as to the prospectus, its necessity, form and contents, are very strict and must be literally complied with.

396. *Commencing business.*—A company commences business when it begins to make use of the powers granted it to trade, manufacture or carry out its special purpose. Under the Dominion Act, it cannot commence business or incur obligations before ten per centum of its authorized capital is subscribed and paid for; in Ontario before the amount (if any) named in the prospectus as the minimum subscription upon which the directors may proceed to allotment (or if no amount is fixed, then the whole amount of the capital stock offered for subscription) has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amounts offered for subscription, has

¹ *Central Ry. of Venezuela vs. Kisch*, L. R. 2 H. L. 123.

² *McKeown vs. Boudard*, 74 L. T. 712.

been paid to and received by the company. A director who expressly or impliedly authorized the commencement of business or the incurring of liabilities by the company before such capital has been paid, would be held jointly and severally liable with the company for the liabilities so incurred. In some cases also, certain requirements as to registration must be carried out, and a sworn declaration filed that these and other formalities have been observed. In Ontario, for instance, any contract made by a company before the date at which it is entitled to commence business would be provisional only, and would not be binding on the company until that date. On that date also it would become binding on the other party. Meanwhile, probably neither party could repudiate the contract, unless for fraud.¹ The same would probably be true in the case of a Dominion company.

397. *Shares—certificate for shares.*—A company's capital is divided into so many shares of \$100, \$50 or \$1, or of other denominations, as the case may be. The amount of the capital, the number of shares and their par value are fixed by the company's charter. Shares are *choses in action*,² represented physically by a certificate, and shareholders are entitled to certificates as evidence of their title to their shares. Unless otherwise provided, shares are all of one kind, and one holder has the same rights as another. Theoretically, at least, a company's paid-up shares "correspond in value to the cash and other assets of the company, such value being estimated either on the market value of the assets or their earning value as in case of franchises."³ Money or

¹ Parker & Clark, Company Law, p. 309.

² A chose in action is a thing of which one has not the possession, but only the right to demand by action at law. A chose in possession is personal property of which one has the actual possession.

³ Parker & Clark, p. 109.

money's worth may be taken in payment for shares. Thus a valuable franchise or a property may be bought by the company with its shares; and in such case the issue of shares fully paid will not be questioned unless the contract by virtue of which they were issued is set aside as fraudulent or for misrepresentation.¹ Such a contract would be set aside, and the directors be held personally liable, if the consideration for the issue of paid-up shares is grossly inadequate, or the apparent consideration is non-existent.² The holders of the shares, unless bona fide holders who are not aware of the circumstances of their issue, must pay for them. Being choses in action, shares are not in the broadest sense negotiable, but a bona fide transferee for value without notice of any impropriety can enforce them against the company.

The by-laws of the company designate the officers—usually the president and the secretary, or the president and the treasurer—who shall sign certificates.

Where a certificate is lost, a shareholder may require the company to issue a new one. Usually the by-laws will provide for the issue of a fresh certificate upon the shareholder arranging to indemnify the company in case a bona fide purchaser of the certificate should present it.

398. *Subscription and allotment.*—A person may become a shareholder in a company in several ways: for example, by subscribing to the memorandum of agreement which accompanies the petition for incorporation; by applying to the company for and being allotted shares; by transfer from a shareholder; by inheritance. Where shares are subscribed or applied for, as a general rule the directors must not only allot the shares by resolution, but must notify the person applying that allot-

¹ Hess Mfg. Co.; Sloan's Case, 23 S. C. R. 644.

² Re Manes Tailoring Co., 14 O. L. R. 89.

ment has been made. But it has been held that where a company offers a person a specific number of shares which he accepts, formal notice of allotment need not be given him. The application is an offer to purchase and need not be in writing. It has been held that a withdrawal of an offer or application, to be effective, must be received by the company before it mails the notice of allotment.¹ It has also been held that where an offer or application is made under seal, the offerer may not revoke it.² But a subscriber or purchaser will not be held to pay where his offer or subscription has been induced by fraud or misrepresentation. And the allotment must be in accordance with conditions imposed by the offer or subscription. When an allotment is made, it may be said that the directors have by resolution appropriated to the offerer the number of shares specified by him. And the allotment of stock is a function of directors, not of their subordinates.

399. *Forms of corporate stock.*—Frequently the capital is by the charter, or afterwards by by-law, divided into different classes of shares having different rights attached to them, e. g., into common and preference shares.

Common, or, as they are called in England, ordinary shares, are shares which have no special privileges or restrictions attaching to them. Where no other stock having some special privilege is issued by a company, all its stock is common.

Preference stock is, as its name implies, preferred in some special way, and there may be a first and second preferred, each entitled to receive a certain dividend. Or the dividend on the preferred may be fixed or limited to a certain proportion of the profits, after which all the

¹ *Byrne vs. Van Tienhoven*, 5 C. P. D. 344.

² *Nelson Coke Co. vs. Pellatt*, 5 O. L. R. 481.

surplus profits go to the common stock. It may be that after a stated dividend is paid on the preferred and common, both will share equally in any surplus profits; or that the common will not receive a dividend until the preferred dividend is paid, when both will share equally in any surplus. These are permutations subject to arrangement by by-law. It is not essential that the power to create preferred stock be mentioned in the charter, for it exists under the general law. Yet, as it is important that the rights and privileges attaching to preferred stock shall be proof against alteration, it is not unwise to declare them by express provision in the charter. Once the rate of the dividend on preferred stock is fixed, it cannot be altered, unless the right to do so is among the conditions attaching to such stock. The usual preference is that of a prior right to dividends and to a return of capital in a winding up of the company. A preference may consist of the right to elect a certain proportion of the board of directors or to control in some way considered advisable the policy and affairs of the company. The preferences attaching to such stock should of course be most carefully defined by by-law, and appear on the face of the certificate itself. Not infrequently the entire by-law appears.

As dividends on preferred stock are payable ahead of a dividend on common stock, if that be the preference, *prima facie* a preferential dividend is cumulative. Preferred stock known as cumulative is entitled to receive not only the dividend falling due at a given time, but to receive all dividends for past years which may not have been paid. The common stock will therefore receive no dividend until all the unpaid dividends on the cumulative preferred shares have been paid.

Preferred stock must not be, as it sometimes is, con-

fused with guaranteed stock, which is stock upon which the dividends are guaranteed, not by the company itself, but by another company. Where, for example, a railway takes over a subsidiary company, it may guarantee the dividends on the latter's stock.

Paid up, or fully paid stock, is stock which the company has issued upon receiving the par value thereof in cash, property, rights, franchises or services. It matters little what form the payment, other than in cash, takes (in the absence of some contrary provision), so long as the directors honestly consider that the company receives the value of the shares issued.

Unissued stock is that which has not been allotted and issued. Stock which has been issued paid up, say, for promotion services, may be handed back to the company to be sold and reissued by it for the best obtainable price, and is then regarded as treasury stock.

Debentures and debenture stock must not be confused. The term debenture is not technical, and is now understood to mean "a security for money, called on the face of it a debenture, and providing for the payment of a specified sum with interest meantime half-yearly. It usually gives a charge by way of security, and in most cases is expressed to be one of a series of like debentures . . . it is sometimes used, both by lawyers and commercial men, to describe an instrument which is not called, on the face of it, a debenture, e. g., a railway mortgage or bond."¹ It is an evidence of a debt (*debeo, I owe*).

Debenture stock is a more recent term. The holders of debentures and of debenture stock are in a somewhat similar position. Debenture stock, as an expression in general use, describes "a debt owing by the company,

¹ Palmer, "Company Law," Ed. 1909, p. 279.

payable at a fixed date, or in the event of winding-up, or some other contingency, and in the meantime carrying interest at a special rate, and secured usually by a trust deed on the property of the company. The debt is generally made payable to trustees, and the beneficial interest thereof is represented by certificates held by the debenture holders.”¹ A “debenture” is the description of an instrument; “debenture stock” is the description of a debt or sum secured by an instrument. Lord Lindley describes debenture stock as “borrowed capital consolidated into one mass for the sake of convenience.”

400. *Subscribers to memorandum.*—As we have seen, those who sign the memorandum of agreement accompanying the petition for incorporation are constituted a body corporate. Upon the granting of the charter they become shareholders—the company’s first shareholders. It has been held that it is not necessary to allot to them their shares. They are liable to pay for their shares, and hence usually subscribe for but one share each. Where they act for the sole purpose of securing incorporation and do not intend to pay for their shares so subscribed for, various devices are used to relieve them of liability, e. g., where an amount of stock is made fully paid up to effect a purchase of property from a promoter, the incorporators’ shares are also made paid up and are included in the number of shares to be given in payment. The incorporator signs an agreement to deliver his share on demand of the promoter, and endorses and delivers his certificate to him.

401. *Underwriting.*—Where an issue of stock is to be made—e. g., by a company in process of formation—it may be of the utmost importance that the issue, or a good part of it, be taken up by the public. By under-

¹ Palmer, “Company Law,” Ed. 1909, p. 279.

writing the issue the promoters are able to insure the risk. A corporation, a number of persons, or even one person, may write a letter to the promoter, agreeing to underwrite a specified portion of the issue, on the understanding that the writer will be paid a commission, in cash or in paid-up stock, on the amount underwritten by him, and will be liable only for a rateable proportion of the shares left unsold. In order that the underwriter may be held to his bargain to take up his pro rata proportion of the stock left unsold, the letter generally contains an authorization to someone to subscribe, on behalf of the company, for his pro rata proportion in case he does not do so when required. The letter, which is merely an offer, must be accepted before the contract is complete; but once accepted, the contract is irrevocable. It must be accepted within the time mentioned, or within a reasonable time if no time is fixed. It must be noted that an agreement to *place* shares does not involve a subscription for shares by the offerer, and as he is not bound to take and pay for those he does not sell, he is not an underwriter. A distinction has also been drawn between an underwriting of debentures and of shares. It has been held in England that an underwriter of debentures cannot be compelled to take up any unsold balance, but that the proper remedy is an action for damages.¹ This anomaly has been overcome by a statutory provision that such an underwriting may be enforced by an action for specific performance.

402. *Payment of commission.*—Where an issue of stock is made to the public through underwriters or brokers, it is customary to pay a commission, either in cash or paid-up shares, or even by an option upon shares at a given figure. In view of the provision in the general

¹ *South African Territories vs. Coallington* (1898), A. C. 309.

act that stock must not be issued at a discount, the right to pay a commission gave rise in England to great controversy. The matter has now been settled by statute in England, and both there and in Canada commission may be paid in either cash or shares.

403. *Corporate meetings.*—Meetings of shareholders and directors may occur on fixed dates or at irregular periods, and are accordingly either regular or special. The by-laws generally fix the date of the annual meeting, and prescribe the notice necessary for calling meetings of both shareholders and directors. If the by-laws do not prescribe the notice for general meetings, the Dominion act requires that notice be given at least fourteen days prior to the day specified in the notice. Likewise under that act, shareholders who hold one-fourth part in value of the subscribed stock, may at any time by written requisition and notice call a special meeting of the company for the transaction of any business specified therein. Under the Ontario Act, again, the requisition must be made by holders of not less than one-tenth of the subscribed stock. The notice should always specify any important business which it is intended to transact, as the powers of the meeting are limited by the scope of the notice. An adjournment of the meeting will not enable business to be transacted which could not be transacted at the original meeting. Notice need not be given of an adjourned meeting.

The court has held that the words "special business" in the notice, without further mention of the nature of the business to be transacted, are insufficient. Also that where a course of action was indicated in the notice and only a part of it was adopted, the action of the meeting was irregular. Where the business of a meeting is to

ratify a contract in which directors have an interest, the notice should so declare.

A notice of a general meeting sent out by the Secretary unauthorized by the directors is invalid, though the directors may validate it by resolution prior to the meeting.

Business must be carried through in the order prescribed by the by-laws or by the general law. At general meetings, matters to be discussed are generally brought up by a resolution which is discussed and voted upon by a show of hands, if a poll is not demanded. Under the Dominion act, unless the by-laws otherwise provide, the chairman shall have a casting vote. The president presides as chairman at all meetings. He must keep order and see that business is regularly transacted. The by-laws generally authorize the chairman, with the consent of the meeting, to adjourn. Although the meeting may resolve in favor of adjournment, the chairman is not bound to exercise his power. But he may not exercise his power and adjourn prematurely. If he does so, the meeting may declare his action irregular, elect another chairman, and then proceed with business.¹ Irregularities at meetings are matters of domestic importance only, and as they can be set right by calling another meeting, the courts have refused to interfere. *Prima facie* proof of the passing of a resolution results from the declaration of the chairman and an entry to that effect in the minutes. Discussion may not be prolonged indefinitely. The majority desire to vote must prevail. If the meeting consents, the chairman may stop further discussion and put the vote. Amendments must be relevant, and come within the scope of the notice. If the notice reads "to increase the capital of

¹ National Dwellings vs. Sykes (1894), 3 Ch. 159.

the company," and it is resolved to increase it to \$50,000, it will be in order to move an amendment to increase it to \$100,000. But if the notice reads "to increase the capital of the company to \$50,000," an amendment to increase it to \$100,000 is irregular, because absent shareholders may be taken by surprise.

A quorum must be present. If the articles do not fix the quorum, the common law rule is that two will form a quorum. But one shareholder, though he may hold proxies, cannot act as a meeting. If a quorum is not present, any proceedings taken are null; but it may be provided in the by-laws that in the absence of a quorum the meeting called shall stand adjourned to another date.

404. *Right of a shareholder to vote.*—The general rule now is that a shareholder has a vote for each share he holds. The by-laws may determine the voting power of preference stock, the shareholder being bound by the by-law. Doubt has been expressed whether under the Dominion act preferred shares can be deprived of the right to vote. Cumulative voting takes place when a shareholder has as many votes as he has shares, times the number of directors to be elected, and the voter may then cast his votes for one director or distribute them as he wishes. The register of shares is the only evidence as to a member's right to vote. His motive in voting cannot be questioned.

If he is denied the right to vote at a meeting, he may appeal to the courts. He may freely accumulate shares in order to increase his voting power at a given meeting. But if he is in arrears for unpaid calls on his stock, he cannot vote. He may validly bind himself to vote or not to vote in a specific way. Debenture stock holders, not being shareholders, cannot vote. Shares held by an-

other company may be voted on by its representative. A company may not vote on its own stock of which it may have become owner. The vendor of shares sold while the company's books are closed may vote, as the transfer of the shares during that time cannot be registered; and ordinarily the vendor may vote on shares sold by him until they have been transferred on the company's books. Where several persons jointly own shares, they must agree upon their vote, which then may be cast by any one of them. Probably an executor could vote on the shares of a deceased stockholder, before formal transfer to him, upon exhibiting his authority as executor.

405. *Voting at corporate meetings.*—Voting is generally done by a show of hands, unless the by-laws otherwise provide. This is the common law rule. But any member may demand a poll, upon which each signs a voting paper and indicates whether he is for or against the resolution. The votes are then counted and the result declared, due notice being taken of the number of shares held by each voter. The general acts provide as a rule that in the case of an equality of votes, the chairman shall have a casting vote. If not, the casting vote may be provided for in the by-laws.

406. *Proxies.*—The right to vote by proxy is a statutory, not a common law, right, the general acts ordinarily providing in so many words that a shareholder may vote in person, or by proxy, if the proxy be a shareholder. The right is also commonly dealt with in the by-laws which may also fix the form of the proxy paper. The proxy paper of a corporation should be under seal. If the proxy paper is signed in blank, it is effective if properly filled in by someone duly authorized. A proxy paper is none the less effective though the shareholder who has given it attends the meeting—but if he votes

before the proxy votes for him, his vote must be taken, and the proxy is therefore considered revoked. If proxies are improperly rejected, as, for instance, in an election of directors, recourse may be taken to set aside the election.

