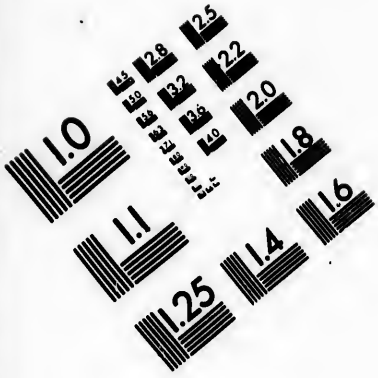

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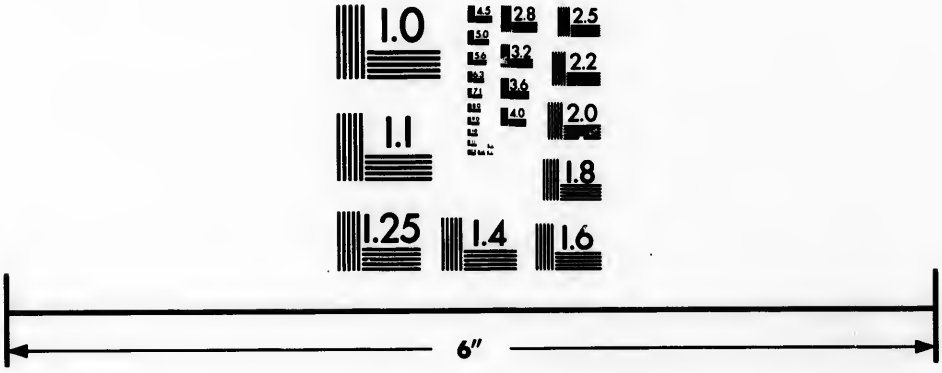

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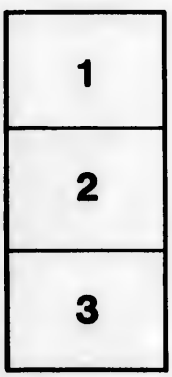

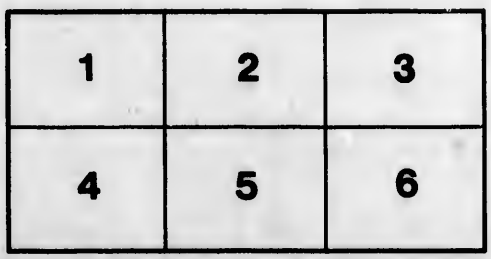

THE MERCANTILE AGENCY'S

LEGAL GUIDE

FOR THE

DOMINION OF CANADA.

COMPILED BY

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JOHN POPHAM, MONTREAL.
PALMER & McLEOD, CHARLOTTETOWN, P. E. I.

Published by J. W. ROOKLIDGE.

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1868.

PREFACE.

In the course of a very extensive business in the collection of past due debts, extending over the last ten years, the necessity has been constantly apparent to us for a work of the character herewith presented. In the daily experience of every Merchant and Manufacturer, legal questions arise, which, though of hardly sufficient importance to justify the consultation with a professional adviser, nevertheless possess interest enough to induce the constant need of some authority in which satisfactory answers can be found. The volume herewith presented is designed to meet that end. It has been the object of the compilers, while giving the fullest information in detail, on the vital points of Commercial Law, to avoid technicalities, and otherwise it is believed that the work, as presented, will not only be found useful, but interesting.

Mr. J. W. Rooklidge, for many years connected with the Collection Department of the Mercantile Agency, has designed and published the work, under our sanction. In the compilation, he was indebted to the following legal gentlemen for their respective portions of the work, who have certainly acquitted themselves in a manner highly creditable to their professional and literary skill: C. B. Price, LL. B., of Britton & Price, Kingston; John Popham, Montreal; and Messrs. Palmer & McLeod, of Charlottetown, Prince Edward Island.

If the work meets with the encouragement anticipated, it is the intention of the Publisher to issue, periodically, a new edition, containing all the amendments to the Laws which may be, from time to time, made, and such other additions as may be deemed appropriate.

DUN, WIMAN & CO.

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Some few omissions occur in the list, principally in Quebec and the Provinces, which, in the second edition, we hope to have complete.

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CHAPTER I.

OF MERCANTILE PERSONS.

SECTION I.

TRADERS.

In Ontario—formerly Upper Canada—trade may be carried on by individuals, partnerships, or corporate companies, and their respective agents.

The term, *trader*, by the bankrupt laws of England, derives a definite and peculiar meaning. In Ontario, the Insolvent Act, applying to "any person unable to meet his engagements," it has no such prescribed and peculiar sense, but applies to every person who does an act upon which any of the rules of Mercantile law operate. Thus, if a man buy a horse, or if he draw a bill of exchange, he is for the purpose of that purchase, and that bill, a merchant with as full rights and liabilities thereto, as if he were every day engaged in mercantile transactions. Instead of being in any way restricted, he may be free from the penalties imposed by the "Act to prevent the Profanation of the Lord's Day," which enacts that it shall not be lawful for any Merchant, Tradesman, Artificer, Mechanic, Workman, Laborer, or other person whatsoever, on the Lord's Day, to sell or publicly show forth or expose, or offer for sale, or to purchase any goods, chattels or other personal property, or any real estate whatsoever, or to do or exercise any worldly labor, business or work *of his ordinary calling*, and that any person convicted before a Justice of the Peace, of any act so declared to be unlawful,

shall for every such offence be fined in a sum not exceeding forty dollars, nor less than one dollar, together with costs. The same act further declares that all sales and purchases, and all contracts and agreements for sale or purchase, of any real or personal property whatsoever, made by any person or persons on the Lord's Day, shall be utterly null and void. Certain persons being unable to bind themselves by any description of mercantile contract, are incapable of engaging in commercial pursuits, unless for cash, or at a great risk to their creditors.

1. All persons below the age of twenty one years, in law, called infants, are allowed only a qualified power of contracting; *i. e.* their contracts will bind them, provided they are for actual necessaries, suitable to their rank and position, and for their benefit; but if they are unnecessary or entered into in the exercise of a trade, they may be receded from and vacated by them. Neither can any action be maintained to charge any person upon any promise made after full age to pay a debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification be by some writing, signed by the party sought to be charged. It must be remembered, however, that infancy is a personal privilege of which no one can, as a general rule, take advantage but the infant himself, and therefore though the contract of the infant be voidable, yet it shall bind the person of full age. An infant may act as an agent, with as full power to bind his principal as if he were of age.

2. *Married women*, having for almost all purposes their legal existence merged in that of their husbands, are incapable of contracting or acting as traders. Neither can a married woman, after the death of her husband, ratify a contract entered into by her during her coverture, so as to make herself liable. A married woman may, however, in some cases, be made liable in equity upon contracts entered

into during coverture, to the extent of her separate estate. She is further liable at law upon any separate contract made or debt incurred by her before marriage, to the extent of her separate property real or personal, not settled by an anti-nuptial contract, provided her marriage has taken place since the fourth day of May, A.D. 1859.

A married woman having a decree for alimony against her husband, or if living apart from her husband, on account of cruelty or other cause, which the law justifies and renders him liable for her support, or if her husband is a lunatic, or is undergoing imprisonment for any criminal offence, or if from habitual drunkenness, profligacy or other cause, he neglects to provide for her support and that of his family, or if her husband has never been in the province of Upper Canada, or if he has deserted and abandoned her, may apply and obtain an order of protection, from a Recorder, Police Magistrate or Judge, as the case may be, entitling her to have and enjoy all her earnings and those of her minor children. Such order of protection seems to give her no power of making herself liable in law upon her contracts; though any property acquired thereunder might be held in equity liable for her debts created in its acquirement.

SECTION II.

OF PARTNERS.

The usual and best definition of a partnership is that it is the result of a contract whereby two or more persons agree to combine property or labor for the purpose of a common undertaking and the acquisition of a *common profit*. This agreement to share the profits is the type of a partnership contract. It is the test whereby to ascertain whether a contract be really one of partnership or not. One partner may stipulate with another to be held free from *loss*, and such agreement though good as between themselves, will not

in the least diminish his liabilities to strangers. Neither length of time nor extent of the undertaking form any part of the essence of a partnership. It comprehends equally the transactions of an hour, and those venerable guides which have existed for centuries. The simple purchase of a horse may come as fully within its meaning as the incomparable transactions of the East India Company.

How Formed.—A partnership though generally created by a deed of partnership, requires no such solemn instrument to establish it. It may be created by a simple agreement to share *profit and loss;* or, an agreement to share profits, or by the acts of the parties in dealings with third persons. Whether a partnership actually exists or not between any particular persons, is a mixed question of law and fact, and not a mere question of fact; it is a question to be decided by a jury, who are bound to apply to the facts established to their satisfaction, those legal principals which the court may lay down for their guidance. Unless there be something in the very nature and constitution of the partnership, which renders it quite impossible that it could have been intended that the consent of the whole body should be obtained upon any change, no new member can be admitted without the consent of every partner. If A. and B. join in the purchase of a parcel of goods, for the purpose of dividing between them the goods themselves, they are, after the purchase and before the division, joint-owners. But if instead of dividing, they sell them again, and divide the gain arising from the re-sale, they become in the legal sense of the word, as to that transaction, *partners.*

How Dissolved.—By lapse of time, by mutual consent, by the will of any partner, by the impossibility of going on, by misconduct and destruction of mutual confidence, by bankruptcy or death of one of the partners, or by marriage if a female. A partnership is dissolved by lapse of time, when at its formation it is expressly agreed that it shall only exist

for a stated period. Its duration may also depend upon an implied contract; for instance, partners may purchase leasehold interest, of such a description as to raise a fair presumption that they only intended the partnership to continue during the currency of the lease.

By mutual consent, is when all the partners agree to close their partnership relation, and it then only continues to exist so far as it may be necessary to complete any transactions previously undertaken, and to settle the affairs of the firm.

Any member of a partnership, the duration of which is indefinite, may upon his own will and motion dissolve it at any moment he pleases, and it will then only continue so far as may be actually necessary for winding up its then pending affairs. But, at the same time, equity will grant an injunction against a dissolution, if a sudden dissolution is about to be made in ill faith, and would work irreparable injury.

Even if a partnership was formed for a definite period, circumstances may arise, which give a partner a right to have it dissolved before the expiration of the term. But such circumstances must be special, and such as render its continuance, or the attainment of the purposes for which it was formed, morally impossible; as, if by reason of ill-feeling between the partners, it is impracticable to continue it, or in case of insanity, permanent incapacity, or gross misconduct of one of the parties, or the hopeless state of the business. A partnership will also be dissolved at the instance of a partner who was induced to enter it on a false representation. A dissolution is in such cases obtained by an application to a Court of Equity which will grant a decree ordering a dissolution, that accounts be taken, and, if necessary, that a manager or receiver be appointed, to close the business and make sale of the property.

The court will not interfere and dissolve a partnership on the ground of a *temporary* insanity. It must be satisfied that it exists at the time, and is incurable.

Even though a partnership may have been formed for a definite period, the death of one, or the marriage of a female partner, at once puts an end to it, otherwise new partners would be introduced without the consent of the existing members of the firm. A partnership, however, may continue, by virtue of positive stipulations to that effect, after the death of a member or the marriage of a female partner.

Rights and Liabilities of Partners among themselves—No closer relation can exist among men. It entrusts to the power of another, a man's property and reputation. It unites, for the time being, in bonds, that have not been inaptly compared to the marriage tie. Consequently, the good faith of the partners is pledged mutually to each other, as of right, that the utmost honesty will be observed in their dealings, and every care and pains taken to advance the general interest of the partnership. If one partner, acting on behalf of, or by using the means of the firm, obtains any individual profit or benefit, above that of the firm, he will be considered as a trustee having obtained it for the firm, and be obliged to account to his co-partners.

They are jointly interested in the partnership property and effects, and in the absence of evidence to the contrary, equally; if there be two, an undivided moiety; if three, a third, and so on. Equity exercising a peculiar jurisdiction and control over the accounts of partners, looks on the right of each in the joint stock, as subject to the state of their accounts, consequently, between himself and his partners, his pecuniary interest may amount to nothing, in fact he may be a debtor to the firm. Thus equity holds the partnership so distinct from its members, that any one of them may buy and borrow from the firm, and the firm from him.

Standing in the situation of trust and confidence, the most scrupulous good faith is demanded, a good faith dictating, not only "abstinence from all deceit and injury," but a zealous co-operation in all things tending to promote the interest of

the concern, an exactness in all accounts, and a willingness to submit them to examination.

Each partner, acting in his legitimate capacity as such, can bind the joint stock and credit of the firm. If not acting in his legitimate capacity, if within the partnership business, though acting contrary to the wishes and interest of the firm, he may bind them in his dealings with an innocent third party.

Partnerships are not unfrequently formed under an agreement that one partner shall furnish the means and the other do the work, who nevertheless is entitled to consider the stock as joint, and claim an equal share of it or its produce. The law will, however, in every case, mould itself, as far as it can, to the ascertained intentions of the parties.

Equity will take hold of partnerships and partnership transactions with a strong hand, and fully investigate their dealings with each other, as well as with other parties, with the strictest care, striving to settle all matters and differences, upon principles of strict equity, guided by the rules and precedents of the Court. Thus, as decided in the case of Davidson vs. Thirkell, 3 Grant, Rep. 330, allowances will be made to an in-coming partner in respect of misrepresentations made to him by his co-partners, as to liabilities of the business when he joined it, and the guilty parties will be charged with either *interest* or *trade profits* on the advances which such misrepresentations render it necessary for the in-coming partner to make. Interest will also be allowed to or against each partner on advances by and to him during the partnership. A surviving partner by reason of his liability to pay the debts due by the partnership was held entitled, in Bilton vs. Blakely, 6 U. C. Chan. R. 575, to receive all moneys and collect all debts due to, and dispose of all the effects of the firm for that purpose, but the representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclu-

sion of them in these respects will entitle them to an injunction and receiver.

Differences sometimes arise among partners, as to the best manner to carry out the purposes of the firm. It is not an uncommon opinion that the minority must submit to the will of the majority when they are unequally divided. But this is by no means the case; for the majority cannot coerce the minority, except within certain limits. Where the partnership is formed of two members only, there can be little difficulty, for as a rule, when equally divided, those who forbid a change or act, must have their way. But when the firm is composed of more than two persons, such differences are not only more frequent, but also more difficult of settlement; especially when the partnership articles make no provision for such an occurrence. The nature of the question in dispute must then be examined; and if the difference relates to matters naturally connected with the legitimate business of the partnership, or incidental thereto, and the majority act, and be constituted with perfect good faith, the minority must give way. Before any act can be an act of the majority, every partner should be consulted, should have an opportunity of expressing his opinions, and should have those opinions properly considered by his co-partners. Lord Eldon clearly defined that to be the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may after due deliberation think proper to negative. This doctrine has been held to apply, where a majority wished to make a division of profits; where they wished to borrow money; where they resolved to convey their property to trustees upon trust, for sale and distribution among their creditors; and where a majority adopted accounts duly laid before them.

Where differences arise as to the propriety of engaging in

undertakings for which the partnership was never intended, no majority, however large, can ever bind any minority, however small. In such a case a single dissenting partner has a right to say "I became a partner for a definite purpose, and upon terms agreed upon by all, and you have no right, without my consent, to engage me in any other undertaking, or to hold me to any other terms, or to get rid of me, if I decline to assent to a variation in the agreement, by which you are bound to me and I to you."

The property of a partnership being joint estate, if one of the several partners is in exclusive possession of the common property, he has a right so to continue, if he can, and no action at law will lie against him by his co-tenant. But it seems if one partner destroys, or sells the partnership property, in breach of duty, an action will lie against him. In case of sale however, the purchaser cannot be made to return the property, for he acquires the interest of the one partner from whom he purchases, and becomes a tenant in common with the others. If a person becomes the possessor of a partnership property, through fraudulent collusion with one partner, trover will lie against him for its recovery.

Where there has been a dissolution and a specific division of the partnership property, the common interest is destroyed, each party becomes the sole owner of the part allotted to him, and may recover his share in an action at law. And if the dissolution and division have taken place by *deed*, the parties will be estopped from denying that a division has been made.

A retiring partner, though he may cease to have any control over the partnership affairs, as between himself and the remaining partners, may have a continuing interest in the profits and capital stock. In McGregor v. Anderson, 6. U. C. Chan. R. 354, a retiring partner obtained from one of the continuing partners a memorandum in writing, agreeing to reimburse the amount advanced by the retiring partner out of the one fourth of the profits to be derived from the busi-

ness. It was held that the retiring partner had a lien on such fourth part of the profits and a corresponding portion of the capital stock and assets of the partnership; and was entitled to have an account of the partnership dealings.

In case of death of one partner, his personal representatives have no right to become partners in his stead, nor to interfere in the partnership dealings, unless there has been an agreement that they should. The surviving partners become at law entittled to sue, and be sued; but all sums received and paid, should be placed respectively to the credit and debit of the late firm, so that they may give a strict account to the representatives of the deceased partner, of what is due them from the firm. In rendering such account, they are not only to consider the state of the firm at the time of the death of the partner, but must also take into account subsequent profits, derived from the partnership dealings, so long as they retain and employ the capital of the deceased partner. They will, however, be entitled, if they carry on the business for the benefit of the estate of the deceased, to a reasonable allowance for their services in so doing, unless they are his personal representatives, when they would not, unless they might be held entitled to an order, granting them an allowance, under 22 Vic. c. 16. S. 66. C. S. U. C.

Rights of third Persons against Partners.—In order properly to understand the liability of Partners to third persons, it is necessary to recognize the distinction between a special and a general partnership; *i. e.* between a partnership in some particular transaction or adventure only, and a partnership in some trade or business generally.

As an agent, appointed for a special purpose, cannot bind his principal, if he exceed his authority, so a special partner can only bind his co-partner, by legally acting within the compass of that transaction or business to which the partnership relates. His power to bind is circumscribed as the partnership itself. And if he attempt to bind the funds or credit

of the firm, by transactions, known to be unconnected with, or not reasonably within its compass, such transactions are considered fraudulent and void. However, to entitle parties to the benefit of this protection, the limited or special character of the partnership should be reasonably within the knowledge of third persons, either from the nature of the undertaking engaged in, or from implied or direct notice.

In general partnerships it is a rule that each partner is the accredited agent of the rest, whether they be active, nominal, or dormant, and has authority to bind them, either by *simple* contracts respecting the goods of the firm or its business, or by negotiable instruments circulated in its behalf, to any person dealing *bonâ fide*.

This implied power of one partner to bind the others by his acceptances, &c., of bills, does not extend to partnerships other than for trading purposes. Attorneys, farmers, &c., for the ordinary purposes of whose business it is not usually necessary to negotiate bills of exchange, promissory notes, &c., though partners, have no such authority.

There may be a stipulation between apparent partners, that one of them shall not participate in profits and loss, and that he shall not be liable as a partner; but to be protected thus from liability to third persons, such third persons must have notice of the stipulation.

It makes no difference under what name the business may be carried on—whether the partners be all active, or a part dormant—or whether the party contracting with the firm had knowledge of whom it was composed or not, yet will they be bound, and rendered liable to the engagement. If a person allows himself to be held forth as a partner, he will be liable, although he has no interest in the business. It should be remarked, however, that the party so seeking to charge him, must have had knowledge of his so holding himself out, otherwise he could not have been misled or influenced by his apparent connection with the firm, which is the ground upon which he will be allowed to charge him.

A plaintiff cannot be compelled to join a dormant partner, in an action against the firm, yet such dormant partner may be so joined at the option of the plaintiff. So a party dealing with a person, and supposing him to be acting on his own behalf, having given him credit, and charged him in his books as such, may afterwards, upon discovery of his agency, elect to charge the firm or principal for whom he was acting.

If a member of a firm purchase goods, such as are usually dealt in by his firm, but instantly converts them to his own use and benefit, the firm will be held liable for their value. And it is of little consequence how fraudulent may have been the parties, conduct, for it will be no answer to the liability of the firm: for they, having taken him to their confidence, and sent him forth clothed with that recommendation and agency, are bound by his acts within the reasonable scope of the partnership. But the partner making such purchase or contract, only will be bound if it can be shown that the party dealing with him had knowledge of his acting in bad faith towards his firm, or if he had knowledge of circumstances, such as would have put a prudent man upon his guard, or led him to make such reasonable inquiries as might have informed him of the facts. Although the co-partners are not liable to such third party, they may, at their option, enforce the contract against such party, for a fraud in a contract can only release the party against whom it has been practised.

It is not within the ordinary and proper business of a mercantile firm to endorse negotiable intruments, nor to become security, for the accommodation of its neighbor. Such instruments are considered in fraud of the firm, and void, unless in the hands of an innocent and *bona fide* holder, a partner will not be presumed as acting fraudulently, and the burthen of proof, for the purpose of avoiding the security, is thrown upon the firm. In the case of Henderson *v.* Carveth, 16 U. C. B. R. 324, it appeared the plaintiff having a claim against M., agreed to give him time upon the receipt of a

good endorsed note, and M. sent him a note payable to W. M. or order, and endorsed by W. M. and by the firm of "J. and J. Carveth." The plaintiff took the note before it was due, and without knowledge of the circumstances under which it was endorsed by the firm, and the authority of James Carveth who endorsed it to use the name of the firm. James Carveth being absent from the country when it fell due, the plaintiff sued the other partner. It was held he was entitled to recover.

The transfer of a partnership security may be fraudulent in part, yet good as to residue; thus A. and B. as partners, owe C. $50, and A. owes C. a private debt of $100, and A. without authority gives the promissory note of the firm for $150, to cover both indebtednesses; though C. may not be intitled to recover against the firm upon the note for the private debt of A., yet it will be good, as to the amount of the indebtedness of the firm. An act of a partner may be *primâ facie* fraudulent as against the firm; but if they subsequently approve of it, such approval raises a fair presumption of previous and positive authority, and will render them liable. In Bloomley *v.* Grinton *et. al.*, 9 U. C. B. R. 455, it was held that where one partner had entered into an agreement under seal, but of a nature not requiring a seal, and the partner not executing the agreement, had afterwards acted under, and received the benefit of it, he could not be allowed afterwards to dispute the authority by which it was executed in his name.

One partner cannot bind another partner by deed—that is, by an instrument required to be under seal—unless he is distinctly authorized to do so, by deed. The mere fact of the partnership articles being under seal, will avail nothing, unless they contain a distinct power. These remarks should be confined to deeds in nature of a grant, for one partner can execute a deed of release, so as to be binding upon his co-partner. Otherwise, a party having barred himself from

recovering in an action, might avoid his deed so barring him, by joining other persons as plaintiffs. In the same manner a release to one partner is a release to all. A covenant not to sue one partner does not act as a release ; for it would be as easy to release, as to give such a covenant, and therefore the only reason for preferring to give such a covenant, must be to prevent the benefit from extending to the co-partner. Neither will a defendant, in an action brought by a firm, be allowed to plead a release granted by one partner, if it can be shown that such partner executed the release, in fraud of his co-partners, and in collusion with the defendant, for the purpose of preventing them from enforcing a just demand.

A firm is bound by all representations made by one of its members, if within the scope of his implied authority, and in reference to the partnership business. But if acting apparently beyond his authority, he falsely represents himself to be acting with his co-partner's consent, they will not be bound by his representations, nor held liable for anything done upon the faith of such representations.

A partner is not liable upon a contract of the firm made before he became such ; not even upon an order given before his admission, if the goods be delivered after. This is the recognized rule, though the partnership may have been made retrospective, by an agreement between the new and old partners. It was held however in Hine et. al v. Beddome et al 8 U. C. C. P. 381, that an incoming partner who, as between himself and co-partners' entered into a joint liability, (with notice to the creditor) as well for prior, as subsequent liabilities, was liable for debts contracted before he became a member of the firm, contrary to the general principle of law.

When a dormant partner retires from a firm, he will not be liable to persons subsequently dealing with the partnership, and who were ignorant of his having been a partner.

Upon a dissolution of a partnership, if a creditor transfers

his account from the old to the new firm, and continues to deal with the new, it is evidence of his having accepted them as his debtors, and will release the retiring partner.

A party withdrawing from a firm cannot release himself from the then existing liabilities of the partnership. He can, however, protect himself against all subsequent contracts entered into, and liabilities incurred, by his copartners, if he take reasonable precautionary measures to notify their former customers, and the world at large, of his withdrawal. What might in all cases be safely considered notice, we think would be a withdrawal of his name from the partnership, and from the signboard, if any; notice in the Canada Gazette, and in some local newspaper, and circulars announcing his withdrawal, to parties who had formerly dealt with the firm. As this protection is founded upon notice, actual or implied, he will be protected without any of these precautions, if he can bring actual notice, by any means, to the knowledge of the party seeking to charge him. Such actual notice, however, must have been at or before the entering into the contract or undertaking, upon which he is sought to be charged.

When a partner dies, and the partnership is dissolved by his death, it is laid down in English works upon mercantile law and partnership, that the creditors of the firm have no means at law by which they can obtain payment out of his estate: their remedy at law being against the surviving partners, and them only, upon the joint liability. By 22 Vic., c. 78, s. 6. C. S. U. C, it is enacted that in case any one or more partners die, any person interested in the contract obligation or promise, entered into by the partnership, may proceed by action against the representatives of the deceased partner, in the same manner as if the contract obligation or promise had been joint and several: and this, notwithstanding there may be another person liable, under such contract, obligation or promise, still living, and an

action pending against such person. Thus, the personal representatives of a deceased partner are liable to the creditors of the firm, to the full amount of both partnership and separate property of the deceased in their hands. The separate estate of the deceased partner, will be applied to the payment of partnership debts, only, after all his personal liabilities are satisfied.

Where the right of recovery of a partnership, or joint debt, has been barred by lapse of time, no member of such partnership or joint debtor, will lose the benefit of the Statute of Limitations, so as to be chargeable, in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them, or by reason of any payment of any principal or interest made by any other or others of them, 22 Vic., c. 44, s. 3. But 26 Vic., c. 45, s. 8, enacts that any acknowledgment or promise, made or contained by or in a writing signed by the agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by the party himself. It appears that although it requires a memorandum in writing to revive the indebtedness against the debtor, and that such writing may be *signed* by an agent; yet it does not require that such agent should, necessarily, be appointed by writing. He must, however, be *duly authorized to make such acknowledgment.* No general and ordinary agency will be sufficient. No particular form of writing is specified; a paper signed by the defendant (not by the party receiving payment) or his agent, though without date, address, or amount due may be sufficient; but it must be a definite promise to pay, and it must appear what debt is intended.

A liability also may be continued by part-payment of the debt, which will act as evidence of a fresh promise to pay the debt. The payment must be such as to warrant the jury in inferring an intention to pay the rest. It must appear the

payment was on account of the debt for which the action was brought; and that it was made as part-payment of a greater debt. Payment of interest upon a note due more than six years, will take the note out of the Statute. Where a debtor owes two debts, one barred by the Statute the other not, a general payment on account, made by the debtor, is to be taken *prima facie*, as paid on the debt not barred, and the application by the creditor upon the debt barred, is not of itself sufficient to take it out of the Statute, and create a liability. Payment may be made, sufficient for this purpose, otherwise than by money; as by goods, a bill or note, &c.

Rights of Partners against third Persons.

The rights of partners against third persons involve very few considerations requiring special notice. They are mostly within the universal rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent, or the principal, may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the principal, as if the agent had been the contracting party.

An action upon a contract under seal, can be maintained only in the name of the party with whom the contract is in terms made, and this is the case though the contract has been entered into by one or more partners, on behalf of, and for the benefit of the firm.

If, upon the face of a simple contract, it appears to have been entered into by, or on behalf of the firm, the firm must sue jointly upon it. If the joint interest and joint consideration do not appear upon the face of the writing, but it appears to have been entered into by one of the parties for his sole benefit, while it has been in reality, on behalf of the firm of which he is a member, his position is that of an

agent, and he individually, or the firm, may recover upon such contract; the right remaining to the defendant, to set up any defence, as against the firm, that he might have against the contracting partner, if sued by him alone. If one partner enter into a written contract in his own name, for the sale of the partnership property to a person ignorant of there being other persons interested in such property, all the partners may sue upon it.

It has been held, that where a party applies to another for a loan, without enquiring whether the money is to be advanced by the individual or by the firm, of which he is a member, either the individual or the firm may sue, as the loan may chance to be made. And it has been held that even in case of collateral liability, and where such liability could only be created by writing, that though given to one partner it may inure to all, and may be so sued upon, if it can be shown to have been given for their benefit.

One partner by a release may determine the rights of the firm against third persons. An accord and satisfaction, *i. e.*, some recompense for a trespass, offence done, or breach of contract, accepted by one partner, is a good defence to an action brought by the firm, even without proof or any authority from the co-partners to accept the satisfaction. A tender of payment of a debt to one member of a firm, is a good tender of a partnership debt, and may be pleaded in defence to an action brought to recover such debt.

SECTION II.

PRINCIPAL AND AGENT.

An agent is a person entrusted with the business of another, or authorized to do some act or acts for another, who is called his principal. It is a general rule (with but few exceptions) that whatever a person can do in his own right, he can appoint some other person to do for him. We say,

in his own right, for an agent cannot depute his agency, unless authorized so to do, or from the very nature of his trust, he could not have been expected to perform it alone, when an implied authority to appoint assistants will be presumed.

Who may be an agent.—All persons capable of acting in their own right, and on their own behalf, may act as agents, and persons laboring under common law disabilities, such as infants and married women, may be appointed agents; a married woman, though utterly incapable to contract on her own behalf, or bind herself by her contracts, yet may be the agent of her husband and bind him as fully as he could himself.

How appointed.—For all mercantile purposes an agent may be appointed by mere words, or by the mere conduct of the supposed principal: as where a party has acted as the agent of another, and the agency has been put an end to between the parties, yet the agent continues to act as formerly, and the principal silently stands by, without using ordinary precaution to give notice to parties having knowledge of such former agency, that he has put an end thereto, the law will presume a continued agency and hold him liable. Letters of authority and powers of attorney are frequently given; but not so much for the purpose of a legal appointment, as an assurance to third parties of a duly created agency, and for the after protection of the agent himself. Whenever the act, contract or conveyance, to be done by the agent, requires to be by deed under seal, the appointment itself must be by some instrument under seal; as where a contract under the Statute of Frauds or a conveyance of land, or any interest therein, requires to be by deed, an agent to perform the same must be authorized by deed. It may be laid down as a rule, that in order to enable an agent to do any act or thing, his authority must be by an appointment of as high a character as that required to perform the act or thing itself. This rule

is not without exceptions, however, as for instance; certain contracts required to be in writing, by the Statutes of Frauds, may be signed by an agent having a mere verbal authority; so may an agent, as we have before remarked, if duly appointed for that purpose, sign a writing sufficient to take a claim out of the Statute of Limitations.

Special and General Agents.—When an agent is appointed to act generally for his principal in any particular business or undertaking, he is called a general agent, and is vested with full power to do what is customary or necessary for the proper carrying out of that business or undertaking. When appointed to do some special act or thing, he is a special agent, and should confine himself strictly to his appointment; if he exceeds it he will not bind his principal.

An agent's authority may also be limited or unlimited. When limited he must follow his instructions closely. When general, he may use his own discretion, acting as a prudent principal would act, guiding himself by the customs and usages of the business in which he is engaged.

Brokers and Factors—Are a description of agents, requiring to be noticed here. A factor is a person who has goods consigned to him, and has both the possession of the goods and the authority to sell. He has a special property in them, and a lien for any money advanced, or charges upon them. Thus, having the possession, he appears to the world as the owner; and having a special property in them, may sell in his own name. The principal is bound by the consequences of such sale, and is liable to have set off against him a debt due from the factor to the purchaser.

A broker has not the possession, but a mere power to sell. No person can therefore be deceived, and induced to deal with him, believing him to be the owner, and having authority to sell in his own name. If he sells in his own name, he acts beyond his authority, and his principal is not bound; neither is he liable to have set up against him a debt due from the broker to the purchaser.

Duties of Agents.—Though ignorance of the law excuses no man, an agent is not bound to know it, so as to be made liable to his principal for every error. He only requires to use reasonable skill, and knowledge, and ordinary care in all his transactions. He must act in entire good faith, with the single purpose of promoting his interest, deriving no personal benefit from his agency, to the prejudice of his principal. This rule is said to take away the sting of temptation. He must follow his instructions as strictly as possible, for, if he disregard them, he will be liable to his principal for any loss or damage occasioned thereby.

If a price be limited by his instructions, he should sell for that, and will not be justified in doing otherwise, by the fact of having made advances to his principal, and having given him notice that in default of payment, he would sell, for the purpose of re-imbursing himself. If no price be limited, he should obtain the best price that he reasonably can, after using ordinary care and pains; but before sacrificing the goods, he should first advise his principal, or he may be liable for selling for less than the goods are fairly worth. He should also be guided by the ordinary rules of the trade in which he is engaged: if it is customary to sell for cash, he must not upon credit. If it is usual in the trade in which he is engaged to sell upon credit, and he do so, and the purchaser become insolvent, he will not be liable, unless he has been guilty of negligence. A *del credere* agent, that is, one who receives an additional consideration for insuring the solvency of persons to whom he sells on credit, is a surety, and in default of payment by the principal debtor, will be held liable, though having exercised the utmost care.

If an agent or factor, in his former dealings with his principal, has been in the habit of insuring goods entrusted to his care, or if it is customary in the trade, he should do so. And where it is his duty to insure, and is from any reason unable to do so, he should at once advise his principal, or he

may be held liable for damages, if sustained. He must in every way take such care of the goods entrusted to his care, as a prudent man would of his own. He is not liable for accidental damages, such as by fire, robbery, &c., unless prior to such damage he had been guilty of some neglect, that might in some way have produced or encouraged such damage. When an agent is employed to purchase goods, he must also follow his instructions closely, and if he exceed them his principal may refuse the goods, or keep them if he thinks it to his advantage.

There is no duty devolving upon an agent that must be regarded more strictly than that of keeping proper accounts; a neglect of which may not only subject him to a forfeit of his right to compensation, but make him liable to any loss to which this default may subject his principal.

Rights of Principal against Agent.—There is a distinction between the liability of a remunerated and an unremunerated agent. A remunerated agent is bound to use ordinary skill and prudence, and the want of them will be no excuse when damages arise therefrom. An unremunerated agent is said to be only liable from gross negligence. This gross negligence may, however, be but simply negligence, as Baron Rolfe once observed, that he could see no difference between negligence and gross negligence, that gross negligence was only negligence with a vituperative epithet.

An unremunerated agent not having begun the task entrusted to him, cannot be compelled to do so, but having once entered it, he will be responsible for his misconduct. A remunerated agent having undertaken, will be compelled to proceed, and is responsible for himself and all those he may employ under him. It makes no difference what his authority or instructions may be if he exceed it, his principal has not only a right to look to him for any damages, but also to claim any benefit that may result therefrom. The amount of damages a principal is entitled to recover, on account of

the misconduct of his agent, is the actual loss sustained. There need not be any actual misconduct in carrying out his engagement on the part of a remunerated agent to make him liable to his principal; if he engages without competent skill, he is a deceiver, and is liable for the consequences of his inability.

An agent employed to sell cannot become the purchaser, nor can an agent employed to purchase be himself the seller, unless by special arrangement between himself and principal. Where an agent, in disregard of his duty, so assumes a double capacity, it is in the option of his principal to repudiate the transaction, or hold him to it, and have him declared a trustee for his benefit.

An agent has no right to dispute the title of his principal to the subject matter of his agency; unless the goods in his hands have been fraudulently obtained by the principal from third persons, for no man is bound to make himself an instrument of fraud.

The principal is entitled to full statements and accounts of all transactions, and to every increase made from his property, or arising from the acts of his agent. He is also entitled to all interest received by the agent, upon money belonging to his principal; also interest upon money lying dead in the agent's hands, if it was his duty to re-invest it. If the agent uses the money belonging to his principal, instead of remitting it, as he might and should have done, he will be held liable for principal, money and interest at six per cent., with annual rests; which is a capitalizing or compounding of interest.

A person residing abroad sent funds to an agent in Canada for the purpose of investing in lands, the agent purchased a parcel of land for £600, and took a conveyance to himself, which property the agent informed his principal had cost £1000, and made a conveyance to his principal charging him that sum in account. The principal some time after discover-

ing the nature of the transaction, filed a bill in Chancery for relief. The Court decreed him entitled to the land at £600, and directed a reference to the master, to take an account of the dealings between the principal and agent. Thus the Court will interfere in all cases where there has been any suppression of facts, disregard of instructions, or non-performance or misperformance of duty on the part of the agent, and place the principal as nearly as it can, in the same position as he would have been if the agent had strictly followed his instructions, and scrupulously performed his duty.

When an agent's instructions involve a breach of good morals, or a violation of the rules of law, or where they are impracticable, or where the agent himself has acquired some right in the subject matter of his agency, which he is not bound to sacrifice to his principal, he will be justified in disregarding such instructions, but then only.

A principal's rights against his agent can generally be more effectually enforced in Equity than in a court of Common Law. It is quite clear, however, that if items can be proved, an action will lie at Common Law. Its machinery, now, is so perfect, for obtaining any information within the knowledge of the defendant, and required by the plaintiff, by interrogatories or an examination of the defendant, and books and documents in his possession, there is little difficulty in enforcing any right, in its courts of record.

When a principal can trace and identify his own property, he may reclaim it. If, however, the agent, or factor, so blends the property of his principal with his own, that it cannot be distinguished, in the event of his death or insolvency, the principal must come in as a common creditor.

By 22 Vic., c. 92, s. 43, C. S. C., it is enacted among other things, that if any money or other security having been entrusted to any agent, with a direction in writing to apply the same or any part thereof, for any purpose specified in such writing, and such agent in violation of good faith, and

contrary to the purpose so specified, converts any part of such money or security to his own use, he shall be guilty of a misdemeanor, and liable to be imprisoned in the Penitentiary for any term not less than two years, or any other prison or place of confinement for any term less than two years, or to suffer such other punishment by fine and imprisonment as the court may award.

By sec. 44, that if any agent having been entrusted with any chattel or valuable security, or any power of attorney, for the sale or transfer of any share or interest, in any public fund or stock, or in any fund of any body corporate, company or society, for safe custody, or for any special purpose, without authority to sell, negotiate, transfer or sell the same, and in violation of good faith, and contrary to the purpose for which the same have been intrusted to him, sells, negotiates, transfers, pledges, or in any way converts to his own use or benefit the same or any part thereof, he shall be guilty of a misdemeanor, and liable to the same punishments as under sec. 43.

By sec. 46, if any factor or agent, intrusted for the purpose of sale with any goods or merchandize, or intrusted with any bill of lading, warehouse-keeper's or wharfinger's certificate or warrant or order for goods, deposits or pledges for his own benefit, in violation of good faith, any of such goods or instruments, as a security for any money or negotiable instrument, borrowed or received by such agent or factor, he shall be guilty of a misdemeanor, and liable to the same punishment as before mentioned. But no factor or agent will be liable under this section, provided such deposit or pledge were not made a security for, or subject to the payment of any greater sum of money than the amount at the time of such deposit or pledge, due and owing to such factor or agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.

In case of the bankruptcy of an agent, who has pledged his principal's goods, and in case the owner redeems the same, he shall in respect to the sum paid by him for such redemption, be held to have paid the same for the use of the agent before his bankruptcy, or in case he do not redeem the goods, the owner is deemed a creditor of the agent, for the value of the goods so pledged, at the time of the time of the pledge. 22 Vic., chap. 59, s. 21, C. S. C.

Rights of Principal against Third Parties.—As the principal is bound by the acts of his agent, he is also entitled to take advantage of them; and if a person, without authority, contract in the name of another as a principal, such principal, may, if he see fit, adopt and enforce it: in either case subject to any defence partial or complete, that the defendant could have relied upon against the agent. If a principal adopt an unauthorized act of his agent, or an act of an unauthorized agent, he must adopt it wholly; he cannot claim the benefit of that part which is advantageous to himself and reject the remainder.

Where property is sold by an agent, if the principal gives notice to the purchaser to pay him and not the agent, he is bound to pay the principal, subject to the equities, if any, he may have against such agent.

Where an agent has been allowed to deal in his own name, this universal rule should not be forgotten, that the party dealing with him will enjoy the same rights against his principal as he would have had against the agent, had he really been a principal. Subject to this rule, although an agent contracts in his own name, his principal may sue upon it; or if a person lend money nominally on his own account, but in reality for another, that other may sue for it; or if a factor delivers goods as his own, without disclosing his principal, the principal may recover for the goods. In some cases it may seem hard that a principal in bringing an action to recover his own, or the value of it, should be subject to unforseen

defences, to be set up against. But, on the contrary, the intention and effect of the law is to prevent hardships. The principal appoints his own agent, confides in him, and clothes him with full power to act. If he is not willing to accept the risk of such rights and defences being set up against him, he should prohibit him from dealing in his own name. He can thus avoid even the risk of a hardship. But how could the purchaser, without this just rule of law, who from peculiar circumstances or considerations has been induced to deal with him? For instance, having a set-off, which he is anxious to realize, he might be induced to purchase from the party, at a time, and at prices, he would not otherwise. No greater hardship could be, than for such purchaser to be afterwards turned over and made liable to some stranger, with his set-off, and the considerations, which induced him to purchase, taken from him.

If at the time of the transaction the purchaser had knowledge, or reasonable grounds for knowing that he was dealing with a mere agent, the principal's rights against such purchasers are safe from the liabilities of the agent. And where the agent is acting in the capacity of a broker, having neither the possession of the goods, nor the right to contract in his own name, he cannot encumber his contracts with his own personal liabilities.

If an agent sells and delivers the property of his principal for a consideration which afterwards fails, the principal can bring an action to recover back the property, if the agent could, or to be reimbursed. As the principal is bound by the admissions of his agent, made in his ordinary course of business, and in connection with the transaction to which the agency relates, so he may have the benefit of statements made by third parties to his agent; and, consequently, in almost every case, it is advisable that the principal should enforce his rights in his own name, and thus secure the benefit of the agent's evidence.

The foregoing remarks apply equally, whether the contract be a simple one in writing, or made verbally. But when the contract requires to be by deed to make it binding, and is so entered into, it is not optional with the principal to enforce his rights upon such contract, against third parties, either in his own or his agent's name. Whether the contract so entered into is the contract of the principal or agent, depends upon the express terms of such contract, and upon the mode in which the power given to the agent is exercised. If the covenants contained in the deed, are distinctly entered into with the principal, and the agent merely executes the deed for and in the name of the principal, then the contract is fully the contract of the principal, and he must sue upon it in his own name. If the agent is made a party to the deed by being named in the body of it, and the covenants are entered into with him, it will be considered as his own deed, and any action brought upon it, must be in his name, as trustee for his principal. If the covenants are entered into with the principal, and the deed is signed by the agent in his own name, neither of them can maintain an action upon it, and the principal may be left wholly unable to enforce his rights. These are consequences growing out of the rule of law, that no person can maintain an action upon a contract under seal, unless he is named therein, either by his own or some acquired or adopted name, and the contract or covenant must in express terms be made with him; and it makes no difference if the instrument has been entered into on behalf of, and for the benefit of some other party. The courts of law recognize no other interest but that of the party with whom the contract is expressed to be made, and hold no other party liable than the one by whom it is executed. It will be seen from what we have said, that in order to enable an agent to contract by deed, and properly to protect his principal and enable him to enforce his legal rights thereon, the utmost care should be taken. The agent's appointment should be by deed, clearly

defining his duties, and the purposes of his appointment;—the principal himself should be the party to the deed;—and the agent should sign his principal's name, above his own as his agent. Then the principal can enforce his rights in his own name, and have the benefit of his agent's evidence if required.

Rights of Third Persons against Principal:—A principal's liability to third persons, depends upon the extent of the agent's authority, to bind him to third persons. This authority, as we have already noticed, may be express, or inferred from the principal's acts, or the nature of the business in which the agent is engaged. Where there is any reasonable ground for presuming authority, or extending it so as to hold the principal liable upon the acts of his agent, both courts and juries are inclined to do so; since one of two innocent parties must suffer from the fraud of a third, he who enabled that third party to commit the fraud should be the sufferer. If an agent is allowed to draw bills, it does not import authority to endorse; but evidence of such authority to draw will be allowed to go to the jury, who are to decide if any authority to endorse exists or not. The question of authority, being one for a jury, must, in each case, depend upon the special circumstance of such case, and cannot be fixed by any reliable rule. Where an agent has been allowed to sign notes for his principal, he may bind him by subsequent ones, though his authority has been withdrawn, and the proceeds never get to his principal's hands. So a servant being permitted to make a single purchase, was held capable of binding his principal by subsequent ones.

When the employment is the measure of authority, an act of the agent in order to bind his principal must be within that employment, and if he attempts to act outside of that employment, he will not, without special authority, bind his principal to any greater extent; thus a merchant's clerk has an implied authority to receive money for his principal, paid in

the course of the business in which he is employed, but he has no implied authority to receive money in collateral or foreign matters, as upon bonds or mortgages. It is only the subsequent ratification by the principal that renders him liable for such acts, on the part of the clerk or agent. Should the clerk neglect or refuse to pay over, or abscond with money so received, his principal could recover the money from his debtor.

A general agent, though restricted by certain stipulation between himself and his principal, can, nevertheless, bind his principal in defiance of such restrictions, by contracts with third parties, within the scope of his agency. The reverse is the case concerning a particular agency, for it is then incumbent upon the party dealing with him to discover the extent of his authority; and if he exceed it, he will not render his principal liable.

A subsequent ratification of, or assent to, the act or contract of the agent, by the principal, exonerates the agent from any excess or want of authority, and renders the principal liable. Such ratification may be inferred, and will be, from the acts of the principal if he accepts any part of the act or contract entered into by his agent, of which such excess or want of authority forms a part.

As an undisclosed principal can claim the benefit of contracts made by his agent, so he will be held liable upon them to third persons. This is the case with simple contracts submitted to writing, even though the principal does not appear upon such writing, as well as with oral contracts. It is true the writing binds the party appearing upon the face of it, but it also binds another, by reason that the act of the agent in signing it is simply the act of the principal. Thus A may contract in writing with B for the purchase of a cargo of grain, yet C may be liable upon the contract, and oral evidence will be admitted to show that A only acted as the agent of C, and that C received the benefit of the contract.

A principal to be liable upon a deed executed by his agent, must appear clearly bound by the deed itself, and oral evidence will not be admitted for the purpose of shewing that the deed, though that of another, was for their benefit.

Where an agent is guilty of misconduct, or negligence in the performance of his agency, the principal is liable to third persons, for any damage they may sustain on account of such misconduct or negligence. But if the agent exceed his authority, or go outside of his legitimate employment, the agent, and not the principal, is liable for the wrong.

An agent at common law, entrusted with goods or documents of title thereto, for the purpose of sale, had no power to bind his principal by pledging such goods or documents, or creating a lien upon them. It was found that this restriction was injurious to commercial success in many instances, whereupon chap. 59 Con. Stat. was passed, enabling any agent entrusted with the possession of goods, or the documents of title thereto, to bind his principal as fully as if he were the true owner of the goods:

1. Upon a lien thereon, for money or negotiable securities advanced, or given to such agent, or received by such agent for the use of such third party.

2. Upon any contract or agreement by way of pledge, lien or security *bonâ fide* made, with such agent, as well for an original loan, advance or payment made upon the security of the goods or documents, as for further or continuing advance in respect thereof.

3. Upon such contracts notwithstanding the person claiming such pledge or lien had notice that he was contracting only with an agent.

It is further provided by said statute, that such loans and advances only shall be valid as are made *bonâ fide* and without notice that the agent making the same has no authority so to do, or that he is acting *malâ fide* against the owner of the goods. And that no antecedent debt owing from any agent so

entrusted, shall authorize any lien or pledge in respect thereof.

While the statute has thus given to the agent increased power to bind his principal, his goods, &c., it has also protected the principal against an undue use of this increased power on the part of the agent, by making him criminally liable, as we have already noticed.

Rights of Third Parties against Agent :—An agent acting on behalf of a responsible and disclosed principal, incurs no personal liability to third persons. But where the principal is undisclosed at the time of a contract being entered into, and the contract was ostensibly on behalf of the agent, the agent himself will be liable, as a principal, to third parties. So where the principal is irresponsible in law, the agent will be held liable. If an agent enters into any undertaking, in writing, without disclosing his representative character, on the face of such writing, the agent himself will be liable ; even though the party dealing with him had knowledge at the time that he was only acting as agent on behalf of a principal. We have seen that oral evidence is admissable, in order to enable a creditor to get at the real principal, and to hold him liable upon the contract ; but it is never admitted for the purpose of discharging the agent from a contract or agreement in writing, in which he has seen fit to represent himself as really the contracting party.

If a person pretend to be acting for a person, from whom he has no authority, he will be liable to the party with whom he contracts. The nature and extent of his liability will depend upon the nature and extent of the contract. If he contract in his own name he will be liable upon the contract ; if in the name of the represented principal, he will be liable to an action for damages for his misrepresentation.

An agent who exceeds his authority so as not to bind his principal, is in the same position as if he act without any authority, and becomes liable as a principal upon his contracts.

In case an agent receive money on behalf of a principal, under such circumstances that some third person would be entitled to recover the same from such principal, the agent himself will be liable to such third person, unless he has paid over the money to his principal, or done some act to divest him of all control over it. But payment over to the principal will not relieve an agent from liability, if he receive money illegally, or as the consequence of a tort committed by him under the instructions of his principal.

An agent is not liable to third persons for not carrying out the instructions of his principal, and the purposes of his agency. But if he commit a tort in carrying them out, he will be liable therefor. It has, however, been held that an agent is not liable for fraud in misrepresenting goods entrusted to his charge for sale.

When an agent has an interest or special property in the subject matter of the contract, and thus unites the character of principal and agent, he is not only entitled to maintain an action upon the contract, but is also liable upon it.

Rights of Agent against Principal.—An agent has few rights against his principal, excepting that of receiving his salary, or commission. When the amount of remuneration he is to receive has been fixed, there can be little or no difficulty, but when it has not, it must be settled by usage, or custom, or by the value of his services, assessed by the verdict of a jury. If he engage in an unlawful undertaking, or if he misconduct himself, or if he be guilty of gross negligence, or if he neglect to keep proper accounts as between himself and principal, he may lose all right to any recompense. It is a matter of no consequence, whether or not the object of his agency proves profitable to his principal; if he has acted in good faith and competent discretion he will be entitled to his renumeration.

Any advances made by the agent in the regular course of his employment, he is entitled to from his principal. And

the same is the case where advances are made, upon some unforeseen and pressing exigency; if they are such as a prudent man, acting for himself, would have considered necessary, and undoubtedly would have made; as for instance for the insurance of property or goods, placed in any extraordinary danger.

An agent has a right to be indemnified by his principal from the consequences, arising from any act, which may be right or wrong, but which he believed, by the conduct of his employer, to be right, done in obedience to his principal's instructions. He is not, however, entitled to any indemnity against acts known to him to be wrong, nor to be repaid unnecessary expenses, arising from his own negligence.

SECTION IV.

JOINT STOCK COMPANIES.

Joint Stock Companies may be considered partnerships, modified and protected as to their members by statutes or charters, and adopting certain regulations for their government. In Upper Canada there have been comparatively few such companies, and for some reason have not generally been so profitable to the stock holders, as they naturally promised.

How formed.—Several statutes have been passed, by complying with the requirements of which Joint Stock Companies may be formed for the purposes therein stated. Chap. 63, Con. Stat. Can. provides, among other things, that any five or more persons, who desire to form a company for carrying on any kind of manufacturing, ship-building, mining, mechanical or chemical business, may make and sign a statement or declaration in writing setting forth:—

1. The corporate name of the company;
2. The object for which it is formed;
3. The amount of capital stock;
4. The number of shares of which the stock is to consist;

5. The annual instalments to be paid in;

6. The number and names of the Trustees who are to manage the company the first year;

7. The name of the place at which the company is to carry on business;

8. The term of the Company's proposed existence.

When such declaration is properly executed, in duplicate, the one copy filed in the office of the Registrar of the County, in which the proposed business is to be carried on, and the other copy filed with the Provincial Secretary, the persons who signed such declaration and their successors, become a body corporate.

By 29 Vic., chap. 22, any seven or more persons may form themselves into a Joint Stock Company, for the purpose of carrying on any labor, trade or business, whether wholesale or retail, except for working mines or quarries, and except for banking and insurance, by executing before a notary public, or justice of the peace, a certificate in duplicate.

One copy of which certificate is to be filed with the Registrar of the County, where the business is intended to be carried on, and the other with the Provincial Secretary. And if the business is intended to be carried on in different counties, a duplicate certificate must be filed with the Registrar of each County. Before commencing operations, any such company must agree upon and frame a set of rules for its regulation, government and management, stating

1. The mode of convening general and special meetings, and of altering rules;

2. Provisions for auditing accounts;

3. Power and mode of withdrawal of members, and provisions for the claims of executors and administrators of the members;

4. Mode of application of profits;

5. Appointment of managers and other officers, and their

respective powers and remuneration; and provisions for filling vacancies from death, resignation, &c.

Which rules, before adoption, shall be transmitted to the Provincial Secretary, and approved of by the Governor-General, and a certificate of such approval obtained from the Provincial Secretary.

Rights and Liabilities.—Such companies have a right to acquire and hold real estate required for the proper carrying on of their business. Though they may acquire and hold such lands, there appears to be no power to mortgage it. 22 Vic. chap. 63, Con. Stat. Can. strictly prohibits it, and 29 Vic. chap. 22, impliedly and effectually does so, by enacting that all transaction of companies formed under its provisions, shall be for cash exclusively; that no credit shall be either given or taken, and that no officer, member or servant, shall have power to contract any debt whatever in its name, except in respect of rent of premises required for the business, the salary of clerks and servants, and such like contracts, necessary in the management of the affairs of the company. They can elect Trustees, and appoint officers for the management of the business.

No stockholder is liable upon any debt or contract of the company, beyond the amount of his share or shares subscribed except under 22 Vic. chap. 63. Con. Stat. Can. for debts due and owing to any of the laborers, servants and apprentices, and for debts and contracts made by the company before the whole of the capital stock is paid up, and a certificate to that effect obtained and registered as required by the act. Trustees may also render themselves personally liable by some misperformance or non-performance of duty; so may an officer or member under 29 Vic. chap. 22, become criminally liable. And if the indebtedness of a company formed under 22 Vic. chap. 63, Con. Stat. Can. at any time exceed the amount of its capital stock, the trustees assenting thereto are personally and individually liable to the creditors for such

excess. The general and common law rights of members of a joint stock company among themselves, may be considered to be quite similar to those of partners, except so far as the act or acts under which they are formed, and the rules and regulations adopted for their guidance, may have provided. The management of the company being confided to trustees and officers, and the bulk of the shareholders being necessarily passive, the utmost good faith must be observed by those in charge, and the courts of equity will be strict in enforcing a proper execution of the duties and trusts reposed. A company as soon as incorporated may sue and be sued in its corporate name.

Limitation of Liability.—It is provided by 22, Vic. chap. 63, Con. Stat. Can. that no Stockholder shall be personally liable for the payment of any debt contracted by such company, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt be brought against the company within one year after the debt became due; and no suit shall be brought against any stockholder for any debt, unless within two years from the time he ceased to be a stockholder, nor until an execution, against the company, has been returned unsatisfied in whole or in part. There appears no corresponding limitation in 29 Vic. chap. 22, and the liability of companies formed thereunder, and of stockholders of such companies, continues until an action is barred by the Statutes of Limitations.

SECTION V.

CORPORATIONS.

A corporation aggregate is created by a number of individuals being so united, either by virtue of an act of Parliament, or a charter from the Crown, that they and their successors exist as one person in law, independent and distinct from their individual characters, in whom privileges and pro-

perty once vested, will for ever remain so, without any new conveyance to new successors. All that is required to continue its existence, is the addition of members, so that it may retain a body, capable of acting as provided or intended, by the act or charter by which it is created.

Power to Contract.—It has been said that the legal entity of a corporation is without soul or conscience, and without any visible or corporeal existence, and could therefore neither be excommunicated or outlawed, or manifest its will by oral communication. The peculiar mode of affixing its corporate seal, was therefore devised for expressing its intentions, and binding it to its contracts. Formerly it was quite strictly held, that though a corporation might to an extent bind itself in equity, by contracts not entered into under its common seal, yet to do so at law, all contracts of any importance must be so executed. Later decisions of the common law courts, have, however, greatly reduced the necessity of contracts being so entered into, in order to make them binding, and the inclination of the courts now seems to be, to hold them liable upon even oral contracts, which fall naturally within the necessities and purposes of the corporation, also upon such legitimate contracts as are executed, or that the corporation has received the benefit of. The contract should be made with a corporation itself, under its corporate name, and not with its head, or the individual names of its members. It is sufficient, however, if a corporation be styled the same in substance with the true name, and it need not be the same in words and syllables. A corporation cannot contract for and hold lands, unless the source from which it derives and has its being, gives it power to do so.

A trading corporation, or one which from the nature of its business can raise a presumption of intention, and necessity that it should do so, may make, and bind itself, by promissory notes, bills of exchange, &c. A common servant may be hired, and acts of a pressing nature performed, without either writing or use of the common seal.

Liability of Corporations.—From what has already been said, it may be seen, in what cases, as well as by what means, a corporation will incur a liability. It may be laid down as a general rule, that it will be liable upon all contracts legally entered into, from which it has derived the contemplated consideration for its promise, and which were not made in bad faith or fraud towards it members.

It was held in the case of Clark vs. Hamilton and Gore Mechanics Institute XII—B. R. U. C. 178, that where a contract is made for work, which is performed, and such as evidently contemplated by their charter, they were liable, though the contract was not under seal, nor the claim for small or ordinary services which might constantly be required. Although a corporation may be liable upon many contracts not under seal, the holding of the courts seems to be that it is not liable for damages upon such contracts when the party with whom it has contracted has been prevented from carrying out his contract, by the act of the corporation; an assessed valuation of the work actually done being considered a fair recompense. If the head of a corporation, or one of its regular servants buys goods, and applies them to the use of the corporation, it is liable for their cost. A corporation may be liable for its own wrong, and for money illegally obtained, to the same extent as a private individual.

It was laid down by an eminent American Chief Justice that the number and extent of corporations, "Had necessarily affected and rendered them liable, like private persons with obligations arising from implications of law, and from equitable duties which imply obligations, with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents, and generally by those legal and equitable considerations which affect the rights of natural persons. This doctrine is broad enough to sweep away almost entirely the formerly recognised peculiar

safe-guards held by corporations, and render the common seal, except in extraordinary matters, almost useless. Our own courts are also, with an equitable wisdom, constantly breaking through those ancient protective rights, set up by corporations, to shield them from liability; and equitable duties as well as legal rights, have now become matters to be considered by them.

Dissolution of a Corporation.—A corporation may be dissolved by the death of all its members, without the choice and introduction of new ones; by the surrender or expiration of its charter; by the forfeiture of its charter; and by an act of Parliament.

SECTION VI.

LIMITED PARTNERSHIPS.

We have thought it better to devote a section to the consideration of Limited Partnerships, than to confuse and encumber our remarks upon general and ordinary partnerships, by reviewing them conjointly.

How formed.—Limited partnerships are formed and exist under 22 Vic. chap, 60, Con. Stat. Can. and may be for any mercantile, mechanical or manufacturing business: but not for the purpose of banking or making insurance. Such partnerships may be composed of one or more persons who are called General Partners, and one or more persons who contribute in actual cash payments a specific sum, as capital to the common stock, who are called Special Partners.

In order to form such a partnership it is necessary that the persons desiring to do so, make and severally sign a certificate containing:

1. The name or firm under which the partnership is to be conducted.
2. The general nature of the intended business;
3. The names and residences of all the partners interested

therein, distinguishing the general from the special partners;

4. The amount of capital stock which each special partner has contributed;

5. The period at which the partnership will commence, and when it will terminate.

This certificate so made and signed is to be filed and recorded in the office of the Clerk of the County Court of the county in which the principal place of business of the partnership is situate.

Any renewal or extension of the business must be by certificate, executed and recorded in the same manner as is required for its original formation.

Liability of Partners.—The general partners are jointly and severally responsible, as general partners are by law; but the special partners are only liable to the amount of their capital stock. Special partners may, however, become liable as general partners in several ways.

If any false statement be made in the certificate, the special partners at once become liable as general. The special partner must pay in his stock in *cash;* any effort to avoid this will be construed strictly against him. It was held in Benedic et. al., and Vanallen et al., xvii. U. C., B. R. 234, that where A and B formed a limited partnership, A to be the general partner and B the special, and B paid in his stock by promissory notes of A which he held, that this was not a payment within the statute. The court of common pleas were of the same opinion in Whittemore & Macdonnell et. al., vi. U. C. C. P. 547 and that the special partners became, in consequence, liable for the debts of the firm. Every renewal or continuance, or alteration made in the names of the partners, the nature of the business, in the capital or shares, or in any other matter specified in the original certificate is considered a dissolution, rendering the special partners liable, unless the partnership be renewed as a special one. If a special partner allows his name to be used in the firm, he

thereby makes himself a general one. A special partner will become personally liable if he intermeddle with the affairs of the concern; and once so liable, he will continue so, even after he has ceased to interfere. And where acts are committed, whether knowingly or unknowingly, of such a nature as to create a general partnership, as to third persons, and such acts are committed with the consent and concurrence of all the parties, the effect may be to make them answerable not only as to third parties, but as between themselves, and liable to contribute towards making up a deficiency ascertained on winding up the affairs of the company.