407. *Transaction of corporate business.*—Meetings of shareholders are held in order that the collective will of the mass of shareholders may be known and registered. The corporate consent is thus obtained in all matters of fundamental importance, as, for instance, the election of directors, the approval of their actions and administration, the increase or decrease of the capital stock or the merging of the company with another corporation. The majority of the shareholders, it is conceded, in the absence of fraud or irregularity, control the destiny of the company. The company is bound by the action of the shareholders or directors in meeting duly assembled. Thus a corporation was authorized to receive and hold for the benefit of a school any land by gift, devise or purchase. A stockholder brought action to restrain the corporation from purchasing certain real estate, claiming that it could not afford it and the result would be the bankruptcy of the corporation. It was held that the action could not be maintained, as the majority of the stockholders had voted for the purchase, which was within the company's powers. Every shareholder contracts that the will of the majority shall govern in all matters coming within the limits of the act of incorporation.¹ It was provided in the articles of association of a company that it should continue in operation eight years, unless it sooner should have sufficient funds to pay its debts and redeem its stock. A resolution was passed by a majority of the shareholders dissolving the

¹ Dudley vs. Kentucky High School, 72 Ky. 576.

association before the time limit. It was held that without the consent of all the stockholders and with unredeemed stock outstanding, such a resolution would have no effect.¹ It has been laid down that where a resolution is passed assenting to a contract with another person, the resolution may be rescinded before the meeting closes or is adjourned, but not thereafter, unless such other person consents.

The majority required may in certain cases be a bare majority; or a vote of two-thirds in value of the subscribed stock may be necessary, as for the passing of a by-law under the Dominion act for the purpose of authorizing the company to issue bonds, or to mortgage real property to secure them; or a vote of three-fourths of the shareholders present, in person or by proxy, and representing two-thirds of the stock of the company, where it is desired to pass a by-law for the issue of preference shares. But the majority of shareholders can in no case act beyond the scope of the company's powers as governed by its charter and the general law.

408. *Right to inspect company's books.*—The right of a shareholder to inspect the company's books is a common law right and is frequently enacted by the general acts. The Dominion act, for example, provides:

Such books (stock transfer books and stock ledgers, lists of shareholders and directors, etc.) shall, during reasonable business hours of every day, except Sundays and holidays, be kept open, at the head office or chief place of business of the company, for the inspection of shareholders and creditors of the company, and their personal representatives, and of any judgment creditor of a shareholder.²

The right to inspect the book involves also the right to make extracts therefrom.

¹ Barton vs. Enterprise Loan Association, 114 Ind. 226.

² Section 91.

The right of the shareholder in this respect has been set out in a New York case:

We think that according to the decided weight of authority, the stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that if this right is refused by the officers in charge, a writ of mandamus may issue in the sound discretion of the Court, with suitable safeguards to protect the interests of all. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the Court; but the writ should issue as a matter of course. Although even then, doubtless, due precautions as to time and place may be taken, so as to prevent interruption of business, or other serious inconvenience.¹

But it has been held that a shareholder has no right to inspect a director's minute book, unless the right to do so is given, when it includes the right to make extracts.²

The Dominion act further provides,³ that upon the application of shareholders representing not less than one-fourth in value of the issued capital stock, a judge may appoint an inspector to investigate the affairs and management of the company and to report to him.

409. *Right to dividends.*—A principal right of shareholders is to receive their share of the company's profits in the form of dividends. But a company is not bound to divide all its profits among its shareholders. The payment of dividends—the division of profits—is a matter of internal management and economy, which is

¹ In re Steinway, 159 N. Y. 250.

² Parker & Clarke, p. 219.

³ Section 92 of the Companies Act.

generally left to the directors to decide upon. The company may create a reserve fund and invest it as the directors may decide.¹ The dividend being declared becomes a debt of the company for which a shareholder may sue. If a company becomes insolvent, a surplus which has accumulated but which has not been divided as a dividend, belongs not to the shareholders but to the company's creditors. Dividends must be paid out of profits, not out of capital. Directors who declare a dividend out of capital would be held to account. A debt owing by a shareholder to the company, for calls or otherwise, can generally be deducted by the directors out of any dividend due him.

In the discretion of the directors, a bonus may be paid in addition to a dividend. A bonus may be described as an amount payable out of a profit and loss account which has accumulated and has not been paid as dividends. This enables the directors to maintain the existing dividend. The courts will not interfere with the directors in the exercise of their discretion in respect to dividends and bonuses, provided they act *intra vires*.

Profits are the clear gains remaining after deducting the paid-up capital, the expenses and losses. Profits have also been defined as "the sum divisible among the shareholders, after discharging or making provision for every outgoing, properly chargeable against the period, whether a year or less, for which the profits are calculated."²

Unless the by-laws or charter otherwise provide, dividends are not paid in proportion to the amount paid upon shares. If a shareholder has paid up fifty per cent of the value of his stock, and is not in arrears for calls,

¹ *Burland vs. Earle* (1902), A. C. 83.

² *Glasier vs. Rolls*, 42 C. D. 436.

he is entitled to his full dividend, because the unpaid balance is an asset of the company upon which it obtains credit.

Dividends are paid frequently in stock as well as in cash, or in scrip entitling the holder to receive stock or cash. It has been held though, that in the absence of express authority, dividends must be paid in cash.¹

410. *Right to subscribe to new stock.*—It is a general rule that upon the increase of a company's capital stock, a shareholder has a preference in subscribing for new stock, unless there is some law to the contrary. The Dominion act is silent upon the point, but provides that the by-law passed for increasing the capital stock shall declare the number of shares of the new stock, and may prescribe the manner in which it shall be allotted; if not, then the control of the allotment vests absolutely in the directors.²

411. *Minority shareholders.*—As we have already seen, the majority of the shareholders are supreme and control the policy and exercise the powers of the company. The majority may be a majority of those present at a corporate meeting duly called. The minority may not interfere. That is the general rule. But the majority must proceed regularly and in good faith. A minority shareholder may attack acts of the majority which are *ultra vires*, fraudulent or illegal; he may also attack acts of the directors which are in excess of their authority, or of the company's powers, or in breach of trust. Where the majority have acted irregularly and the irregularity could be set right by a majority at another meeting, the courts will not interfere.³

¹ *Hoolé vs. Great Western Ry. Co.*, 3 Ch. 202.

² Section 53.

³ *Mellish vs. Gardiner*, 1 C. D. 13.

412. *Liabilities of shareholders.*—The cardinal liability of a shareholder is to pay in full for stock for which he has subscribed.¹ If he is in arrears, the company or its creditors may force him to pay in full. Generally, however, he cannot be sued for arrears by a creditor of the company, until an execution at the suit of such creditor against the company has been returned unsatisfied in whole or in part. But the debtor may plead against such an action any defence or set-off which he could set up against the company, except a claim for unpaid dividends, or a salary or allowance as a president or as a director of the company. Where shares are not paid for in full and the holder validly transfers them, the transfer being duly registered in the company's books, his liability ends, as it has been assumed by the new holder. But where a director is a party to an allotment of shares as fully paid-up, to the prejudice of the company, and he tries to evade liability by putting them off on some transferee, he will be held liable as for a breach of trust.²

If shares are issued for insufficient consideration, they may be deemed to have been issued at a discount, and the holder be held to account; though this would not apply in the case of an innocent holder for value of stock covered by a certificate marked "paid-up."³

Frequently shares are sold upon the understanding that part of the purchase price is payable with the ap-

¹ The limited liability clause of the Companies Act, Sec. 38, reads: "The shareholders of the Company shall not, as such, be responsible for any act, default or liability of the Company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing relating to or connected with the Company, beyond the amount unpaid on their respective shares in the capital stock thereof." It must be remarked, however, that holders of bank stock are subject to double liability.

² *In re Warton Beet Sugar Co.*; *Freeman's Case*, 12 O. L. R. 149.

³ *The North West Electric Co. vs. Walsh*, 29 S. C. R. 33.

plication, and the balance, or a part thereof, upon allotment. Or the instalments may be otherwise fixed as to date or amount, or may be called for in the discretion of the directors, according to agreement, the directors being given the power by the general acts to make calls and arrange for payment of stock. An agreement that a shareholder should not be liable for calls would be *ultra vires*. Reasonable notice of a call, with particulars as to the amount, the time and place of payment, and the name and address of the payee, should be in all cases given. On overdue calls interest is exigible, the Dominion act fixing the rate at six per cent payable from the day fixed for payment and until paid. If a call is not paid, the directors may sue the holder for the amount of the call, or may by vote declare forfeited the shares upon which the call is due, upon which the shares revert to the company. But the holder of the shares at the time of forfeiture continues liable to the creditors of the company at such time for the full amount unpaid on such shares at the time of forfeiture, less any sums subsequently received by the company in respect thereof.¹

But persons holding stock as executor, administrator, tutor, curator, guardian or trustee of or for a person registered on the company's books as being so represented, are not personally liable; nor are persons holding stock as security.²

413. *Who are the officers: powers and duties.*—The officers are chosen by the directors to act as their agents in the practical carrying on of the business. They are generally the president (who is frequently the general manager), the vice-president, a secretary and a treas-

¹ See Dominion Companies Act, Section 62.

² *Ibid.*, Section 41.

urer. The secretary and treasurer need not be shareholders, unless the by-laws otherwise provide. Acting within the scope of their authority, real or apparent, they bind the company.

The president in most cases is the chief executive officer, whose duty it is to supervise the company's affairs and carry out the wishes of the directors. His powers may be fixed by by-law, or he may act with the general acquiescence of the board. In reality his powers are limited; and it has been held that persons dealing with the president of a company must take notice that he has but limited authority. If he exceeds his authority, his action should be promptly repudiated by the company. He presides as chairman at all meetings of directors or shareholders.

Following are two cases in point:

In a certain company, no by-law existed defining the general powers of the board or of the managing director, except as to borrowing for company purposes. The managing director signed a letter agreeing to furnish plaintiffs with a certain lot of goods, but without consulting the directors or securing their ratification, although he knew, as did also the plaintiff, that to fulfil the contract, the company would have to make substantial additions and changes to plant and premises. It was held that the company was bound, as there was no evidence of bad faith on the part of plaintiff or that he had notice that the managing director was exceeding his authority. Moreover, the contract was one which the board had power to make or to authorize the managing director to make. The plaintiff was entitled to assume that he had the authority which he was ostensibly exercising.¹

¹ National Malleable Co. vs. Smith's Falls, 14 O. L. R. 22.

The by-laws of another company authorized the general manager to compromise claims and to do other acts which occasionally might require legal advice. It was held that there was a reasonable inference that he had authority to retain a solicitor in his discretion.¹

The vice-president, in the absence of the president, exercises his functions.

The secretary is the clerk of the company. He keeps the company's books, takes minutes of meetings of directors and shareholders, has charge of the corporate seal, compiles reports, and performs such other duties as the directors may assign to him.

The treasurer has charge of the funds and securities of the company and of its books of account. He does the company's banking in accordance with the banking resolution and his general instructions.

414. *Compensation.*—The compensation of officers is a matter of contract, whether special or as provided by the by-laws. Usually the board when appointing the officers fixes their remuneration. Where a director is to be compensated for his services as a director or as an officer, the shareholders should be asked to ratify the by-law at a general meeting. Ordinarily, if no provision is made for the payment of directors, they can claim nothing for their services. But it has been held that an officer who is not a director may claim for his services a reasonable amount.

415. *Liabilities.*—The officers, as agents of the company, are liable for their wrongful or negligent acts while in office. For example, directors and officers are jointly liable if they lend the company's funds to a shareholder. As officers of the company, directors will be held liable if they pay a dividend out of capital, or

¹Clarke vs. Union Fire Ins. Co., 10 Ont. P. R. 342.

when the company is insolvent; or if they permit the transfer of stock not fully paid to a man of straw, or to someone who is unable to pay. In an American case it was recently held that a director must obtain leave of absence if on a vacation, or if absent, except for some good cause, as on account of illness, his responsibility being an active responsibility to act on behalf of the company.

416. Directors; agents and trustees.—Directors stand toward their company in the position of agents and trustees, for the company must act through them—"trustees of the company's moneys and property, agents in the transactions which they enter into on behalf of the company."¹ A director who accepts office, impliedly undertakes to give his best skill and attention to the company's affairs, and to hold himself with respect to third parties so that he may freely and independently discharge his duties.

417. Qualification.—A person cannot be a director unless he is a shareholder owning stock absolutely in his own right to the amount required by the by-laws or by the general acts. He must not be in arrears in respect to calls thereon. Though the statute uses the words "in his own right," it has been held that he may qualify upon shares standing in his name as trustee. But he may not accept a present of his qualification shares from a promoter.² If he disposes of his qualification shares, or comes to hold less than the requisite number, he ceases to be a director.

418. Election.—The Dominion act provides that the directors of a company shall be elected by the shareholders, in a general meeting of the company assembled

¹ Great Eastern Ry. Co. vs. Turner, 8 Ch. 149.

² Pearson's Case, 5 C. D. 336.

at some place within Canada, at the time and place and for the term, not exceeding two years, prescribed by the Letters Patent or the by-laws. The election takes place annually, at the general meeting, though a vacancy may be filled by the directors from among the qualified shareholders. The act further provides that every election of directors shall be by ballot.

419. *Proceedings*.—Directors act in meetings regularly constituted and duly called, and as the by-laws prescribe. Generally speaking, therefore, the directors may not act privately and informally out of meeting. Hence, where the secretary sealed a bond, though he had the authority of two directors privately and the third had promised to sign an authorization, the bond was held void.¹ To avoid inconvenience and delay, the by-laws sometimes provide, however, that a resolution in writing signed by all the directors shall be as effective as if passed formally at a board meeting. As power to act is vested in the directors collectively, *prima facie* one director has no power to act alone for the company. But he may be authorized to do so. Notice of meeting should be given as prescribed. Generally, notice need not be given of meetings occurring regularly on fixed dates. Probably the notice need not in such cases specify the special business to be transacted. It has been held that a director's vote cannot be cast by proxy at a board meeting.² The by-laws generally fix the quorum or authorize the directors to do so. Where a director is not entitled to vote on a given question, he cannot be counted to form a quorum. A director need not attend every board meeting; gross

¹ D'Arcy vs. Tamar, &c., Ry. Co., L. R. 2 Ex. 158.

² Craig Medicine Co. vs. Merchants Bank, 59 Hern. (N. Y.) 561.

non-attendance may however amount to negligence for which he will be held liable.

420. *Votes—personal interest.*—Frequently the general acts provide that a director must abstain from voting at board meetings in respect of any contract or arrangement in which he is interested as vendor, purchaser or otherwise.¹ This is also a general principle of law to be closely followed. His interest and his duty must not be allowed to conflict. But the fact that he is a shareholder in a company which is entering into a contract with his company will not prevent his voting. It has also been held that a director may vote as a shareholder at a general meeting called to ratify a contract between himself and the company, which, if not ratified, could be avoided.²

421. *Contracts by directors.*—As the directors of a company are its agents for the transaction of corporate business, contracts entered into by them in its name will be binding upon the company, where they act within the scope of their authority and not *ultra vires* of the company. But the company may ratify acts and contracts which exceed their authority, but not if *ultra vires* of the company. And where they exceed their authority they may be held liable to the company.

Nor, in the absence of provisions in the by-laws to that effect, may directors contract with the company, as for the sale to or purchase from it of goods. Their relations with the company, as has been said, must be such as to exclude a conflict of interest and duty, though of course the shareholders may by resolution permit or approve of such contracts. And a director would be accountable for any secret profit which he

¹ See, e. g., Ontario Companies Act, Sec. 89.

² North-Western Transportation Co. vs. Beatty, 12 A. C. 589.

might make at the expense of the company. It has been held by the Privy Council, however, that where a director purchases property under conditions which do not make him trustee of the property for the company, and he sells at a profit to the company, the latter, whether entitled or not to rescind the contract, cannot confirm the sale and yet hold the director as trustee of the profit he has made.¹

422. *Powers*.—The directors of a company may administer the affairs of the company in all things, and make or cause to be made for the company any description of contract which the company may, by law, enter into; and may, from time to time, make by-laws not contrary to law, or to the letters patent, as to the following matters: ²

(a) The regulating of the allotment of stock, the making of calls thereon; the payment thereof; the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock;

(b) The declaration and payment of dividends;

(c) The amount of the stock qualifications of the directors, and their remuneration, if any;

(d) The appointment, functions, duties and removal of all agents, officers and servants of the company, the security to be given by them to the company and their remuneration;

(e) The time and place for the holding of the annual meetings of the company, the calling of meetings, regular and special, of the board of directors and of the company, the quorum, the requirements as to proxies, and the procedure in all things at such meetings;

¹ *Burland vs. Earle* (1802), A. C. 83.

² See *Dominion Companies Act*, Section 80.

(f) The imposition and recovery of all penalties and forfeitures;

(g) The conduct, in all other particulars, of the affairs of the company.

These by-laws they may, from time to time, repeal, amend, or re-enact; but by such by-laws, except by-laws made respecting agents, officers and servants of the company, and every repeal, amendment or re-enactment thereof, unless confirmed meanwhile at a general meeting, have force only until the next annual meeting, when, unless they are then confirmed, they lapse.

423. *Number.*—The number of directors varies, but the minimum number may be said to be three. The Dominion act provides that they shall be not more than fifteen and not less than three.¹ The Ontario act merely declares that the affairs of the company shall be managed by a board of not less than three directors, though the number may, with the proper formalities, be increased.²

424. *Personal liability.*—Directors are under no personal liability for contracts entered into by them in the name and on behalf of the company. Where they act *ultra vires*, for example, they may be liable to third parties on an implied warranty of authority.³ They would also be liable to the company for any damages. If they contract in their own name, as—"We, the directors of the A. Company, Limited, hereby agree to, . . . etc."—their contract binds them, not the company. They will be liable to the company, jointly and severally, if they declare and pay dividends out of capital or when the company is insolvent; if they allow

¹ Section 72.

² Sections 80, 86.

³ *Coventry's Case* (1891), 1 Ch. 202.

transfers of unpaid stock to persons unable to pay for same; if they lend the company's money to a shareholder; if they allow the company to commence operations or incur liabilities before ten per centum of the authorized capital has been subscribed and paid up.¹ They are also liable under the same act to the clerks, laborers, servants and apprentices of the company, for all debts not exceeding six months' wages due for services performed for the company while they are such directors, though the action must be brought within a limited time.² They are liable to account to the company if they authorize the sale to it of property at a gross overvaluation.

Where the directors commit a tort—a private wrong or injury, other than that arising from the breach of a contract, for which damages can be collected—and the directors are responsible, they are liable as well as the company.³ But a director who does not expressly or impliedly authorize the wrongful act, will not be held liable.

425. *Negligence*.—A director must give his best skill and attention to his company's affairs. He may make errors of judgment and mistakes. For these he is not liable. Fraud, or gross carelessness or a lack of the exercise of bona fide discretion must be shown. Ordinarily he is not responsible where co-directors have carried on frauds upon the company of which he is not aware. He is entitled to assume that they also are doing their duty. Where, for example, he signs checks of the company, he is presumed to know whether they are properly issued for company purposes. A director's

¹ See the Dominion Companies Act, Section 82-86.

² Ibid, Section 85.

³ Parker & Clarke, Loc. Cit., pp. 209, 210.

general duties in these respects are summed up by Lord Jessel—"Directors are bound to use fair and reasonable diligence in the discharge of their duties, and to act honestly; but they are not bound to do more."

426. *Disqualification—removal—resignation.*—The by-laws generally declare the qualifications of directors as to stock. They may also provide that a director shall become disqualified if he accepts an office incompatible with his position, or becomes bankrupt or insane, or absents himself from meetings for a certain period. Though the by-laws may not so provide, it has been held that a director automatically vacates his directorship if he accepts a position incompatible therewith. The same would be true if he ceased to hold his qualification shares.

The by-laws should provide for the removal of a director where desirable, by a vote of a majority of shareholders or of a two-thirds majority. It has been held that the by-laws may be amended to provide for his removal, even during his term of office.

Prima facie, a director may resign when he pleases, though the by-laws may govern as to the time, notice and conditions of his resignation. Once made, his resignation is irrevocable. By parting with his qualification shares he in effect resigns—and he may part with his shares at any time.

427. *Remuneration.*—The remuneration of directors should be provided for by a by-law first passed by the directors and then approved and passed by a general meeting of shareholders. The amount is purely a matter of internal arrangement.

428. *Amalgamation—merger—consolidation.* — The word amalgamation is used loosely to describe a consolidation or a merger of several companies, as, e. g.,

where two or more companies desire to unite their undertakings. The amalgamation may be effected by forming a new company to take over the several undertakings of the existing companies, or by an existing company taking over the undertaking or undertakings of the other concerns.¹

The first form—the combination of the property, rights, franchises and interests of several companies and their taking over by a new company—may be called a consolidation. The second form—the absorption of one company by another by the purchase, lease or other means of control of the former—may be called a merger. But it has been held in a Quebec case, citing numerous English authorities, that a mere transfer of a company's assets to another is not an amalgamation and does not merge the companies into one.² In order that a company may purchase another, and generally in order that an amalgamation may take place, authority must be found in the charter of one or other of the companies or by statutory enactment. And where amalgamation is authorized, usually the consent of two-thirds or three-fourths of the shareholders must be obtained at a general meeting.

As a rule, amalgamations are effected only between companies having the same or similar objects, or carrying on businesses which may conveniently or advantageously be carried on together. Thus it might be advantageous for several companies carrying on a general contracting business to amalgamate with a wood-working company and a quarry company, a brick or cement company. Or a railway company—under special statutory authority, with the consent of two-thirds of the

¹ Palmer, *Loc. Cit.*, p. 410.

² *Maple Leaf Rubber, Ltd., vs. Brodie*, 18 Que. S. C. 352.

Whereas, the Company was incorporated in the year under the Companies Act with a nominal capital of \$, divided into shares of \$ each.

And, whereas, the whole of the said shares have been issued and on each share has been paid thereon.

And, whereas, the respective directors of the said Companies have duly passed by-laws providing for amalgamation and authorizing the execution and delivery of this agreement for the purpose of effecting an amalgamation between the two said Companies and subject to the approval of the shareholders of the said Companies respectively.

Now it is agreed as follows:

1. The said Companies shall be amalgamated and consolidated as one Company under the provisions of the Companies Act.

2. That the name of the new Company shall be Company.

3. That the terms upon which the said amalgamation shall be carried out shall be as follows, namely, the said Companies, the Company and Company, shall transfer to and the new Company shall take over all and singular the lands, buildings, goods, chattels and moneys, credits, debts, bills, notes and things in action of the old Companies and the undertaking, business and goodwill thereof, with the full benefit of all contracts and agreements and of all securities in respect of said things in action to which the old Company is entitled, and all other, the real and personal property and assets of the old Companies whatsoever and wheresoever, subject to several mortgages, charges, liens and encumbrances affecting the same or any part thereof.

4. That the said Company shall undertake, pay, assume, satisfy and discharge all the debts and liabilities and obligations of the old Companies respectively whatsoever, and shall accept, perform and fulfil all contracts, engagements and obligations of the said two Companies hereto respectively as the same may exist at the time of such transfer aforesaid.

5. That the said transfer of assets and assumption of liabilities, contracts and obligations shall be made, entered into and carried into effect immediately upon the incorporation of the said new Company, and such incorporation shall be applied for immediately upon this agreement being approved of by the shareholders of the said Companies hereto respectively, as provided by section of the Companies Act.

6. The number of directors of the Company shall be .

7. That shall be the first directors of the said Company, and shall hold office until the first annual meeting of the shareholders of the syndicate.

8. That the capital stock of the said Company shall be divided into shares of \$ each.

9. The shareholders of each of the Companies parties hereto shall surrender and deliver up the shares and certificates therefor now held by them and each of them, and the shareholders of Company, Limited, shall be allowed pro rata in lieu thereof shares of the capital stock of the Company, calculated on the basis of \$ shares in the new Company for every one share held in the Company, and the shareholders of the Company, Limited, shall be allotted pro rata in lieu thereof shares of the capital stock of the Company, calculated on the basis of shares in the new Company for every one share held in the Company.

10. Immediately upon the incorporation of the new Company, a meeting of the directors of the said Company, of which meeting at least days' notice in writing shall be given, addressed and mailed to the said directors, shall be held, and at such meeting the directors shall elect and appoint officers for the management and control of the affairs of the said Company, and transact such other business as they may think proper.

11. Immediately upon the completion of the incorporation of the said new Company and the transfer to it of the assets and properties of the said two Companies, the parties hereto, as

hereinbefore provided, the said two Companies shall thereupon cease to exist.

In witness whereof the parties have hereunto set their hands and seals.

Signed, Sealed and Delivered

In the presence of

429. *Holding companies.*—As we have already seen, the Dominion Companies Act prohibits a company from using its funds in the purchase of stock of another company, unless specially authorized by its charter or by by-law. A holding company may be formed to hold a controlling interest in the stock of several corporations. Otherwise it has no business of its own. It was held in the Northern Securities case, in the United States, that a holding company may not by the exercise of its powers form a combination in restraint of trade under the Sherman Anti-Trust Act. A company which holds shares in another company is, in so far as its rights and liabilities are concerned, in the position of a private individual who is a shareholder. What will constitute control of a corporation is well explained as follows:

Control of one corporation by another requires at most but a holding of a bare majority of its stock. A large corporation is controlled by a holding of sometimes less than one-third of its stock, the other two-thirds being widely distributed and held in a large measure by investors who do not exert their voting power. Besides providing an effective method of controlling several corporations, and enabling perpetual control, a holding company permits the capitalization of the controlling stock interests. Thus a \$10,000,000 corporation may be controlled through a series of holding companies by stockholders who hold 51 per cent of the stock in a \$1,000,000 corporation, for the first corporation may be controlled by another which holds \$5,100,000 of its stock, and that in turn may be controlled by another which holds \$2,600,000 of the holder's stock, and so on.

CHAPTER XXXI

WINDING-UP OF COMPANIES

430. *Application of the Dominion Winding-Up Act.*
—By Section 91 of the Confederation Act, the subjects of bankruptcy and insolvency are declared to be within the exclusive legislative authority of the Parliament of Canada. The Dominion Winding-Up Act applies therefore:

(a) To all corporations incorporated by or under the authority of a Dominion Act, or of an Act of the late Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, or Prince Edward Island, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada;

(b) To incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock;

(c) To all incorporated trading companies doing business in Canada, wheresoever incorporated, and

(1) Which are insolvent; or,

(2) Which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of the act.

The act applies, therefore, to all trading companies, wherever incorporated, which are insolvent; and section

2 only to companies which are insolvent, and which were incorporated under the authority of the Dominion Parliament or are subject to its control. So that although there is an Ontario Winding-Up Act, it applies only to a company, not insolvent, which is in voluntary liquidation. A company incorporated under the Ontario Companies Act and carrying on business in Ontario, is "doing business in Canada," under (c). So also is a foreign company, incorporated, say, in France, and carrying on business anywhere in Canada. If winding-up proceedings have been begun against it in such foreign country, our courts may, under our act, order it to be wound up so far as concerns its assets in Canada. But if our courts order the winding up of a foreign company, its business and operations in such foreign country are not affected. It may there still continue in business, unless, of course, its home creditors take steps to wind it up. Our courts are entitled to protect the rights of Canadian creditors upon the company's assets in Canada. But the act would probably not apply if the foreign company had no assets here.¹ Nor does the act apply to building societies which have not a capital stock, or to railways or telegraph companies. It probably now applies to an incorporated club or society, which though not a "trading company" under (c), is a "corporation."

431. *Insolvency; how determined.*—A company is deemed insolvent, under the act,

- (a) If it is unable to pay its debts as they become due.
- (b) If it calls a meeting of its creditors for the purpose of compounding with them.
- (c) If it exhibits a statement showing its inability to meet its liabilities.

¹ Allen vs. Hanson, 18 Can. S. C. R. 667.

(d) If it has otherwise acknowledged its insolvency.

(e) If it assigns, removes or disposes of or attempts or is about to assign, remove or dispose of any of its property, with intent to defraud, defeat or delay its creditors or any of them.

(f) If, with such intent, it has procured its money, goods, chattels, land or property to be seized, levied on or taken, under or by any process of execution.

(g) If it has made any general conveyance or assignment of its property for the benefit of its creditors, or if without their knowledge and against their interests it sells or conveys the whole or the main part of its assets.

(h) If it permits any execution issued against it, under which a seizure of any of its assets is made, to remain unsatisfied for fifteen days or to within four days of the time fixed for the sale thereof.

Where a petition for a winding-up alleges insolvency, one or more of the above grounds must be alleged and strictly proved.

A company is deemed to be unable to pay its debts as they become due [see (a)], when a creditor in a sum exceeding two hundred dollars has made legal demand for payment, and the company has, for ninety days in the case of a bank, and for sixty days in all other cases, from the service of the demand, neglected to pay or secure or compound for the sum claimed. By a demand is meant, not a writ of summons, but a demand for immediate payment, reasonably certain in terms and not calculated to mislead.¹

432. *When a winding-up order will be granted.*—The court may make a winding-up order:

(a) Where a company's charter has expired; or when the event, if any, has occurred, upon the occurrence of

¹ Re Abbott Mitchell, &c., Co., 2 O. L. R. 143.

which the charter provides that the company is to be dissolved.

The order is in such case made at the instance only of the company or of a shareholder.

(b) Where the company, at a special meeting of shareholders called for the purpose, has passed a resolution requiring the company to be wound up.

Here again only the company or a shareholder may petition.

(c) When a company is insolvent.

The petitioning creditor's claim must be for at least two hundred dollars. If a shareholder petitions, he must hold stock of the company to the amount of at least five hundred dollars.

(d) When the capital stock of the company is impaired to the extent of twenty-five per cent thereof and when it is shown to the satisfaction of the court that the last capital will not likely be restored within one year.

A shareholder only may petition, and he must hold at least five hundred dollars of the company's stock.

(e) When the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

A shareholder, similarly qualified, alone can petition.

It has been held in England that under a similar section a company may be wound up when the main purpose for which it was formed has failed.¹

433. Who may petition.—Among those who may petition as creditors are the following: the assignee of a debt; an unpaid debenture holder; a secured creditor; a creditor's executor. But a creditor who has lent money to a company *ultra vires* of its powers may not petition; nor a person who has a claim for unliquidated damages;

¹ Re Haven Gold Mining Co., C. D. 151.

nor a creditor whose claim has been attached in the hands of the company by his own creditors, he not having a sufficient interest; nor by two or more creditors each of whose claims are for less than, but which together exceed two hundred dollars. And a petition should not be allowed merely as a means of forcing payment of a disputed debt. Possibly, where the circumstances warranted, a creditor whose claim was not actually due, could petition. But a person who has guaranteed a debt of the company cannot petition until he has paid the debt. Naturally in all cases, the company can contest a petition in an endeavor to show that the conditions alleged do not exist.

434. *Duties of liquidator.*—Upon the petition being granted, a winding-up order is made, and a provisional liquidator is appointed who takes charge and possession of the company's assets and affairs temporarily. A meeting of creditors, shareholders and contributories is then called to appoint a permanent liquidator and inspectors. The permanent liquidator proceeds to make an inventory of the company's assets and a list of contributories, and to call in all claims against and collect all debts due the company. Where it is advantageous or expedient he may be authorized to continue the company's business. He may be authorized, with the approval of the inspectors, to sell the company's assets, *en bloc* or in detail, privately or by public auction. When he has liquidated all assets, he prepares a dividend sheet which is mailed to all interested persons, and a petition is presented to the court for the allowance of his fees and those of inspectors and solicitors. If the dividend sheet is not contested within a prescribed period, he pays the dividend and obtains his discharge from the court upon a petition to that effect.

435. *Powers of liquidator.*—With the approval of the court, the liquidator may:

(a) Bring or defend any action, suit or proceeding, civil or criminal.

(b) Carry on the business of the company so far as may be necessary to the beneficial winding-up thereof.

(c) Sell the real and personal property of the company.

(d) Do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and use the seal of the company where necessary.

(e) Prove, rank, claim and draw dividends in case of the insolvency of a contributory, for sums due by the contributory to the company.

(f) Draw, accept, make and endorse any bill of exchange or note for and in the name of the company.

(g) Raise or borrow money upon the security of the company's assets.

(h) Do and execute all such other things as are necessary for the due performance of his duties.

436. *Contributories; how settled.*—The act directs that as soon as may be after the commencement of the winding-up, a list of contributories shall be prepared and settled. The liquidator goes over the company's books in order to discover those persons who in his opinion have not paid in full for their shares. By a petition, accompanied by his list and an affidavit as to its correctness, he asks that an order be given calling upon the contributories mentioned to appear and show cause why they should not be settled upon the list. They may then appear and contest liability, and upon being found liable, or in default of their appearance, they will be thereupon declared liable as contributories. Action may be taken by the liquidator against contributories who do not pay,

or against their representatives. The amount which a contributory is held to pay is of course an asset of the company which its creditors are entitled to have collected.