The general partners are liable to account both in law and equity to each other, and to their special partners for their management of the concern; and one of the partners will not be allowed to make special profit out of the business, above his co-partners, as by furnishing from his shop goods for the use of the partnership upon which he charges the usual trade profits.

Dissolution.—The partnership may be dissolved by expiration of time, by the act of the partners, or by insolvency. A dissolution by act of the partners may take place, by such acts as convert the limited partnership into a general one, and also by a dissolution of all partnership between the parties, by filing a notice of such dissolution in the office where the original certificate was filed, and publishing it once in each week, for three weeks, in a newspaper published in the county where the partnership has its principal place of business, and in the *Canada Gazette*.

In case of bankruptcy or insolvency the special partners can only claim against the estate, after all the claims of other creditors of the partnership have been satisfied.

CHAPTER II.

MERCANTILE PROPERTY.

SECTION I.

ITS PECULIAR INCIDENTS.

There are a few peculiar incidents which property derives by passing in the hands of a merchant, and becoming part of his stock, and through the force of mercantile law and customs.

In order to clearly understand these incidents, it may not be amiss to consider the peculiar, though spontaneous and natural manner by which all right to property first arose. In law as in anything else, in order to fully comprehend aright a natural effect, it is most important to go back to the origination of that right, or the first cause producing the effect, and passing therefrom by careful and proper advances, we soon arrive at, with a clear and correct conception of, the result. If we desire to form a correct knowledge of our rights in property, which we so properly desire and prize, and if we would have a fair conception of the incidents peculiar thereto, we must not be afraid to give ourselves the trouble to consider the original foundation of those rights, nor to look back to the means by which they were acquired.

It is not our intention, nor would it be advisable in so elementary and practical a work as this, to enter into a full and discursive review of the development of these rights, now so matured and defined in the mercantile world.

We only glance over them, and advise those who have the time, to enjoy the pleasure and benefit of a perusal of Mr. Backstone's Commentaries upon this subject.

Acquisition of Property.—When "dominion over all the earth, and over the fish of the sea, &c., and over every living thing that moveth upon the earth," was given to man; there was given to him the only true and solid right over external things. The earth, therefore, and all things therein, then became the *general* property of man. This general right was at first sufficient, and may be said to have continued so while men retained their primeval simplicity and customs. With the use of goods there came a special right, that lasted so long as the use continued but no longer. This was the first right of possession; a right that has aptly been called "nine points of the law." Temporary possessory right was first acquired in land. The ground was common. Yet whoever first occupied a determined spot for rest or shade, acquired a sort of ownership, lasting only so long as he continued to occupy it. The fruit tree and the vine were common, but the fruit once gathered became the property of the party who had gathered it. As the human family multiplied and lands began to be cultivated and flocks fed, a more lengthy possession ensued, and with it a more definite and permanent right. Habitations for shelter, and raiment for warmth and protection, excited the ingenuity and industry of man, and induced him to exert himself to *produce* the means nature had placed before him to those purposes. The labour bestowed for those purposes, gave a deeper interest in the subject matter, naturally inducing a more tenacious holding, and more vigorous enforcement of right. The increase of population, and an almost unavoidable necessity, introduced the exchange of products, first from adjacent individuals then from distant localities; first for the individual's own use, then as a matter of traffic. Here commerce began, and with it civilization, refinement, a settled right in transient pro-

perty, and a primitive and obscure mercantile law; yet such a law as respected the right of possession, the necessity of protection, and the benefit of permitting a free alienation.

Upon this rude foundation has been being reared for ages, and is now so complete, that noble structure of mercantile law, that directs and controls the commerce of the world, and gives to mercantile property its peculiar rights and incidents.

Right of Alienation.—The law will not allow property to be rendered inalienable, for the reason given by Lord Coke, it would militate *against trade and traffic*, and against bargaining and contracting between man and man. There was formerly an exception allowed to this rule in the case of property given or settled to the use of a married woman. But the onward march of the law, has in effect trampled out this exception. And as noticed in chapter on Principal and Agent, the possession of mercantile property gives to the agent nearly all the rights of the principal, and among them the right to dispose of them in any manner almost that he may see fit, if the party dealing with him act *bonâ fide*.

Surviving Interest.—It is the ordinary rule at law that where two or more persons are jointly interested in, and possessed of personal property, and the one dies, his interest does not pass to his heirs or next of kin, but to the surviving joint tenant. The reverse of this is the rule with mercantile property. The goods, wares, merchandise, and effects which joint merchants or partners in trade may possess, do not survive, but go to the personal representative of the deceased, as separate personal estate; and this, as the old law writers have it, "by *the law of merchants*, which is part of the law of the realm, for the advancement and continuance of trade."

The same rule applies to real property held in partnership for the purpose of trade. A joint tenancy is not favoured in equity, so that courts of equity will lay hold of any circumstances, which will enable them to vary in this respect from

their practice of following the law. Equity also holds that real estate, bought and held for the purposes of a partnership in trade, as a part of the stock in trade, will be considered in equity, although not at law, as personal estate to all intents and purposes, whatever may be the form of the conveyance; so as to be subject to all the equitable rights and liabilities of the partners and their creditors; and so as to pass to the personal representatives, on the death of a partner, and not as realty to his heir at law, unless there be a clear expression to the contrary by the deceased partner, or some stipulation entered into between the partners.

In Equity the creditors of the partnership have a sort of lien upon the partnership funds and estate, and have a right to payment of their debts out of them, before the private creditors of the individual partners.

Privileged from Seizure.—In order to favor trade, the law protects certain property in which traders are temporarily interested, from liability of distress for rent; thus goods delivered to a person to be carried, wrought or managed in his ordinary trade or employment, cannot be distrained. An auctioneer, commission merchant, agent, wharfinger, mechanic, &c., comes within this important and beneficial rule. The necessary implements, or tools, ordinarily used, are also in the same manner privileged; but only in case there be other property upon the premises, sufficient to satisfy the demand.

It is a rule of law that any property or fixture once *attached* to the freehold, immediately becomes a part thereof, and cannot be removed, without the consent of the owner of the freehold. But it has long been held that, in order to encourage commerce, and foster and protect trade and manufacture, that fixtures attached to the freehold, and known as trade fixtures, should be removable. The tendency of modern decisions, as lately remarked by Chief Justice Richards, seems to be to carry out what may seem to be the intention of the parties at the time the article, which would otherwise be con-

sidered a chattel, was attached to the freehold. If it was for a mere temporary purpose, or the more complete enjoyment or use of it as a chattel, then it would still retain its original character.

If a party leases land for the special purpose of carrying on thereon a certain trade or calling, and for that purpose affixes to the realty any fixtures, machinery or even buildings, the only question necessary in deciding whether they are removable or not, is whether they were designed for purposes of trade, or not, and are accessory to its carrying on. If so, it makes no difference if it be a smith's forge, a steam engine in masonry, or a two story soap chandlery.

SECTION II.

SHIPPING.

No part of the commercial trade of England and the property employed therein, has been more carefully guarded and fostered by legislative enactment than the shipping. The great source of England's wealth and strength being her supremacy upon the ocean, it is most important that she should guard the rights of British ships, extend their privileges to the utmost limit, and train up a numerous and hardy class of seamen.

In Canada legislation has been chiefly to better secure the right of property in Colonial vessels navigating our inland waters, and to facilitate their transfer, and to prevent the fraudulent transfer of the property in them.

The Imperial Acts prohibit certain traffic except in British ships, give them certain privileges above foreign vessels, and enact that they must be navigated by a certain proportion of British seamen. We have no such privileges nor protections, and it has been a frequent, and no doubt just ground of complaint, that while the United States, whose shipping is brought in such active competition with our own, has been

zealous to secure it every advantage, to the almost seclusion of ours, yet the Canadian shipping interests, seemingly unthought of, has been left just where it was when every voyage was only an expedition.

Now that our Provincial character is melted into a Dominion, and we have taken our place among nations, with something more to do to sustain our position and honor upon the water, if need be, than trusting to the navy of England, there is a fair hope that legislation will do something to foster and protect this important arm of our commercial wealth, and secure a hardy navy to sustain our national honor.

Our Provincial Statute, 22 Vic. chap. 41, Con. Stat. Can. is very similar to parts of the Imperial Statute, 8 and 9 Vic. chap. 88, and the decisions of the Courts upon parts of that Statute, will be most important in construing similar sections of our own.

What Ships may be Registered.—All vessels of over fifteen tons and which have been wholly built in the Province, and which wholly belong and continue to belong to Her Majesty's subjects, are capable of being, and should be registered.

Where Registered.—Every vessel is considered as belonging to some port, at or near which some or one of the owners, who shall make and subscribe the declaration required previous to registry, reside. It is with the collector of customs at this point she must be registered, and from him receive her certificate.

How Registered.—In order to obtain registry a declaration must be made and subscribed before the collector of customs, to whom application is made by the owner, if only one; or if there be two joint owners, and they both reside within twenty miles of the place of registry, by both of them—if either at a greater distance, then by one; if more than two, by the greater part, (not exceeding three) if residing within twenty miles, unless a larger number wish to join; and if all, or all but one reside at a greater distance, then by one only.

The declaration must contain the ship's name, the master's name, the owners' names, residences and occupations, that the party making the declaration is a British subject, and that neither he nor any other part owner has taken the oath of allegiance to any foreign state whatever, &c. And that no foreigner hath any interest or share in the vessel.

The name of such ship must be painted in white or yellow letters, not less than four inches in length, upon a black ground upon her stern, as must also, in a legible and distinct manner, the port to which she belongs. If they neglect to have her name so painted before she takes in any cargo, or wilfully allow or permit it to be altered, erased, obliterated, or concealed, or to be described differently in any paper or document, such owner or master, so acting or permitting, incurs a penalty of eighty dollars.

In case of a change of master, the certificate of ownership must be delivered to the person authorized to grant a certificate at the port where such change is to take place, who endorses a memorandum of such change upon the certificate, and gives notice to the office where the vessel received its certificate, that such change may be noted in the book of registry of ownership.

When the vessel belongs to a corporation or limited partnership, a declaration differing somewhat from the one above referred to, is made and subscribed to by the secretary, director, manager, or general partner as the case may be.

The applicant for registry must also produce (unless unavoidable through death of builder) the builder's certificate of the time and place of building, denomination and tonnage, and the name of the first purchaser, together with a declaration of her identity.

Registry de novo.—A vessel may be registered *de novo*, if the certificate be lost or detained, if the vessel be so altered as not to correspond with her former particulars, or if there be any change of property in her.

Property in Vessels.—The property in every vessel belonging to more than one owner, is considered as being divided into sixty-four equal shares, and the property of each owner must be described in the certificate of ownership as so many sixty-fourth shares. No person is entitled to be registered as an owner of any share, unless it be an integral sixty-fourth; but if an owner's interest cannot be reduced to a certain number of sixty-fourths, his interest in the fractional part is not affected by reason of non registry. Partners in trade having an interest in a vessel may have it registered as joint property, without distinguishing the proportionate interest of each partner, and such interest will then be considered as partnership property, to all intents, and so dealt with.

Number of Owners.—Not more than thirty-two persons can be *legal* owners of any registered vessel at the same time; but minors, heirs, legatees, creditors or others, exceeding that number may have an equitable interest, represented by or held from any of the persons within that number.

Transfer of Ownership.—The builder of a vessel is not compelled thereby to have his vessel registered before he can make a valid sale of her; the property in it thus being the same as any other chattel and transferred in the same manner. But the transfer of property in a registered vessel can only take place by a bill of sale, or other instrument in writing, reciting the certificate of ownership or principal contents thereof. But no bill of sale is void merely by reason of any error in such recital, or the recital of a former certificate, if the identity of the vessel be effectually proved thereby. But no bill of sale of any registered vessel is valid, or effectual to pass the property in such vessel, nor has it any effect until it has been produced to the collector of customs of the port, at which such vessel received a certificate of ownership, or the collector of a port at which she is about to receive a certificate *de novo*, nor until such collector has entered in the book of ownership in the one case, or in the book of registry *de novo*,

after all the requisites of law for such registry *de novo* have been complied with, in the other case, the name, residence and description of the vendor, or mortgagor, or of each, if more than one, the number of shares transferred, the name, residence and description of the vendor or mortgagor, or of each if more than one, and the date of the bill of sale, and of the production of it; and (except such vessel is about to receive a certificate of ownership *de novo*) endorsed the said particulars of such bill of sale on the certificate of ownership of the vessel, when produced to him, and shall have given notice thereof to the Finance Minister, or other persons to whom the copies of certificates are to be sent.

When the particulars of the bill of sale are entered in the book of registry, such bill of sale is effectual to pass the property thereby intended to be conveyed, against every person and to all intents; except as against subsequent purchasers, and mortgagees, who first procure the endorsement of ownership to be made upon the certificate.

It has been held in an action brought for breach of contract in refusing to sign certain promissory notes, the sale and delivery to the defendants of a certain interest in a schooner, being the alleged consideration for the promise; and it appearing that the plaintiff had surrendered his interest to the defendants, and they had remained in exclusive possession of the vessel; but that no assignment had been made or required by the statute, and no transfer endorsed on the registry, nor any new certificate of ownership granted, that the plaintiff could not recover.

If the promissory notes, however, had been given, the want of a valid title to the vessel would not have been an effectual defence, to resist their payment.

Had the vendor completed his part of the contract as fully as he had power, and applied to a court of equity for specific performance, it would, no doubt, have ordered the defendants to sign promissory notes.

Where the same property has been transferred more than once, the several vendees or mortgagees take priority, *according to the time when the endorsement is made on the certificate*, and not according to the time of entering their respective instruments in the book of registry—Thus if an owner of a share or shares execute two different bills of sale to different persons, and both conveyances be entered in the book of registry, but the second purchaser get the certificate and have the proper endorsement made on it, he, and not the first purchaser will have the legal title. Every purchaser should therefore be exceedingly careful to obtain the certificate of registration, as the possession of it is important for the completion of his title, and without it he may lose his purchase by a fraudulent conveyance to some other person, who may succeed in getting the certificate, and having the proper endorsement made.

But in order to protect parties as much as possible against such fraudulent conveyances, it is provided: that when any instrument of transfer has been entered in the book of registry, the collector shall not enter any other instrument, purporting to be a transfer of the same share or shares, from the same vendor or mortgagor to any other person, until after the lapse of thirty days, or (if the vessel were absent from her port at the time of entry,) thirty days after her arrival thereat; and if a second instrument has been entered, a like period must elapse between its entry and that of a third. Wherever more than one have been entered, the officer is to endorse on the certificate the particulars of that one under which the person claims, who shall produce the certificate for that purpose, within thirty days after the entry of his instrument in the book of registry, or if the vessel be absent at the time, within thirty days after her return to port; and if no person produce the certificate within such time, then the particulars of that person's instrument, who shall first produce the certificate for that purpose, shall be endorsed. If the certificate be lost, mislaid, or detained, on sufficient proof, time may be granted

for its recovery, or for registry *de novo*, during which additional time no other transfer can be entered in the book of registry.

This gives to each of rival vendors thirty days from the entry of his instrument, or next subsequent return of the ship to port, to get the certificate endorsed, and obtain a perfect title. If he allow that time to pass, he will be in danger of having his title defeated by some subsequent vendee; unless further time have been granted, as above pointed out.

To avoid the inconvenience that would, in some cases, arise if the certificate had to be produced to the Collector of customs of the port, at which the vessel was registered, it is provided, that if after any bill of sale has been recorded, at the port to which the vessel belongs, it be produced with a notification upon it of such record, signed by the Collector of such port, and also produced the certificate of registry, to the Collector of any other port; the Collector of such other port may endorse on such certificate, the transfer mentioned in such bill of sale, and give notice thereof to the Collector, at the port where the vessel belongs, who will record the same as if he had made the endorsement himself. The Collector of such port, must first give notice to the Collector of the port to which the vessel belongs, of such requisition made to him, and ascertain whether any other, and what other bills of sale have been recorded with respect to such vessel, after which he is to endorse the certificate as if the vessel belonged to his port.

Mortgages.—The transfer of a vessel, or of shares therein by way of mortgage, is effected in the same manner as by bill of sale, so far as practicable. But where the transfer is made by way of mortgage, or to a trustee for the purpose of sale, for the payment of money, the collector must in the entry in the book of registry, and also in the endorsement on the certificate of ownership, state that such transfer is only as a security for money, or by way of mortgage, and the transferee is not deemed to have become, or the transferrer to have ceased to

be, the owner thereof, except so far as may be necessary for the purpose of rendering the vessel, or share so transferred, available by sale or otherwise, for the payment of the money it was transferred to secure. If the mortgagee neglect to have the proper endorsements made upon the certificate, he must abide the consequences, and the court of Chancery will not relieve him against the omission.

Rights and Liabilities of Part Owners.—It is possible that a joint tenancy may exist in a vessel as in any other chattel property, causing the whole interest in the vessel to pass to the surviving partner. But the operation of the Registry act, requiring the property to be registered and conveyed in distinct shares, makes the owners, as a consequence, tenants in common of the vessel. At common law any one tenant in common may seize upon the chattel, and regulate the mode of its enjoyment to the exclusion of all the rest. The shipping transactions in which the vessels of Upper Canada are yet engaged, are not of sufficient extent or importance to produce many if any differences, which cannot be amicably arranged between the part owners themselves. Should such differences occur, they must look to their legal rights as protected in their deed of settlement (if such a deed exists), or they may seek the interference of the court of equity. The necessity of a court of admiralty is frequently felt; and there is no doubt if once established and invested with competent jurisdiction and well defined powers, it would afford many benefits and reliefs to those interested in shipping interests.

The proper mode for the part owners to obtain an adjustment of a vessel's accounts, is by a suit in equity. The part owners, like partners, are liable to the full extent of debts contracted for its repair and other necessary expenses, which can be shown or presumed to have been incurred with their assent. The mere legal ownership of itself is not sufficient to render an owner liable, consequently any one

will be exempt who can show that he has not pledged his responsibility.

Where the ship is under a master, and the owners divide the profits, the master is, with respect to her concerns, *prima facie*, the agent of them all.

The admission of one joint owner is not binding on the others, but it seems to be established that in all that concerns the repairs and necessaries of a vessel, one part owner is agent for the rest. Each may transfer his share without the consent or privity of the others.

Mortgage on Ship's Keel.—As soon as the Keel of any vessel is laid, the owner may mortgage or grant a lien upon the vessel to any person contracting to advance money or goods for its completion: And such mortgage or lien will not attach only to so much of the vessel as may be completed at the time of its creation, but to the whole vessel during her construction, and afterwards until paid.

It may also be agreed that the vessel when completed shall be the property of the person advancing; which agreement will enable such party to register her in his own name, sell the same and grant a clear title. This does not take away from the original owner his right of action of account, or such other remedy as the law may afford him, for the purpose of recovering the value of his equitable interest in the vessel.

All mortgages or liens upon Keels are special in their character, and should be drawn with care. They are to be passed before a Notary Public, or made in duplicate, before two witnesses, and such contract if made in duplicate, or a memorial thereof if passed before a notary, must be registered in the Registry Office of the county where the vessel is being built. The contract and all the rights thereunder only accrue from the date of registration.

The contract among other things should contain a description of the vessel, the designation of the ship yard where she is

being built, the amount in money or goods to be advanced, the names, residences and additions of the parties, and of the witnesses.

No owner can grant more than one such mortgage or lien, without the express consent of the first advances, and if any subsequent grant be made without such consent, it is void.

SECTION III.

GOOD WILL.

It is difficult if not impossible to give a clear and precise definition of the term "good-will," when used in a mercantile sense. The only characteristic of mercantile property that it possesses, though recognized as such, is a certain pecuniary value. It is the right and privilege of carrying on an old and established business in an old and established place, and its value must be estimated by the benefit to accrue from this privilege. This benefit depends upon so many surrounding and independent circumstances, that it is almost, if not quite impossible, to compute its true and correct value, unless it be by offering it for sale by public competition, when its selling price would give the best if not the correct idea of its real value.

It is so much the growth of modern enterprise and advancement, that it is said the Courts have not settled the landmarks by which it is to be defined and protected It is in its nature to a great extent analagous to the exclusive use of a particular name or trade mark upon goods or merchandize. No man has an abstract right to the exclusive use of any particular trade mark or place for carrying on business; but having once adopted them, and devoted his time, talent and means in building up a business in connection with them, and to an extent known and recognized by them, they become to him of a pecuniary value, and their protection becomes necessary to secure him the full benefit of ingenuity, industry, and integrity. It is with this view that Courts of

Equity restrain an improper use of the trade mark of another, and estimate as far as possible the value of the good will of a business.

In professional business the profits being derived almost entirely from the talent and reputation of the individual, the good-will is so significant that the courts have declined to consider it. It might, however, in such a case have a marketable value, and if special circumstances could be shown to the court, making it a matter of importance, there is little doubt that the court would not refuse to consider it, on account of its arising in connection with a professional calling.

In the case of hotels, manufacturing and mercantile houses, this so called property becomes of real intrinsic value, and as such is regarded. Upon the sale of such a business the good will passes, as a matter of course, without being specially named.

It is in the case of dissolution of firms that the questions relating to the good will of a business are most likely to arise, and it makes no difference whether such dissolution occurs by the act of the partners or by the death of one of them.

In case of dissolution there is no obligation on the part of any of the partners to retire from the business, nor in the case of death of one partner is the survivor under any obligation to continue the business, so as to preserve its good will until its final winding up. Whatever value such good will may have, however, belongs to the firm, and unless otherwise agreed, must be sold for the benefit of the partners.

In the case of death the good will does not survive, and if the survivor continue to carry on the business, deriving the benefit of the established reputation of the old firm, the Court of Chancery will, as nearly as possible, estimate its value, and order the survivor to pay a reasonable price to the personal representatives of the deceased partner for the use of such good will.

When one partner retires from a firm and from the business, the continuing partners obtain the good will for nothing; for continuing the business in the "old stand," the good will naturally and necessarily continues with it. An agreement that the continuing partners shall take the share of the retiring partner at a valuation, has been held not to entitle the retiring partner to have the good will taken in account. In case of a retiring partner it is only subject of account when there has been some special agreement to that effect.

CHAPTER III.

OF MERCANTILE CONTRACTS.

SECTION I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

A Bill of Exchange is a written order or request, from or by one person to another, for the payment of money absolutely and at all events, and is substantially in the following form:

KINGSTON, January 1st, 1867.

$500.

Thirty days after date pay to A. or order, the sum of five hundred dollars, for value received, and charge the same to account of

B.

To C.
of Montreal.

B. is the drawer, C. the drawee, and A. the payee. Sometimes the drawer is the payee.

The bill is then usually forwarded to the payee, who presents it to the drawee for his acceptance as it is called. If he does so, he writes his acceptance across the face of it, and then becomes and is known as the acceptor.

The essentials of a bill of exchange then, are, a drawer, drawee, and payee, who may be the same person as the drawer. It must be in writing and be a request for the unconditional payment of money, upon some time certain as at sight, on demand, a certain time after date, or the tran-

spiring of some event, as upon the death of the party. The want of one or more of these essentials may not render the instrument a nullity, though they may destroy its assignability and character as a negotiable instrument.

The legal effect of drawing a bill of exchange payable to a third person is a conditional contract on the part of the drawer, to pay to the payee his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill is an unconditional contract to pay the amount therein specified to the payee, or order, or bearer. And the effect of endorsement is to incur a liability to pay the immediate or any succeeding endorser or bearer, in case of the acceptors' or drawers' default. The acceptor is primarily liable, the drawer secondarily, and then the endorsers according to their priority.

The contracts arising upon a bill of exchange, like those of a promissory note, are simple contracts, although they differ from ordinary simple contracts in two important particulars: first, that they are assignable; secondly, that consideration will be presumed till the contrary appear. Bills of exchange derive these peculiar properties from the custom of merchants; promissory notes, from Stat. 3 and 4 Ann. chap. 9, which places them on the same footing with bills.

At Common Law neither money, nor securities for money, could be taken in execution at the suit of a creditor; but by 22 Vic. chap. 22, sec. 261, C. S. U. C., the sheriff or officer, having execution, may seize any money, or bank notes, checks, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for money. The money and bank notes are to be handed over by the sheriff to the execution creditor, and the sheriff, on receiving a sufficient security, is to sue in his own name on the checks, bills, notes, &c., and apply the money arising therefrom upon the execution.

Promissory Notes.—A promissory note is a promise to

pay a sum certain, absolutely and unconditionally, at a time limited, or on demand, or at sight, to a person named therein, or to his order, or to the bearer.

No particular form of words are necessary to constitute a note, but the following is the usual form :—

Kingston, January 1st, 1867.

$500.

Three months after date I promise to pay to A, or order, at the Bank of Montreal here, five hundred dollars, for value received.

B

B is the maker; A the payee, and when endorsed by A in blank, i. e. by A simply writing his name across the back, it becomes transferrable by mere delivery, and the holder is the payee. Thus the maker of a note occupies the same position as the acceptor of a bill; the endorser of a note the same as the drawer of a bill; and the payee in either case has the same legal rights and remedies.

A note cannot be made by a man to himself without more. But if made to himself or order, and endorsed in blank, it becomes payable to bearer; and if specially endorsed, it becomes a note payable to the endorsee or order. If made payable to a man, "or to his wife and to no other person," is the same as if made payable to him alone, and his executors may sue upon it.

The promise to pay must be unqualified, the amount clearly ascertained, and the time certain.

"Three months after date *pay* to the order of W. S. at Port Hope, one hundred dollars, for value received," is not a note.

A promise to pay a certain sum on a day named, "*in cash or mortgage upon real estate*," is not a promissory note, not being an absolute promise to pay money, nor will it become a note by the maker's election to pay in cash.

An instrument purporting to be a promissory note, with the words " with exchange on New York " has been held not a promissory note, the amount being rendered uncertain by the uncertainty of exchange.

On the other hand " I do acknowledge myself to be indebted to A in $50 *to be paid* on demand for value received " has been held a promissory note, the words " to be paid " amounting to a promise.

It is for the interest of trade and commerce that the law should be construed liberally, and the courts will do so, in order to recognize an instrument a bill or note, if they can find the several requisites contained in it.

A note may be made payable by instalments, and should be presented and protested upon each dishonor, allowing the usual three days of grace, and cannot be endorsed over for less than the sum due.

A note made by two or more makers may be either joint, or joint and several. If signed by two or more and beginning "We promise," it is a joint note ; if beginning "I promise," it is a joint and several ; and if beginning, " I promise " and signed by one partner for his copartners is the joint note of all, and has been held to be also the several note of the signing partner.

Checks.—A check resembles and is in effect a bill of exchange drawn upon a banker, payable on demand and subject to many of the rules regulating bills : it must be presented ; it requires equal diligence on the part of the holder ; and may be transferred by endorsement or mere delivery as the case may be. Checks differ from bills and notes, in the time of falling due : as a check is not due until payment is demanded. Neither have they any days of grace, nor require any acceptance, excepting prompt payment. The drawer of a check is not a surety, but the principal debtor, like the maker of a promissory note.

The holder must use reasonable diligence in presenting a

check for payment, otherwise, if the bank fail in the meantime, he will lose the money, besides being at the risk of the drawer checking out his funds in the meantime.

Prior to the passing of the act imposing "duties on Promissory notes and bills of exchange" a check might be post dated, or made payable on a day other than that upon which it bears date. By section three of that act, it is enacted that "every document usually termed a letter of credit, or whereby any person is entitled to have credit with or to receive from or draw upon any person for any sum of money, shall be deemed a bill of exchange or draft," and by the same section among other exceptions from duty, is "any check upon any chartered Bank, or Licensed Bank, or any Savings Bank, if the same shall be payable *on demand.*"

Under these sections an intended check payable on a different day from that on which it bore date, has been held if not a bill at common law to be one under the act requiring a stamp, and void for the want of it.

The drawee of a bill is not generally speaking, liable till acceptance; but a bank having sufficient funds of its customer, is bound to pay his checks within a reasonable time after their presentation, and is liable to an action by the customer if it do not. There is an implied contract between the banker and his customer, when he receives his money, to pay his checks, and if he refuse, and the customer's credit be impaired by the refusal, he is entitled to damages.

Although checks being intended for immediate payment, on being presented, are not usually accepted; however, if a banker, as is now frequently done, mark a check as good, and such marking amounts to a writing within the statute 22 Vic. chap. 41, sec., 7, C. S. U. C., it binds the banker to pay the check so marked. In such a case the check should be stamped, as there is little doubt the courts would hold it such an instrument, by the acceptance, as requires a stamp.

The giving of a check is *prima facie* no evidence of money

lent, but, on the contrary, is evidence of a debt paid, or that cash was given for it at the time, neither is payment by a banker of money advanced by the banker to the customer, but on the contrary is *prima facie* evidence of repayment, of money previously lodged by the customer.

A check, once accepted, until dishonor, is payment. The mere production of a check drawn payable to a party, and proved to have been paid by the banker upon whom it was drawn, is no evidence that the party in whose favor it was drawn ever received the money. It must be shown to have passed through his hands, and for this purpose, it is always a safe precaution to make a check payable to the payee's order, so as to secure his endorsement, which will be evidence that he received the money.

When a check is given to take up a bill or note, the holder is entitled to retain the bill or note until payment of the check. If a person take a check in payment of any debt, other than that of a bill or note, and the check from any cause, not resulting from the negligence of the party taking the check is dishonored, the parties' remedies remain entire upon the original debt.

The death of a drawer of a check countermands the banker's authority to pay; but if payment be made before notice of the death, the payment is good.

If a check be fraudulently altered and increased, and the banker pay it, he cannot charge the drawer with the excess, but if the forgery has been induced and assisted by the negligence of the drawer, the party whose negligence induced the fraud, and not the banker, must suffer the loss. Thus in a check for fifty dollars, if the word *fifty* in the body of the check be commenced with a small letter in the middle of the line and the figures 52 placed at some distance from the printed $ at the top of the check, and a party puts a 1 before the 52, and writes one hundred in the body before the fifty, upon the banker paying the full amount the loss will fall upon the drawer.

When several parties, not partners in trade, deposit in a bank to their joint credit, they must each sign the check. If one should quit the country, or from some improper reason refuse to sign a check, the court of equity will grant relief and assist the others to get their money.