437. *Defences.*—Where a shareholder has purchased shares for which he has not fully paid, *prima facie* he is liable for any balance of price outstanding. Frequently, however, a contributory will contest liability on one or more of several well recognized grounds.

He may contend, for instance, that his subscription was induced by fraud or misrepresentation. Generally this is not accepted as a defence, unless before the winding-up he had begun proceedings to set aside his subscription; or upon an action for unpaid calls, unless he had counterclaimed for rescission on the ground of fraud or misrepresentation.

Or he may urge that there was no binding contract to take the shares—that he made no offer, that his offer was not accepted, that he withdrew his offer before it was accepted.

Again he may deny liability on the ground that, though he received shares as fully-paid when really they were not, he transferred them, before the winding-up, to some one, accepted by the company as transferee, in whose hands they may be held to be fully-paid; or that he has transferred his shares, but through the fault of the company the transfer has not been registered.

He may be able to show that he has paid in full for his shares—in cash, or property or services. As shares cannot be sold at a discount, it is for him to prove that he paid in full in cash, or that the property or services accepted by the company for its shares were well and reasonably of the value of the shares. Payment in cash may have resulted from an agreement between the

parties that a debt due him by the company should be written off upon his accepting shares for an equal amount; or that he should accept shares in payment of advances made by him for the company. Where in good faith the directors of a company have, in the exercise of their discretion, issued shares in payment of property or services, it is not essential that the property or services must be equal to the nominal value of the shares. And in the absence of fraud, the courts will not inquire into or set aside such an agreement.¹

438. *All claims may be proved.*—All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are, under the act, admissible to proof against the company. A claim for an uncertain amount, as a claim subject to a contingency or for unliquidated damages, will be given a fixed value by the court, and for this value it will rank. Claims are proved by affidavit of the creditor or of some one acting for him. Ordinarily the creditor pays the expense of proving his claim; but upon a contestation, the costs are in the discretion of the court.

Debenture holders may demand interest, but not so a creditor upon his claim after the winding-up has commenced. It has been held that prescription ceases to run after the date of the winding-up order; but a claim previously barred by prescription may not be proved. The holder of a bill of exchange may prove both for the amount thereof and for protest charges. Damages for breach of contract may be proved. It has been held that an agent cannot prove for commissions on future business of the company if the company is not bound to continue its business—the order for a winding-up ter-

¹ Hess Mfg. Co., *Edgar vs. Sloan*, 23 Can. S. C. R. 664.

minates all contracts, and in this respect is retroactive to the date when the winding-up commenced. A guarantor of a debt of the company may prove, though he may not have paid the debt. He is liable and claims as for an indemnity.

439. *Secured creditors*.—So far we have considered creditors whose claims are not secured or are only partially secured. They have to take what they can get out of the estate. But a secured creditor who has some mortgage, charge or lien on the property of the company is in a different position. He cannot be compelled to submit his claim for adjudication. He may, if he so decides, rely upon his security. He has several courses open to him: ¹

(a) He may rest on his security and not prove.

(b) He may realize his security and prove for the deficiency.

(c) He may value it and prove for the deficiency after deduction of the assessed value, in which case the liquidator may redeem at such assessed value.

(d) He may surrender his security and prove for the whole debt.

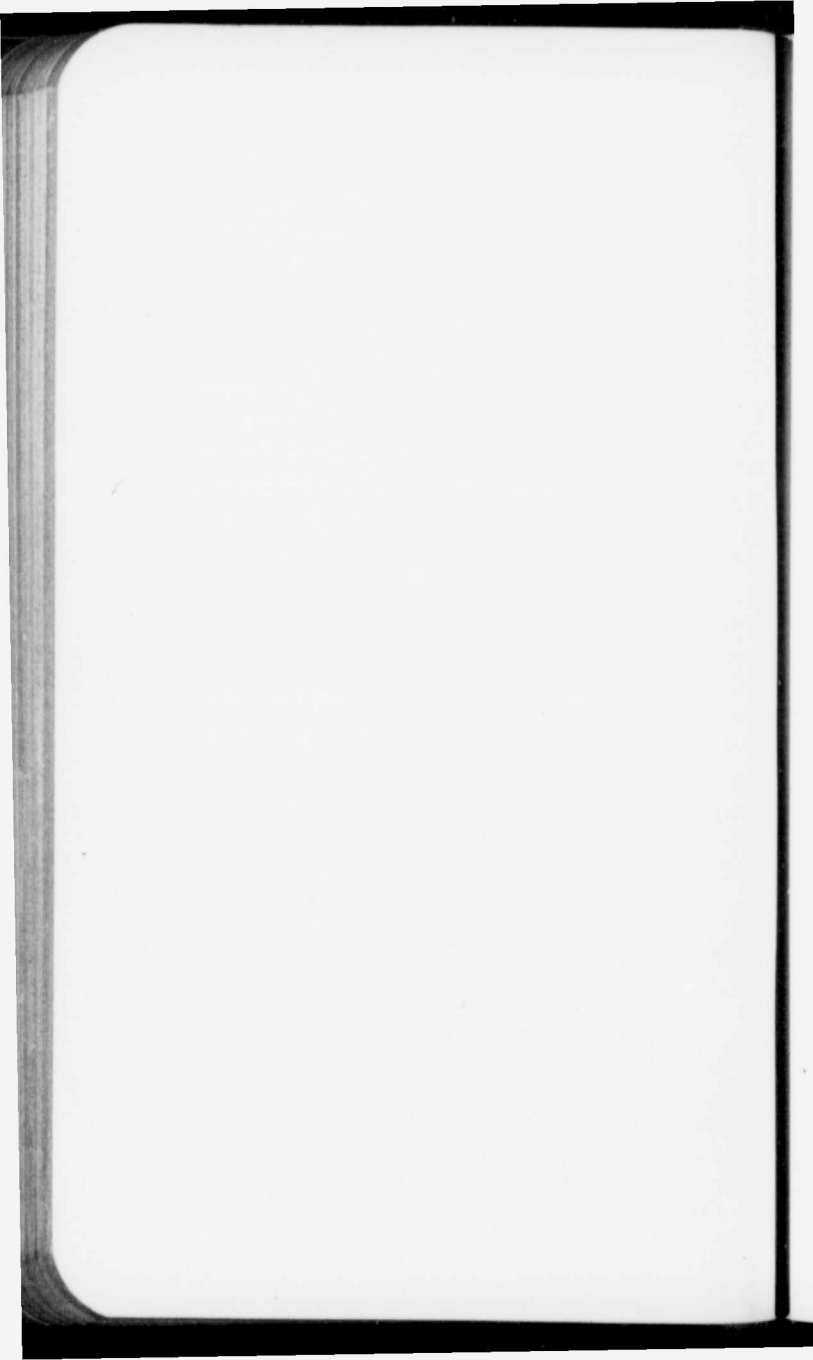
440. *Hire-purchase creditor*.—Where goods are sold on what is known as the hire-purchase system, while the contracts may vary in terms, generally it is agreed that the property in the goods shall not pass until the final instalment of the price is paid. If a company which has bought goods in this way becomes insolvent, the creditor may value his hire-receipt note as a security, which would amount to a release of the goods, and the company would become owner thereof. The liquidator could then take them over at the value fixed by the creditor. If he does not value his security, the creditor may

¹ See Palmer, "Company Law," p. 396.

either take possession of the goods or claim for the full amount of the debt. But having thus taken possession of the goods, the creditor has no further claim upon the estate.

441. *Claims of clerks.*—The act provides that clerks or other persons who are, or who have been, in the employ of the company are privileged over other creditors for arrears of salary or wages due and unpaid at the making of the winding-up order, but only for the arrears which have accrued during the three months next previous to the date of the order. Among the “clerks and other persons” would not be included, under the jurisprudence, workmen, laborers, mechanical experts or inspectors of departments, auditors, agents. The “other persons” must be in a class with “clerks”—of the service, i. e., as distinguished from the executive. Thus the manager or managing director, the mechanical expert, the inspector, could not be considered as “clerks or other persons”—but among “clerks or other persons” would be included office managers, bookkeepers, stenographers and office boys. It has been held, however, that a commercial traveler is within this class, and is entitled to be collocated by special privilege over other creditors in respect of a claim for salary and expenses under his contract of employment.¹

¹Re Morlock & Cline, Limited; Sarvis & Canning's Claims, 23 O. L. R. 156.



QUIZ QUESTIONS

(The numbers refer to the numbered sections in the text.)

CHAPTER I

PRELIMINARY TOPICS

1. Of what benefit is the knowledge of legal rights and obligations? How should the study of general law be approached?

2. Define law, in its technical sense. Classify technical law in two ways.

3. What is meant by municipal law? How does it differ from public international law?

4. Explain public international law. How is it not law in the technical sense? What is its field? How many questions of international law arise between persons domiciled in different provinces of Canada?

5. What is public law? What branches of law does it include?

6. What is private law? May a given act violate both a public and a private act? Explain.

7. What are the six great sources of Canadian law? What subjects does each cover? Differentiate between common law and statute law.

CHAPTER II

NATURE AND CLASSIFICATION OF CONTRACTS

8. Define a contract. What must a true contract include? What is the difference between a moral and a lawful obligation?

9. What part does agreement play in a contract? Is a quasi-contract binding? Is an offence binding? A quasi-offence?

10. What are the purposes of contracts? Explain assignment, release and novation.

11. Distinguish between an executed and executory contract, between a bilateral and a unilateral contract; between a formal and informal contract. When is a contract valid? Void? Voidable? What is an express contract? What is a simple contract? A contract under seal? A contract of record? What is an escrow?

CHAPTER III

FORMATION OF CONTRACTS: COMPETENCY OF PARTIES

12. What are the requisites of a contract?

13. What is meant by capacity? What persons are subject to defective capacity?

14. Discuss the position of minors in relation to contracts. Are a minor's contracts voidable or void?

15. Discuss the liability of infants in regard to necessities. What are necessities?

16. Is an infant husband liable for the debts of his wife contracted before marriage? When may a minor be bound by his contract?

17. How may an infant disaffirm his contract? May he disaffirm after he reaches his majority? What does benefit to a minor have to do with disaffirmance?

18. Who may disaffirm an infant's contracts?

19. How and when may an infant ratify his contracts? May he ratify only that part of the contract beneficial to

him? If he buys goods on credit and squanders them, is he bound to pay for them?

20-21. What is the general rule concerning contracts of an insane person? May he contract during lucid intervals? Does the good faith of the other party to the contract bind an insane person? Is the contract of an insane (or drunken) person void, then, or voidable? When must such a contract be rescinded, if at all? What is the practical question to be decided? Is intention to pay on the part of the insane person ground for action? Is a deaf and dumb person incompetent to contract?

22. When may a person disaffirm a contract made during insanity? May the other party disaffirm? Is the marriage of a lunatic valid?

23. Must a lunatic return the consideration when he repudiates a contract? What is the general rule in Quebec? What is lesion?

24. Upon what condition may the contract of a drunken person be set aside? Is a drunken man liable for necessities? To what extent? Is he liable for offences? On his quasi-contracts?

25. Upon disaffirmance of his contract after becoming sober, what is done with the consideration?

26. May alien enemies sue in an English court? What enforceable contracts may they make?

27. At common law, could a married woman make a valid contract? Can she do so by statute? What is "a community of property"? Who is the head? What are the wife's rights? Where is this form of property ownership in practice? What are a married woman's property rights in the English law provinces?

28. What contractual rights has a corporation? Through what representative mediums does it act?

CHAPTER IV

THE CONTRACT ITSELF

29. What are the vital features of offer and acceptance?

30. When is an offer sent by mail or telegraph complete? When may it be revoked? May a posted acceptance be revoked?

31. Must the party to whom the offer is made be ascertained? If an offer is made to the public, when does a contract arise? Must the party performing the service have knowledge of the offer? How may an offer by public advertisement be revoked?

32. Define consideration. Of what importance is it? Is a moral obligation enforceable? What is the law concerning consideration in Quebec?

33. Is the value of a consideration important? If a person is legally bound to do a certain thing, is a promise a sufficient consideration? May an action be supported by an illegal consideration?

34. What is the Statute of Frauds? What are its important provisions? When may a contract be oral? What contracts must be in writing? Explain fully.

CHAPTER V

VOID AND VOIDABLE CONTRACTS

35. What does legality of object have to do with the making of a contract? Give the various grounds upon which legality of object is based. What freedom has the average person to make contracts? What are the exceptions?

36. What is the legal status of wagering contracts? Define a wagering contract. What is the right of action for recovery under a gaining contract? Distinguish between buying stock on margin and betting in a bucket shop. Is a contract of insurance enforceable? A contract for the sale and delivery of commodities at different prices?

37. What is meant by usury? What is the law regarding usury?

38. What is the general rule regarding contracts in restraint of trade?

39. What is an unlawful combination? Does the law uphold dealers in staple commodities in raising prices or restraining trade? May workmen combine to control the price of their labor?

40. May a valid contract be made on Sunday? What business may be transacted on Sunday? What is a "work of necessity"?

41. What is the legal status of contracts in restraint of marriage? Give examples. Are marriage brokerage contracts valid?

42. When is a contract involving a third person void?

43. What can you say about contracts against liability for negligence? Are carriers liable as insurers, ordinarily?

44. What is the effect of illegality in a contract if some of the promises are legal? If any part of a single consideration for a promise is illegal? What part does intention play?

45. What is the importance of reality of consent?

46. Discuss the difference between mistakes of fact and mistakes of law. Does mistake of expression invalidate a contract?

47. What must be proved in order to set aside a con-

tract on the grounds of fraud? How is misrepresentation usually included in fraud? Define fraud. Is a man responsible for ignorance of truth? What is the reasoning supporting this? Can a man be held for silence on the ground of misrepresentation?

48. Name some instances of undue influence and state its effect on a contract. In attempting to discover whether or not undue influence has been used, what circumstances do the courts take into consideration?

49. What is duress? What is the effect of duress or violence or fear on a contract?

CHAPTER VI

OPERATION AND INTERPRETATION OF CONTRACTS

50. What is the general rule concerning third parties and contracts? Give an instance in which a third person may be held liable for damages as well as the principals.

51. May a third person sue on a contract made by others for his benefit? What is the English rule? The New York rule? The Quebec rule? What is the general rule regarding the rights of a creditor when a debtor refuses to exercise his own rights?

52. What is the best evidence of intention? When is oral testimony allowed?

53. State some of the rules of construction used by the court in interpreting a contract.

54. When there is doubt as to the intention of the parties, at what will the court look?

55. Will the court enforce unexpressed obligations that are implied by law? If time is the essence of a con-

tract, what is the effect of non-performance of the contract at the specified time?

56. Explain the distinction between liquidated damages and a penalty.

57. Define joint and several contracts, and state the rules governing the liabilities of the parties.

CHAPTER VII

ASSIGNMENT AND DISCHARGE OF CONTRACTS

58. Define assignment.

59. Who are competent parties to an assignment? Under what circumstances may a partner make an assignment? A tenant?

60. Are the liabilities growing out of a contract assignable? Explain, giving examples.

61. Are the following assignable: bonds, mortgages, benefits under judgments, insurance policies, contracts of suretyship, chattel mortgages? Is a right of action for breach of promise to marry assignable?

62. Name eight ways in which a contract may be discharged.

63. Explain discharge by payment of performance. How important is the construction of the contract in this kind of discharge?

64. Explain discharge by payment or performance. How important is the construction of the contract?

65. When no time is stated, what is the rule applied by the courts? When no place is stated, where must payment be made?

66. When is an agreement by a creditor to accept less

than the full amount of his claims valid? May one creditor benefit over another under such an agreement?

67. When part payment is made and several debts are owed, what determines the application of the amount paid? When is the creditor at liberty to apply the money as he sees fit? If neither party decides, who determines the application of the fund?

68. Explain tender. Refusal by the creditor to accept the tender results in what? What duty is incumbent upon the offerer?

69. What is meant by novation? Between whom can it be effected? Of what importance is intention?

CHAPTER VIII

DISCHARGE OF CONTRACTS (*Continued*)

70. What is breach of contract? Under what circumstances will there be discharge of contracts by breach?

71. When does failure of performance discharge the contract? How does the distinction between divisible and indivisible contracts affect discharge by failure of performance?