An I. O. U.—is simply an evidence of debt and as such does not require to be stamped. If it goes further and contains a promise to pay, or an agreement to pay upon a certain day, it will assume the character of a note and should be stamped. An I. O. U. not addressed to any one, is evidence of an account stated for a Plaintiff in an action, upon its mere production, and if another person was meant, the defendant must prove it. But it may be shown under the general issue, that it was given on a consideration that has failed, as for part of a deposit on a sale that has gone off for want of title.

Capacity of Contracting Parties to a Bill or Note, and their Liabilities.—Any person, it seems, acting in the capacity of an agent, may make a bill or note binding upon his principal, and no particular form of appointment is necessary to constitute such agency: it may be created by writing, or by verbal directions, or may be implied from the actual relations existing between the parties.—Vide Chap. 1, Sec. III.

There are several descriptions of persons, though capable of acting as agents, so as to bind their principal, yet labor under disabilities that render them unable to bind themselves. An infant cannot bind himself by his promissory note or bill. A married woman cannot bind herself unless her husband be under a civil incapacity, or unless she be carrying on a separate and independent business, and own separate estate, vested in trustees, where the court of equity would hold her estate liable.

Persons who are drunk, or whose mental faculties are for the time so impaired that they are not capable of knowing what they are doing, may avoid a bill or note made by them while in such state.

Insane persons, during their periods of insanity, and after their being found lunatics by the Court of Chancery or a Commission, can make no valid contract.

An agent's authority to accept or endorse may be special, and in such a case is construed strictly. It is of the utmost importance that care should be taken to discover the extent of an agent's authority, before accepting a bill or note from him, where there is the least intimation of such authority being limited or special. The words "*per procuration*," or as it is generally written "*per pro*" are an express intimation of a limited authority, and a person taking a bill or note so made, accepted or endorsed, is bound to inquire into the extent of such authority. "A", who carried on business, on his own account and also in partnership, went abroad, and before going gave a power of attorney to a party "for him and on his behalf to accept bills drawn on him by his agents or correspondents." "B", one of his partners (and who acted as his agent) in order to raise money for the payment of creditors of the partnership, drew a bill which the attorney accepted in "A's" name by procuration. In an action against "A" by the endorsee of the bill it was held, first, that the right of the endorser depended upon the authority given to the attorney; secondly, that the power applied only to "A's" private individual and not to his partnership affairs; thirdly, that the special power to accept extended only to bills drawn by an agent in that capacity, and that "B" did not draw the bill in question as agent, but as partner; and lastly that the general words in the power of attorney were not to be construed at large, but as giving general powers for the carrying into effect *the special purposes* for which they were given.

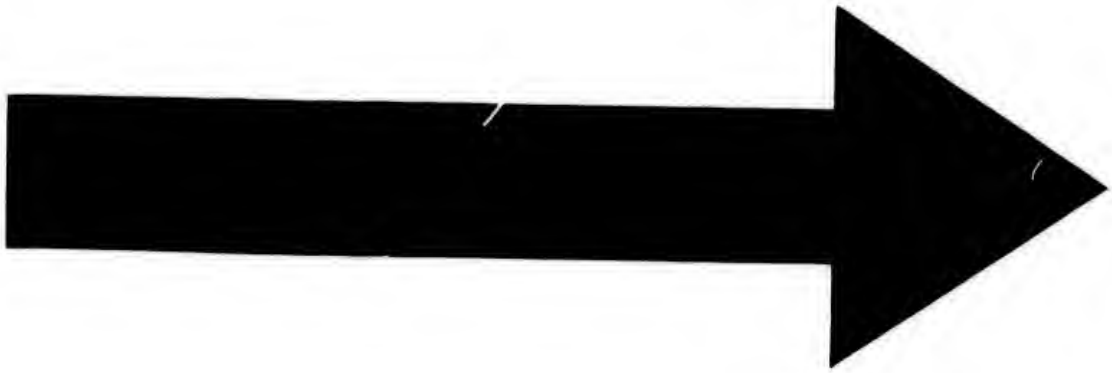
In a late case, four notes signed "The executors of the estate of the late William Notman, per pro James S. Meredith," were sued upon. It was proved that Meredith had managed the affairs of the estate since testator's death, and that it had been left to him to do what he thought best, in

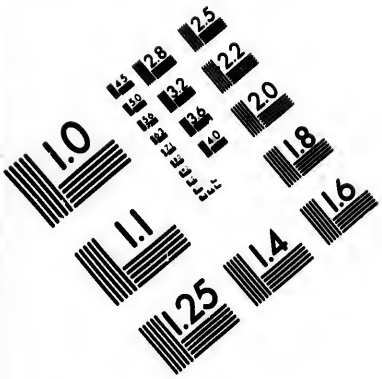
winding it up. Upon the trial the learned Chief Justice of the Common Pleas left it to the jury as a matter of fact, whether James S. Meredith was authorized to bind the executors personally, pointing out the difference between authorising or shewing that a party in winding up the business of an estate, and authorizing an attorney to [illegible] notes, which would bind an individual personally; re[illegible] the defendants leave to move for non-suit, among [illegible]ds, that there was no proof of any authority on the part of James S. Meredith to bind the defendants. It was held that though Meredith might have sufficient authority as regarded the estate, he clearly had none to bind the defendants personally, as they were sued; and a non-suit ordered accordingly. The learned Chief Justice of the Queen's Bench in delivering the Judgment of the Court, remarked, in winding up the estate, Meredith may have required to raise money, conceding that he had authority to pledge or charge the real or personal property of the estate, it is a very different thing to charge the personal representatives of it in their individual capacity.

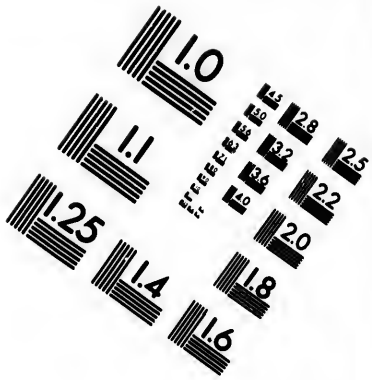
An authority to draw does not import an authority to endorse. An agent who exceeds his authority in negotiating a bill, cannot in any case convey a title to it, and a person taking a bill under such circumstances from an agent, has his title affected by the wrongful act, and is liable to refund to the principal, money which he receives in discharge of the bill from the previous parties; or if he take a renewal bill, such renewal bill belongs to the principal.

If an agent endorse a bill without authority, a bill payable only to order, he conveys no right of action, except against himself. But an unauthorized delivery of a bill or note payable to bearer, gives to a *bonâ fide* holder, without knowledge of the want of authority, a good title and right of action against all parties to such bill or note.

An agent may be personally liable to a third person, by drawing, endorsing or accepting in his own name or without







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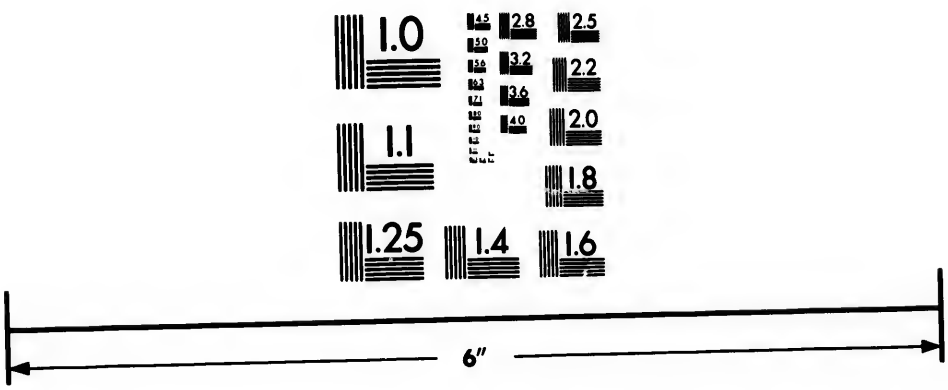

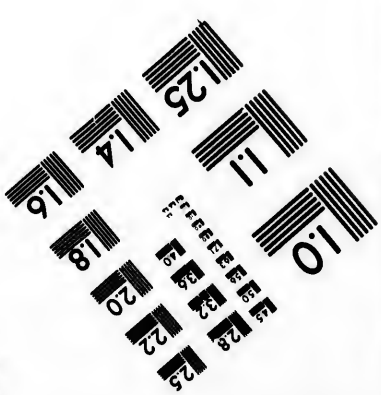

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authority, or without unequivocally shewing on the face of the writing, that he signs only in a ministerial capacity. This liability most frequently occurs in signing on behalf of a Company, with a mistaken idea of authority to bind. Thus a bill drawn "pay to J. S. or order $800, value received, and place same to account of Y. B. Company as per advice from C. M. to H. B., cashier of Y. B. Company," and H. B. wrote "accepted per H. B." It was held that H. B. was personally liable, though accepted by direction of the Company. Where a bill was directed to "A. C. Mining Company" and was accepted in his own name "for the A. C. Company" by one of the managing partners, who had no authority to sign for the rest, it was held, that on proof of his being a partner, he was personally liable. A bill was drawn upon a person as treasurer of the Wolfe Island Railway and Canal Company, and "accepted W. A. Geddes, Trs. W. I. R. W. & C. Co.," adding the company's seal,—it was held he was personally liable. So a promissory note made "on demand we jointly and severally promise to pay E. H. or order $800, value received, for and on behalf of W. U. Association," and signed "P. S. I. W. Directors" was held to bind the persons signing personally. G. being secretary of an Insurance Company gave the following note for a loss incurred, "£1000 sixty days after date I promise to pay to order of J. S. Wood, Esq., of Colborne, one thousand pounds, value received, by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton," and signed "C. Horatio Gates, secretary O. F. Company." Held, he was personally liable thereon. But if in any such a case a note or bill be made and delivered, and accepted, with a distinct understanding that it is so delivered and accepted, on behalf of the company referred to, it would be an equitable defence against personal liability.

It will be seen from the foregoing that a person taking a bill accepted, or a note made by an agent, ought to exercise

due caution, for he must take it upon the credit of the party who assumes the authority, and it would be only reasonable prudence to require the production of that authority.

The law presumes that each partner in trade is entrusted, by his co-partners, with a general authority in all partnership affairs. Each partner, therefore, by making, drawing or accepting negotiable instruments, in the name of the firm, and in the course of the partnership business, binds the firm—whether he signs the name of the firm, or signs by procuration, or accepts in his own name, a bill drawn on the firm.

A partner cannot, it seems, bind his co-partner by a joint and several note.

Partners not in trade, but for other purposes, as farming, medical and law partnerships, have no implied power to bind each other.

If a man be at the same time partner in two firms, each using the same style, and he draw a bill in the common name of the two firms, the endorser may charge either firm at his election.

If a new partner be introduced into a firm, an acceptance for an old debt, in the name of the new firm, will not, in the hands of the party taking it, bind the new partner.

The taking of security from one of several partners, joint makers of a note or acceptors of a bill, will, in general, discharge the other co-partners.

A secret or dormant partner is bound by negotiable instruments under the names of the firm; and it makes no difference whether such instruments are negotiated for the purposes and benefit of the firm, or be given by one partner in payment of his private debt,—provided the holder were not aware of this circumstance, for credit is given to the firm generally, of whomsoever it may consist.

A mere nominal or ostensible partner is liable to any one to whom he has been held out as a partner; for as they can not know what his interest in the firm may be, they would be

injured if they could not charge; and it would be a fraud to allow a party to hold himself out as a partner, and induce parties to give credit or take bills or notes upon his responsibility, and then to avoid all liability upon ground of want of interest.

To put it shortly, the man is liable who is really a partner, though he is not known to be one, and he is liable who holds himself out as a partner, to those who thought him one, whether he was one or not.

Thus there are two classes of persons liable upon a bill or note signed in the name of the firm.

1. Those who participate, or are entitled to participate in the profits of the concern.

2. Those on the strength of whose credit a person may have contracted.

After dissolution, the ex-partners have no power to bind each other by bills or notes to persons aware of the dissolution, but if notice has not been given, a *bonâ-fide* holder of a bill or note may recover from the ex-partners.

A secret partner is not liable after dissolution without notice; for the contract not being made upon his credit, and he having no interest in it, he is not brought within either of the above rules of liability.

Where the dissolution arises from death of one of the partners, no notice is required to protect the estate of the deceased; nor can an executor complete his testator's endorsement by delivery of the instrument.

In taking from an ex-partner a bill or note, belonging to the late firm, the separate names of each partner should be had, or else the partner putting the name of the late firm to such bill or note, should show his authority to do so.

A bill drawn or note made without authority, but afterwards ratified, is as binding as if made under a prior and sufficient authority.

If an infant be a party, jointly with an adult, to a negotiable

instrument, the holder may recover from the adult alone, without taking notice of the infant.

An infant drawing and endorsing bills may convey a title, so the holder can sue the acceptor and all other persons except the infant himself.

If a bill or note is given to a single woman, and she marries, the property in such bill or note would remain vested in her by virtue of 22 Vic. chap. 73., C. S. U. C., but her husband must be joined with her in any action upon it.

Agreements intended to control the Operation of Bills or Notes.—Such agreements are either written or verbal. A written agreement may be either upon the instrument, or upon a distinct paper; and may be either made at the same time of the bill or note, or at a subsequent time. And a contemporaneous written agreement may either be parcel of the instrument, or it may be collateral.

A verbal agreement made contemporaneous with the instrument cannot take effect, it must be a subsequent agreement.

The effect of a memorandum endorsed upon a bill or note, depends upon circumstances. If it make the payment contingent it will be incorporated with it. But if it be merely directory as to place of payment, or imports a collateral security has been given, or is intended merely to identify the instrument, it does not affect its operation.

A written agreement, on a distinct paper, to renew, or qualify the liability of a maker or acceptor is good as between the original parties.

But a written agreement, though contemporaneous, will not restrain the bill or note, if other persons besides the parties to the bill or note are parties to it.

An agreement to renew, has been held to be an agreement to renew once only.

Stamps on Bills and Notes.—Our Stamp Act, 27 and 28 Vic. chap. 4, seems to have two effects upon commercial paper, which should not be lost sight of. First it makes all notes,

bills of exchange and drafts, made, drawn or accepted in this Province, void, unless properly stamped. Secondly, it makes informal instruments, such as letters of credit, certain receipts, &c., bills of exchange or drafts for the purposes of the act.

The original Stamp Act came in force on the first day of August, 1864, prior to which date no stamps were necessary upon negotiable instruments, and although now in force for nearly three years, unstamped instruments are not at all uncommon, partly from ignorance of the strict requirements of the Act, and partly from its unadaptability to a country like our own. The stamp system may afford a large revenue, and very little inconvenience, in an old and thickly populated country like England, but in a deep back country like ours, with a scattered population, full of the spirit of commerce and speculation, the inconvenience of obtaining stamps is too great. This is no doubt the cause of much unstamped paper; and not a desire to evade the law.

The Imperial Stamp Act has long made, in England, the distinction between foreign and inland bills an important one. In this country we have, heretofore, scarcely recognized such a distinction. But it may now become important to recognize such a distinction even here, for the purposes of evidence. The Act in effect applies only to notes and inland bills and such foreign bills as are accepted within the Province. Such foreign bills therefore as do not come within the Act, are both admissible in evidence, and capable of recovery.

The stamps, imposed by the Act, and by 29 Vic. chap. 4, extending it, are as follows:—

Upon every promissory note, bill of exchange or draft, made, drawn or accepted, in the Province of Canada,

Amounting to $25 or under	1c.
Exceeding $25, not exceeding $50	2c.
Exceeding $50, not exceeding $100	3c.
And for each additional $100 or fractional part of $100	3c.

On each draft or bill executed in duplicate, a duty on each part for the first $100 of.....	2c.
And a further duty on each additional $100, or fractional part thereof, of.....	2c.
On each draft or bill executed in more than two parts, a duty on each part for the first $100 of	1c.
And a further duty for each additional $100, or fractional part thereof, of.....	1c.

Any interest made payable at the maturity of any bill, draft or note, with the principal sum, shall be counted as part of the amount thereof.

A bill or draft under the Act does not only include an ordinary bill of exchange, or bank draft, but also all instruments *for the payment* of any sum of money, *by a bill or promissory note*, whether such payment be required to be made to the bearer or to order.

Every document usually termed a letter of credit, or whereby any person is entitled to have credit with, or to receive from or draw upon any person for any sum of money—

And every receipt for money, given by any bank or person, which shall entitle the person paying such money or the bearer of such receipt, to receive the like sum from any third person—

The exemptions from duty are :

1. Every bill, draft or order drawn by any officer of Her Majesty's commissariat.

2. Every bill, draft or order by any officer in Her Majesty's Imperial or Provincial Service, in his official capacity.

3. Every acceptance or endorsement by any such officer on any bill drawn out of Canada, or any draft of or on any bank payable to the order of such officer in his official capacity.

4. Every note payable on demand to bearer, issued by any chartered Bank of Canada.

5. Every note issued by any bank under and by virtue of chap. 55, Con. Stat. Can.

6. Every Cheque upon any Chartered Bank, or Licensed Bank, or on any Savings Bank, if payable on demand.

7. Every Post-Office order.

8. Every Municipal Debenture, or coupon of such Debenture.

All stamps are to be cancelled at the time of affixing them by writing, or stamping thereon the date at which it is affixed, which date so written is held to be *prima facie* the date of affixing.

Any person becoming the holder of, or paying any instrument requiring to be stamped, and which instrument is unstamped, may affix thereto double the amount of stamps originally required to be affixed thereto, and such instrument will thereby become valid.

There appears to be a lax opinion among commercial men as to within what time such double stamps must be affixed in order to meet the requirements of the act; but there is no doubt from the wording of the act there should be no unreasonable delay. It was remarked by Chief Justice Richards in the case of Stephens *v.* Berry, 15 C. P., page 548, that "the holder of such a bill, can only be considered safe by affixing the proper stamps at such time as he in law would be considered as having taken and accepted the bill as his own or within a reasonable time thereafter." And Henderson *v.* Gesner *et al*, 25 B. R. U. C. 184, has established the above dictum, and will undoubtedly be followed by the several courts.

There may be some doubt whether or not the want of a stamp can be successfully taken advantage of in a court of record unless raised by special plea. As remarked by the learned Chief Justice of the Common Pleas, in a late case, "the most convenient and proper mode of raising the question of validity of a bill or note is by a special plea." This does not apply to instruments within the jurisdiction of, and sued in the Division Court; for there being no written pleadings in this court, any defence can be set up orally, and taken advantage of as it may arise.

When the necessary duty or double duty required by the act has not been duly affixed, such instrument is not only invalid, and of no effect in law or in equity; but any person who makes, draws, accepts, endorses, signs, becomes a party to or pays any such instrument before such duty has been paid, does thereby incur a penalty of one hundred dollars; and any person wilfully writing or stamping a false date will also incur a penalty of one hundred dollars. But it is provided that no party to, or holder of such instrument, shall incur any penalty, by reason of the duty thereon not having been paid at the proper time, and by the proper party, if at the time it came to his hands, it had affixed to it the necessary stamps, and if he had no knowledge that it was not affixed at the proper time, and if he pays the proper duty, as soon as he acquires such knowledge.

Consideration.—A consideration in law means some benefit given, or promise made, or loss suffered by the plaintiff in any action, to or for the defendant.

In suing upon a *simple* contract it is necessary to aver that it was made on good consideration, and to substantiate that allegation by good and sufficient evidence, the law presuming there was no consideration until proved.

One of the important peculiarites of negotiable instruments, is their exception to this rule,—the presumption of law being, that they were given for a consideration. Although consideration is presumed to have been given for a negotiable instrument, yet, under certain circumstances, a defence may be made out by shewing that the instrument was obtained without consideration, or that it was given for an illegal consideration, or was obtained by force or fraud, or that it was lost and the plaintiff is not a *bonâ fide* holder for good consideration, neither fraud nor want of consideration can be any defence to an action on a bill or note, by an innocent and *bonâ fide* holder, who became possessed of it as such before due.

But if a defendant can make out a *prima facie* case of fraud, or that the instrument was originally tainted with illegality, it throws the burden of proof upon the plaintiff to relieve it of such fraud or illegal taint and prove consideration. Mere absence of consideration, as in case of an accommodation bill or note, received by the defendant, does not entitle the defendant to call upon the plaintiff to show what consideration he gave. It is necessary for the defendant to go further, and prove not only that it was an accommodation bill or note, but that the plaintiff and those *through whom* he deduces his title gave no value for it. We say, "and those through whom he derives his title," for it must be remembered, that between remote parties, as between payee and acceptor, between endorsee and acceptor, or between any maker, acceptor, or endorser, and the holder of a bill or note which has passed through intervening hands, two distinct considerations must be regarded, first, that which defendant received, and secondly, that which plaintiff gave. And an action between such remote parties will not fail unless in absence of both these considerations. Again, if any intervening holder gave value, the plaintiff may take advantage of it, and it will sustain his action.

An *entire* failure of consideration has the same effect as an original and total absence; but a plea showing not a total but a partial, is bad. But where the consideration fails in a specific ascertained amount, the defendant may set up its partial failure as an answer *pro tanto*. Thus if A give B a promissory note for $100, for value as to $60, and as an accommodation to B for residue, A may, in an action against him by B, set up want of consideration as to $40.

Where a bill or note is given for work done or goods sold, the price, amount, and quality of the goods or work cannot be disputed in an action on the bill or note.

We have already stated in general terms what may be considered sufficient consideration to sustain a simple con-

tract. But it may be well to state a little more fully and plainly what may be looked upon as constituting a good consideration for a bill or note. First, the payment of money, however small the amount. Second, a pre-existing debt, at all events if the bill or note be payable at a future day. Third, a fluctuating balance upon an open account, the consideration increasing or decreasing from time to time with the amount of balance. Fourth, a debt due from some third person to the transferee. Fifth, any risk run at the request of the person giving the bill or note. Sixth, a judgment debt is a good consideration for a bill or note, payable at a future day.

Whenever a bill or note is proved to have been illegal or fraudulent in its inception, or where the immediate endorser to the plaintiff is shewn to have obtained possession of it by fraud, the plaintiff will be called upon for proof that he gave value for, and took the bill without notice of the illegality or fraud. In case of fraud there is said to be no contract; for instance, if A sell B a horse, which he warrants, B giving his note for the same, and the horse turn out unsound, the breach of the warranty, simply, is no defence to an action on the note by A; but if A knew of the unsoundness, there is fraud and no contract, and no action lies upon the note by A.

A fraud may be committed as to third persons, so as to render the instrument unavailable. As for instance, an insolvent proposes to compound with his creditors, but A being one of his creditors, refuses to execute the deed of composition and discharge, unless the insolvent gives him a note for the balance of his debt. The insolvent does so without the knowledge of the other creditors, and A and the rest of the creditors then sign the deed. The note so given is void, as a fraud on the other creditors. And if the note so given also include his proper composition dividend, his dealing with the insolvent is one entire transaction, and we are of opinion he could not recover on the note, even for the

amount of his dividend. And it has been held that a note given for such a purpose, though given by a third party, is equally void. So the note would be equally void if given with such fraudulent intention, though the composition be never effected. But a note given by an insolvent, after his discharge, to a creditor for his debt, unsatisfied by his estate, would be free from fraud, and the moral obligation would be sufficient to support a consideration.

It matters not what may have been the fraud practised upon a maker or acceptor, or how improperly it may have been obtained, a third person who takes it fairly, for valuable consideration, can recover upon it. It is important that this should be so, otherwise the use and benefit of negotiable instruments in trade would be almost destroyed; as each holder would require to trace them back to the maker or acceptor, and satisfy himself that it was free from fraud or illegality.

It is also important to remark that the consideration given for a promissory note or bill must not be an illegal one. A consideration may be illegal, first, by common law; secondly, by statute. Those at common law are "such as violate the rules of religion or morality," and "such as contravene public policy." Thus a contract in *general* restraint of trade; or in restraint of marriage or to procure a marriage; or to evade or violate the customs and excise laws; or not to proceed in a prosecution for felony; or tending to the sale of a public office; or procuring a neglect of duty in a public officer, or with a public enemy; or to secure a future illicit intercourse, is void.

Those by statute are chiefly founded upon gambling considerations, or stock jobbing, or usury.

As to usury, it may be said that it is entirely wiped out. 22 Vic. chap. 58, C. S. C., enacted, that excepting banks and banking institutions, any person or persons might stipulate for, allow and exact, on any contract or agreement

whatsoever, any rate of interest or discount agreed upon. And by the same statute it was enacted, that no bank should stipulate for, take, reserve, or exact, a higher rate of discount or interest than seven per cent per annum; excepting in case of bills or notes payable at some foreign place within the province, upon which might be taken, in addition to the discount, a sum not exceeding one-half per cent, on the amount thereof, to defray the expense of agency and exchange in collecting. And that all bonds, bills, notes, &c., whereupon any greater interest was received and taken than authorized by law, should be *utterly void*; and that every bank and every corporation, or company, and association of persons (not being a bank authorized to lend or borrow money) which should directly or indirectly take, accept or receive a higher rate of interest, should *forfeit* and *lose*, for every such offence, treble the moneys, &c., lent or bargained for.

By the 5th section of 29 and 30 Vic., chap. 10, it is enacted, that after its passing, no bank shall be liable to any penalty or forfeiture for usury, but the amount of interest or commission which such bank can receive shall remain as limited as before.

The effect of this last enactment, has just been considered in the Court of Error and Appeals, in the case of the Commercial Bank v. Cotton et al., and it was held that 29 and 30 Vic., chap. 10, not only exempts Banking Corporations from liability to the pecuniary penalty, but from the loss or forfeiture of the security received by them for the moneys advanced.

However much this judgment may astonish the legislators that passed the act, as well as the mercantile community, it is none the less law by force of this decision, and usury may be said not to exist. The mere fact of an enactment that banks shall take only seven per cent. interest, without any penalty or forfeiture, amounts to nothing. It is simply saying, the Courts will not assist you in recovering more, but get what you can.

Transfer of Bills and Notes.—Let us consider, first, what instruments are transferable; secondly, the modes of transfer; thirdly, the nature and extent of an endorser's liability; fourthly, the rights of an endorsee: fifthly, the liability of a person transferring by delivery; sixthly, the rights of a transferree by delivery; seventhly, transfer under peculiar circumstances, and when a Court of Equity will restrain a transfer.

First.—A note or bill in order to be transferable must be made payable to *bearer* or *to the order* of the payee, otherwise the maker or acceptor is not liable upon an assignment of the right of action. A person, however, transferring a note not transferable by mere delivery, or by endorsement and delivery, may, however, become liable, as upon a guarantee. And as every endorser of a *bill* is in the nature of a new drawer, he will be liable to his endorsee upon a not negotiable bill, unless indeed the Stamp Act would be held to intervene and render such endorsement void.

Secondly.—A bill or note payable to bearer is transferable by mere delivery; but if payable to order, only by endorsement; if it be not payable either to bearer or order, it is only good in the hands of the payee.

An endorsement may be either in blank or special. A blank endorsement is made simply by the payee writing his name on the back. A special endorsement, besides the signature of the endorsee, contains a written direction to pay to a particular person, as "Pay X. Y. or order. C. D." The omission of the words, "or order," will not in this case restrict its negotiability; for its negotiable quality, is one of its incidents, of which it cannot be divested.

An endorsement is not complete, any more than an acceptance, until delivery.

An endorsee may convert a blank endorsement into a special one, either in his own favor, or that of a stranger.

Thirdly.—Every endorser is liable to every subsequent holder, in case of default by the maker or acceptor.

And a subsequent endorser may be liable to a prior one, if it be distinctly proved that such subsequent endorsement was made for the security and benefit of the prior endorser, and that though nominally made payable to the prior endorser, it was substantially payable to the subsequent endorser, and the prior was not to become liable to the subsequent endorser, and that this was clearly understood and agreed between them.

Any person may avoid liability in endorsing, by simply adding to his name the words "*sans recours*," or "without recourse to me," which is the proper endorsement for an agent. Also a simple agreement between an endorser and his immediate endorsee, that such an endorsee will not sue the endorser, is valid as between them; but it is no protection against any subsequent holder.

A bill may be endorsed conditionally, as making it dependent upon some particular event. Thus, a bill endorsed on such a condition by the payee, afterwards accepted, then passed through several hands, and finally paid by the acceptor before the condition is fulfilled, the acceptor will be liable to pay the bill again to the payee.

An endorsement admits all the prior signatures to the instrument, and they cannot afterwards be disputed.

An endorsement intentionally struck out by the holder, discharges the endorser; not so, if by mistake.

Fourthly;—An endorsement vests in an endorsee a right of action against all parties to the instrument, and none of them can set up the defence of fraud, duress, absence of consideration, or, in general, illegality, unless the holder can be coupled with it.

If a party deliver a bill or note, where it was intended that he should endorse, and afterwards refuse to do so, he is liable to an action, and may be compelled to do so, by a bill in equity.

If a bill be re-endorsed to a previous endorser, he cannot,

if he was liable upon his first endorsement, sue the intermediate parties. For they would have an action over against him, which would be an inadmissible circuity of litigation.

An endorsement by a trustee in breach of trust, gives to the endorsee with notice of the breach of trust, no right or title against the rightful owner, and it makes no difference whether the trust be expressed on the instrument itself, by a restrictive endorsement, or whether it exists by a simple agreement; actual notice is all that is necessary.

Fifthly:—A transfer by mere delivery of an instrument, made or become payable to bearer, does not render the transferrer liable upon the instrument. Nor is he, as a general rule, liable upon the consideration, though such bill or note turn out useless, by reason of the failure of the parties to it. There is no implied guarantee of the solvency of the parties to it by such a transfer; while it is a *prima facie* sale of it for what it may be worth.

But if a bill or note be given on account of a *pre-existing* debt, it is not considered as sold; and if not paid at maturity, and if duly presented and notice of dishonor given, the remedy for the antecedent debt revives.

A transferrer by mere delivery, does warrant that the bill or note is not forged or fictitious. And if notes or bills are transferred as valid when the transferrer knows they are good for nothing, the suppression of the truth is fraud, and the transferrer is liable.

Sixthly:—A transferree of a bill or note negotiable by delivery, who takes it before due, *bonâ fide*, and for good consideration, has a right to the property in, and the possession of it. If a bill be payable to order, and not made payable to bearer by a blank endorsement, a transferree has no right to the bill, either as against the real owner, or to sue any party upon it.

If a bill or note be transferred, when over due, it is said to come to the hands of the transferree "disgraced," and that he

takes it at his peril, "subject to all the equities with which it may be encumbered."

But the endorsee takes it only subject to the equities attaching upon the instrument itself, and he is not affected by those which are collateral to it, or a set-off from the payee to the maker or acceptor.

Seventhly:—A bill or note may be endorsed before made or accepted, and while the note itself is only a blank.

If a party venture to sign his name across the back of a blank promissory note, he imprudently places himself in the power of the party in whose hands it may fall.

It has been said by Lord Mansfield, that "such an endorsement on a blank note is a letter of credit for an indefinite sum," and as such, under our stamp act, requires to be stamped.

A bill or note cannot be endorsed for a part of the sum due to the endorser upon it, if the limitation appear in the endorsement. It can only be endorsed for the whole amount.

If a bill or note be part paid, it may be endorsed for the whole of the balance.

A release at maturity, like a payment, extinguishes a bill or note. But a release before maturity, will not act as a discharge, as against an endorsee for value, before maturity and without notice.

After the death of the holder, his personal representatives are the proper parties to transfer. And the husband of a married woman should endorse bills or notes transferred to her either before or after marriage.

A court of equity will restrain the negotiation of a bill or note unduly obtained; and will also decree them, if void in their creation, to be delivered up to be cancelled.

Of the Presentment for Acceptance.—Presentment for acceptance only applies to bills of exchange, and our remarks under this head should be remembered as applying strictly to them.

An acceptance is an irrevocable assent on the part of the payee to pay the bill, in money, when it becomes due.

It is enacted by 22 Vic. chap. 42, C. S. U. C., "that no acceptance of any bill shall be sufficient to bind any person, unless such acceptance be in writing on the bill, and if there be more than one part to such bill, then on one of the said parts."

A holder of an unaccepted bill should always present it for acceptance, without delay; for he thus secures the additional security, if accepted, and if refused the antecedent parties become liable at once.

It is not necessary to present a bill payable at a certain time after date for acceptance, in order to hold the drawer; presentment for payment when due is sufficient, but it should be duly protested, and notice given. If drawn payable at sight, or at a certain period after sight, it must be presented for acceptance, for there is no right of action till such presentment, and unless made within a reasonable time, the antecedent parties may be relieved.

Presentment for acceptance, as well as payment, should, properly, be always made during business hours, and to the drawee himself, or to his authorized agent.

If the holder of an unaccepted bill put it in circulation, and it be kept in circulation from hand to hand, there is no laches in its not being presented even for a year, so as to relieve the drawer. So may presentation be delayed from sickness or other unavoidable cause.

There may be an acceptance "for honor," as it is called. Thus, when a bill is in the hands of a payee or endorsee, and the drawee cannot be found, or will not accept, a stranger may, to save the credit of the drawer or some other party, go before a notary, and accept the bill, after it has been protested, for the honor of the drawer, &c. In doing so he writes across the bill, "accepted S. P. (or supra protest) for the honor of A. B.," and signs.

Such an acceptance is a conditional one to pay, if the drawee do not when the bill becomes due; it is therefore necessary again to present the bill to the drawee when it becomes due.

The parties who may accept a bill, are: *first*, the person upon whom it is drawn; *second*, either partner if drawn upon a firm; *third*, if drawn upon several persons, not partners, all must accept; *fourth*, a duly authorised agent; *fifth*, any person for honor.

A bill may be accepted in a *general* or qualified manner; the holder may refuse anything less than a general or unrestricted acceptance.

A general acceptance is an unconditional undertaking to pay according to the tenor of the bill.

Qualified acceptances are of two kinds; *conditional* and *partial*. Conditional when they make it depend upon some subsequent circumstance or event; as "to pay as remitted for" or "when consignment of goods sold." A partial acceptance is when the bill is accepted for part; as a bill for $500, "accepted for $200," part thereof. Or it may be to pay at a different time or place, from that mentioned in the drawing of the bill.

It must be remembered that an acceptance will not restrict a bill as to place of payment, unless such acceptance contain the additional words "and not otherwise or elsewhere." All other acceptances being general ones.

An acceptance once made and issued cannot be revoked. It admits the drawer's signature and capacity to draw, but not that of an endorser. An acceptor becomes relieved from his contract or acceptance: *first*, by payment in pursuance to his acceptance; *second*, by a cancellation of his acceptance, done by the consent of the holder; *third*, by the holder expressly renouncing his claim; *fourth*, by taking a co-extensive security, by speciality, without recognizing the bill as still existing, *fifth*, by taking a security from some third party; *sixth*, by the Statute of limitations.

Presentment for Payment.—It is not necessary, except in case of bills or notes payable at or after sight, that they be presented for payment, in order to charge the maker or acceptor. But when a bill is accepted, or a note made payable, at a particular place "and not otherwise or elsewhere," it must be presented and payment duly demanded at such place, before either such acceptor or maker can be held liable.

It is not necessary that presentment should be made to the maker or acceptor himself; it is sufficient if made at the place named. And if not so made it relieves all the parties to such instrument except the maker or acceptor; unless presentation, or the want of it, is waived by the party to be charged thereby.

The bankruptcy, insolvency, removal, or death of the party, is not an excuse for non-presentment. If the party has removed, reasonable efforts should be used to find his whereabouts.

And if maker or acceptor die, presentment should be made to his personal representatives, and if he have none, then at his house. If the holder die, presentment should be made by his personal representatives.

A bill or note payable upon demand becomes due upon presentment; and such presentment should be made within a reasonable time, after receiving it. What is a reasonable time is a question to be settled in each particular case; but any delay beyond that warranted by the common course of business, is considered unreasonable. As long as it is kept in circulation, there is no delay; but a holder must not lock it up and keep it.

If a bill or note is payable upon a certain day or event; or so many days after sight, there must also be added three days of grace, as they are called. And then if the last day falls upon a Sunday, Christmas day, Good Friday, Easter Monday, Ash Wednesday, New Years Day, the Queen's or King's Birth

day, or any day set apart by Royal Proclamation for Fasting or Thanksgiving, then upon the *next following day*, not being one of such non-juridical days.

If a bill or note specify no time of payment, it is payable upon demand, and should be presented within a reasonable time.

All presentments must be made at reasonable hours; and if at a Bank, within banking hours.

In case of dishonor of a bill or note upon presentment, it should be protested at some time, after three o'clock, of the same afternoon, and notices of such protest sent to each of the parties thereto; which notices are deemed to have been duly served upon the party to whom the same are addressed, if deposited in the Post Office, nearest to the place of making presentment, at any time during the day of making presentment, or the next juridical day then following. And the protest of any bill or note, is *prima facie evidence* of all the allegations and facts (such as presentment, dishonor, and notice) therein contained.

Notice must be more than mere knowledge, though it need not be of a formal character, nor given by a notary. If it come from the holder, or some party entitled as an endorser, and distinctly shows that the bill or note has been presented dishonored, and the party is looked to for payment, it is sufficient if it can be proved. The notice should describe the instrument in a manner sufficiently accurate, that the party cannot be misled by it.

Immediately upon receiving notice, the party to whom it was sent becomes at once liable to pay, and be sued upon the bill.

A notice is not necessary to hold a party who guarantees a bill or note.

A notice may in certain cases be excused or waived. For instance by a prior agreement, on the part of the party otherwise entitled to it, that it be not necessary to give him notice,

and it has been held even by implication, as where the drawer stated to the holder a few days before the bill became due, that he would call and see if it had been paid by the acceptor."

Where the drawer of a bill has countermanded payment, notice to him is dispensed with, though necessary to present, and give notice to other parties.

If the drawer had no funds at any time during the currency of the bill, in the hands of the acceptor, and will have no remedy against him or any other person, it has been said as he will not be prejudiced by the want of notice, he need not receive any. But even though he had no effects in hands of the drawer, yet if he had reasonable grounds to expect it would be honored, he is entitled to notice of dishonor.

If the holder cannot after due diligence and enquiry find a party's address or residence, that will excuse notice so long as that ignorance continues.

The death, bankruptcy, or insolvency of the drawee, will not excuse want of notice. But in any case where notice is *absolutely impossible* it will be excused.

The want of notice may also be waived by a subsequent promise to pay, or a part-payment, or an acknowledgment of liability, though even after action. Such a promise or acknowledgment must not be obtained through any misrepresentation of the facts on the part of the holder, nor in ignorance of the facts on the part of the party to be charged, or it will be of no avail.

Although presentment and notice may, as we have noticed, be dispensed with, or waived, yet it should never be done under any circumstance, when it can be avoided. All these exceptions are questions for a jury, and their verdicts are not always safe.

Of Payment.—Payment must be made to the holder of the instrument, or his representative, entitled to receive payment; for payment to any other person is not a discharge to the

maker of a note or acceptor of a bill; unless the money finds its way into the holder's hands, and he receives it in liquidation of the bill or note. A drew a bill upon B which B accepted. A then endorsed it to his banker, who credited him by it. At maturity it was dishonored, and charged to A's account, without being delivered to him. A continued his account, and paid in more money than sufficient to cover the bill, and all the preceding items in the account, though a balance larger than the bill always remained against him, A failed, and the bankers proved the whole of their balance against his estate; and then sued B upon the bill. It was held that the payments by A did not of themselves discharge B; but that the bankers having charged A with the bill, and *having treated it as paid*, B was discharged. If there was a desire of holding B in case of accident, it should not have been debited to A's account.

There are cases in which payment to a person, other than the rightful holder, will be a discharge. If a bill or note be lost, or stolen, and such bill is payable to bearer, either from the manner in which it was drawn, or from blank endorsement, payment even to the thief, without suspicion, or reasonable grounds for suspicion of the wrongful possession, is good; but if such payment be made under suspicious circumstances, or incautiously, it will not discharge the party paying.

If a bill or note be transferrable by endorsement only, and be paid to a wrong party, it is no discharge; therefore, the accceptor or maker, should be satisfied, on paying such an instrument, that the endorsement is genuine; for if forged, or made by an unauthorized person, he may have to pay again.

The maker of a note and acceptor of a bill have the whole of the day upon which it falls due, and presentment is made for payment. And payment by the maker or acceptor, fully extinguishes the instrument, and renders it a bit of waste paper. But a bill paid at maturity by the drawer or endorser, is not extinguished, it is simply *retired*, and still may be recovered from the acceptor.

If a bill be paid before it is due, and is afterwards endorsed over, it is a valid security in the hands of a *bonâ fide* endorsee; the payment in such a case, rather taking the character of a discount.

A bill or note payable on demand, can never be prematurely paid, and a payment on demand of such an instrument, will be good against all parties. Extreme caution should therefore be used in taking such bills or notes, which may be useless.

The person paying a bill of exchange *supra protest*, for the honor of some party to such bill, has a right to recover from the party for whom the payment was made, and from all parties from whom that party had a right; but he thereby discharges all other parties.

A party paying, should always as a matter of right and caution, upon paying a bill or note, have it given up to him. And if it be mislaid, or lost, he would be justly entitled to ask and receive an indemnity against it in the future.

If the holder constitute any one of the parties liable to him his executor, and die, the appointment is equivalent to payment and release in law.

A set-off does not amount to payment except by agreement. A legacy does amount to payment, when it may be presumed to have been the intention of the testator that it should so operate.

Appropriation of Payments:—Where a party is indebted to another in several items, it is often important to third parties, as well as to themselves, to which of the items a partial payment is to be applied. The rule is this: *first*, to such as the party paying may direct: *second*, if no such direction be given, then as the creditor may see fit; *third*, if the intention of neither be distinctly shown, the court will appropriate them according to the presumed intention of the party paying; that is, in discharge of such debts as are most burdensome, as a debt carrying interest, before one not; a debt with a forfeiture or penalty attached, before one of a mere simple-con-

tract nature; a debt which subjects the party to arrest, or bankruptcy, before one not doing so; *fourth*, if the debts are of equal character, then according to their priority in point of time; *fifth*, if there be an open account, then to items according to priority.

The lapse of time raises a presumption of payment, and bars an action. Thus six years after right of action has accrued, except in case of bills and notes payable upon a certain time after demand, when twenty years has been held sufficient presumption of payment, to be a defence to an action.

A check produced, drawn by an acceptor of a bill upon his banker, and endorsed by the holder of a bill, is *prima facie* evidence of payment, unless there have been a number of transactions between the parties, when it must be connected with the bill by some additional evidence.

The mere possession of a bill or note is also a presumption of payment; except in case of bills in the hands of the acacceptor, when it is necessary, in addition, to show that the bill was in circulation after acceptance.

It is to be remembered that a tender of part payment of a bill or note is not good, even to the amount tendered, and it need not be accepted.

If the drawer discovers after payment that the bill or check is a forgery, he may, by giving notice on the same day, in general, recover the money back, as paid under mistake.

Satisfaction, Extinguishment and Suspension.—There are other circumstances under which a bill or note may be as much satisfied, and the remedies on it extinguished, as by means of payment, strictly so called.

Before breach, a simple contract debt of any kind may be discharged, without a release or satisfaction. But after breach, there must be one or the other, a release *or* satisfaction.

We have before mentioned, that a part payment of a bill or note need never be accepted; and a part payment by a

party owing a larger sum can never satisfy the whole debt; unless accompanied by some act done, matter or thing, which will render it capable of being as effectual to discharge the party as payment. If for example, A holds a bill against B for $500—one hundred dollars cannot *pay* this bill—but if A agrees to take $100, and certain work and labor, or 50 bushels of wheat from B, this will discharge the bill, and is called "*accord and satisfaction.*"

In order to be a good discharge of the cause of action, an accord must be executed, that is, performed by the debtor and accepted by the creditor, before it can be set up as a defence; but a valid executory agreement, that is, one to be performed, *may* be accepted in satisfaction; the question being for the jury, whether the *agreement*, or *the performance of it*, was accepted in lieu and satisfaction.

One of several joint-creditors, without the consent of the co-creditors, may accept a satisfaction.

Though payment, by the debtor, of a less sum than the debt, is no satisfaction, the reverse may be the case, if the payment be made by a third party. A holds a bill for $500 against B, who is unable to pay. B's father, to assist him, pays A $200, in full satisfaction of the debt. This is a good and complete discharge of the bill; otherwise it would be a fraud on the father, to induce him to advance money, on the faith that such advance was to discharge his son from further liability.

Relinquishing a suit, involving a doubtful point, has been held a good satisfaction. So a bill from one of two partners may extinguish a partnership one.

The liability upon a bill or note will be *extinguished* if the holder take or obtain a higher security, as a judgment obtained upon such bill or note. But such judgment will not, until actually satisfied, prevent the holder from proceeding against any of the other parties to the bill or note.

Taking a bond, chattel-mortgage, or mortgage of real estate,

for the purpose of acting simply as an additional and collateral security, to a note or bill, has frequently the effect of merging and extinguishing the bill. There is, however, no need of losing the double security and rights if a proper precaution be taken that the intention plainly appears upon the face of the higher security, that it was intended as a collateral.

If a holder of a bill or note take a new one, or renew it, as it is called, holding the old one, his right of action upon the original bill or note is *suspended*, until the renewal falls due. In case of non-payment of the renewal, or failure in recovering upon the second, the original may be resorted to and recovered upon. And, although the renewal be paid, the holder may recover interest upon the original at the time when the second was given, unless the second was intended as a satisfaction of the whole of the former.

After a note or bill has been given, the right of action may be suspended by a binding verbal agreement to renew when due. Such an agreement must not, as we have noticed, be made contemporaneous with the making, or if made with an endorser, contemporaneous with the endorsing; for this would be incorporating with a written contract, a verbal condition, which is contrary to first principles of law, affecting written contracts.

Release:—An express release is an acquittance under seal. A release before a bill or note is due, is good between the parties; but not against subsequent *bonâ fide* holders, without notice, for value. If made after maturity, it is good against all parties; as subsequent holders taking after maturity, take it with the equities only of the transferrer.

A release of one joint maker, or acceptor, is a release to all; and so is a release to one of several joint and several debtors. In the French law it only liberates the party to whom it is given, discharging him of his portion of the debt.

A covenant not to sue, for a limited time, may act as a release to sureties, but it is not even a suspension of right of

action as between the parties, it only gives a right of action for breach of the covenant. A covenant not to sue at all in law amounts to a release; for with the right of action barred the debt is useless.

A release by one of several joint creditors, as partners, is as effectual as a release by all, to an action brought by the other joint claimants.

The release of a debt, is a release of the right to hold any collateral security. A party, therefore, releasing a bill or note, may be compelled to execute a release of a mortgage, held by him as a collateral.

Principal and Sureties.—The parties to a bill or note, may as in other simple contracts, bear the relation of principal debtor, and sureties.

This relationship, as a surety, may attach to a person either by his becoming a party to a bill or note, or by an independent contract.

The maker of a note, and the acceptor of a bill are the principals, and all the other parties are their sureties, but each is a principal to those who follow him.

This relationship of principal and security is only important to be recognized and understood, for the purpose of properly comprehending the effect of a discharge or release, to any of the parties, to the instrument.

A general rule may be laid down, and it is this, a discharge to prior parties is equally a discharge to all subsequent parties, but a discharge to subsequent parties, is not a discharge to prior ones. The reason of this rule is plain: for if a discharge did not so act, the subsequent party might still be sued, and in his turn, again, sue the prior party who had been discharged; thus by a circuity of action robbing him of all benefit from the discharge. On the other hand, as the prior party has no right over against a subsequent party, he has no reason to complain if a discharge be granted to such subsequent party.

There is an exception to this rule, where the discharge is an act of the *law* and not of the parties. Thus, if the acceptor of a bill be discharged in insolvency, the holder of the bill may still recover, against the drawer or endorsers; and this although he may have proved his claim before the assignee.

The holder of a bill or note may be as negligent as he will, in recovering from the party primarily liable, and he will not, by so doing, discharge the subsequent parties; but if he, for a single moment, suspend his right of recovering against the principal, those liable as sureties are discharged, unless such suspension took place with their sanction.

An agreement, however, not to sue for a certain time, with a proviso, that if not paid, the creditor may have judgment as soon as he could by the regular course, will not affect the liability of the sureties.

The taking of a new bill or note, (unless it be taken merely as collateral) suspends the right of action upon the first, and thereby discharges the sureties; but taking a new bill or note against a subsequent party does not discharge a prior one.

A voluntary composition accepted from the principal, is a discharge to the sureties.

If it be agreed between the holder, and the principal debtor, that the sureties shall remain liable, they will so remain; for it is thus presumed the sureties can at any time pay off the debt, and recover against the principal debtor, and it is on the continuance of this right, that the continuance of the sureties' liability depends.

A surety who has paid an over due bill may at once recover from the principal; and if he pay by instalments, he can bring an action for each instalment.

Where there are several sureties for the whole amount, each is liable to the creditor for the whole amount, but among themselves, only for a *pro rata* share; therefore if one pay more than his share, he may sue the others for contribution.

There is a marked difference in the liability to contribute, in law and equity. It is this:— if one become insolvent, and can pay nothing, each of the others is, at law, only liable to contribute to the extent of his original proportion; but, in equity, each is liable to the same, or as large a proportion, as if the insolvent had never been reckoned among the number.

Interest.—As we have before noticed, usury is, in legal effect, abolished; the law leaving the question of interest a matter of contract between the parties. But when no rate of interest is settled upon, the law fixes it at *six* per cent.; and frequently when no time is mentioned, the law will stop and regulate the periods from which it is to run, when it takes the form of damages for the retention of the principal debt.

Interest is seldom expressed to be payable on the face of a bill or note, but when it is, it is counted from the date of the instrument.

When there is no mention of interest, it is counted from maturity, and in case of a note payable on demand, *from demand.* And when there is no demand until action brought, interest is given from the service of the writ.

Interest is recoverable upon an open account, from the time when a demand of payment is made in writing, informing the debtor that interest will be charged from the date of such demand.

Interest runs to the time of payment, but ceases upon a tender being made.

If a party is liable by agreement to give a note with interest (as for goods sold), he cannot escape his liability to interest by not giving the bill.

A surety or party guaranteeing a bill or note is also liable for interest.

Where payments are made at different times, and the amount large, the manner of computing interest becomes important. It was decided in Barnum *v.* Turnbull 13, U. C.

B. R. 277, that the usual mode of adding the interest to the principal, deducting the payment, and charging interest on the balance, could not be adopted; but that interest could only be computed on balance of principal remaining due at each payment.

There are certain damages, in addition to the ordinary six per cent interest, recoverable under 29 Vic., cap. 42, C. S. U. C., upon bills drawn upon persons residing out of the Province, and upon notes made so payable. These damages are reckoned by way of per centage upon the face of the bill or note, and may most properly be considered of the nature of a penal interest.

If a bill has been drawn upon any person at any place in Europe, or in the West Indies, or in any part of America, not within this Province or any other British North American Colony, and not within the United States, *ten* per cent.; and if drawn upon any person in any of the other British North American Colonies, or in the United States, *four* per cent. upon the principal sum specified in the bill, *in addition* to the ordinary six per cent. interest. And such aggregate interest or damage, together with costs of protest, &c., as well as the principal money, shall be paid to the holder, at the current rate of exchange of the day when the protest for non-payment is produced and re-payment demanded; that is to say, the holder of any such bill returned under protest for non-payment, may demand or recover from the drawer, or endorsers, so much current money of this Province as shall then be equal to the purchase of another bill of the like amount, drawn on the same place at the same date or sight, together with the damages, interests, and costs of protesting.

It has been held that ten per cent. damages are recoverable upon a bill drawn in Upper Canada, addressed to a person in Upper Canada, and payable in England; and that six per cent. damages are chargeable upon a protested bill

drawn in Upper Canada, accepted in Upper Canada, and payable in the United States.

In case a promissory note payable *only* at some place in the United States of America, or in some one of the British North American Provinces not being Canada, *and not otherwise or elsewhere*, be made or negotiated within Upper Canada, and be protested for non-payment, the holder will, in addition to the principal sum, and the ordinary six per centum interest, recover damages at the rate of four per centum upon such principal sum, to be reckoned from the day of the date of the protest, together with the costs of protest; and such aggregate amount shall be paid to the holder at the current rate of exchange of the day when the protest is produced and payment demanded, in the same manner as in the case of bills before mentioned.

When the parties themselves cannot agree upon the rate of exchange, the holder and the drawer, maker or endorser, or any of them interested, may apply to the President, or in his absence the Secretary of any Board of Trade or Chamber of Commerce, in the city or town in which the holder of such protested bill or note, or his agent, resides, or in the city or town nearest to the residence of such holder, or his agent, and obtain from such President or Secretary a certificate in writing, under his hand, of the then current rate of exchange, which shall be final and conclusive between the parties, and shall regulate the sum to be paid.

Alteration of a Bill or Note.—According to the general rule of law, all instruments in writing, including bills and notes, are rendered *void* by alteration in any material part, whether made by a party to the instrument or by a stranger, unless all the parties interested consent to such alteration.

When an alteration is made by the consent of all the parties, the original contract is put an end to, and a new one created. Therefore it is more than probable, that an alteration of a bill or note, in any material part—such as the date,

sum, time of payment, &c.—even with the consent of the parties, would render the instrument void, under the Stamp Act.

As alterations in a material part affect all subsequent holders, it is of the utmost importance to a party taking a bill or note, on which any change appears to have been made, to know first, whether it arose from mere accident; second, whether it is a material alteration.

Any alteration made before a bill is perfected, that is issued, or if made to correct an obvious mistake or omission, and in furtherance of the original intention of the parties, it will not vacate the instrument.

An alteration by the drawer and payee of a bill, or the payee of a note, though it avoids the instrument, does not extinguish the debt; but an alteration by an endorsee also extinguishes the debt due the endorsee from his endorser; for if the endorsee could compel his endorser to pay the debt, the latter would lose the whole amount, as he could not recover upon the bill or note from any other.

When an alteration appears upon the face of a bill or note it lies upon the holder, if he sue, to show that it was made under such circumstances as not to vitiate the instrument.

A party is not liable upon a renewal bill given for an altered one, unless he knew of the alteration in the original, at the time of giving the substituted one.

Forgery and False Pretences.—Forgery is the counterfeit making or altering of any writing with intent to defraud.

If any person forges or alters, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, promissory note, undertaking or order for payment of money, he is guilty of felony, and liable to imprisonment in the Penitentiary, for any term not less than two years, nor more than seven years, or to be imprisoned in any Common Gaol for any term less than two years.

A *bonâ fide* holder cannot acquire any rights in a forged

bill as against the party whose name has been forged; nor even keep it as against him. Therefore, if an acceptor of a bill, or maker of a note pay to a person who derives his title through a forgery, the payment is no discharge, and he may be compelled to give up the instrument to the true owner, and to pay him the amount.

Where a party paying upon a forged instrument, has not been guilty of any want of caution, which it was his duty to exercise, and has not by his conduct affected the rights of any other party to the instrument, he may in general recover back the money as money paid under a mistake.

But where the party paying ought to have ascertained, or is bound to know that the handwriting is forged; or where by his delay in discovering his mistake, or from any other cause, he has deprived the holder of the means of resorting to other parties on the bill or note, he will not be allowed to recover.

The general principle of law, that a mistake to enable a party to recover back money once paid, must be a mistake of *fact* and not of *law*, is applicable to bills and notes.

If a party purchases or pays a bill, note, or check upon which a forged addition has been made to the sum, he cannot recover more than the original amount; unless the forgery has been induced and assisted by the negligence of the party making or drawing the instrument.

Limitation of Actions.—Because a party has been over lenient in allowing his rights to remain unenforced, it may seem in many cases inequitable that he should be entirely barred from recovering. But as prescription is the original source of all title, so is a limitation in point of time to actions; the security which a person has against actions, which would endanger his property and rights, when the true and proper means of evidence in his defence may have passed away.

A statute of the 21st year of James the First has fixed the time upon which all actions on simple contracts, including those on bills, notes, and checks must be brought within six years after the right to bring the action may have accrued.

There are exceptions to this in cases where the party to whom the right of action has accrued is laboring under some disability; as an infant, married woman, or a person of unsound mind, who has six years after the disability has ceased. Also, when the defendant is out of the country, when the right of action accrues, a party has six years after his return within which to commence proceedings. But where there is a right of action against two or more joint debtors, and one of such parties be out of Upper Canada, a party is not entitled to any additional time, in consequence of such absence, within which to commence and sue any action or suit against those of such joint debtors as may be within Upper Canada, at the time such action accrued. And the party so entitled may bring a subsequent action against such joint debtor, as may be so without Upper Canada, at any time within six years after his return.

It is generally said that the statute does not destroy the debt, but only bars the remedy. Consequently, a party to rely upon it as a defence, must plead it in a proper manner, and not simply set it up in evidence.

In Lower Canada, the effect of the law is to go further, and destroy the debt. Therefore, if a note or bill be made payable there, and dishonored, it cannot be recovered upon in Upper Canada, except within five years after the right of action accrued; although the statute does not bar the right until the expiration of six years.

An action may be taken out of the statute first by a sufficient acknowledgement, or payment, or by issuing process.

An acknowledgement or promise to be sufficient, must contain evidence of a new or continuing contract, and be made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgement or promise.

An endorsement of a payment, written or made upon a bill or note by the holder, or any one for him, is no longer evidence

against the party to be charged. It must be made by the party making such payment in order to take the instrument out of the statute as to him. The endorsement is, however, only evidence of payment. It is the payment itself of part of the sum that takes the balance out of the statute, and this may be proved by oral evidence.

In case of persons liable jointly, or jointly and severally on any bill or note, no acknowledgement, or promise, or payment made by one will bind the others; unless made by him, as the agent, and with the authority of the others.

The statute does not run after the issuing of process, as a writ of summons. And it seems it need not be served, if it only be properly continued as by renewal.

Set off.—Set-off is now favored in all cases when practicable, for the purpose of avoiding circuity of action. It is only admitted in case of mutual debts; that is, of ascertained money demands. Hence it follows there can be no set-off unless the demand the action is brought for, and that sought to be set-off, are both of them for a specific sum of money; that is, for a sum of money calculated from figures, and not a mere estimation for the opinion of a jury, as in cases of damage. Again, the set-off must be a legal and not a mere equitable debt.

A set-off may exceed the plaintiff's claim, when a verdict will be found for the defendant, to the amount of the excess. One judgment may by order of the Court be set-off against another when they are substantially between the same parties.

If a firm sue, only a debt due by the firm can be set-off. So if a firm be sued they can only set-off a debt due to all, but not to one or more of the partners.

But the debts and credits of a firm are vested at law in the surviving partner, who is then in the same position as regards set-off, as if the other partners had never existed.

In case of insolvency, the right to set-off is of the utmost

importance; otherwise, a person might have to pay the full amount of a debt due from him to the insolvent, and only be able to recover a small dividend upon the debt that might be due him at the same time from the insolvent.

But a debt to be the subject of set-off against a claim of an insolvent estate in liquidation, should be one incurred prior to an assignment, or attachment in insolvency, and without knowledge of the intended insolvency. And the party so seeking to set-off should be the real creditor, and not the mere holder of a bill or note, transferred to him for the purpose of using for set-off.

Lost Bill or Note.—The finder of a lost bill or note acquires no interest in it, nor right to retain the instrument itself against the rightful owner. But if it be capable of transfer by mere delivery, and be passed to a party who takes it for value, and *bonâ fide*, he is not only entitled to retain the instrument, but also to recover from the parties liable thereon.

The loser of a bill or note should at once give notice to the parties thereto, and give notice to the public by advertisement in some newspaper: for any person discounting it with notice, does so with such strong evidence of fraud that he can acquire no property in it.

If a bill or note be lost or destroyed, application must be made to the proper party at the time it falls due; and give notice of dishonor, as carefully as if the instrument itself had been presented.

A party upon demanding payment of a lost bill or note, should be prepared to give to the person upon whom such demand is made, an indemnity against the claims against any other person, into whose hands such bill or note might come.

Much difficulty having been met in recovering upon lost bills and notes, it was enacted by 19 Vic., Chap. 43, Sec. 292, that in case any action be *founded* upon a lost bill or

other negotiable instrument, then upon an indemnity to the satisfaction of the Court or a Judge, or any officer of the court to whom such indemnity is referred, being given to the defendant against the claims of any other person upon him in respect of such instrument, the Court or a Judge may order that such loss shall not be set up as a defence in such action.

It will be observed that this applies to actions *founded* on lost instruments, but if a bill or note be lost *after* action brought, and the defendant, in resisting the action, puts the plaintiff to prove the bill, it is said the loss may be no excuse for the non-production of it.

How far a Bill or Note is considered Payment.—A bill or note given, does not act as payment of a pre-existing debt unless it be so agreed. It simply acts as a suspension of the creditor's remedy, and, if he receive the money upon the instrument, or be guilty of negligence, it then becomes a complete satisfaction. If the bill or note is in the hands of the creditor, over due and dishonored, he has his remedy, either on the bill or note, or on the original debt, and though he may have parted with the instrument, he will, in case it be dishonored, still have his remedy for the original debt.