72. What determines whether the promises in a contract are or are not independent?

73. When is a contract conditional? What restrictions are put upon the conditions of a contract? What is a condition precedent?

74. Of what effect is the breach of a subsidiary promise?

75. What is meant by breach of renunciation? Must the renunciation be express?

CHAPTER IX

DISCHARGE OF CONTRACTS (*Continued*)

76. What is the effect of impossibility of performance? When may it occur? When does it discharge the contract? Illustrate both.

77. What is the effect of the destruction of the subject matter?

78. Is obligation under a contract discharged if performance is rendered impossible by law?

79. Contracts for personal services which can be performed only during the lifetime of the person who promises them are subject to what implied condition? Give examples.

80. When is one justified in refusing to carry out a contract under conditions of danger? Is an employer liable for the wages of an employee who stops work on account of the danger involved?

81. What is the effect on a contract when the promisor prevents performance? When the promisor is prevented from performing?

82. State some methods of discharging a contract by operation of law.

83. What are the general laws of insolvency in Canada? In United States?

84. What is meant by "confusion"?

85. What is meant by "compensation"?

86. What are the remedies of the other party to a contract when one party commits a breach of the contract?

87. What damages is the injured party entitled to recover?

CHAPTER X

SALES—THE CONTRACT

88. Define sale.

89. Distinguish between sale and a contract to sell; between sale and barter; between sale and gift; between sale and bailment.

90. Who may be parties to a sale? Who may not pass title although having possession of the property. Has the man who finds or steals goods a good title?

91. Define actual and potential existence. Is a present sale of future property which has no existence whatever valid? May a valid sale of incorporeal things be effected? Can a sale be made of an expectancy based on chance?

92. What is the provision of the English Statute of Frauds in regard to the sale of chattels?

93. In what three ways may the Statute be satisfied? Define "acceptance" and "receipt." Is actual physical delivery always essential? What is "constructive possession"? Is the writing necessarily formal?

94. Why is oral evidence allowed in a mixed contract of sale and for labor?

95. What is the general rule about the completion of a contract? Upon the death of a seller, to whom does the title to his property pass? At whose risk do goods remain, if delivery has been delayed by the fault of one or the other? What is the general rule regarding movable things to be sold by weight, number or measure?

96. What is conditional sale? When goods are ordered from a distance, at what time does the title to them pass to the buyer? What are the differing rules as to title in C. O. D. sales?

97. When the seller retains possession, when does title pass?
98. When goods are to be manufactured, what presumption arises concerning the time title passes?
99. In case of sale by sample, when does title pass?

CHAPTER XI

SALES: PERFORMANCE OF THE CONTRACT

100. What are the principal obligations of the seller? Of the purchaser? What is meant by delivery?
101. What about the place of delivery? Who bears the expenses of delivery?
102. What is the rule about delivery to a carrier? Can the buyer sue for damages if goods are lost or destroyed in transit due to negligence of the seller?
103. Discuss the time of delivery? What is a "reasonable hour"?
104. Must the specific quantity agreed upon be delivered? Need a buyer receive goods by instalments? What is the rule when the contract is severable?
105. What is the rule concerning the quality of the goods delivered? Has the buyer the right of inspection?
106. What may take the place of actual delivery?
107. Define warranty. Distinguish between express and implied warranty.
108. What is implied warranty of the title? Of what is possession by the vendor *prima facie* evidence? What is constructive possession? Does it warrant title?

109. What does *caveat emptor* mean? If goods are sold by sample, does *caveat emptor* apply?

110. What remedies has the buyer for breach of express warranty?

111. Name three remedies for breach of implied warranty?

112. Explain seller's lien; stoppage *in transitu*.

113. When a vendor has exercised one of the above rights, what two things may he then do?

114. When may the unpaid vendor bring action for the purchase price?

115. Upon what does the buyer's remedy depend? What is his measure of damages? When are special damages recoverable?

CHAPTER XII

BAILMENTS

116. Define bailment. What may be bailed? Need the bailor be the owner of the property?

117. Distinguish bailment from sale; from barter. In what case is this distinction of great importance?

118. Classify bailments in two ways. What does each division include?

119. Give an example of extraordinary bailment.

120. Explain the contract of bailment. How are the rights and duties of the partners determined?

121. What degree of care must the bailee give the bailed property? For what may he be liable if he fails in this respect?

122-123. What are the obligations of the bailor and

bailee respectively in a bailment for the bailor's sole benefit? Of what does gross negligence consist?

124. What are the obligations of the bailee and bailor respectively in a bailment for the bailee's sole benefit?

125. When may a bailment for sole benefit of one party be terminated?

126. What is a pledge? How does the relation between pledgor and pledgee arise?

127. What does the pledge cover? May the pledgor sell to a third party his interest in the goods pledged? What is done when the obligation which the pledges secures is unpaid? What degree of care is the pledgee bound to use?

128. Must actual tender of payment be made to secure return of pledge? Explain the termination of pledge or pawn.

129. For whose benefit is hiring property for compensation? Give an example.

130. In caring for chattels, repairing or transporting them, who is benefited? In case of breach of contract, what are the rights of action?

131-132. What are the rights and duties of the bailor? Of the bailee?

133. What determines the duration of the bailment?

134. Define warehouseman; wharfinger. Of what importance is a warehouse receipt? Is the contract one of sale or bailment? Define warehouse receipt. What degree of care is a warehouseman bound to use?

135-136. Define inn; innkeeper.

137. What constitutes a guest? Distinguish from tenant.

138. What are the rights and duties of an innkeeper? Of a guest? Is an innkeeper responsible as a depositary for the effects brought by travelers into his house?

What lien has an innkeeper on the baggage of his guest, and how far does the lien extend? How far is an innkeeper liable for loss of or injury to possessions of guests?

139. What terminates the relation between innkeeper and guest?

CHAPTER XIII

COMMON CARRIERS

140. Define common carrier. Are the following common carriers: sleeping car companies, telegraph and telephone companies? What is a private carrier?

141-142. Why are liabilities of common carriers imposed? What are the liabilities? Is the carrier responsible for losses caused by other than human agency? Upon what are carrier's charges largely based? What is the shipper's obligation in evaluating goods?

143. May a carrier contract to limit his extraordinary liability? Stipulate for total exemption? Of what value is a printed notice issued by the carrier or affixed to a receipt?

144. When is a carrier's liability terminated? If goods are refused at consignee's address, how is the carrier liable?

145-146. Discuss time and place of delivery.

147. When does liability as carrier end and that of warehouseman begin? Discuss carrier's liability as warehouseman.

148. What is the liability of a carrier who gives the goods to a connecting carrier? What is meant by a joint tariff?

149. When is the privilege of stoppage *in transitu* allowed? Need the consignee's possession be actual?

150. Is a public carrier permitted to refuse passage to anyone? Is it an insurer? What is its responsibility as regards equipment and roadbed? Is it liable for baggage not in the baggage car?

151. State the rule as to uniformity of passenger rates. Of what importance are the conditions printed on a ticket?

152. What is the relation of sleeping car company to traveler?

153. What does the Railway Act stipulate as regards the running of trains on schedule? What composes negligence?

CHAPTER XIV

SURETYSHIP

154. What is suretyship? What is the contractor of this engagement called? Give the distinction sometimes made between suretyship and guaranty. What are the three kinds of suretyship?

155. Distinguish suretyship from original contract.

156. Can suretyship exist for any but a valid obligation? Can suretyship be contracted for a greater sum, or under more onerous conditions, than the principal obligation? May suretyship be presumed? What may consideration for suretyship consist of?

157. When may a suretyship be void? What are the conditions of co-suretyship?

158. What authority have agents and partners in suretyship?

159. What is the rule concerning notice of default?

160. Under Quebec law, when is the surety liable? Generally speaking, when may the creditor proceed against the surety?

161. Upon what does the extent of the guarantor's obligation depend? What terminates the surety's liability?

162. What is a joint suretyship? How is obligation apportioned?

163. What rights has the guarantor when he has paid the debt of the principal? Against the principal? In relation to the creditors?

164. Name six ways in which suretyship may be terminated.

165. Does death of a surety terminate his liability? In case of illegality of the main contract, is the surety liable?

CHAPTER XV

INSURANCE

166. Define insurance. What is the fundamental principle in insurance? Is life insurance regarded as a contract of indemnity in Quebec? In Ontario? Explain assessment insurance. Premium insurance. Upon what natural law is the latter based?

167. What is an essential element of an insurance contract?

168. What risks may be insured? May things incorporeal be the subject matter of insurance?

169. What does fraudulent misrepresentation or con-

cealment on the part of either party result in? What else does good faith include?

170. In what sense is a contract of insurance voluntary? In what sense personal?

171. Give the United States Supreme Court's definition of life insurance. What does the company take into consideration? Differentiate life insurance from accident insurance. What is endowment insurance? Term insurance? Tontine insurance? Do policies always cover death by suicide or by execution for a crime?

172. Is a contract of marine insurance a contract of indemnity? What may marine insurance cover? What is the implied warranty in marine insurance?

173. What does accident insurance mean in this sense? Against what is the insured to be protected? Need the insured be absolutely helpless in order to be totally disabled?

174. What is re-insurance? Give an example. Does the re-insured ever retain a proportion of the risk?

175. What is co-insurance? Give an example.

176. Define a valued policy.

177. What is an open policy?

178. Distinguish between blanket and specific policies.

179. Explain floating policy.

180. Discuss subrogation. To what kind of insurance does it not apply?

181. What is meant by insurable interest?

182. What constitutes insurable interest in life insurance? May the interest be merely speculative or contingent? Name some cases of insurable interest.

183. When does insurable interest terminate, in life, fire and marine insurance, respectively?

184. What does assignment of insurance contracts consist of in fire insurance? In life insurance?

185. Is there a standard insurance policy? What is a covering note in fire and marine insurance? What is the other name?

186. Does concealment avoid the policy? How important is good faith?

187. What are warranties in the contract? Of what importance are they?

188. What is meant by waiver? Give some examples.

189. What are the main warranties in marine insurance? When must the insurable interest exist in fire, life and marine insurance, respectively? What is the meaning of the expression "lost or not lost?" Explain general average loss and particular average loss.

190. What notice of loss must be given in fire insurance? Does the ordinary presumption of delivery operate?

CHAPTER XVI

NEGOTIABLE INSTRUMENTS IN GENERAL

191. Define negotiable instruments. Name some instruments that are not, in the fullest sense, negotiable.

192. What right to collect from the persons liable upon the instrument does a negotiable instrument give the transferee?

193. What consideration is a negotiable instrument presumed to have? Explain, with examples.

194. What are days of grace?

195. What is the origin and development of the present Bills of Exchange Act?

196. Define promissory note. What must be prom-

ised? Who must sign it? Is delivery necessary? How is interest provided for?

197. Define bill of exchange. Who is the drawer? The payee? What does "writing" include? What can parol evidence determine? When is a bill payable? What are inland bills? Foreign bills?

198. What are bills in a set, and why were they devised?

199. Define a check. Who is the drawee? What rules apply to checks? When should a check be presented for payment? What is a reasonable delay?

200. What is certification? What happens if the holder of the check has it certified?

201. To whom is a check payable? Discuss fully.

202. How clearly must the drawee of a bill of exchange be indicated?

203. What is the general rule concerning blanks on an instrument? What is a holder in due course?

204. What is the general rule concerning a bill materially altered? What are some exceptions?

CHAPTER XVII

TRANSFER AND NEGOTIATION

205. How may negotiable instruments be transferred?

206. What is the effect of assignment?

207. Explain transfer by operation of law.

208. Define negotiation. When may it take place by simply delivery?

209. What is meant by endorsement? By an allonge? How may an endorsing representative negative personal liability?

210. Name the chief requisites of an endorsement?

211-212. What is an endorsement in blank? How may it be negotiated?

213. What is a special endorsement?

214. What is meant by a qualified endorsement? What other name has it?

215. What is a conditional endorsement?

216. Explain restrictive endorsement.

217. What is the function of an endorsement waiving conditions?

218. What is the Canadian Bankers Association's ruling about regular and irregular endorsements? What is an endorser *pour aval*? Is an endorsement to the cashier of a bank a transfer to him or to the bank?

219. May the transferee demand endorsement if it has not already been made?

220. What is the second element of negotiation? Define delivery. What does constructive possession mean? Is payment to anybody in possession of a bill valid, if made in good faith?

221. Discuss generally the holder in due course.

222. Give some instances of irregular bills. Is any bill necessarily invalid?

223. When a bill is overdue, what is the position of the holder in due course?

224. Must notice of previous dishonor of a bill be given to the holder in due course? What does the court attempt to discover about the transferee?

225. Define value. What value must be given for a bill?

226. What rights does a holder get who takes through a holder in due course?

227. Discuss generally the rights of a holder in due course.

CHAPTER XVIII

CONTRACT OF PARTIES

228. What does the maker agree to do? What is meant by paying accord to tenor? Is presentment necessary to fix his liability?

229. Discuss the contract made by the acceptor. Must the acceptance be in writing? When is a bill which is accepted when overdue payable? Is a promise to accept an acceptance?

230. By an acceptance, what is not admitted?

231. What kinds of acceptance may there be? Discuss qualified acceptance fully.

232. Who may accept an instrument?

233. When does dishonor for non-payment occur? What kind of bill in Quebec, is protested in case of a dishonored acceptance? Elsewhere in Canada?

234. What promises are made by the drawer? What does he warrant?

235. Explain the endorser's contract.

236. What warranties are made by an unqualified endorsement? Does an endorser "without recourse" incur the liability of an ordinary endorser?

237. How are endorsers liable among themselves? Illustrate.

238. Discuss the liability of the accommodation party as drawer, acceptor, etc. How does a guarantor differ from an endorser?

239. What damages may be recovered in case of dishonored paper? What is re-exchange?

CHAPTER XIX

PRESENTMENT AND NOTICE OF DISHONOR

240. When is presentment for acceptance necessary for a bill payable at sight? When is it necessary to present a bill for acceptance which is payable after sight? How is the due date of a bill determined?

241. How is a bill presented for acceptance? When and where should it be presented? When is presentment excused and the drawee given the right to treat it as dishonored? What law determines the duties of the holder?

242. When is presentment for payment necessary? Where must it be made? When is presentment for payment dispensed with?

243. At what time is it necessary to present demand bills, checks and demand notes? Where must this presentment be made?

244. Discuss the waiver of presentment.

245. What are the rights and liabilities of the payer for honor?

246. When must notice of dishonor be given?

247. By whom is notice of dishonor to be given?

248. What is meant by sufficiency of notice? When is notice sufficient?

249. At what time is notice excused?

250. Where must notice be given?

251. When is notice dispensed with? How may the waiver be made? What are the rights of the parties in regard to waiver?

252. How is a bill protested? When is protest necessary? Where must the protest be made?

CHAPTER XX

DEFENCES

253. Define personal defences. Distinguish personal defences from real or absolute defences.

254. What is the effect of fraud? Differentiate between the fraud which invalidates the instrument and that which does not.

255. What constitutes valuable consideration? What is the effect of the total failure of consideration?

256. When is consideration illegal?

257. Define payment in due course. How must payment be made to discharge a bill? What is the effect of a forged endorsement? How is an accommodation bill discharged? Discuss renunciation.

258. Who are secondarily liable? How may they be discharged?

259. What are real defences? State their effect.

260. How is the cancelation of a bill accomplished? What is the effect of unintentional cancelation?

261. Define forgery. How does forgery operate as a defence? State the provisions of the statutory provisions in regard to forged checks or bills. What is the liability of a partnership on negotiable instruments? When may recovery be had upon a forged instrument?

CHAPTER XXI

PRINCIPAL AND AGENT

262. Define mandate. What is an agent? Distinguish between special and general agents. What is a factor? What are his relations to the principal? Explain the status of a broker. Give a definition of an auctioneer. Discuss *del credere* agency.

263. What is necessary to constitute the relation of principal and agent? How may the consent be implied?

264. Discuss agency by estoppel.

265. What is meant by agency by necessity?

266. Who is a competent principal?

267. When is it within the power of a corporation, partnership, unincorporated society or association to appoint agents?

268. Who are competent to become agents?

269. What acts may be done by the agent?

270. Discuss the rights and liabilities of joint and several agents.

271. Describe ratification and state its effect.

272. What conditions must exist for ratification?

273. Distinguish between express and implied ratification.

274. How does an agent obtain authority?

275. When may a principal restrict by private instructions the actions of a general agent?

276. Is a principal bound when his instructions have been ambiguous?

277. What is "power of attorney?"

278. How far may an agent extend his implied powers? May an agent entrusted with goods to sell pledge them under implied authority? What is the general rule to be observed concerning implied authority?

279. What is the agent's contract? Is he bound to carry obedience to the point of committing an unlawful act? Is an agent acting gratuitously liable for non-performance?

280. What is the rule regarding the delegation of an agent's authority to a sub-agent? Name an exception. Upon what authority is this delegation made?

281. When is a principal not bound by the acts of a sub-agent? Is an agent always liable for the acts of a sub-agent?

282. What are the duties of an agent?

283. May an agent act for both parties to a transaction and accept a commission from both without their full knowledge and consent? When may an agent be the vendor of property to his principal?

284. For what is an agent liable to his principal? Illustrate. Is an agent liable for an authorized act which results disastrously to the principal? For what is a gratuitous agent liable?

285. What is the measure of damages allowed a principal against his agent? Illustrate.

286. Is an agent personally liable to third parties with whom he contracts? Is he personally liable when he is acting for an undisclosed principal? Discuss in general the liability of agents on agency contracts.

287. When may an agent sue in his own name?

288. What is the chief right of an agent against his principal? What is the Quebec rule in regard to remuneration? When, in general, is an agent entitled to commission? On what transaction is he entitled to commission? When may an agent be deprived of his commission?

289. What rights of indemnification has an agent?

290. Has the agent any lien on the property of the principal?

291. When is the principal alone bound to third persons by the acts of the agent? What is the test of the agent's authority?

292. When is a principal not bound?

293. Name seven ways in which an agency may be ter-

minated. What is the status of acts done by the agent in ignorance of any cause whereby the mandate is extinguished?

CHAPTER XXII

MASTER AND SERVANT

294. Explain the relationship of master and servant and distinguish from agency.

295. Discuss in full the contract of hire and service. When does presumption of contract arise?

296. Explain independent contractor; what are the liabilities?

297. Define fellow-servant; vice-principal. What are their respective duties?

298. Who is liable for negligence by servants?

299. Who is liable when a servant does not disclose the fact that he is his master's agent? Who is liable for servant's wilful torts?

300. From what causes of injury to workmen is an employer liable? What effect do wilful misconduct and serious negligence have? Who fixes the compensation? What is the compensation rule in Quebec?

301. Against what does the alien labor act provide? Contravention of this provision is what kind of offence? State cases in which the act does not apply.

CHAPTER XXIII

PROPERTY IN LAND

302. What two divisions of property law are there in Canada?

303. Distinguish between real and personal property.

When is "property in Canada" personal property?
What is corporeal property? Incorporeal?

304. Why is duration of estates in land important?
In what ways may right of possession subsist?

305. What is a freehold estate? Estates in fee-simple? Estates in fee-entail? Conventional life estates and legal life estates? Estates by dower and estates by curtesy? What are the rights of husband and wife, respectively, with regard to dower and curtesy?

306. Name four kinds of estates that are less than freehold.

307. Explain the division of estates from the viewpoint of the number of owners, and the four classes into which joint estates are divided.

308. To what kind of estates do partnership estates belong? Explain the common law in regard to the non-payment at maturity of a debt secured by mortgaging of real property.

309. Explain absolute and qualified estates. Give examples of estates upon condition implied and expressed. Distinguish between a condition and a limitation.

310. How are estates classified as to the time when enjoyment begins? Does an estate in remainder arise by operation of law? What is a reversion?

311. What are the essential elements of a title? How may it be acquired? Distinguish these three kinds of deeds: quit-claim, bargain and sale, warranty.

312. Describe four involuntary methods by which titles are alienated.

313. Discriminate between legal and equitable estates.

314. Define land, tenements and hereditaments. What is a *profit a prendre*? What is an easement? A franchise?

315. What are the three divisions of water rights? What is the rule regarding the title of owners of land adjoining navigable streams? To whom does land formed by alluvium belong?

316. What are the rights of owners of land under and near water?

317. State the general rules which pertain to the control of surface water.

318. What do the terms "natural fruits" and "civil fruits" include? "Industrial fruits"?

319. To which owner does a border tree belong?

320. What is a fixture? What two elements change a chattel into a fixture?

321. State the rights of adjoining owners with regard to fences and party walls.

322. What right has a land owner with regard to the lateral support of adjacent land?

323. Explain easements; how may they be acquired? How about an easement of light and air?

CHAPTER XXIV

TRANSFER OF OWNERSHIP OR POSSESSION OF PROPERTY

324. Describe a contract of sale.

325. How is the ownership of property usually transferred? What should be done with a deed?

326. What is a hypothec? How is it executed and foreclosed?

327. Discuss some other liens.

328. What is a lease? Must it be in writing? What

are the usual covenants? In Quebec, what is the implied warranty on the landlord's part? How far is the lessee bound?

CHAPTER XXV

PROPERTY IN LAND—QUEBEC LAW

329. Discuss movable and immovable property in Quebec. How is property ownership divided?

330. What is ownership? When is a possessor in good faith? What belongs to the proprietor?

331. What is usufruct? Discuss fully. For what is the usufructuary liable? How does usufruct end?

332. What is a right of use?

333. What is a real servitude? Give an example of a servitude arising from the situation of property. Discuss the servitudes established by law.

334. What effect has registration? For default of registration by memorial, what is the penalty? Describe the processes of registration at length, and registration by memorial.

CHAPTER XXVI

TRANSFER OF PROPERTY BY WILL

335. Define will. What are the various forms? Explain "non-cupative will."

336. Who are competent to make wills?

337. What four general rules should a will follow?

338. What are the exceptions to the general rule that wills are not revocable? What are the exceptions to the

general law regarding revocation by marriage of the testator?

339. Define succession; intestate succession. In what four ways does property, in case of intestacy, descend? Is distinction of sex or primogeniture observed in Quebec?

340. Distinguish between an executor and an administrator. What are the privileges of a testator?

341. Describe the duties of executors and administrators.

CHAPTER XXVII

PERSONAL PROPERTY

342. What are choses in possession? Choses in action?

343. What is a general trade-mark? A specific trade-mark? What are the elements of the Trade-mark and Design Act? What is the importance of good will?

344. How may a man change his name?

345. What is a patent? For what may it be granted?

346. How are patents obtained?

347. Discuss the copyright law in Canada.

348. What is lost property? What is the general rule regarding it? Under what circumstances may a finder of lost articles render himself liable to prosecution for theft?

349. Describe treasure trove. What are the Canadian and American rules concerning it?

350. What does acquisition by occupancy include?

351. What are the property laws in regard to animals?

352. Name three ways in which title to personal property may be acquired.

353. What is a gift *inter vivos*? *Mortis causa*? Is delivery essential in a gift *inter vivos*?

CHAPTER XXVIII

PARTNERSHIP

354. What are the three essential elements of partnership?

355. What measure of authority has each partner in a partnership? How may a man be bound as a partner without his full knowledge and consent of partnership?

356. Of what importance is the purpose of profit?

357. Distinguish between sharing in profits as profits and sharing in profits as compensation. Which must a partner do?

358. In what two ways may a partnership be illegal?

359. State the difference between a partnership and a corporation. What are the advantages of incorporating a partnership?

360. Of whom are partners debtors and creditors? Is a partnership ever regarded as a legal entity? How much power has a partnership in Quebec?

361. Of what may capital consist? How will losses of capital be shared?

362. What does the expression "partnership property" include? What is done in case of doubt as to the ownership of property in the name of a partner?

363. What rights has a partnership as a third person?

364. Who holds title to firm personality? Explain the "equitable doctrine of conversion." What is the American rule concerning firm realty?

365. What is a partner's "share" in firm property?

366. What are the rights of surviving partners in firm property in: the English law provinces, Quebec, United States, England?

367. Of firm creditors and separate creditors, which are preferred? What is the difference between the law of Quebec and of the English law provinces in this respect?

368. What degree of care and scrupulous conduct must a copartner maintain?

369. What is a partner's liability in regard to the exercising of care and skill?

370. Discuss the question of private benefits among partners.

371. May a partner carry on a private business?

372. Who has a mandate for the management of firm business? Who issues the mandate?

373. What are the rights of a majority of partners in Quebec and in the English law provinces?

374. What duties and rights has a partner over firm accounts?

375. How is contribution among partners arranged?

376. Has a partner a right to indemnification for payments made to the firm?

377. Is a partner always entitled to compensation for services?

378. May he claim interest on balance with the firm?

379. Has a partner any lien on the property? If so, to what extent?

380. Is a firm always bound to a third party in good faith?

381. What actions come under the implied authority of a partner?

382. Explain "holding out."

383. Discuss the notice of withdrawal. What is sufficiency of notice?

384. Under what circumstances may a partnership be dissolved?

385. What is limited partnership?

386. Describe the functions of general and special partners.

387. What are the main provisions in all statutes concerning the formation of special partnerships?

CHAPTER XXIX

COMPANY LAW

388. Define corporation. What are some reasons for forming corporations? How are companies formed in England? In Canada?

389. What are the powers of companies incorporated under Dominion charter? Under provincial charter?

390. Discuss fully the charter of a corporation.

391. How are the private affairs of a company regulated? Distinguish between by-law and resolution.

392. How broad are the powers of a company under the various acts?

393. Define *ultra vires* acts. Give examples.

CHAPTER XXX

COMPANY LAW (*Continued*)

394. Define promoter. What does his undertaking usually involve? May a promoter make a secret profit at the expense of the company?

395. What is the purpose of a prospectus? What about the obligation of stating material facts?

396. When does a company commence business? When may it?

397. What is a share? Distinguish between *chose in action* and *chose in possession*. How are shares represented physically? Are shares negotiable?

398. How may a person become a shareholder in a company? Describe the process of subscription and allotment.

399. Define common stock, preference stock, cumulative preferred, guaranteed, paid-up, issued and unsued stock. Distinguish between debentures and debenture stock.

400. What constitutes a body corporate?

401. Describe the process of underwriting.

402. What is the law regarding commission to underwriters?

403. Give the main points concerning corporate meetings.

404. What are the general voting rights of a shareholder? What may a member do, when he is denied the right to vote at a meeting?

405. How is voting usually done?

406. What kind of right is the right to vote by proxy? When is proxy paper effective?

407. For what purposes are corporate meetings held? State the rule about voting of a majority?

408. What right has a shareholder to inspect the company's books? What other right does this include?

409. Discuss in general the right of shareholders to receive dividends. May dividends be paid out of capital?

410. What is the law concerning the right to subscribe to new stock?

411. What are the rights of minority shareholders?
412. Give some of the chief liabilities of shareholders.
413. Name the officers of a corporation and state their duties.
414. How is compensation arranged for?
415. What are some of the liabilities of officers?
416. In what capacity does a director stand to his company?
417. What are the qualifications of directorship?
418. How are elections provided for? What are the conditions?
419. How are directors' meetings conducted? How is notice given?
420. How is the problem of voting on matters of personal interest met?
421. When are contracts of directors binding upon the company?
422. Name seven matters concerning which directors may make by-laws.
423. What are the number limits of directors?
424. Discuss the personal liabilities of directors.
425. Is a director liable for errors of judgment? Is he responsible for the fraud of co-directors of which he is not aware?
426. Under what circumstances is a director disqualified? How is removal provided for? Is a resignation revocable?
427. How is remuneration of directors provided for?
428. What is amalgamation? Distinguish between a consolidation and a merger.
429. What is a holding company and why is it formed?

CHAPTER XXXI

WINDING-UP OF COMPANIES

430. To what subjects does the Dominion Winding-Up Act apply? The Ontario Winding-Up Act? What is the rule concerning the winding-up of Canadian companies in foreign countries?

431. Name eight conditions that determine the insolvency of a company.

432. Give the various circumstances that will cause the granting of a winding-up order.

433. Who may petition as creditors? May the company contest a petition?

434. Give the chief duties of a liquidator.

435. What are his chief powers?

436. How is the matter of settling contributories arranged?

437. On what grounds may a contributory contest liability?

438. What claims are admissible to proof against an insolvent company?

439. What open courses has the secured creditor?

440. What is the hire-purchase system?

441. What claims are clerks allowed?

INDEX

A

- Absolute property, 112.
- Acceptance,
 - Effect of, 293.
 - Kinds of, 291.
 - Presentment for, 299.
- Acceptance of a contract, an essential, 34.
- Acceptance of goods, an evidence of sale, 121.
- Acceptor's contract, 289.
- Acceptors, persons qualified as, 292.
- Accident insurance, 225, 228.
- Accident, liability for, 356.
- Accident,
 - Liability for, 356.
 - Recovery in case of, 205.
- Accretion, alienation by, 378.
- Acquisition by occupancy, 431.
- Act of agent binding upon principal, 350.
- Act of God, meaning of, in transportation, 194.
- Acts exceeding an agent's authority, 351.
- Action against the principal, in surety, 214.
- Actions by agents, 345.
- Actions by unpaid vendor, 158.
- Administrators of estates, 419-422.
- Advances made by agents, 348.
- Agency,
 - By estoppel, 319.
 - By necessity, 320.
 - How constituted, 318.
 - Termination of an, 352.
- Agent,
 - Actions by, 345.
 - And principal, 316-353.
 - Authority, 328.
 - Authority in suretyship, 213.
 - Contract made by, 12.
 - Duties of an, 337.
 - Exceeding his authority, 351.
 - General, 316, 329.
 - General and special, 329.
 - How different from servant, 354.
 - Implied powers of an, 333.
 - Liability of, to principal, 340.
 - Lien of an, 349.
 - Not liable on agency contracts, 343.
 - Ratification of the, 324-328.
 - Remuneration of an, 346.
 - Right of, to indemnity, 347.
 - Special, 316, 329.
 - Sub-agent, and principal, 337.
 - What acts may be done by an, 323.
 - Who may be an, 322.
- Agreement, discharge of contract by, 79.
- Agreement in general, 11.
- Agreement, purposes of, 13.
- Agreement to sell, when a sale, 113.
- Alien Labor Act, 361.
- Alienation, involuntary, of titles, 378.
- Aliens as parties to a contract, 31.
- Allonge, meaning of, 270.
- Alteration of contract, 106-108.
- Amalgamation of companies, 514-519.
- Animals, property in, 431.
- Application of payment of contract, 83.
- Armour, quoted on real property, 372.
- Assignment and discharge of contracts, 77-111.

- Assignment, contract of, how formed, 13.
 - Assignment of contract, definition of, 77.
 - Assignment of insurance contracts, 238.
 - Assignment of liabilities, 78.
 - Associations, business, 435-529.
 - Attorney, power of, 331.
 - Auctioneer,
 - Definition of, 317.
 - Liability of, 341.
 - Authority, agent's, 328-336.
 - Authority of a partner, 464.
- B
- Baggage, carriers of, 204.
 - Bailed property, use and care of, 167.
 - Bailee,
 - Obligations of, 168.
 - Restrictions of, in use of goods, 171.
 - Rights and duties of, 179.
 - Bailor,
 - Obligations of, 168.
 - Rights and duties of, 177.
 - Bailment,
 - Contract of, 167.
 - Extraordinary, 166.
 - For the benefit of the bailee, 170.
 - Termination of, 172.
 - Termination of, for special causes, 182.
 - Bailments, 163-190.
 - Classification of, 165.
 - Definition of, 163.
 - For reward, 166.
 - Gratuitous, 166.
 - How distinguished from sales, 164.
 - Jones on, 169.
 - Bank Act, on rate of interest, 47.
 - Bankruptcy, proceedings in, 108.
 - Bargain and sale deed, 376.
 - Benefit of a third person, contracts for the, 70.
 - Benjamin, on delivery of goods, 155, 158.
 - Benjamin, on sales, 112, 113, 130.
 - Bilateral contract, 14.
 - Bills in a set, 258.
 - Bills of exchange, 255.
 - Alteration of, 265.
 - Defenses of, 309-315.
 - Bills of Exchange Act, 252.
 - Bills payable,
 - Acceptance of, 299.
 - When and how made, 300.
 - Blackburn, Lord,
 - On agent's authority, 330.
 - On correct paper, 284.
 - On insurance, 220.
 - On promoters, 486.
 - On sales, 130.
 - Blank endorsement, 274.
 - Blanks, for bills of exchange, 263.
 - Blanket policies, 232.
 - Bonds and mortgages generally assignable, 79.
 - Bonus, 502.
 - Books of a company, inspection of, 500.
 - Boundary lines, 407.
 - Bowstead,
 - On agencies, 322.
 - On agent's authority, 334.
 - Breach of an express warranty, remedies for, 152.
 - Breach of an implied warranty, remedies for, 153.
 - each of contract, 88-96.
 - Actions by unpaid vendor for, 158.
 - Damages recoverable for, 110.
 - Remedies for, 109.
 - Broker, definition of, 317.
 - Business associations, 435-529.
 - Business, conduct of, through representation, 316-(iv).
 - Business, when it may be a principal, 322.
 - Buyer of goods, remedies of the, 169.
 - By-laws of a corporation, 475.