If the payment of such a bill be made, not for a past debt, but for an immediate consideration, such as the sale of goods, then and there, the seller is supposed to consent to take the bill in exchange for the goods, and if he has taken a bill without endorsement, he cannot sue the buyer, if the bill turns out worthless; for the transaction is simply one of exchange, the bill passing with all its faults.

The taking of a bill or note from a party bound by contract, under seal, does not extinguish or suspend the remedy upon the specialty, unless the bill or note is actually paid; until then it operates as a collateral.

A bill or note accepted from one partner in consideration of a pre-existing partnership debt, will discharge the firm,

unless there was a distinct agreement that the firm should continue liable. This is because, in case of insolvency of the firm, or death of the partner, the creditor might be in a far better position than he would be if having the firm his debtors, and this advantage amounts to a consideration. If a party having a lien on goods, takes a bill or note for the debt, his lien on the goods is at an end, and he must give them to the owner, unless he can hold them under some special agreement.

If the party giving a bill or note knows at the time it is of no value, it will not act, even as a suspension of the original liability, and he is liable to be sued upon the original indebtedness as soon as the fraud is discovered.

A bill, check, or note is earnest, or part payment, within the seventeenth section of the Statute of Frauds, so as to avoid the necessity of a written contract.

Foreign Bills and Notes :—A bill of exchange is *prima facie* an inland bill; that is, one drawn and payable within the country. All others may, for our present purpose, be considered foreign. Foreign bills are frequently drawn in sets, or parts, each part referring to the other parts, and containing a condition that it shall continue payable only so long as the others remain unpaid.

The legal questions arising upon foreign bills, are of the greatest intricacy; resulting from the country in which the different parties reside, the place where the contract is made, the place where it is to be performed, the place where the remedy is sought, &c.

The nature of the present work will not allow a further examination of the law effecting foreign bills, than a mere synopsis of the principles of law to be regarded as effecting them and the rights of parties in reference to them.

First, a contract is in general to be regulated by the laws of the country where it is made.

Hence any bill or note not valid in the country where

made, will not be valid here; though it might be made, if here.

Secondly, a contract made in one country, to be performed in another, is deemed to have been made in the country in which it is to be performed.

Thirdly, any contract immoral or contrary to the law of nations, or injurious to British interest, though valid where made, will not be enforced in behalf of a guilty party here.

Fourthly, one country will not in general regard the revenue laws of another.

Fifthly, the remedy will be governed by the law of the country where the remedy is sought.

The time of payment, including the days of grace, is to be regulated by the laws of the country where the note is made payable. So must the protest and notice of dishonor be regulated by those laws. But a general acceptance, being a promise to pay everywhere, is governed by the law of the place where given.

Though a party be not liable to arrest in the country in which a contract is made, he may be here, if the remedy is sought here; this being part of a legal remedy, and not a part of the contract.

The depreciation and fluctuation of United States Currency, for the last few years, has introduced a new and important question here in the recovery of bills and notes payable in the United States.

The Courts have decided that the amount a party is entitled to recover, on such a bill or note, here, is not on the face of the instrument in Canada Currency, nor an amount equa to the face of the instrument; at the time of judgment in American Currency; but an amount equal to the face of the instrument in American Currency, at the time the bill or note became payable; which sum must be settled upon proof of the rate of exchange or, more properly, price of gold, at that date.

Remedy by Action on Bills and Notes:—The holder of a bill or note is the person entitled at law to receive the money, and the only person who can safely or properly sue upon it.

Where there are several parties liable to the holder of a bill or note, he is not obliged to single out any one of such parties, but may proceed at once against them all, at his option. If separate actions be brought, no costs, except actual disbursements, can be recovered in more than one of such actions.

If action be brought against the maker of a note or the acceptor of a bill, together with the parties subsequently liable upon such instrument, and such party that is subsequently liable occupies the position of a surety for the party or parties primarily liable, he will be entitled, upon payment of the judgment, to have it together with every specialty and other security held by the creditor assigned to him, or a trustee for him; and will be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and on proper indemnity, to use the name of the creditor, in any action or other proceeding in law or equity, to recover the money paid upon such judgment.

A Plaintiff may bring his action in any part of Upper Canada, in a Court of Record, and without any reference to the residence of the defendant.

A tender after a bill becomes due, is no defence by the acceptor. But a drawer or endorser may tender within a reasonable time after the request.

All tenders must be unconditional of the correct amount, and in current funds.

If a bill or note be obtained by the plaintiff from the defendant without consideration, the court will stay proceedings on an affidavit to that effect by the defendant. But if there are contradictory affidavits filed, the court will decline to interfere in a summary manner, but let the question of consideration go down for trial before a jury.

SECTION II.

CONTRACTS OF SALE.

It is foreign to the present work to treat of contracts by way of Record, or contracts by Deed: therefore our remarks may be considered to apply solely to simple contracts: i. e. contracts by writing or parol.

There are no principles of law, which are of such every day occurrence, and which it is of more importance for every one to perfectly understand, and have fresh upon the mind, than those which govern and operate upon simple contracts —as of bargain and sale. Those principles alone cannot be stated in so elementary a work, but they may be sufficient to protect one from many of the egregious mistakes, that so often take place in the ordinary transactions of every day business. Nice distinctions and subtle principles of law are frequently found in connection with such contracts. But in such cases, no author can be a safe counsel for the non-professional; the only safety is, and must be found in the advice of a sound and honest lawyer, who has before him all the facts incident to the case.

A Sale, is the entire disposition, and passing over of property, from one man to another, in consideration of a *money* price. If the consideration is not a cash one, it is a barter or exchange.

There is also a peculiar species of contract, called *bailment*, which it is often difficult to distinguish from a sale or exchange. The distinction generally taken is between an obligation to restore the specific thing, and the duty of returning others of equal value. In the first, it is said to be a bailment; in the latter, it becomes a debt.

A contract of sale may be either *express* or *implied*. Express contracts are where the terms of the agreement are openly uttered as to pay a stated price for certain goods. Implied, are such as reason and justice dictate, and which,

therefore, the law presumes every man undertakes to perform: thus, if a man take wares from a tradesman, or goods from a merchant, without any agreement of price, the law concludes that he contracted to pay their real value.

Who may Sell.—The general rule is, where a man has in himself the property of the goods, he may dispose of them to whomsoever and in what manner he pleases. If there be judgment, however, against him, and an execution in the hands of the sheriff, the goods are liable to answer the execution and can only be disposed of subject to the sheriff's right to seize by virtue of the execution.

Or if a person is in insolvent circumstances or unable to pay his debts in full, or knows himself to be upon the eve of insolvency, makes any gift, conveyance or transfer of any of his goods and chattels, with intent to defeat, delay or defraud, or to give a preference to any of his creditors, it is provided by 22. Vic., cap. 26., sec. 18., C. S. U. C., that such gift, conveyance, or transfer, shall be null and void against the creditors of such person. Or if a sale be within the restrictions of the Insolvent Act of 1864, as referred to in a subsequent section, the sale may be void, though the vendor has in himself the property in the goods.

Markets overt.—In England there are certain public sales called markets overt, at which a person having no property in the article sold may yet convey a good title to the purchaser. We have no such market in Canada, consequently a person must have some title in order to pass the property.

Sale by Common Law.—By the common law, a parol agreement might, in every case, be sufficient to perfect a sale of goods; and if the vendor tendered the goods, the vendee became liable for the contract price; and if the vendor tendered the contract price he might recover the goods.

Statute of Frauds.—In order to prevent frauds, which frequently occurred, when a contract might depend simply

upon some verbal agreement, the Imperial Statute, 29 Car. II., chap. 3, was passed—which statute is in force here, and known as the Statute of Frauds. By the fourth section of this statute it is enacted, "that *no action* shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person, thereunto by him lawfully authorized." It has been decided, that under the word "*agreement*" the consideration as well as the promise must appear. It may be remarked that this agreement need not be contained in a single writing, but may be collected from several. Thus it may be collected from several papers, provided they are sufficiently connected in sense among themselves, so that a person looking at them all together, can make out the connection and meaning of the whole, without the aid of any verbal evidence; but it is otherwise when such connection does not appear on the face of the writings, for letting in verbal evidence to connect them would be introducing the very mischief intended to be avoided by the Act, namely, the uncertainty and temptation to falsehood, occasioned by allowing the proof of a contract to depend upon the recollection of witnesses.

By the seventeenth section of the same statute it is enacted that "no contract for the sale of any goods, wares, or merchandizes, for the price of £10 (sterling) or upwards, shall 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 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."

This section was held not to extend to contracts for the making and manufacturing of goods, *i.e.*, contracts to make

and complete, and deliver at some subsequent period, goods not in existence, and consequently not capable of delivery, or of part acceptance, at the time of making the contract; which were only considered contracts for work and labor, and supply of material, rather than contracts of sale; whereupon cap. 44, sec. 11, Con. Stat., U. C., was passed, following the Imperial Act 9, Geo. IV., c. 14, s. 7, enacting that "the seventeeth section of the Statute of Frauds shall extend to all contracts for the sale of goods of the value of forty dollars and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

It will be observed that the seventeeth section of the Statute of Frauds only refers to contracts of sale, where the value of the goods is £10 sterling ($48.60) or upwards, while our Provincial Statute refers to all contracts of sale where the value of the goods is $40 or upwards.

The rules which govern cases arising under the fourth or seventeenth sections are very analogous. The signature must be by the party to be charged, or his agent thereunto lawfully authorized; but in neither case is it necessary that such agent should be appointed by writing. So under the seventeenth section, as well as under the fourth, several documents may be read together as making up the contract. The names of both parties must appear in the statement, as there can be no bargain without two parties; and so should the price or consideration, if one be agreed upon. If none be named, the court will assume the parties meant the consideration should be what the thing sold is reasonably worth.

Acceptance and Receipt.—Where an acceptance is necessary under the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right

of possession in the purchaser, and there must be an actual acceptance by the latter with the intention of taking to the possession as owner. An acceptance without, as it was, is said to be insufficient, for the words are "accept and actually receive;" but the acceptance may be prior to the actual receipt, and need not be contemporaneous with or subsequent to it. There can be no acceptance while the vendor retains a lien for the price, for a lien necessarily implies a possession of the goods; nor can there be a full acceptance so long as the buyer continues to have a right to object either to the quality or quantity of the goods; nor can there be one until the buyer has had an opportunity of judging whether the articles correspond with the order. And it further appears that the purchaser may use a part of the goods for the purpose of ascertaining their quality, and yet there will not be an acceptance. If the goods be ponderous, and be incapable of being handed over from one to another, there need not be an actual delivery, but may be one by what is tantamount; as by the delivery of the key of the store-house in which goods are lodged, or some other indicia of property as the bill of lading. Acceptance of a sample which is to be accounted part of the commodity is sufficient, though acceptance of one which is to be no part is not so. Delivery to an agent or carrier appointed by the vendee is sufficient. Where different classes or lots of goods are jointly ordered, acceptance of one is an acceptance of all. There may also be a *constructive* acceptance where a party receives goods, and does not advise the vendor of his refusal to accept within a reasonable time.

Earnest or Part Payment.—Earnest is given by the buyer and not the seller, and the part delivery of the goods is not by way of earnest as is sometimes thought. It is either money or something given to bind the bargain and to show that it is concluded, and no longer remains in mere proposal or *in fieri*. If given in money, it presumably forms

part of the price, like a deposit at an auction. If it be some other article, it is in the nature of a pledge.

The old North of England custom of *striking a bargain* by drawing a shilling across the hand, is not sufficient, nor is an understanding that the vendor shall take in part payment a smaller debt due from him to the vendee, in itself sufficient part payment to dispense with a writing.

What Note is a sufficient Memorandum under Section 17th.—A mere offer made by one side and not accepted by the other is not sufficient; as if A write to B that he will buy his horse for one hundred dollars, if warranted sound and *quiet in harness*, to which B replies he will send him and warrant him sound and *quiet in* DOUBLE *harness*; this is no contract, the proposal of A not being completely accepted. Where there is an insufficient memorandum such as an unsigned order for goods, a subsequent letter, signed by the defendant, referring to the order, is sufficient. Where the buyer, after an oral contract, receives, without objection, an invoice or sold note signed by the seller, differing from the contract, he cannot, in a case within the statute, set up the original terms to contradict the invoice or sold note. The contract as made must stand, it cannot be altered though it may be completely rescinded by a subsequent parol agreement. We have already seen that if there be a stated price it must appear in the writing.

And signed by the Parties to be charged.—It is not necessary that the note or memorandum should be signed by both parties to the contract. It is sufficient if it be signed by the party to be charged, and it makes no difference if there be no remedy against the party who does not sign. It is quite immaterial where the signature is placed in the document, it may be at the head as well as the foot of the instrument; for instance I, A B agree, or A B agrees, is sufficient, although the document is not signed. It would, however, be different if a signature at the end of the instrument was

manifestly intended, in order to its completion as if it concluded "As witness our hands." The signature may be printed as well as written if the person is in the habit of doing so, thus the signature that usually appears at the top of bill heads is sufficient to bind the vendor. A signature by initials is not sufficient, though where a person cannot write, a signature by mark, if properly identified, may be.

Or by their Agents.—An agent, to bind a party by his signature, must be some third person, and not the other contracting party; and to bind under the statute of Frauds now being considered must be "*thereunto lawfully authorized.*" A parol authority is sufficient, and although the agent may not have authority at the time of signature, it will be sufficient if the principal subsequently recognizes the agent's act, and adopts the contract.

An auctioneer is an agent for both parties, and as such binds them within the statute: therefore, where an auctioneer writes down the buyer's name, in the catalogue, opposite the lot, together with the price paid, it is a sufficient memorandum; so where a broker is the agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller.

Ordinary contracts of Buying and Selling, duly authenticated in the mode previously pointed out, may operate as a direct transfer of the ownership and right of property in the thing sold, to the purchaser, and that in the price to the vendor; or may amount only to an agreement for a future transfer, giving the purchaser a right of action against the vendor for a breach of contract, but not affecting any alteration of ownership. When the bargain operates as a transfer of ownership and of right of property in the thing sold, the sale is a perfect and complete sale, and the goods remain at the risk of the purchaser, who in case of accident may be compelled to pay the price, although he can never have the thing for which he agreed to pay.

Duties of Vendor.—First, to deliver the goods as soon as the purchaser has performed all conditions precedent on his part, and may, if he refuse to do so, be sued either specially for non-performance of contract, or in trover for the goods themselves. An actual delivery may be excused, if the vendor has offered to deliver, or the purchaser has dispensed with a delivery, or has made it an useless and idle form to attempt to deliver. Goods are delivered when they are placed in the vendor's power, when he may immediately remove them, and cannot be rightfully prevented from so doing; thus if the goods be in a stranger's close, and that stranger have licensed the vendor to remove them, that is a delivery, for the license is irrevocable.

The vendor, when no time is mentioned, has a *reasonable time* to deliver in, and what is a reasonable time is a question of evidence, depending upon the circumstances of each case. If it be specially mentioned that the vendor shall send the goods, that means within a reasonable time. It was also once considered that the delivery should be made at a *reasonable hour*, in order to discharge the vendor's duty; but it is now decided that an actual tender of the goods to the purchaser, *if he be at his warehouse*, at any hour of the last day, which will allow him time before midnight to examine, weigh, and receive them, in the absence of any special custom, will be good; but the purchaser is not bound to remain at his warehouse after a reasonable time before sunset to allow of the examination.

Duties of Purchaser.—The principal duties of a purchaser are to receive the goods and pay for them, in pursuance of his contract. In the absence of special stipulations, the condition precedent upon the vendee's part is readiness to pay the price, and of this readiness a demand of the goods, even though made by a servant, is *prima facie* evidence. When the goods are sold for a bill, the bill should be tendered; but the word bill does not mean an approved

one. And if an approved bill is mentioned, that means one that no reasonable objection can be taken to it. When goods are sold on credit, the vendor may be compelled to deliver them without payment or tender of the price; but the vendee's rights are not indefeasable, but will be defeated if he become insolvent before receipt of them. If a purchaser give a limited order for certain specified goods, and the seller sends those and others from a distant place in one package, charged at a lump sum, the purchaser may repudiate the whole and refuse to receive the package. Neither need a party accept articles tendered in closed packages, so as to prevent inspection, for it is no tender in law. If the goods were to be of a particular description, the vendee has a right to inspect the article tendered, and refuse to accept, if not according to agreement or sample, and may, if prevented from doing so, rescind the contract. So, if he order several things at the same time, he may regard the contract as entire, and object to receive some of them without the rest; but if he accept one singly he severs the contract, and cannot object to receive another singly.

Implied Warranty.—There are many cases in which a warranty on the part of the vendor is implied in law. Where the sale is of any particular class and description of goods to be selected by the vendor, and not of any particular ascertained parcel of goods, there is an implied undertaking that the goods furnished fairly answer the description given him. If a person describe an article falsely, and through such false representation sell it, he is liable to an action for breach of an implied undertaking, to furnish an article corresponding with the description.

If the vendor is informed that an article of a certain quality, character, or description, suited for some specific purpose, is required, the law implies a promise from him that he does not, at least at the time of sale, know that the article is not of the requisite character and quality, and that it is

unfit for the purpose for which it is required. A manufacturer is presumed to have a reasonable knowledge of the article he makes; and the law implies a promise or undertaking from him, that all goods manufactured and sold by him for a specific purpose, to be used in a particular way, are *reasonably* fit and proper for the purposes for which he professes to make them, and for which they are known to be required. Very slight expressions made at time of a sale may be held to be warranty; if it can be made appear that they were so intended, but any warranting after sale is void, or want of consideration.

Defects that are visible to the eye, and equally apparent to the purchaser as the seller, are not the subject of implied or general warranties, as they are not the subject of deceit or fraud, and the warranty can only be intelligibly construed, as saving those manifest defects, seen and contemplated by the parties.

Damages.—In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken, is the ordinary measure of damages. And the right to re-sell (though not the obligation to do so) exists in all cases of sale, where the vendor wrongfully refuses to receive, and there is no express stipulation precluding such right. Where goods were to be delivered at a certain time, and while on their way the vendee gave notice that he would not accept, the measure of damages was held to be the difference between the contract and the market price, on the day fixed for the delivery, and not that on the day on which the seller received the notice. If a party has ordered goods, and then wrongfully countermanded the order, and thereupon the manufacturer ceases to manufacture them, he is entitled to damages for the goods in hand and to such profits as he would have made if the contract were carried out.

If the vendor has performed his part of the contract in full,

and the vendee refuse to accept the goods, the vendor may either sue him specially upon the contract, or (if the property has passed) for goods bargained and sold, in which latter form of action he will recover the price, while by the former but the amount of damages actually sustained.

If the goods were to be delivered at a stipulated place, the vendor, before suing for the price, must tender them there, unless the vendee has refused, or put it out of his power to complete his contract. If there is no place of delivery mentioned, it is the vendee's duty to fetch them, and if they are to be forwarded by a carrier, the vendor must enter them so that the carrier may be liable for them if lost.

Fraud and Illegality.—If a contract has been obtained by fraud or deceit, all those of the contracting parties who have been parties or privies to the fraud will not be allowed to sue upon it. It matters not whether the fraud consists in a wilful misrepresentation, or an intentional concealment by one of the contracting parties, of circumstances material to be known, and which ought, in good faith to have been disclosed. A mere misrepresentation or false statement, not amounting in law to a warranty, is not fraudulent, and will not vitiate the contract, unless the party knew it to be untrue at the time it was made, and there was consequently an intention to deceive on the part of the party making it. But if the means of knowledge are peculiarly within the reach of the vendor, and he pretends to have informed himself about it, when in reality he knows nothing at all about it, he does, in fact and reality, wilfully make a representation which he knows to be false, and is in principle guilty of wilful deception and fraud, or if he makes a representation, not knowing at the time whether it is false or true, it is fraud, if in point of fact it turns out to be false ; for it is equally false and fraudulent for a man to affirm his knowledge of that he knows nothing of, as to affirm that as true which he knows to be false. He is presumed to warrant his knowledge of the fact and it is his want of knowledge which constitutes the fraud.

A representation, moreover, frequently amounts to a mere statement of the party's own opinion and belief upon a matter concerning which the other contracting party is to exercise his own judgment, and does not amount to a positive affirmation or statement of fact. The ordinary praise or commendation made by the vendor upon the wares he sells, though embodying statements of fact, known by the party making them to be not strictly true, does not vitiate the contract of sale. They are looked upon as mere *puffs*.

A mere concealment of the truth may alone, in certain cases, and under certain circumstances, amount to fraud. Thus, if a debtor induces his creditors to compound their claims, and execute a deed of composition for their several debts, by concealing from them the true state of his affairs, and withholding information which ought to be given in good faith, the deed will be void, and the creditors will be remitted to their original rights, and will be entitled to sue for the full amount of their several debts. If in sales of manufactured articles, provisions, &c., the vendor is cognizant at the time of sale of latent defects, materially lowering their value, and rendering them totally unfit for the purpose for which they are known to be required, and neglects to disclose such defects to the purchaser, he is guilty of fraudulent concealment.

As fraud vitiates all contracts, it is a sufficient excuse for the vendee to be off and refuse a performance on his part of the contract that the vendor has been guilty of fraud; thus, if puffers are employed at an auction to enhance the price, without a notice being given of an intention to do so.

Though a vendee who has been imposed upon, has in every case a right to repudiate the contract, and may, if he have paid his money, recover it back again; yet he must elect to avoid the contract as soon as he discovers the fraud; if he lie by and treat the property as his own, he will be considered as having elected to confirm the transaction; and even though he

subsequently has discovered a new incident in the fraud, for that does not give him a new right to rescind, but merely strengthens the evidence of the vendor's dishonesty.

We have already noticed what contracts are illegal—either from being contrary to public policy, or statutary enactments, or from being of an immoral character. We have now only to mention that either party to a contract may excuse himself from it by showing that it is illegal, and it will make no difference whether the illegality exists in the consideration, or the promise based upon the consideration.

SECTION III.

CONTRACTS OF DEBT.

A *Contract of Debt*, may be that whereby a right to a certain sum of money is mutually acquired and lost. It includes every contract whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely.

Duty of Debtor.—The debtor should, generally speaking, before demand made, or action brought, tender payment; but when the creditor has marked out the mode of payment, it is sufficient to follow his arrangements. And where the parties have agreed on a particular thing as payment, whether it be lands, goods, labor, or a bill, or note, and the agreement has been carried into execution, it is in effect equal to a payment in money.

The tender must be made to the creditor himself, or some person duly authorized to receive it. In the absence of directions from the creditor, there must be a tender of the debt by an actual production and offer of the sum due; unless the creditor dispense with it by a declaration that he will not accept it; and this tender must be of *money*. The tender of a larger sum than that due is good, but not so if change is demanded. Nor is a tender good if accompanied

with a condition; as that a bill be delivered up, or a receipt in full be given. Nor should a tender be made in such terms as would compel the creditor to make any admission. Although a bill or note is not generally payment, except by special agreement, yet if the creditor negotiate the bill or note for value, and without rendering himself liable, it will operate as payment, though dishonored.

It has been held, that where payment is to be made by a bill or note, payable at a certain period, the creditor cannot, even if the bill or note be not delivered according to agreement, commence an action on the consideration, till the expiration of that period, though he may sue in the meantime upon the special contract, and complain of the non-delivery of the bill or note; and where goods were sold at six month's credit, payment then to be made by a bill at two *or* three months, it was considered in effect, nine month's credit.

Duty of Creditor.—We have already noticed that it is the duty of the creditor to receive payment. The consequence of refusing payment when tendered, will be, that if he afterwards commence an action for the amount, the tender accompanied by a payment of the sum paid into court, will be a good defense, unless the creditor can prove a prior or subsequent demand and refusal. Such a tender will also prevent interest from afterwards running against the debtor.

A receipt is not conclusive evidence of payment as against the creditor; unless it be by deed.

SECTION IV.

CONTRACTS WITH CARRIERS.

A common carrier is one who undertakes for hire, to carry goods for such as choose to hire him, from place to place. Railways or steamboat companies are common carriers with regard to the goods which they convey, unless the Acts constituting them, limit their liability.

Common Law Liability.—It is the duty of a common carrier to carry the goods of all persons offering (for there need not be an actual tender) to pay the charges, unless his carriage be full, or the goods are of a character that render them liable to extraordinary danger, or such as he is unaccustomed or unable to convey. He is also bound to take proper care of them while in his charge, to carry them by the route which he professes to be his route, and to use due diligence in delivering them, having reference to the means of conveyance at his disposal. He is, also, the insurer of the goods against all accidents, except the act of God, or the Queen's enemies; and it makes no difference whether the loss occurs from accident, robbery, violence, or the negligence of third persons. This liability continues up to the time of the delivery of the goods, unless, as often happens, they continue in his possession after the journey, under a contract expressed or implied by the nature of his employment, or the circumstances of the case, which alter the nature of his employment, and consequently his liabilities in regard to them; for instance, if upon their arrival at their destination he agrees to hold them as a warehouseman or wharfinger.

Carriers by sea are not liable for losses by piracy; as there is very little possibility of collusion between the carrier and the pirate, and a contrary rule would have tendency to check commercial enterprise in that way.

Special Agreements.—The common law liabilities being so general and strict, where there was no special agreement between carriers and their employers, special contracts and terms were soon introduced, and have now become general, to limit this liability. These special terms generally are made known by posters, advertisements, or printed stipulation in the body of, or upon the back of freight or shipping bills. These special terms should be carefully regarded, for they will, if consistent, be held to free them from damage or loss sustained, without fault upon the part of the carrier; but if

he be guilty of wilful misconduct, or gross negligence, he will be chargeable with damage or loss occasioned thereby, and his notice or special agreement will not be permitted to limit his liability.

Common carriers are also in the habit of making special agreements, in the same manner, for a premium in proportion to the risk incurred, where goods are of a peculiar character or great value. If such notice or conditions can be brought home to the knowledge of the employer, his consent to its terms are implied, and the carrier becomes entitled to the protection for which he stipulated; but the carrier will be held liable for the apparent value of the goods at the time of their shipment, unless his employer's misconduct was to some extent conducive to the loss.

The question frequently arising, in practice, whether carriers who have received a parcel of goods to be carried to a point beyond that to which their own means of conveyance extends, are liable *as carriers* for loss beyond that point, or are to be looked upon as mere *agents* for the purpose of carrying to the end of their route, and employing fresh agents at its termination to complete the journey. This is often a question of fact for a jury, but the tendency of the courts is to hold them liable as carriers.

Evidence of the Contract.—The contract implied from the delivery and acceptance of the goods to and by a party in his capacity as carrier, is to charge a reasonable reward for the conveyance; and if a carrier refuse to carry and deliver, except upon payment of an exorbitant charge, the excess, if paid, may be recovered back. But it is competent at common law, to make a previous special bargain in each case for the rate of charge, and thus such agreement has the full effect of a contract, and the parties must be strictly guided by it.

Damages.—The proper person to claim damages is the person in whom the property was vested when lost or damaged. Hence the consignee is usually the proper plaintiff, because

delivering of goods to the carrier commonly vests the property in the consignee. But if the consignment does not change the property, as where goods are sent on approval, or are to be delivered free of charge at the place of business of the purchaser, the consignor is the party entitled to recover damages.

The amount of damages must be measured by the ordinary consequences of a breach of contract or duty, such as both parties must be supposed to have contemplated.

If here goods are sent from A to B and are lost, the consignee is entitled to their value at B as distinguished from the place where they were delivered to the carrier. Speculative or trade profits which might have been enjoyed cannot be recovered as damages. Thus where, owing to the delay of a month in the delivery of cloth by the defendants, (common carriers), which the Plaintiff wanted immediately to make up into caps, the Plaintiff lost the season, it was held that he could not recover as damages the loss of the profit he would have made by the sale of the caps, but that be could recover the amount of depreciation in the market value of the cloth owing to the lapse of the season.

SECTION V.

CONTRACTS OF AFFREIGHTMENT.

Contracts of affreightment, though confined in their meaning to the carriage of goods in vessels, possess most of the characteristics of contracts with common carriers by land.

There are two classes of contracts of this description:—

1. Contracts of affreightment by a charter-party.
2. Contracts for the conveyance of goods in a general ship.

Affreightment by Charter-party—Is when the entire ship or some specified part of it is let for the conveyance of goods, for some specified period of time, or for a particular voyage. The customary stipulations on the part of the shipowner or

master are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by the day appointed to receive the cargo, and shall wait a certain time to receive it on board, and shall then sail with the first fair wind to the destined port, and there deliver the goods in proper order and condition to the order of the charterer; and that during the voyage the ship shall be tight and staunch, and furnished with sufficient men and necessaries, to the best of the owner's endeavors. The charterer's usual covenants are to load the vessel within a fixed or reasonable time, after she is ready to receive her cargo; to unload within a certain number of days and to pay freight.

When the master of a vessel undertakes to carry freight, he impliedly contracts that his vessel shall be seaworthy and fit for the purpose. Also when there is no stipulation as to time, he must sail within a reasonable time, and proceed without deviation to the destined port, otherwise he will be liable to the plaintiff for loss occasioned thereby; even though the loss be occasioned by the perils of sea, if the deviation has been the proximate cause.

The charter-party usually contains a clause exempting the charterer from liability, in case of being prevented from performing his contract, by certain specified causes,—as, the acts of God, the Queen's enemies, fire, and the dangers of the lakes, rivers and navigation, and such restrictions of common law liability as the parties agree upon.

The merchant usually covenants to load and unload within a certain time, or, if he detains the ship a longer time, which sometimes he receives liberty to do, to pay a daily sum, which, as well as the delay itself, is called *demurrage*.

This stipulation must be strictly performed on both sides. With respect to the time allowed for loading and unloading, the merchant must pay demurrage for any delay beyond the arranged period, though not attributable to his fault, but to some

unforeseen impediment to her loading or unloading, such as the crowded state of the docks; for he has expressly engaged and is bound by his contract. But if the owners interrupt the loading or unloading by their wrongful interference or act, they are not entitled to receive demurrage for any additional time occasioned by such wrongful interference or act.

The time allowed for unloading is not to be reckoned from the arrival of the vessel at the entrance of the port, but at the usual place of discharge.

The claim for demurrage ceases as soon as the vessel is loaded, and none can be claimed for subsequent delay occasioned from the state of the port, nor from tempestuous weather, nor though the vessel set out and be driven into port again.