C

- Cairns, Lord, on promoters, 475.
- Campbell, Lord, on fraud, 64.
- Canada,
 - French law yields to English in, 8.
 - International law in, 3.
 - No bankruptcy law in, 108.
 - Rate of interest in, 47.
 - Sources of law in, 4-9.
 - Subjects of legal jurisdiction in, 5.
- Canadian Bankers' Association, on endorsement, 276.
- Cancellation of a bill of exchange, 313.
- Capacity of party to a contract, 17.
- Capital, partnership, 447.
- Capital required, 487.
- Caring for chattels, 177.
- Carriers, common, 191-209.
 - Liabilities of, 192-200.
- Carriers, connecting, 201.
- Carriers, delivery of goods to, 139.
- Carriers of passengers and baggage, public, 204.
- Carriers, private, 192.
- Cause distinguished from consideration, 39.
- Caveat emptor*, 150.
- Certifying checks, 261.
- Chance goods, the sale of, 118.
- Change of contract, a cause for discharge, 106-108.
- Charter of a company, 473.
- Chattels, real, 423.
- Checks, 259.
 - Certifying, 261.
 - Forgery of, 266.
- Choses in action, 423, 488.
- Choses in possession, 423.
- Circumstances of a contract, 74.
- Claims against a company, 527.
- Classification of contracts, 14.
- Clerks, claims of, 529.
- Club, how different from partnership, 438.
- Co-agents, powers of, 324.
- Co-insurance, 230.
- Codicil to a will, 410.
- C. O. D. sales, 132.
- Coke, Sir Edward,
 - On land and water, 381.
 - On reversion of property, 374.
 - On sales, 131.
 - On tenements, 381.
- Combinations, unlawful, 49.
- Commission, agent's, 346.
- Commission merchant, 316-317.
- Commission to underwriters, 494.
- Common carriers, 191-209.
 - Definition of, 191.
 - Liabilities of, 192-200.
- Common law, as source of legal procedure, 7.
- Company law, 470-519.
- Companies,
 - Holding, 519.
 - Winding-up of, 520-529.
 - See Corporations.
- Companies Act, the, 471.
- Compensation acts, workmen's, 359.
- Compensation of terms of a contract, 109.
- Competency of parties to a contract, 17-33.
- Competition, unlawful restraint of, 50.
- Composition with creditors, 82.
- Concealment by insurer, 241.
- Conditional acceptance, 291.
- Conditional endorsements, 275.
- Conditional promises to a contract, 91.
- Conditional sale, 129.
- Conduct of business through representation, 316-(iv).
- Confederation Act, the, 4-5.
- Confusion of debtor and creditor, 109.
- Consent to contracts, 60.
- Consideration essential to a contract, 38.
- Consideration, failure of, 310.
- Consideration received for notes, 285.

- Constitution of Canada, the, a
 source of law, 4-5.
 Construction of contracts, 73-74.
 Contract,
 Acceptor's, 289.
 Breach of, 88-96.
 Drawer's, 293.
 Endorser's, 294.
 Essentials of a, 34-43.
 How distinguished from a memorandum, 124.
 How distinguished from sale, 113.
 Maker's, 288.
 Original, distinguished from suretyship, 210-211.
 Performance of the, in a sale, 137-162.
 Requisites of a, 17.
 Special forms of, 112-136.
 Terms to a true, 11.
 Two essentials of a, 34.
 Contract of hire and service, 355.
 Contract of parties, 288-298.
 Contract of sale, 112-136, 393.
 Contract of suretyship, formation of the, 211.
 When void, 212.
 Contracts,
 Against liability for negligence, 55.
 Agency, 343.
 Assignment and discharge of, 77-111.
 By directors, 510.
 Definition of, 10.
 Effect of illegality upon, 56.
 Formation of, 17-68.
 For work, 180-181.
 For work and labor, 125.
 In fraud of third persons, 54.
 In general, 10-111.
 In restraint of marriage, 53.
 In restraint of trade, 48.
 Joint and several, 76.
 Made for the benefit of a third person, 70.
 Made on Sunday, 52.
 Modes of discharging, 79.
 Nature and classification of, 10-16.
 Of record, 15.
 Operation and interpretation of, 69-76.
 Promoters, 485.
 Reality of consent to, 60.
 Under seal, 15.
 Usurious, 47.
 Void and voidable, 44-68.
 Wagering, 46.
 Contractor, independent, 355.
 Payment of a, 100.
 Contributories, how settled, 525.
 Conveyance of property, 394.
 Co-partners, good faith toward, 455.
 Copyrights, 428.
 Corporation,
 Amalgamation, 514-519.
 As party to a contract, 32.
 Auditors, 480.
 By-laws of, 475.
 Charter, 473.
 Commencing business, 487.
 Compared with partnership, 471.
 Directors, 478, 508-514.
 Dividends, 501.
 Forms of stock, 490.
 Holding companies, 519.
 How different from partnership, 444.
 Liabilities of shareholders, 504.
 Meetings, 476, 495.
 Minority shareholders, 503.
 Nature of, 470.
 New stock, 503.
 Officers, powers and duties, 479, 505-508.
 Powers, 482.
 Proceedings, 509.
 Prospectus of, 486.
 Provincial powers, 472.
 Right to inspect books, 500.
 Shareholders, 477.
 Stock certificates, 488.
 Subscribers to memorandum, 493.
 Transaction of business, 499.

Corporation (*Continued*)

Ultra vires acts, 483.

Votes of stockholders, 407-498.

Coutume de Paris, in use in Quebec, 9.

Creditors,

Composition with, 82.

Firm, 453.

Hire-purchase, 528.

Refusal of payment by, 84.

Secured, 528.

When confused with debtors, 109.

Criminals, the protection of, 59.

D

Damages,

For non-acceptance, 297.

Liquidated, 75.

Measure of, through an agent, 342.

Danger, as an element against contracts, 103.

Days of grace, 252.

Deaf and dumb persons, as parties to a contract, 27.

Debtor,

An insolvent, 108.

When confused with creditor, 109.

Debts, liabilities of partners for, 453.

Deceased party to a contract, 79.

Deceased person, fulfilment of contract of, 102.

Deed,

Definition of, 375-376.

Conveyance of property by, 394.

Default, notice of, in surety, 214.

Defect, notice of, in time paper, 283.

Defences, governing bills of exchange, 309-315.

Personal, 309.

Real, 309, 312.

Delivery of goods, 137.

Place of, 138.

Time of, 141.

Time and place of, 199.

Various ways to make, 137-162.

Delivery of notes, 278.

Delivery to the carrier, 139.

Destruction of goods, its effect upon title, 127.

Destruction of the subject of a contract, 98.

Directors, powers and duties, 508-514.

Disaffirmance,

By a drunkard, 30.

By an infant, 21.

By an insane person, 27.

Of infant's contracts, the agent for, 24.

Discharge of contract, 77-111.

By breach, 88.

By compensation, 109.

By confusion, 109.

By operation of law, 105.

Discharge of suretyship, other means of, 218.

Dishonor, notice of, 305.

In time paper, 283.

Dishonor, presentment and notice of, 299-308.

Dissolution of partnership, 467.

Dividends of a company, 501.

Dominion Companies' Act, on contracts, 33.

Dominion Railway Act, the, 56.

Dominion statutes, as sources of law, 6.

Dower rights to estates, 366.

Drawee of a bill of exchange, the, 263.

Drawer's contract, 293.

Drunken persons, responsibility of, 29-31.

Drunkenness, its effect upon a contract, 26.

Due course, holder in, 280.

Duration of estates in land, 364.

Duress—violence and fear in making contracts, 66.

E

Easement, definition of, 382.

Easement or servitude, 391-392.

- Eldon, Lord, on contracts, 66.
 Ellenborough, Lord, on endorsement, 272.
 Emancipation of minors from contracts, 18, 20.
 Endorser,
 Contract of, 294.
 Liability of, 295.
 Warranties of, 294.
 Endorsement,
 Conditional, 275.
 In blank, 274.
 Irregular, 276.
 Kinds of, 273.
 Not used in transfer, 277.
 Of paper, 270.
 Qualified, 274.
 Requisites of, 271.
 Restrictive, 275.
 Special, 274.
 Waiving conditions, 276.
 Without recourse, 274.
 Endowment insurance, definition of, 225.
 Epidemics, the fear of, a cause for breach of contract, 104.
 Erasures on notes, 284.
 Escheat, alienation by, 378.
 Escrow, meaning of, 280.
 Estate,
 At sufferance, 368.
 At will, 367.
 By entirety, 370.
 Executory, 375.
 For years, 367.
 From year to year, 367.
 In common, 370.
 In coparcenary, 370.
 In expectancy, 374.
 In joint tenancy, 369.
 In lands, 364.
 In possession, 374.
 In remainder, 374.
 Estates,
 By dower, 366.
 Classified, 372-375.
 Executors and administrators of, 419-422.
 Legal and equitable, 379.
 Less than freehold, 367.
 Of freehold, 365.
 Severalty and joint, 369.
 Estoppel, alienation by, 379.
 Evidence in contracts, 72.
 Exchange, bills of, 255.
 Exceptions to rule of contract, 42.
 Executors of estates, 419-422.
 Executory contract, 14.
 Expenses of delivery of goods, 139.
 Express warranty, 147, 244.
 Eyre, Justice, on partnership, 465.
- F
- Face of instrument, regularity of, 281.
 Failure of performance, a breach of contract, 89.
 Fault of either party to complete contract, 105.
 Fear, in the making of contracts, 66.
 Fellow-servant and vice-principal, 337.
 Fiduciary obligations of an agent, 338.
 Fire insurance,
 Insurable interest in, 238.
 Liability in, 340.
 Premiums on, 222.
 Fire, losses by, in bailment, 180.
 Fixtures, on property, 387-390.
 F. O. B., definition of, 141.
 Forgery,
 Of a check, 266.
 Recovery for, 314.
 What constitutes, 313.
 Foreign bills of exchange, 258.
 Forfeiture clause in building, 105.
 Formation of contracts, 17-68.
 Forms of contract, special, 112-136.
 Franchise, definition of, 382.
 Fraud and threats of violence, 309.
 Fraud in contracts, 62.
 Fraud in insurance contracts, 223.

Fraud of third persons, in contracts,
54.

Frauds, statutes of, 41.

Freehold estates, 365.

Freight classifications, how gov-
erned, 193.

Fruits, natural and civil, 386.

Fulfilment of contract, when impos-
sible, 97.

Future goods, the sale of, 116.

G

Gambling as opposed to stock deal-
ings, 46.

General property, 112.

Gerstenberg and Hughes, on en-
dorsement, 296.

Gifts, various kinds of, 433-434.

Good faith in insurance contracts,
223.

Good faith of party to contract, 25.

Good faith toward co-partners, 455.

Goodwill of a business, the, 426.

Goods,

Delivery of, 137, 199.

Destruction of, its effect upon
title, 127.

In pawn, redemption of, 175.

Inspection of, 151.

In transit, 155.

Quality specified in contract, 145.

Quantity of, specified in contract,
142.

Symbolic or constructive delivery
of, 146.

To be manufactured, 133.

Grace, days of, 252.

Greenhood, on Public Policy, 51.

Guaranty, continuing, 219.

Guaranty, how distinguished from
suretyship, 210.

Guest, definition of a, 186-187.

H

Halsbury, Lord, on contracts, 46.

Hereditaments, definition of, 381-
382.

Hire and service, contract of, 355.

Hiring property for compensation,
177.

Holder in due course, 280.

Rights of a, 286.

Holding out, in partnership, 465.

Hotel proprietors, responsibilities of,
185-190.

I

Ignorance of law no excuse, 1.

Illegality, effect of, on contracts, 56.

Illegality of consideration, 311.

Illness as a cause of failure on con-
tract, 103.

Implied warranty, 148, 244.

Implied warranty of quality, 150.

Implied warranty of title, 149.

Implied matters in a contract, 75.

Implied powers of agents, 333.

Impossibility of fulfilling contract,
97, 101.

Imputation of payment of contract,
83.

Incapacity for personal services, 101.

Indemnity,

Agent's, 347.

Definition of, 220.

Infant, liability of an, for neces-
saries, 18.

Influence, undue, in contract, 64.

Inheritance,

Estates of, 365.

Laws governing, 415-419.

Inland bills of exchange, 258.

Innkeeper,

Definition of, 186.

Responsibility of, 185, 188-190.

Insane persons, as parties to a con-
tract, 25-29.

Insanity, its effect on insurance, 226.

Insolvency,
 How determined, 521.
 Proceedings in the case of, 108.
 Inspection of goods, 151.
 Instalments, delivery of goods in,
 143.
 Instruments, negotiable, 250-266.
 Insurable interest, 234-238.
 Insurance, 220-249.
 Accident, 225, 228.
 Contract of, 47.
 Contracts, assignment of, 238.
 Definition of, 220.
 Endowment, 225.
 Fire, 222.
 Lavery on, 241.
 Life, 224.
 Marine, 227, 231.
 Marine, special rules, 246-247.
 Notice and proof of loss, 249.
 Policy, construction of, 240.
 Policies generally assignable, 79.
 Term, 225.
 Tontine, 226.
 Waivers in, 245.
 Intemperance, its effect on insurance,
 226.
 Intention of parties to a contract,
 74.
 Intention to renounce a contract not
 sufficient, 94.
 Interest, insurable, 235-238.
 Interest, rate of, in Canada, 47.
 International law, definition of, 3.
 Interpretation of contracts, 69-76.
 Intestate succession, 415.
Intra vires, 328.
 Involuntary alienation of titles, 378.
 Irregular endorsements, 276.
 Islands, ownership of, 402.

J

Joint and several contracts, 76.
 Joint estates, 369.
 Joint sureties, 215.
 Joint tariff, what is meant by, 203.

K

Kent, on contracts, 57.

L

Labor Act, Alien, 361.
 Land,
 Definition of, 380.
 Limits changed by water, 384.
 Property in, 363-392.
 Property in, Quebec law, 399-409.
 Lands, tenements and hereditaments,
 380.
 Landlord and tenant, 396.
 Lavery, on insurance, 241.
 Law,
 Common, definition of, 7.
 Definition of, 2.
 Commercial, its importance to
 business men, 1.
 Sources of, in Canada, 4-9.
 Various kinds of, 2-4.
 Lawyer and client, contracts be-
 tween, 59.
 Leasing of property for immoral
 purposes, 58.
 Lefroy, on incorporation, 472.
 Legal and equitable estates, 379.
 Legal impossibility of fulfilling con-
 tract, 101.
 Legal obligations of minors, 20.
 Legal or implied warranty, 148.
 Legality of object of contract, 44.
 Letters patent, 470, 471, 472, 474.
 Liability,
 Assignment of, 78.
 Of agent to principal, 340.
 Of directors, 512.
 Of endorsers, 295.
 Of master for servant, 358.
 Of shareholders, 504.
 Of third parties, 69.
 Of various parties to a note, 296.
 To damages for non-acceptance,
 297.
 Upon refusing to work under dan-
 gerous conditions, 103.

Lien of an agent, 349.
 Lien of the seller of goods, 154.
 Liens, on property, 396.
 Life insurance,
 Definition of, 224.
 Insurable interest, 235.
 Not a contract of indemnity, 220.
 Limitations in real property, 373.
 Limited partnership, 468.
 Limiting liability of carriers, 197.
 Lindley, Lord, on partnership, 443,
 446, 460.
 Liquidated damages, 75.
 Liquidator, duties and powers of a,
 524-525.
 Live stock, the shipping of, 196.
 Lord Tenterden's Act, 118 *et seq.*
 Loss, insurance, notice and proof of,
 249.
 Lost property, 429.
 Lunatic, as agent, 321.

M

Maclaren, Justice,
 On endorsement, 272.
 On negotiable instruments, 250.
 On time of paper, 283.
 Majority, legal age of, 17-18.
 Maker's contract, 288.
 Mandate,
 Execution of a, 335.
 Powers of the, 350.
 Marine insurance, 227.
 Insurable interest in, 238.
 Partial, 231.
 Special rules, 246-247.
 Marriage, contracts in restraint of,
 53.
 Marriage of a lunatic void, 28.
 Married women, as parties to a con-
 tract, 31.
 Marshall, C. J., on corporations, 470.
 Master and servant, 354-362.
 Master liable for servant's acts, 358.
 Maturity of paper, 282.

Meaning of contracts, how con-
 strued, 73-74.
 Meetings of corporations, 495.
 Memorandum, difference between it
 and a contract, 124.
 Mercantile law, increasing impor-
 tance of, 1.
 Minors, as parties to a contract, 17-
 25.
 Misrepresentation and fraud in con-
 tracts, 62.
 Misrepresentation by insurer, 241.
 Misrepresentation in insurance con-
 tracts, 224.
 Mistake or error in contracts, 61.
 Mortgages,
 Generally assignable, 79.
 On real property, 394.
 Real estate, 371.
 Municipal law, definition of, 2.

N

Name, use of, in business, 426.
 Nature and classification of con-
 tracts, 10-16.
 Nature of corporations, 470.
 Negligence, in making paper, 283.
 Negligence, liability for, 55.
 Negotiable contracts, 79, 81.
 Negotiable instruments, 250-266.
 To whom payable, 262.
 Negotiability of paper, 251.
 Negotiation of paper, 269, 285.
 Negotiation, transfer and, 267-287.
 Non-acceptance, damages for, 297.
 Non-assignable contracts, 79.
 Note of hand, on evidence of sale,
 121.
 Notes, promissory, 253.
 Notice of dishonor of a note, 305.
 Novation,
 Definition of, 85.
 How caused, 13.

O

- Obligations,
 - Fiduciary, of an agent, 338.
 - How derived, 10.
 - Implied in a contract, 75.
 - Of principal debtor toward a surety, 216.
 - Of surety toward creditor, 214.
- Occupancy, acquisition by, 431.
- Offer and acceptance,
 - By mail or telegraph, 36.
 - The two essentials of a contract, 34.
- Offer to the public, 37.
- Officers in a company, 505-508.
- Open policies, 232.
- Operation of contracts, 69-76.
- Operation of law, for the discharge of contract, 106.
- Oral contract, 15.
 - Where sufficient, 42.
- Oral evidence in contracts, 72.
- Oral evidence of part payment, 123.
- Owners, adjoining, rights of, 390.
- Ownership of property, 401.

P

- Packages, the packing of, 195.
- Partial acceptance, 291.
- Parties, contract of, 288-298.
- Parties to a contract, 17-33.
- Parties to an assignment of contract, 77.
- Parties to a partnership, 436.
- Parties to a sale, 114.
- Partners,
 - Agency of, 463.
 - Authority of, in suretyship, 213.
 - Contributions of, 459.
 - Duties and obligations of, 455.
 - General, 468.
 - Implied authority of, 464.
 - Interest and rights of, in firm property, 451-453.
 - Lien of, 461.
 - Must receive no private benefit, 456.
 - Restrictions of, 456-458.
 - Rights of a majority, 458.
 - Special, 468.
- Partnership, 435-469.
 - Accounts, 459.
 - Agreement of laws concerning, 441.
 - An agreement, 436.
 - As a "person," 445.
 - Business must be lawful, 442.
 - Capital, 447.
 - Carried on for profit only, 438.
 - Compared with corporation, 471.
 - Compensation in, 460.
 - Creditors of a, 453.
 - Defined in England, 440.
 - Dissolution of, 467.
 - Good faith in, 455.
 - How formed, 469.
 - Holding out in, 465.
 - Indemnity in, 460.
 - Interest on money advanced in, 461.
 - Limitations, 437.
 - Limited, 468.
 - Must not be incorporated, 444.
 - Nature of, 435, 468.
 - Notice of withdrawal, 466.
 - Obligations, 455.
 - Property, 448.
 - Property not subject to dower, 366.
 - Real estate, 450.
 - Restrictions, 456-458.
- Part payment, an evidence of sale, 121.
- Part settlement of contract, 82.
- Party walls, 390, 406.
- Pass, conditions governing traveling on a, 205.
- Passenger regulations, 207.
- Passengers,
 - Carriers of, 204.
 - Safeguarding of, in sleeping cars, 208.

- Patents,
 - Assignment of, 428.
 - Duration of, 428.
 - Laws governing, 427.
 - Sale of, 150.
- Pawn, creation of a, 173.
- Pawnbroker, definition of a, 173.
- Payee, the, of negotiable instruments, 262.
- Payment,
 - Discharge of contract by, 80.
 - Distributed, on contracts, 83.
 - For honor, 304.
 - Of a bill of exchange, 312.
 - Presentment for, 301-304.
- Performance, discharge of contract by, 80.
- Performance of contract impossible through fault, 105.
- Personal baggage, 207.
- Personal contract in insurance, 224.
- Personal contracts, 343.
- Personal endorsement, 272.
- Personal insurance, 228.
- Personal property, 423-434.
 - Title to, 431-433.
- Personal services in a contract, 92.
- Personal services, incapacity for, 101.
- Petitioners for winding-up companies, 523.
- Place of delivery, 138.
- Place of delivery of goods, 199.
- Place of payment of contract, 81.
- Pledge, construction and operation of a, 174.
- Pledge or pawn,
 - Creation of a, 173.
 - Termination of a, 176.
- Policies,
 - Blanket and specific, 232.
 - Floating, 232.
 - Insurance, 240.
 - Open, 232.
 - Valued, 232.
- Pollock, Sir Frederick,
 - Defines common law, 7.
- On contracts, 21, 37, 38, 54, 85, 100, 101.
- Possession retained by seller, 133.
- Pothier, on partnership, 436.
- Power of attorney, 331.
- Powers of the mandate, 350.
- Preliminary topics of law, 1-9.
- Prescription, alienation by, 379.
- Presentment and notice of dishonor, 299-308.
- Presentment for payment, 301-304.
- Primary debtors, 312.
- Principal,
 - Agent and sub-agent, 337.
 - And agent, 316-353.
 - Bound by agent's acts, 350.
 - In surety, action against the, 214.
 - Liability of agent to, 310.
 - Who may be a, 321.
- Principal debtor toward a surety, obligations of, 216.
- Private carriers, 192.
- Private law, definition of, 4.
- Profits, 502.
 - Essential to a partnership, 439.
- Promises in a contract, 90-96.
- Promissory notes, 253.
 - Form of, 274.
- Promoters and their contracts, 485.
- Proof of contract, 42.
- Property, 363-434.
 - Absolute, 112.
 - Bailed, use and care of, 167.
 - Corporeal, 364.
 - General, 112.
 - Immovable, 399.
 - In animals, 431.
 - Incorporeal, 364.
 - In land, 363-392.
 - In land, Quebec law, 399-409.
 - Lost, 429.
 - Movable, 399.
 - Partnership, 448.
 - Personal, 363, 423-434.
 - Personal, title to, 431-433.
 - Public and private, 400.
 - Real, 363.

Property (*Continued*)

- Title to, when passed, 126.
- Transfer of, 393-398.
- Transfer of, by will, 410-422.
- Protest, how prevented, 304.
- Protest of payment, 308.
- Prospectus, nature of a, 486.
- Provincial constitutions as sources of law, 6.
- Provincial statutes as sources of law, 6.
- Proxies, 498.
- Public carriers of passengers, 204.
- Public law, definition of, 4.
- Public policy,
 - As a factor in contracts, 46.
 - Greenhood on, 51.

Q

- Qualified acceptance, 291.
- Qualified endorsements, 274.
- Quality, implied warranty of, 150.
- Quality of goods specified must be delivered, 145.
- Quantity of goods specified, 142.
- Quasi-contracts, 121.
- Quebec,
 - Code on insanity, 29.
 - Difference in law of, 23.
 - Difference of land laws in, 363.
 - Law, in property in land, 399-409.
- Quebec Insurance Act, 223.
- Quebec Workmen's Compensation Act, 360.
- Quit-claim deed, 376.
- Quorums at meetings, 497.

R

- Railway Act, provisions of the, 193, 390.
- Railway regulations for passengers, 207.
- Ratification, express or implied, 328.
- Ratification of minor's contract, 24.

- Ratification of an agent's acts, 324-328.
- Real defences, 312.
- Real estate,
 - Mortgages, 371.
 - Ownership of, 363-392.
 - Partnership, 450.
 - Transfer of ownership, 393-398.
- Real property,
 - Mortgages on, 394.
 - Titles to, 375.
- Real rights, registration of, 408.
- Real servitude, 405.
- Reality of consent to contracts, 60.
- Redemption of goods in pawn, 175.
- Refusal of money by a creditor, 84.
- Refusal to accept, 293.
- Registration of real rights, 408.
- Reinsurance, 229.
- Release of a bill of exchange, 311.
- Remedies for breach of an express warranty, 152.
- Remedies for breach of an implied warranty, 153.
- Remedies for breach of contract, 109.
- Remedies of the buyer for non-delivery, 160.
- Remuneration of an agent, 346.
- Rent, definition of, 382.
- Renunciation, breach of contract by, 94.
- Renunciation of a bill of exchange, 311.
- Repairing chattels, 177.
- Repairs, by tenant, 404.
- Repudiation of contract by insane, 28.
- Requisites of a contract, 17.
- Rescinding the sale of goods, 157.
- Restrictive endorsements, 275.
- Return of consideration by the insane, 28.
- Revocation of an offer, 36.
- Revocation of authority, 353.
- Revocation of wills, 413.
- Right of resale, vendor's, 157.

Right of way, 382, 408.
 Rights and duties of innkeeper and guest, 188-190.
 Rights and duties of the bailee, 179.
 Rights and duties of the bailor, 177.
 Rights and liabilities of third parties, 69.
 Rights of adjoining owners, 390.
 Rights of a holder in due course, 286.
 Rights of an unpaid seller, 153.
 Risks, insurance, 222.
 Rule of contract, exceptions to, 42.

S

Sage, Russell, in suit for damages, 11.
 Sale,
 Conditional, 129.
 Contract of, 393.
 Definition of a, 112.
 Four things essential to a, 112.
 How distinguished from bailment, 164.
 How distinguished from contract, 113.
 Parties to a, 114.
 Subject matter of a, 115.
 Sales,
 By sample, 134.
 C. O. D., 132.
 Performance of the contract, 137-162.
 The contract, 112-136.
 Sale of Goods Act, 119 *et seq.*
 Sample, goods bought by, 151.
 Satisfaction of the statute of sale, 121.
 Secondary debtors, 312.
 Secret arrangements of agents, 339.
 Seller, rights of an unpaid, 153.
 Seller, the, when he retains possession, 133.
 Servant,
 Definition of, 354.
 How different from agent, 354.

Master liable for acts of, 358.
 Servant and master, 354-362.
 Servitude, real, 405.
 Severable contract, what constitutes a, 144.
 Severalty estates, 369.
 Shareholders,
 Defences of, 526.
 Liabilities of, 504.
 Minority, 503.
 Minors as, 22.
 Right of, to vote, 497-498.
 Shares of stock, 488.
 Sheriff's sale of goods, 150.
 Shippers, duties of, 194.
 Sickness, and its bearing upon contracts, 104.
 Silence a means of deceit, in contract, 64.
 Simple contract, 15.
 Sleeping cars, rules regarding, 208.
 Special endorsement, 274.
 Statutes of the Dominion, 6.
 Statute of sale, satisfaction of the, 121.
 Statute of Frauds, 41.
 Ruling on sales, 118.
 Ruling on suretyship, 212.
 Stephen, Sir James, on bailments, 163.
 Stock,
 Common, 490.
 Debenture, 492.
 Issues of, 488-490.
 New, 503.
 Paid-up, 492.
 Preferred, 490.
 Underwriting, 493.
 Unissued, 492.
 Stock-buying as opposed to gambling, 46.
 Stolen goods, title to, 114.
 Stoppage in transit, 155, 203.
 Story, on partnerships, 441.
 Sub-agent, agent, and principal, 337.
 Sub-agent, authority of a, 335.
 Subject matter of a sale, 115.

Subrogation, in insurance, 233.
 Subsidiary promises in a contract, 93.
 Succession, intestate, 415.
 Sufficient consideration to contracts, 40.
 Suicide, its effect on insurance, 226.
 Sunday, contracts made on, 52.
 Supreme Court of the United States, decisions of, 19, 20, 38, 50, 52, 65, 83, 84, 89, 136.
 Sureties, joint, 215.
 Surety, death of the, 218.
 Surety toward creditor, obligations of, 214.
 Suretyship, 210-219.
 Contract, termination of, 216.
 Nature of the contract, 210.
 Symbolic or constructive delivery of goods, 146.

T

Tariff, joint, what is meant by, 203.
 Technical law, two classes of, 2.
 Tenant at sufferance, 368.
 Tenant, landlord and, 396.
 Tender of payment on a contract, 84.
 Tenement, definition of, 381.
 Term insurance, definition of, 225.
 Termination of suretyship contract, 216.
 Termination of the carrier's liability, 198.
 Testamentary succession, 415-419.
 Theft by conversion, 430.
 Third parties to contracts, 54, 69, 70.
 Time and place of payment or performance, 81.
 Time of delivery, 141.
 Time of delivery of goods, the, 199.
 Timetables, rules regarding, 209.
 Title,
 By accession, 432.
 By confusion, 433.
 By natural increase, 431-432.
 Implied warranty of, 149.

In goods sold by sample, 134.
 To partnership property, 449.
 To personal property, 431-433.
 To property, when passed, 126.
 To real property, 375.
 Tontine insurance, 226.
 Topics, preliminary, 1-9.
 Torrens system of land transfer, 394, 395.
 Tort, and its part in a contract, 13.
 Trade-marks and trade-names, 423-426.
 Trade, restraint of, 48.
 Traffic, suspension of, 195.
 Transfer,
 And negotiation, 267-287.
 By assignment, 267.
 By endorsement, 270.
 By negotiation, 269.
 By operation of law, 268.
 Methods of, 267.
 Of property, 113, 393-398.
 Of property by will, 410-422.
 Without endorsement, 277.
 Transporting chattels, 177.
 Treasure trove, 430.
 Treaties, as sources of law, 6.
 Trees, border, 387.

U

Ultra vires, 328, 483.
 Underwriting stock, 493.
 Undue influence in contract, 64.
 Unilateral contract, 14.
 Unlawful combinations, 49.
 Use and habitation, 405.
 Usufruct, 402.
 Usurious contracts, 47.

V

Valid contract, 14.
 Valued policies, 232.
 Value received, on instruments, 285.
 Vendor's right of resale, 157.

Vice-principal and fellow-servant, 357.
 Violence, in the making of contracts, 66.
 Threats of, 309.
 Void and voidable contracts, 14, 44-68.
 Voluntary and personal contract in insurance, 224.
 Votes of directors, 510.

W

Wagering contracts, 46.
 Waiver in insurance policy, 245.
 Waiving of notice of dishonor, 307.
 Waiving of presentment for payment, 303.
 Warehouseman,
 Definition of, 182.
 Liability as, 200.
 Responsibility of the, 184.
 Warehouse receipt, definition of, 183-184.
 Warranties,
 Definition of, 146, 243-244.
 Of endorser, 294.
 Warranty deed, 376.

Water,
 Its effect upon ownership of land, 384.
 Rights, 383.
 Surface, 385.
 When defined as land, 381.
 Wharfinger, definition of a, 182.
 Will,
 Conveyance of property by, 394.
 Definition of, 410.
 Execution of, 412.
 Lost, how proved, 108.
 Made by whom, 411.
 Provisions of, 379.
 Revocation of, 413.
 Transfer of property by, 410-422.
 Winding-up of companies, 520-529.
 Woman, married,
 As agent, 321.
 As party to a contract, 31.
 Work and labor, contracts for, 125.
 Workmen's compensation acts, 359.
 Writing as an essential to contract, 42.
 Written contract, 15.
 Wrong, civil, and its avoidance of contract, 45.