In contracts of charter-party it is often important to determine whether the possession of the ship passes to the merchant, so as to constitute him an owner, for the purposes of the charter, and cause the general owner to stand to him in the position of a lessor, rather than a carrier. On this important question may depend the owner's right of *lien* for freight. It is impossible to lay down any general and safe rule for its solution; it must be gathered in each case from the terms of the instrument, creating the charter-party, or its purposes and objects. The greatest care should therefore be exercised that the relation of the parties distinctly appear upon the face of the instrument.

It has been held that a person may be owner for the voyage, who by a contract with the general owner, has the ship for the voyage, and has exclusive possession, command and navigation of the vessel. But where the general owner retains the possession, command or navigation of the ship, contracts to carry a cargo or freight for a voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. In the first place the general

freighter would be responsible for the conduct of the master and crew during the voyage; in the latter case the responsibility rests on the general owner.

Also where the owners were to keep the vessel in order and the charters to pay all wages and disbursements, it was held that the owners continued in possession of the ship, and liable for mischief done by the crew.

Affreightment in a general Ship.—Where the use of the entire vessel, or a certain amount of storage therein, is not contracted for, but merely packages of goods sent on board to be conveyed to the port of destination, and the master or some person acting for him gives a receipt or bill of lading, it is affreightment in a *general ship*.

The bill of lading is really the contract in such cases existing between the shipper and the master or owner of the vessel; it is usually executed in three parts, one of which parts is retained upon the vessel, and two delivered to the shipper, one of which he sends to his consignee, and the other keeps for his own security.

The bill of lading is generally a partly written and partly printed memorandum, signed by the master, acknowledging the shipment of the goods on board, and promising to deliver them at the port of destination, to a person named as the consignee or his assigns, on payment of freight primage, average, &c., with a protective clause from the act of God, &c., as in a charter party.

This bill is usually assignable by a mere endorsement and handing over to some other person, who then stands in the position of, with all the rights of, the original consignor as to the property in the goods.

It is the duty of the master to deliver the goods upon the presentment of the bill and payment of the freight, &c., and if the bill and payment are not tendered within a reasonable time, he is not bound to keep the goods for an indefinite time on board his vessel, but may deliver them to a trustworthy

wharfinger or person, as is the usual custom, to be kept until presentment of the bill, and offer to pay the freight and charges.

According to the English decisions, though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills sure to be dishonored, has been held to pass them absolutely to the assignee, and deprive the consignor of his right to stop *in transitu* (a right hereafter to be noticed), which as against the original consignee he might have exercised. But if the assignee have not acted *bonâ fide*; for instance, if he knew that the consignee was insolvent, and assisted to defraud the consignor of the price of his goods, he stands in no better situation than the consignee; and if there be any condition either in the bill of lading or in the endorsement thereof, ex. gr., if the goods are to be delivered, *provided A B pays a certain draft*, all subsequent endorsers take subject to that condition.

The full effect of an endorsement and transfer of a bill of lading seems to be a symbolical delivery of the goods, and capable of operating no further than a delivery of the goods would have done.

If therefore the consignee could not transfer a good title, although in possession, to a *bonâ fide* purchaser, his endorsement and delivery of a bill of lading will not be allowed a greater effect even in favor of an innocent party who has paid value for it.

Payment of Freight.—When the goods have been carried and delivered according to contract, the merchant must pay freight, according to the agreement of the parties, or if no rate be specified, then for the value of the services performed, estimated according to the usage of trade in like cases, or by the course of former dealing between the parties.

In addition to the ordinary remedy by action, the shipowner has a lien on the goods for his freight. The terms of the bill of lading may, however, be such as to waive the lien, as where the freight is to be paid at the port of lading, or by the shipper at a given time after sailing, ship lost or not lost. There are certain other charges, such as primage, average, &c.

Primage.—Is a small customary payment to the master of the vessel for his care and trouble in taking charge of the cargo. This claim we believe is seldom or ever made in our inland navigation.

Average—Denotes several petty charges, such as towage, beaconage, pilotage, &c.

General Average.—Where damage or loss is incurred by a particular part of the ship or cargo, for the preservation of the rest, it is called *general average*.

But it may be more clearly understood when defined to be the contribution that the owners of the ship and cargo and freight are called upon to make, for the purpose of recompensing a party whose goods or property have been sacrificed for the general safety.

Thus, when for the safety of the ship in distress, any destruction of property is incurred, either by cutting away the masts, throwing goods overboard, or other means, all persons who have goods on board, or property in the ship, must contribute to the loss according to their average, that is the goods of each on board—everything saved pays according to its value: the shipowner contributes in proportion to the value of the ship and furniture, excepting the provisions of the passengers and crew—the passengers and owners of goods shipped in proportion to their value, and the owners of the freight and earnings of the ship after deducting the wages and expenses of the voyage.

In order to establish a claim for general average, it must be shown that the goods were thrown overboard in a moment of distress and danger, for the purpose of preserving the ship

and cargo. All ordinary losses and damage sustained by the ship, happening immediately from the storm or the perils of the sea, must be borne by the shipowners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably as general average. Thus it will be seen that it is only a *voluntary* injury to the vessel, or destruction of goods, for the general preservation and benefit of all, that creates a liability to general average.

Salvage.—In order to encourage persons to lend their aid and assistance for the protection and preservation of property from shipwreck, the law gives to parties by whose labor and assistance the property has been saved, a right to a fair and reasonable compensation for their services, and a right to retain the property until they have received it. This compensation is called *salvage*, and the amount payable depends upon the value of the things saved, the degree of danger of loss, and the amount of labor and skill employed in saving it.

A man cannot entitle himself to salvage in respect of services rendered contrary to the expressed wishes and directions of the owner, and has no right to interfere with persons employed to save the property. A passenger is not entitled to claim salvage in respect to assistance which it is the natural duty of all on board to give in case of distress; but for extraordinary services rendered and dangers incurred for the preservation of property, the passenger is equally entitled with the stranger. Neither can a person such as an officer or seaman upon the vessel, whose duty it is to do all in his power to save the vessel and freight, claim any salvage for rescuing her. If he could, it might act in some cases at least, as an inducement to endanger the vessel, upon the venture and hope of securing salvage in saving her.

SECTION VI.

MARITIME LIENS.

Bottomry—Is an agreement whereby the owner of a ship or his agent undertakes to repay with interest, money advanced for the use of the vessel, if the vessel terminates her voyage successfully, and binds or hypothecates the vessel for the performance of the agreement, by a bond or deed poll called a bottomry bill.

Respondentia—Is an agreement or contract similar to that of bottomry, except the lien is given upon the goods and merchandize laden upon her, and not upon the vessel herself.

Character of the Liens.—These liens differ from most others in the risk the party advancing has to run; as the condition is, if "the vessel terminates her voyage successfully;" and in the high rate of interest he consequently receives.

These contracts are entered into by the owner or the master acting as agent—most generally by the master in charge. The master's authority to thus hypothecate the vessel or cargo, arises only upon the utmost necessity; as when in a foreign or distant port, and unable to correspond with the owners, he can by no other means raise money to repair or furnish his vessel, or to enable him to carry out his voyage, and without it the adventure would be frustrated. It is not until all other means of obtaining necessaries fail that he has authority to hypothecate the ship, and to give a maritime interest, which is in effect defeating the object of the adventure and transferring to the creditor much of the profits of the voyage.

No debtor to the vessel can make advances upon a bottomry bond; but the consignee of the cargo may if he can fully establish the fairness of the transaction.

Where several bottomry bonds have been given upon the vessel by the master at different periods during the voyage, those of the latest date have the priority of payment, on the

supposition that the last bond operates for the protection of the prior interests. A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the vessel, so as to be entitled to priority.

SECTION VII.

MARITIME INSURANCE.

The Contract of insurance is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from the risks and accidents to which any particular property is exposed, in consideration of a certain premium, the price of the risk. Maritime insurance is where a merchant gives a premium to others to insure his ship or goods from one port or place to some other port or place, upon such terms and for such premium as may be agreed upon. If the ship or goods are lost in the whole, or part, or damaged, every subscriber is to make a recompense either to the full extent of the insurance or in proportion thereto, depending upon the loss.

In case of loss the insured may be called upon to prove the following facts, which should be carefully considered and regarded; viz., the execution of the policy; the interest of the party as averred; the putting of the goods, &c., on board when the policy is on goods; the inception of the risk; compliance with warranties; a license for legalizing the voyage in some cases; the loss; and amount of it.

The Policy.—It may be a *voyage* or *time*, *valued* or *open* policy. When the insurance is on a voyage from port to port, without reference to time, it is called a voyage policy; when it is from one fixed period of time to another it is a time policy. When the value of the property insured, as between the insured and the insurer, is expressed upon the face of the policy, it is a valued policy; and when it is not so expressed,

but left to be estimated in case of loss, it is called an open policy. Valued policies when capable of being entered into, are preferable, as they may save much after trouble and expense. The valuation in such a case must be a fair one, or the policy may be held fraudulent and void, for the contract being strictly a contract of indemnity for a real loss, the law will not permit it to be made a means of profit and gain to one party at the expense of the other.

Policies yet retain much of the ungrammatical and technical construction of their ancient form, and are liable to mislead the unprofessional. The principal parts are:

1. *The Name of the Insured*, which should properly appear in full in the body of the policy.

2. *The Name of the Ship*, which should be correctly stated, for a variance from the right name may discharge the company; it is not unusual to insert, "or by whatever other name or names the ship shall be called." A policy may be upon ship or ships expected from a certain place.

3. *The Subject Matter* of insurance, which should be described with accuracy and certainty. A person may insure under the term of *freight*, profits expected to be derived from his own vessel. It is sufficient to say that a policy is on *goods* generally; but that will only mean goods of an ordinary not extraordinary danger. It is always better also to state in the policy the nature of the insured's interest in the goods or property.

4. *The Voyage* also must be accurately set forth; the description comprehending the times and places at which the risk is to begin. An omission of the time is said to cause the risk to begin from the making of the policy. If a voyage be from or to a district containing several ports, they must in absence of provision to the contrary be visited in their geographical order; but words are generally inserted to authorize a deviation from the direct track, in order to the better accomplishment of the purposes of the voyage. If a vessel

sail upon a voyage different from that described, or having entered upon her voyage, afterwards deviate, her policy is vacated and rendered void.

The voyage is generally limited to determine when the ship has been moored twenty-four hours *in good safety*. If she arrive a mere wreck, and afterwards founder, she cannot be said to have moored an instant *in good safety;* but if she continue in good safety twenty-four hours and afterwards be lost, although by some act performed during the voyage; and if the words "*good safety*" be not used, the risk determines under all circumstances at the expiration of the limited time.

When the insurance is upon goods, it is better to have it continue until they shall be "*discharged and safely landed.*" The risk then continues even after the goods have left the vessel, and are in lighters for the purpose of being landed, if necessary, in the usual custom of the voyage. There must, however, be no unreasonable delay in unloading the goods.

5. *The Perils* insured against are usually described to be "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all queens, princes and people, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, or detriment, or damage of the vessel, or any part thereof." And if the words lost or not lost be added, the underwriter becomes liable, though the vessel be lost at the time of the insurance.

The words of the policy having by decisions derived important meanings, we will briefly notice them:—

Perils of the Sea.—These words cover all damage or loss, where the sea, strictly speaking, has been the proximate cause; whether by stress of weather, winds and waves, lightning and tempest, rocks, sands, &c. A loss occasioned by another vessel's running down the ship insured, is a loss by peril of the seas, although there has been negligence and

want of skill on the part of the master and crew of the ship insured. If the loss takes place from the vessel running aground, on entering or leaving port, the loss is a loss by perils of the sea, so is a loss of animals killed by the agitation of the ship in a storm.

If a vessel is not heard of within a reasonable time after her sailing, it is presumed that she foundered, and the assured may recover for a loss by perils of the sea.

Loss by Capture.—An insurance on voyages to ports blockaded by a British squadron is illegal, and no action can be maintained for indemnity in respect of losses resulting from an attempt to break such blockade, if it appear that the party had knowledge of the blockade and intended to break it at the time he effected the insurance. But if he had no knowledge of the blockade, or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid. In every policy there is an implied term or proviso, that the insurance shall not extend to cover any loss from capture of enemies' property by the British government, on the breaking out of hostilities. When the insurance was effected against capture only, and the vessel was driven on the enemies' coast, in a stiff gale of wind, but received no damage, and whilst she remained stranded on the shore she was seized and confiscated, it was held to be a loss by capture.

Enemies.—A capture by enemies is an act done under the recognized laws of warfare. The mere capture does not divest an owner's property in the thing captured; but the insurance being in form of an indemnity, the insured must be reimbursed for his loss. If the vessel be re-captured, and the owners recover it, upon payment of salvage, this may change a loss that was *primâ facie* total, into a *partial* loss. An insurance against *British* capture is illegal, as being against public policy.

Pirates, Rovers and Thieves, are not like enemies, such

parties as commit an injury under color of authority; but are such as without any right or authority commit acts of depredation and injury to property.

Restraint and Detainment of Kings, Princes, and People.—By *kings* and *princes* are meant all potentates, whether at peace or war. The word "people," comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. It means the supreme power of the country, whatever it may be; and if a vessel is seized by a mob, or party of rebels—they not having the supreme power—the loss resulting therefrom is not covered by the policy.

Jettison is a throwing of the goods overboard from some just cause, as for the purpose of preventing their capture by an enemy.

Fire.—It is of no consequence whether this occurs from common accident, or lightning, or in duty to the state, the damage is equally covered by the policy. But if the goods spontaneously generate the fire, from their character and damaged state when put on board, the insurer is not liable.

Barratry of the master and crew, in policies includes every species of fraud or knavery by them, by which the owners are injured. Thus barratry may be committed by a wilful deviation in fraud of the owners, by smuggling, by running away with the ship, by sinking or deserting her, or by defeating or delaying the voyage with a criminal intent. If by reason of these or other similar acts, committed in fraud of the owners, the subject matter is detained, lost, or forfeited, the insured will be entitled to recover for a loss by barratry.

Other Perils, &c., as generally inserted in policies, cover and protect all losses happening on the sea and in port, whilst the ship is in the due and customary prosecution of the voyage insured, and whilst the risk on the policy continues. If a vessel is fired into and sunk by mistake, or if a vessel is lost or injured in port, the loss will be covered by this clause.

Memorandum.—There is usually a memorandum introduced in the policy to protect the insurer from liability to small averages, or partial losses which might be claimed in respect of certain perishable commodities. This memorandum protects the insurer from making good any partial loss whatever upon the classes of articles mentioned therein, further than to the small extent stipulated. As this memorandum is incorporated into the policy, and becomes part of the contract, it is important that it should be clearly understood, and carefully regarded, otherwise the insured may unexpectedly find his policy next to useless.

Insurable Interest.—If the assured has no property exposed to loss, and no real risk to guard against, he has no insurable interest, and the policy is void. Neither can a party who is a stranger to the property in both a vessel and her cargo, create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel. But if he has any pecuniary interest, however small, he may lawfully insure to the extent of it, whether it be a property in the vessel or goods, or an interest in the freight, or a profit derivable from the carriage of goods, or the hire of the vessel under a charter party. So may a shipowner insure the profits which he ordinarily makes from carrying his own goods in his own vessel to a distant market, or any profits fairly expected to be made in the due course of trade. It seems that any interest (not being a mere expectancy) even though defeasable or inchoate, may be insured. It has been held that when a party contracted to purchase the property insured, and had failed in making his payments but was proceeding in equity to compel performance of the contract by the vendor, he had an insurable interest. The party effecting an insurance should be very careful in making known to the agent, and having appear in the body of his policy, the character and extent of his interest in the property insured. This may avoid much after trouble, and perhaps loss.

Inception of the Risk.—If the policy is on goods "lost or not lost," the indemnity extends to all past as well as all future losses. The risk begins at the port, when the insurance is on a voyage, "at and from," &c., or at the beginning of the voyage, when the insurance is "from" the port. In an insurance upon a *time* policy, (i. e., one within certain dates without regard to a particular voyage) the risk begins at the first date.

In the case of goods, the risk depends upon the agreement of the parties, but it usually begins with the loading on board, and ends with the safe discharge, including their passage to the shore by usual means. The risk on freight it seems begins, in the absence of express provisions, when the goods, or part are on board, or the ship is at the point of loading in a condition to take them on board.

Warranties.—Warranties are *expressed* or *implied*. They are in the nature of conditions precedent; and unless they are performed there is no contract, and, in this necessity for a literal compliance they differ from mere representation, which it is sufficient to perform substantially.

Express Warranties are such as appear in the body, margin, or at the bottom of the policy, and are incorporated in, and form part of it by reference. They are usually:

1. *Time of Sailing.*—When a ship is warranted to *sail* on a particular day, that means that she shall be *upon her voyage* on that day, for which purpose she must be completely unmoored, and not simply with her cargo on board, though prevented from sailing by stress of weather. If she have once set sail, that will be sufficient, though she be afterwards detained by embargo, or stress of weather, &c. She must, however, have her clearance, her full cargo on board, and everything necessary for the performance of her voyage,—nothing remaining to be done afterwards.

If the warranty be to "*depart*," or to "sail *from* a place," it is necessary that the vessel should be out of port on or before the day; to set sail on the voyage is not sufficient.

2. *Safety of the Ship on a particular day.*—If the vessel be safe upon any part of the day, the warranty is complied with.

3. *To Depart with Convoy.*—It is usual in time of war, for merchant vessels to depart with a naval convoy, appointed by the goverment of the country to which the vessel insured belongs. The appointment of the goverment is essential, and a ship of war accidentally bound to the same port as the merchantman is not sufficient.

Neutral Property.—Whenever property is insured as neutral property, which is not neutral, there is no contract, and nothing can be recovered on the policy. But if the property is neutral at the time the insurance is effected, and the risk attaches on the policy, the fact of its ceasing to be so at a subsequent period, does not affect the insurer's liability. If a war break out the next day he is liable.

5. *Freedom from Zeizure in Port of Discharge*, is a warranty frequently inserted, to protect the insurer from liability in case of confiscation, seizure, or capture in port; which may arise from illicit trade, or trade in articles contraband of war. The seizure must be in *port*, and for a legal and justifiable cause. As to where a vessel is in port, for the purposes of this warranty is often a vexed question; but the holding of the courts appears to be, that she must at least be within the head of the port, if not within that part where ships generally unload.

Implied Warranties.—There are certain implied warranties, the breach of which, equally with express ones, will prevent the insured from recovering; such implied warranties are:

1. *Seaworthiness.*—By seaworthiness is meant that the vessels shall be in a fit state as to repairs, equipment and crew, and in all respects to encounter all the ordinary perils of the voyage insured, at the time of sailing upon it. There is a warranty of a similar nature in an insurance upon goods, with

respect to the vessel upon which they are loaded, but there is no warranty as to the goods themselves that they are seaworthy for the voyage.

If the assured makes no warranty that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage, their negligence or misconduct is no defence where the loss has been immediately occasioned by the perils insured against. There is not ordinarily any implied warranty of seaworthiness, where the policy is merely a time policy, and not even connected with a voyage.

2. *Deviation.*—Where the insurance is on a voyage to a given place, and the captain when he sails does not mean to go to that place at all, he never sails on the voyage insured against, and the policy never attaches. When the vessel sets out upon her voyage but afterwards deviates, the insurer is discharged, not from the beginning of the voyage, but *from the time of deviation;* a deviation happens when there is a wilful and unnecessary departure from the due course of the voyage, for any, even the shortest time. But all deviations by reason of inevitable accident or stress of weather, to obtain needful provisions, or do needful repairs, or avoid capture, are implied exceptions to the warranty. An unreasonable and unjustifiable delay on the part of the insured, either before or after the risk attaches, in commencing the voyage insured, is in the nature of a deviation, and discharges the insurer.

3. *Reasonable Diligence in Guarding against Risk.*—There is also an implied warranty that the insured will use all reasonable diligence in guarding against the risk covered by his policy. Thus, he must have the vessel properly documented according to her national character. There is an important distinction between an express warranty of the ship's national character, and an implied warranty of her being properly documented. In case of such an express warranty, if the ship be not properly documented at the time of sailing,

the insurer is discharged, whereas a breach of the implied warranty does not discharge him, unless the loss actually happens in consequence.

There is, however, no implied warranty of documentation in an insurance upon goods, unless the owner is also the owner of the ship.

4. *Disclosure of all Material Circumstances.*—The assured is bound to make known, at the time of obtaining the risk, all circumstances within his knowledge materially affecting it. The fraudulent keeping back, or concealment of circumstances calculated to materially affect or enhance the risk to be incurred by the insurer, avoids the policy, and prevents a recovery in respect of a loss wholly unconnected with the circumstances concealed. But the assured is not bound to disclose matters as much in the knowledge of the insurer as himself, nor such things as it is the business of the insurer to know or find out for himself: so may either party be innocently silent upon matters of mere opinion, and upon which both can exercise their judgment.

All material statements and representations which are false to the knowledge of the party making them, are *fraudulent*, and avoid the policy, even though the actual loss is unconnected with the fact represented, and though there be no fraud intended.

Proof of Loss.—The loss is either total or partial; and a total loss may be either so of itself, or rendered so by abandonment.

1. *Total Loss* is where the thing insured is either totally destroyed or is so damaged as to be worthless; or if the thing insured, though still existing in fact, is lost to all useful purposes, so as to justify the insured in abandoning all his interest and claiming for a total loss. A loss is total and requires no abandonment where the vessel is lost, or destroyed, or captured, or reduced to a mere wreck, so as to exist as a ship for no useful purpose. In some cases of damage by

sea, the owners or master may be justified in selling the vessel and claiming for a total loss; such a sale must be justified by necessity, and be for the benefit of all parties, and the proceeds of the sale becomes money received for the insurer.

An abandonment cannot be partial; it must be of the whole thing insured, and unconditional, unless the insurer think proper to accept a conditional or limited one.

The insured is in no case compelled to abandon, but where he is entitled and thinks proper to do so, he must without delay, and give notice of abandonment within a reasonable time. What is a reasonable time, is a question of evidence, and must depend upon the circumstances of each case. It may be given, however, as a general rule, that not more time should elapse than is absolutely necessary to learn the amount of damage done, and to give the notice.

Partial Loss.—A loss once total may from subsequent circumstances become a partial one. Thus, a vessel captured is a total loss; but if she escape or be recaptured, so as still to be of value, that which was once a total becomes a partial loss. So where the policy is on freight, and the ship is detained under an embargo, the loss is a total one; yet if the embargo is taken off, it then becomes a partial one.

Loss how calculated.—When the policy is a valued one, and there has been a total loss, the assured is entitled to be indemnified to the extent of the declared value in the policy, and is released from proving the value, unless the valuation can be impeached by the insurer. But if the declared value exceeds the interest of the insured, through some mistake or misapprehension, the loss will be adjusted in the same manner as if the policy was an open policy, and the computation be made by the real interest on board, and not by the value in the policy.

The rule on an open policy is to estimate the actual value of the subject insured, at its actual or market value at the

commencement of the risk,—the object of insurance being merely to put the party in *statu quo*, and not to indemnify him for the loss of prospective profits. If the claim be on repairs of a vessel which has sustained damage, the full costs of repairs will not be allowed, but only two-thirds of the cost of repairs, it being considered a deduction of one-third ought to be made in favor of the insurer, by reason of the owner's having the benefit of new material instead of the old, unless the vessel is on her first trip. If a partial loss has been sustained on goods, this loss is calculated and adjusted by comparing the selling price of the sound commodity with the selling price of the damaged part of the same, at the port of delivery. The difference between these two affords the proportion of loss in any given case, i. e., it gives the aliquot part of the original value, which may be considered as destroyed by the peril insured against, and for which the assured is entitled to recover, or as it is sometimes put, the sum to be paid by the insurer is to bear the same ratio to the original value at the port of lading, as the gross proceeds of the actual sale bear to what would have been the gross proceeds if the goods had been sound when sold. The expense of insurance and commission are to be added to the prime costs or invoice price. Thus, suppose the original value, costs of commission and insurance were $400; had the cargo arrived safe at the end of its voyage would have fetched $800; but in its damaged state will only bring $500; then as $800 : $500 : $400 to the sum required, which will be $250; subtracting $250 from $400, the original value, we have $150, the estimated loss for which the insurer is liable.

Where the policy is a valued one, the parties thereby having fixed the value of the goods, are bound by it as the standard to be adopted.

The amount recoverable depends on the value of the thing insured, the sum insured, and the amount of loss; and as the

contract of marine insurance is a contract of indemnity only, where there are several policies on the same subject matter, and the assured has been paid on some of the policies, he can only recover on another such an amount as with the sum already received will give him indemnity against the loss actually sustained. In ascertaining this loss in an action on an open policy, the true value of the thing assured is the criterion. But on a valued policy the assured can only recover to the amount that the thing is valued in the particular policy; and it has been held, that if he has already received the value on another policy, he cannot recover anything further, although the true value and loss be beyond what he has already received.

Return of Premium.—If the policy is void from the beginning, or where there is no insurable interest, and this proceeds from misinformation or other innocent cause; or where an interest is less than that insured; the premium, or part of it may be recovered back. Where there are two insurances, at different times, together exceeding the interest insured, the excess of premium may be recovered from the last insurer, not the first. Where there are several insurances effected at the same time, and before the risk commenced, they are to be taken as one policy, and the return must be pro rata.

If the risk has never commenced there must be a return; as if the ship never sailed, or the policy is avoided by failure of warranty, without fraud. But if the risk has once commenced, or the policy is void for illegality, or for any fraud of the assured, there can be no return.

SECTION VIII.

INSURANCE AGAINST FIRE.

The insurer, by this contract, in consideration of a premium paid either in gross or at stated periods, undertakes

to indemnify the assured against loss of, or injury to, property from fire, and the policy is called a *fire policy*. Most of the observations already made in reference to maritime insurances, may be considered equally applying to *fire policies;* the application being made with due consideration of the different character of the property, nature of the contract, and different conditions attached.

Interest.—It is necessary to show an insurable interest in the subject insured at the time of insuring, and of the fire. This interest need not be an absolute one; thus an insolvent may insure a house, &c., to which his assignees are entitled, he being in possession and responsible to the real owners. Warehousemen and wharfingers may insure their customers' goods in their custody, and may recover the whole value under a policy on goods, "held in trust on commission." The mortgagee of reality may insure; so the holder of a chattel mortgage being a mortgagee, has an insurable interest though the mortgagor remain in possession. Whenever there is an actual pecuniary interest in the property held by the party, it seems an insurance may be lawfully and effectually made; and even where this interest is of such a fine and equitable nature as scarcely to be recognizable; thus, where A, owner of a stock of goods sold to B and C, endorsed B's notes in payment, and the policy of insurance was assigned from A to C as a security against his endorsement, it was held that C had an insurable interest.

Description of Property.—The utmost care should be taken, at the time of affecting an insurance, that an accurate and full description of the property to be insured be given. A building, for want of care, may be described as belonging to one class instead of another, when a larger premium would have been required for that other, and the policy thus rendered void. Also personal property, intended to be included, often is found not to be within the strictness of the policy and decisions from the want of sufficient care in describing it

at the time of insuring; thus an insurance on "household furniture, linen, and drapery," will not cover linen bought on speculation.

Warranties.—Every statement, condition, and representation, material to the risk, will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk.

Such warranties or conditions as are inserted in the policy, or incorporated into it by reference from printed proposals (which are considered parcel of the contract) must be strictly observed.

In every insurance against fire, there is an implied promise or undertaking on the part of the assured, that he will not after the making of the policy, alter the premises so as to increase the risk.

Fraudulent Concealment.— All facts and circumstances known to the assured, material to the risk, should be fully disclosed at the time of insuring, otherwise it will be considered a fraudulent concealment, and the policy be held void. Where a warehouse adjoining a boat builder's shop took fire, and the fire was apparently extinguished, and the boat builder sent immediate instructions for the insurance of his shop, without communicating the fact of the neighboring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the following morning, and extended to and consumed the shop, it was held that the concealment of the increased risk, from the recent adjoining fire, avoided the policy.

Conditions.—The conditions contained in the body, and those endorsed on back of policy, should be carefully examined and strictly followed. They are generally numerous, and all in favor of the Company, but as they form a part of the contract, they are none the less binding upon the insured, and the non-observance of the least of them may render a recovery impossible. Here is the greatest danger, and we cannot urge a too careful observance.

Mutual Insurance Companies have certain conditions rendering their policies void, under 22 Vic. chap 52, C. S. U. C., which do not appear in general upon their policies, and are therefore generally unknown by their holders.

1. If the party has a title less than a fee simple, unencumbered to the buildings insured, the policy is void, unless the true title of the assured, and of the incumbrances on the premises, be *expressed therein* AND *in the application* therefor.

2. If a double insurance exists at the same time, the policy is void, unless the double insurance exists with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary. But if a notification in writing be given of a subsequent insurance, or of an intention to effect one, the additional insurance will be deemed to have been consented to, unless the Company notified signifies its dissent in writing within two weeks after such notice.

3. In case the property insured be alienated by sale or otherwise, the policy becomes void; but the alienee may have the policy assigned to him, and confirmed, by furnishing security to the Company, &c., within thirty days, as provided by the act.

Loss.—As the insurers take upon themselves only the risk of fire, they will not be responsible, it is said, unless there be an actual ignition. If damaged from the heat and smoke of *ordinary* flues and chimneys, overheated and mismanaged, they will not be responsible. Nor will the injury caused by lightning be within the risk unless conflagration ensue.

One of the chief objects of insurance is to guard against the negligence of servants and others, and therefore the simple fact of negligence has never been held to be a defence against the claim of the assured, and there is no distinction against the negligence of servants or agents, and the assured himself.

Notice of Loss.—In case of loss, the necessary notice, proof of loss, certificate of a Justice of the Peace, &c., must be carefully given in manner and time as provided by the policy. This should be most carefully done, and when possible under the direction of a legal adviser. No informality should be risked. It has been even held, where the affidavit of loss sent in after the fire, had no jurat, and was not in the form of an affidavit, that the insured was on that account precluded from recovering.

Distribution of Loss.—Where there are several insurances upon the same property, and the loss is not to the full amount of the united insurances, the insured is not compelled to partition the loss upon the several policies, but may sue and recover for one or more of them to the extent of his entire loss if the sums subscribed will cover it; each insurer standing in the relation of a co-surety with the other, according to their several amounts. The insurer paying the amount, may compel contribution from the others, in proportion that the sums subscribed by them bears to the whole amount of the insurances. To avoid this circuity of recovery, a clause sometimes is introduced providing that in case of loss or damage the insured shall recover upon the policy no greater sum than the amount thereby insured shall bear to the whole amount insured upon said property.

Assignment of Policy.—An assignment of a fire policy can only be affected by the consent of the insurer; which consent is generally signified by an endorsement upon the back of the policy, to that effect, signed by the agent of the insurer. In case of sale of property insured, the policy must be assigned to the purchaser, or it in effect becomes void. For the holder of the policy, having no longer any interest in the property, cannot recover, neither can the purchaser, he having no legal interest in the policy.

After loss, however, it is otherwise; the insurance then becoming fixed, may like any other debt, be assigned, without the consent of the insurer.

SECTION IX.

GUARANTEES.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of failure of some other person, who is himself, in the first instance, liable to such payment or performance. It differs from a warranty in this, that a warranty properly relates to some property or thing, while a guaranty relates to the act of a person.

What constitutes a Guaranty.—By the statute of Frauds, "no action lies to charge any person on a promise to answer for the debt, default or miscarriage of another, unless the agreement, or some note or memorandum thereof be in writing, signed by the party to be charged, or by some person thereunto lawfully authorized." The agent to sign a guaranty need not be authorized in writing. This section prevents a *verbal* guaranty from binding, though it is to be observed that money once paid in pursuance of it cannot be recovered back, the contract being legal, and the statute only preventing any *action* being brought. Under this statute it was held that the word *agreement* comprehended contracting parties, a *consideration* and a promise, all of which must therefore appear in the writing. Innumerable guarantees, honestly entered into, were afterwards found to be void, from want of a consideration expressed therein; and no just reason could be advanced why it should be so expressed, except the holding of the Courts in defining the word agreement. To remedy this, sec. 1, chap. 45, 26 Vic., was passed, enacting, "that no special promise to answer for the debt, default or miscarriage of another person, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise was made, by reason only that the consideration does not appear in writing, or by necessary inference from a written document." This statute has so far changed the law affecting guarantees, as to render it no longer

necessary that the consideration be mentioned in the writing itself. The consideration, however, is equally necessary as before, and must still be proved, independent of the writing.

The Consideration.—A consideration may be some loss or inconvenience to one party as well as some profit to another. In the case of guarantees the consideration which usually binds the party is not any benefit to himself, but some loss to the party to whom he is a surety. Thus if A purchase goods from B, and C become surety to B for the payment of the price, it is not necessary in order to constitute a good consideration, that C should receive the goods, or anything either from A or B. The fact that B has parted with his goods, upon the inducement of C becoming a surety for their price, is a consideration in law, and sufficient to bind C. So if "A" cash or take the promissory note of B, if C guarantees the note, the taking of the note by A under such circumstances, is a sufficient consideration. But if the guaranty is taken after the goods are sold and delivered, or after the note is taken, it will then require some additional consideration to support it.

Where a party, however, instead of taking the position of a surety assumes that of a principal, the agreement does not require to be in writing, though there must be some constructive consideration. Thus when A agreed that if B would give up his claim against C for $200, he would pay him $175 out of proceeds of a certain raft, when it would arrive at Quebec, it was held B could sue A on such agreement upon the common counts, without producing proof of the agreement in writing.

Surety how Discharged.—Entire good faith is required between the debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act of duty when required by the surety, and that act or omission may prove injurious to the surety, or if a creditor enters into any stipulation with the debtor, unknown to the surety, and inconsistent with the terms of the original contract, the

surety may set up such contract as a defence to any suit brought against him, in a Court of Law or Equity. So that if a creditor stipulates with his debtor, in a binding manner, upon a sufficient consideration, to give further time for payment, without the consent of the surety, or discharges the principal, the surety will be thereby discharged. But a conditional agreement for further time, does not discharge the surety, when, from the agreement not being performed, the agreement does not become binding. Nor does mere delay on the part of the creditor to proceed against the principal debtor release the surety.

Reimbursement.—A surety is not under the necessity of waiting to be forced by legal process to pay the debt. But as soon as there has been default on the part of his principal, and he is under legal liability, he is entitled to pay the amount, and look to his principal for reimbursement. And so if he has paid part of the debt, he has a right to obtain reimbursement to that extent, and may thus recover—*toties quoties*, as it is called—as often as he is compelled to make a payment on account of it.

Contribution.—When there are several sureties and one is compelled to pay the whole amount of the debt, he has a right to recover from his co-sureties their proper proportion, and this right is called contribution. And this right is the same whether their suretyship arises under the same, or under different instruments, either executed with the knowledge of the several sureties or not, if all the instruments are primary securities for the same debt.

There is a material distinction between the rights of co-sureties to contribution at Law and in Equity. At law, a surety is entitled, in every case, to contribution from his co-sureties, in proportion to their *number*, without regard to the insolvency of any of them. But in equity, if there are several sureties, and one of them is insolvent, and another pays the debt, he can recover from the solvent surety or sureties

as much as such solvent surety or sureties would have had to pay if the insolvent had never undertaken the office of surety.

Assignment of Collaterals.—If the creditor holds any collateral security from his principal debtor, and the surety pays the debt, he is entitled to have delivered over to him all such collateral securities, and to enforce them, as the creditor might, for his own benefit. And now by 26 Vic., chap. 45, sec. 2, "every person, who, being surety for the debt or duty of another, pays the debt, or performs such duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt, whether such specialty, judgment, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt, or performance of the duty." And by sec. 3, he is "entitled to stand in the place of the creditor, and to use all the remedies, and if need be, such creditor's name, to obtain the full benefit of such judgment, specialty, or other security."

Representations in nature of Guarantees.—It was formerly held that there might be a representation in the nature of a guaranty, and yet not one so as to bring it within the statute of Frauds. An action might be brought upon such representation, and the effect of the statute, requiring a guaranty to be in writing, rendered nearly useless. To remedy this mischief our statute of 22 Vic., chap. 44, sec. 10, C. S. U. C., was passed, enacting that no action should be brought to charge a person upon or by reason of any representation or assurance made or given concerning the character, conduct, credit, ability, trade or dealing of any other person, to the interest or purpose that such other person should obtain money, goods or credit thereupon, unless the same be made in writing, signed by the party to be charged therewith.

CHAPTER IV.

MERCANTILE REMEDIES.

SECTION I.

STOPPAGE IN TRANSITU.

Right to Stop.—A delivery of goods to a carrier, to be conveyed to a purchaser, in fulfilment of a duly authenticated contract of sale is, in ordinary cases, a delivery to the purchaser, so that the vendor has no longer any power or control over the goods, and cannot, lawfully, demand them back from the carrier, or intercept the delivery, yet, if the purchaser becomes bankrupt or insolvent before payment of the price, the vendor is entitled so long as the goods are *in transitu* and have not reached their final destination, or come in the manual possession of the purchaser or his agent duly appointed to take possession of them, to retake them, and put himself in the same situation as if he had never parted with the actual possession.

The transitus, has been held to be every sort of passage to the hands of the buyer, and it is not terminated by delivery, if it appears that the consignee has not taken possession of the goods *as owner*. In *Burr, et al* v. *Wilson, et al*, xiii. U. C., Q. B., 478, A, living in Kingston, bought six cases of goods in New York, and saw them packed, and leave the vendor's shop, on their way to the shipping warehouse. On their arrival in Kingston, they were received by the officers of the customs, and placed in the custom house store. A entered

and paid duty upon and took away two of the cases; he also paid the freight and charges upon all from New York. It was held, that the vendor had not lost the right of stoppage *in transitu* over the remaining four cases.

Who possess the right.—The person who stops the goods *in transitu* must not be a mere surety for their price, one, for instance, who has at the instance of the vendee, accepted bills drawn by the vendor for the purchase money. But a person abroad, who, in pursuance of orders sent him, purchases goods, on his own credit, of others whose names are unknown to his principal, and charges a commission on the price, is a consignor, so as to entitle him to stop the goods *in transitu*, if his principal fail, while the goods are on their passage.

How defeated, or divested.—The right to stop being co-extensive with that of the transit of the goods, from the vendor to the purchaser, it is defeated by their coming into the actual or constructive possession of the purchaser. It is defeated by a delivery of part of goods sold under one entire contract, if such delivery appears to have been intended as a delivery of the whole. The most usual way in which the right of a vendor to stop goods *in transitu* is defeated, is by assigning the bill of lading to a *bonâ fide* assignee, for valuable consideration. The assignee in such a case, in order to divest the right of stoppage, must have acted with fairness and honesty. If he assist in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation with the consignee. If, for instance, he knows that the consignee has been in insolvent circumstances, the interposition of himself between the consignor and consignee, to assist the latter in disappointing the just expectations and rights of the former, will be an act done in fraud of the right to stop, and unavailing to the party taking the assignment.

An assignment by the consignee by way of pledge, will not defeat the right of the vendor subject to the pledge.

Where goods in the hands of a warehouseman were sold, and the vendor gave a delivery order to the purchaser, which he lodged with the warehouseman, who transferred the goods in his books into the purchaser's name, this was held to be equivalent to an executed delivery and to divest the vendor's right.

How exercised.—A consignor, in order to exercise his right to stop *in transitu* is not obliged to make an actual seizure of them while upon their road; it is sufficient to give notice to the *carrier* in whose hands they are; on the delivery of such notice it becomes that person's duty, *to retain the goods*, so that if he afterwards, by mistake, deliver them to the vendee, the vendor may bring trover for them, even against the vendee's assignees, if he himself have become insolvent; and the carrier, who after such notice, delivers the goods to the vendee, becomes thereby liable to the vendor.

This notice must be given to the person having the actual custody of the goods; if given to the principal, whose servant has such custody, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant.

Effect of stopping in transitu.—Whether its effect be or be not to dissolve the contract of sale between the consignor and consignee, is a question of much discussion. The better opinion appears to be, that it does not rescind the contract of sale, but gives an equitable lien, adopted by the law, for the purpose of substantial justice.

SECTION II.

LIEN.

What it is.—A lien is a right vested in one man to retain possession of the property of another until some debt or claim

is satisfied. It exists in favor of the unpaid vendor; if persons who have advanced money upon the security of goods deposited; of innkeepers who have provided food and lodging for guests; of common carriers for the carriage of goods; of shipowners for the freight carried by their vessels; of factors, brokers, or auctioneers, who have received goods, and have made advances, or given advances upon the credit of them to his employer; generally in favor of mechanics and artizans, who have bestowed labor upon articles placed in their hands for that purpose. It may also exist by custom or by the express agreement of the parties.

There are two species of lien known to the law—general liens and particular liens.

General Lien—Is a right claimed in respect of a general balance of accounts, and this founded in custom only, and is therefore to be taken strictly. A general lien may be proved either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment of such notoriety as that it may fairly be presumed to be known to the owner of the goods.

Particular Lien—Is where a person claims to retain goods in respect of labor or money expended upon them, and those liens are favored in law.

Where goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien for the work expended upon the whole attaches upon every part.

How lost.—As a lien is a right to retain possession, it follows, of course, that where there is no possession there can be no lien. It also follows that where the possession of the goods have once been abandoned, the lien is gone. But when the master of a vessel in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for freight; and

where they are not required to be landed at any particular dock, the common practice is to land them at a public wharf, and direct the wharfinger not to part them till the charges upon them are paid; in this case the wharfinger is the ship-master's agent, and the goods remain in the constructive possession of the latter.

If the party changes the nature of his possession, as by a purchase of the goods under execution, or if he voluntarily parts with the possession, the lien is gone; so that if he afterwards recovers possession of the property, his right of lien does not revive; but if it is stolen or taken away by a trespasser, or by fraud, and he gets it back again, his right of lien is not extinguished.

The mere taking of a bill of exchange, for the amount of the debt, does not necessarily waive or extinguish a lien; but so dealing with such bill, as by negotiation, so as to approve of it, does. A tender of the amount for which the goods are held, is a satisfaction of the lien, and gives the party tendering a right to the goods, and if the creditor refuse after such tender, to restore them, he does so at his peril, for if the tender were sufficient in amount, he is a wrong doer, and answerable for his misconduct in an action. And it has been held, that an actual tender is not necessary, if the party, in whose possession the property is, has signified his refusal to accept the amount really due. If a security is taken for the debt, for which a party has a lien upon the property of the debtor, such security being payable at a future day, the lien is gone. So, too, if the parties come to a new arrangement, and agree that the debt shall be paid in a particular way. But a mere right of set-off does not destroy it. And it has been held that a verdict for goods *bargained* and sold did not destroy the lien upon them for the purchase money.

SECTION III.

BY CIVIL SUIT.

If a debtor reside within this Province, or if a creditor reside, and have a cause of action which arose here, he has a right to invoke the assistance of our Courts of law, to assist him in the recovery of his claim. There are three Courts of common law, possessing different jurisdictions, and differing in their course of procedure and time of holding. It is for the creditor to consider in which of these Courts he will proceed. In this decision he must be guided by the nature of his claim, the amount of indebtedness, the residence of the parties and witnesses, and the importance of a speedy recovery.

We will separately and briefly notice the jurisdiction and machinery of these different courts, beginning with the inferior and so proceeding to the Court of Queen's Bench.

Division Court.—This is said to be the poor man's and small debtor's court. There is no doubt that it was established for the best of purposes, and with a full hope that it would be of important benefit. Cheap law is at all times a fruitful source of litigation. As political purposes have created in every county ignorant and dangerous magistrates, who, it has been aptly said " keep ready-made convictions on hand for the first applicant," to whom every supposed grievance is carried, and satisfaction obtained for a few shillings—and these recoverable, and thus the peace of whole neighborhoods disturbed, and ordinary rights of citizenship endangered, by the necessary elevation of such irresponsible political brawlers, so not from the character and ability of the men who preside over the Division Courts, but from its cheapness, and the existing inducements to flee to it, with every supposed grievance, has it been rendered, if not quite, at least next to as great a public nuisance. While they thus act, at least in many counties as foster-schools of ill-feeling, and future litigation, they are mostly useless to the honest creditor, for the purpose of re-

covering a just claim. And most intelligent men now say, that they would rather forgive a debtor than seek redress here. The costs, (which the creditor must generally pay); the slowness of the remedy; the incapable, and frequently doubtful character of its officers; and the devoted care that many of its jugdes exert to *protect* a debtor, in a dishonest decision, not to pay his just debts, all give strength to the opinion, that it is cheaper to be ignored by a debtor, than defrauded by the machinery of a Court. The Judge of the County Court is also Judge of the Division Courts, within his County. As Judge of the Division Court, he possesses legal and equitable powers, his decisions are final, and has no check except that which exists in his own mind, as regards equity and law. From the low and unimportant cases he is here forced to try, the intimate acquaintance and connection he must here form, from direct discussion with the most ignorant and doubtful men; and from the unsoundness of many decisions, too hastily given, he loses his proper respect and dignity, both in the eyes of the community and the profession, and thus weakens the position and benefit of the Superior Court over which he presides.

It is, however, a *civil* court of Justice, and as such, entitled to a brief and careful consideration.

Its officers.—First, a Judge, who may be said to control it in every part, without check or supervision.

Second, a Clerk, who is appointed by the Judge. He receives all claims; issues summonses; attends the Judge at Court; generally appears in the improper capacity of agent for either the Plaintiff or Defendant; issues executions; receives all moneys, and settles claims.

Third, Bailiffs.—They are also appointed by the Judge, and as seldom a good and commendable man will accept the office, he has few good men to select from. They serve all processes of the Court, act as its criers, enforce executions and warrants. These are generally the worst officers of the

court, although the most successful in gain, not, however, from what they do, but from what they dont—not from the money they collect, but from what they do not.

Jurisdiction.—The Judge of every Division Court may hold plea of, and may hear and determine in a summary manner, for or against persons, bodies corporate or otherwise, in :—

1. All personal actions, where the debt or damages claimed do not exceed forty dollars.

2. All claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, when the amount or balance claimed does not exceed one hundred dollars, and except in cases in which a jury is legally demanded, the judge shall in all actions determine all questions of law and fact, and shall deliver such judgments and decrees thereupon as shall to him appear just and equitable, and every such order and judgment shall be final and conclusive.

3. A cause of action cannot be divided into two or more suits for the purpose of bringing it within the jurisdiction of the Division Court, and no greater sum than one hundred dollars can be recovered for the balance of an unsettled account, nor can any action for any such balance be sustained where the unsettled account in the whole exceeds two hundred dollars.

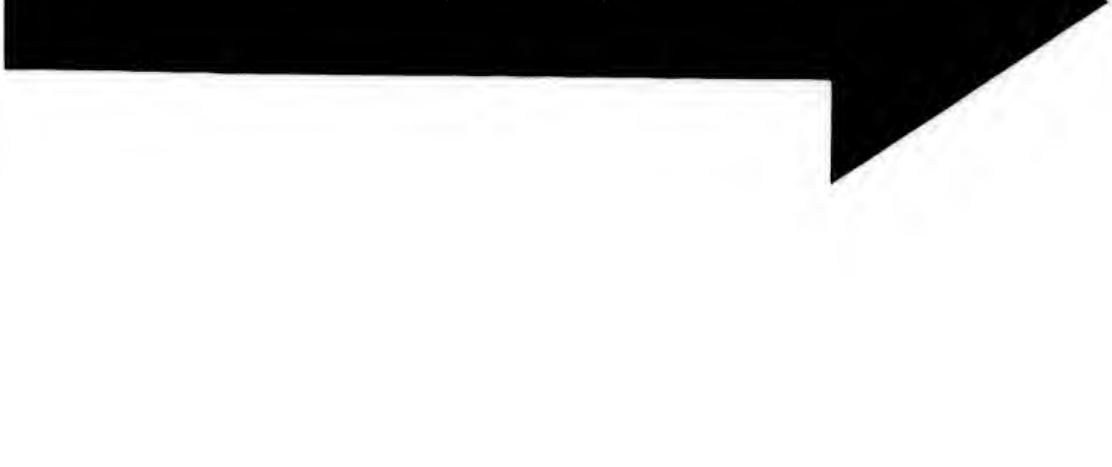
4. In replevin, where the value of the goods does not exceed forty dollars,

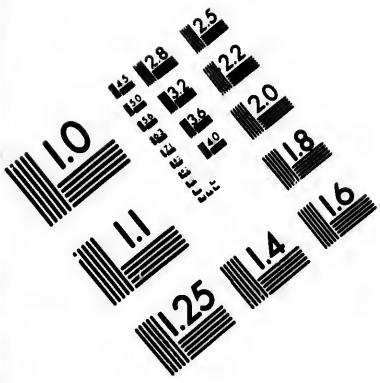
It will be noticed that it is first over *personal* actions that the Court is given jurisdiction ; that is, in actions whereby a man either claims the specific recovery of a debtor personal chattel, or satisfaction in damages for some injury done to his person or property.

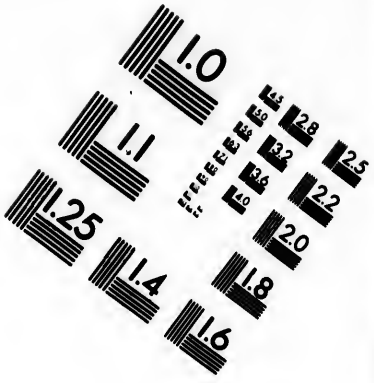
What has been said as to jurisdiction refers particularly to causes of action arising in this Province. If the cause of action arise out of this Province, as in the Province of

Quebec, it is the practice to bring the suit in the County Court, even though the amount sought to be recovered be less than one hundred dollars. Many of our small dealing merchants have become aware of this fact, and when owing some foreign house—generally at Montreal—for goods, something less than one hundred dollars, they are careful to send either a promissory note or accept a [illegible] payable in Ontario, and thus change the character of t[illegible]ness, and give jurisdiction to the Division Court. [illegible] done, the creditor's prospects of collection are g[illegible]duced. He is forced to bear his own costs of suit, and after waiting an unreasonable time for the money to be made, is in great danger, even though the defendant be solvent, of losing the debt as well as the costs, through the inability or dishonesty of the officers of the Court. It is far preferable that any account or balance of account, less than one hundred dollars, should remain in open account, or if settled by note or bill, that such note or bill should be made payable at the place of business of the creditor.

Where Suit must be brought.—A Plaintiff is not entitled to bring his action in any Division Court that suits his convenience, but must either bring it in the Court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resides, or carries on business at the time the action is brought, or at that Court which is nearest to the residence of the defendant or defendants. The words "cause of action" mean the whole cause of action, therefore when a contract is entered into in one division and the breach takes place in another, the cause of action includes both the contract and the breach. The consequence is, the action can neither be brought in the division in which the contract was entered into, nor the one in which the breach occurred. It must therefore be brought where the defendant resides, or in the Court nearest to his residence.







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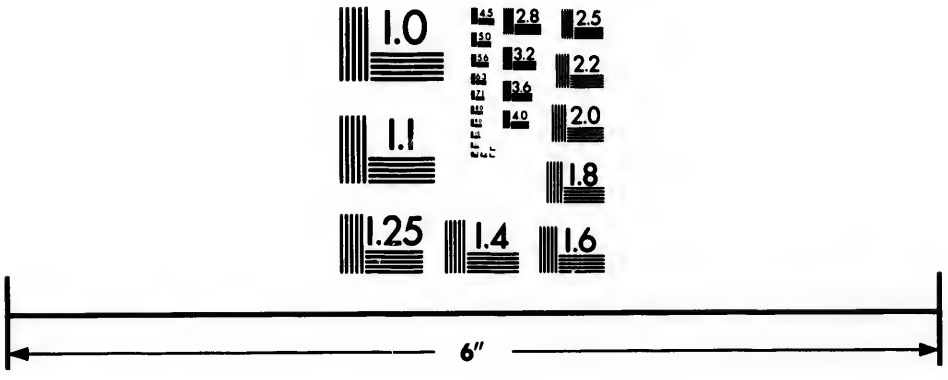

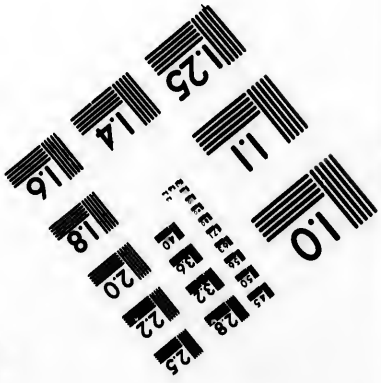

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Service of Process.—The summons, which is the beginning of legal proceedings, with a copy of the account, or of the particulars of the claim or demand attached, must be served ten days (exclusive of the day of service and the Court day) before the return day thereof. And in case none of the defendants reside in the county in which the action is brought, but one of them resides in the adjoining county, the summons must be served fifteen days; and in case none of the defendants reside within the county within which the action is brought or in an adjoining county, then twenty days before the return day, which is the day of the holding of the Court.

When the amount of account, claim, or demand exceeds eight dollars, the service must be personal; if it does not exceed eight dollars it may be upon the defendant, his wife, servant, or some grown person being an inmate of the defendant's dwelling-house, place of abode, trade or dealing.

Trial of the Cause.—On the day named in the summons, the plaintiff and defendant, in person or by attorney or agent, must attend at Court. If the plaintiff neglect so to appear, he is liable to be nonsuited, and if the defendant neglect, judgment is almost certain to be passed against him. The Judge tries the cause in a summary manner (unless a jury has been properly asked for) and gives such judgment as he thinks proper in law and equity.

The evidence necessary to establish a claim in this Court is of the same nature and character as that required in Superior Courts of Law, with this exception, that when the amount claimed is less than eight dollars, if the plaintiff gives sufficient evidence to satisfy the judge that the defendant is indebted to him, the Court may in its discretion examine the plaintiff as to the items of the account.

Defence.—The defendant, besides simply denying his indebtedness, may also plead a tender before action brought, by paying the amount into Court, at least six days before trial, and at once giving notice of the same to the plaintiff.

The defendant may also rely upon a set off or some statutory defence, as the statute of limitations, in which case he must also give the proper six days' notice.

Judgments are either given at once or reserved and afterwards given by the Judge in Chambers, or left to abide the award of such person as the Judge may name. Once entered, the judgment becomes final, unless properly applied against within fourteen days. If there be cross-judgments, the less may be set off against the greater, and execution issued for the balance.

Execution.—Except in cases where a new trial has been granted, the issue of execution should not be postponed for more than fifty days from the service of the summons, without the consent of the plaintiff. The execution is against the goods and chattels of the defendant situated within the county in which the same is issued. If the defendant removes to another county, the Judge of such county may, upon a copy of the judgment, duly certified by the Judge of the county in which the judgment was entered, order an execution for the debt and costs, to issue against the party. The clerk of any court in which judgment has been entered, may send a transcript of such entry to the clerk of any other court, and upon such transcript being duly entered, all such proceedings may be had, as if the same were an original judgment.

There is no means of getting against a debtor's lands in the Division Court. If the amount of the judgment remaining unpaid exceeds forty dollars, a transcript may however be obtained, and filed in the office of the clerk of the county court, in which the judgment was obtained or in which the debtor has lands. Upon such transcript being filed, it becomes a judgment of the county court, and execution may be issued against lands, which binds the same from the time of being placed in the Sheriff's hand. And after the filing and entry of such transcript, the same remedies, for the recovery thereof, may be pursued as if the judgment had been originally obtained in the county court.

Rights of Landlords.—When an execution is issued from the Division Court, as when from a Superior Court, the liability of goods to seizure and sale under such execution is frequently materially affected, by the right of a landlord to his preferential lien for rent. To entitle a landlord to a preferential right under such circumstances, the rent should be due, and the landlord must, within a reasonable time, or before sale, by a writing under his hand, or under the hand of his agent, claim the amount of rent due from the Bailiff seizing the goods, and in such writing must state the terms of holding, and the rent payable for the same. He cannot, however, claim more than four weeks rent, when the tenement has been let by the week; nor more than two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year.

In case of such a claim for rent being made, the Bailiff making the levy, is to distrain for the amount of such rent, as well as the costs of such additional distress, and upon sale of the goods must first pay over to the landlord the amount of such rent, and then from the surplus, if it be sufficient, the execution debt.

Attachments.—If a person indebted in a sum exceeding four and less than one hundred dollars, absconds from this province, leaving personal property, liable to seizure, under execution for debt; or attempts to remove such property from either out of Ontario, or from one county to another therein; or keeps concealed to avoid service of process; and in case any creditor of such person, his servant or agent, makes and produces an affidavit of such fact, as required by the rules of the court, and files the same with the clerk of the court, such clerk may issue a warrant to his Bailiff to attach such debtor's personal estate and effects. The creditors must then proceed to judgment and execution. The property seized under the warrant of attachment is liable to sale under execution; or

if from the perishable character of such property it has been sold, then the proceeds to be applied in satisfaction of the judgment.

Examination of Judgment Debtor.—A party having an unsatisfied judgment, may obtain a summons calling upon the judgment debtor, to appear and be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt, as to the means and expectations he then had, and the property and means he still has, and as to the disposal he may have made of any property.

If the party so summoned, does not attend as required, or allege a sufficient reason for not attending; or if he attend and refuses to be sworn or to declare any of the things aforesaid; or if he does not make answers touching the same satisfactory to the Judge; or if it appear he obtained credit under false pretences or by means of fraud or breach of trust, or wilfully without a reasonable expectation of being able to pay; or has made any gift or transfer of property, or removed or concealed the same with intent to defraud; or if it appears that the party has had, since the recovery of judgment, sufficient means to pay the same and has neglected to do so, the Judge may order him to be committed to jail for any period not exceeding forty days, subject to release upon payment of the debt and costs.

This would be a beneficial provision if vigorously enforced by our Judges. Most of them are, however, strongly inclined to seek an excuse to protect the debtor from its consequences; an excuse which is generally easily found, when it is remembered that a debtor dishonest enough to bring himself within it, will always give evidence sufficiently in his own favor, to found such excuse.

Instead of being a great benefit, it is therefore of little use, at least when sought to be administered through many of our Judges.

Holding of the Courts.—The courts are held in different parts of the several counties, and at such times as the several Judges appoint There are generally from three to six sittings during the year, differing in the different divisions, as circumstances require.

COUNTY COURT.

Jurisdiction.—As to the collection of debts the jurisdiction of the County Court extends to all personal actions where the debt or damages claimed do not exceed the sum of two hundred dollars.

2. To all causes and suits relative to debt, covenant and contract, to four hundred dollars, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant.

Time of Holding.—The County Courts are held in every county or union of counties, on the second Tuesday in March, June, September and December in every year. Thus having four sittings in each year at which defended suits may be tried.

Practice.—The practice and proceedings in the several County Courts are mostly regulated by and conform to the practice of the Superior Courts of Common Law. We shall therefore pass them for the present, reminding the reader that our remarks upon the practice and proceedings of our courts of Record and Common Law, are applicable to the County as well as Superior Courts.

SUPERIOR COURTS.

The Superior Courts, at Common Law are the Courts of Queen's Bench and Common Pleas. They are equal in their jurisdiction and powers, and may be considered as distinct Courts, for the purpose of a division of labor; a matter of no importance to the suitor. This fact, however, is important;

they have differed materially in their holding upon certain technicalities and rendering of the law. A wise counsel will therefore consider well, at times, in which court he will conduct his client, unless he is desirous of carrying his cause to the Court of Error and Appeal, and settling the point by a higher tribunal.

Jurisdiction.—The Superior Courts have jurisdiction in all cases, no matter how large or small may be the amount. But if a suit be brought, in which the Division Court or County Court has jurisdiction, the Plaintiff will only recover the costs of such Inferior Court, as the case may be, and is also liable to have the defendant's additional costs, incurred, by such action being brought in the Superior, instead of an Inferior Court, set-off against his verdict and Inferior Court costs.

Sittings.—The Assizes, as they are usually called, or sittings of the Superior Courts, for trial of causes, are held in the United Counties of York and Peel, three times in each year—commencing on the Thursday next after the municipal elections in January, on the second Monday in April, and on the second Monday in October. The city of Toronto has also three sittings, which take place about the same time, as in the United Counties of York and Peel. In each of the remaining counties and union of counties, throughout the province, the Assizes are held twice in each year—some time between the second Saturday after the first Monday in February, and the third Monday in May, and some time between the second Saturday, following the Monday next after the twenty-first day of August, and the third Monday in November.

PRACTICE IN THE COUNTY AND SUPERIOR COURTS.

The practice and proceedings both in the County and Superior Courts, are regulated partially by precedents, and rules made by the Judges, but mostly by the Common Law

Procedure Act. They are so nearly similar in the different courts, that it is sufficient, in a work like the present, that our remarks should be of a general character.

Commencement of an Action.—An action is ordinarily commenced by the issuing of a Writ of Summons; which is to be served personally upon the defendant; and in case this is rendered impossible by the acts of the defendant, then such substitutional service and proceedings may be had to judgment, as ordered by the judge of the court.

Special Endorsement.—In all cases where the defendant resides within the Province, and the claim is for a debt or liquidated demand in money, arising upon a contract expressed or implied, as on a bill of exchange, promissory note or cheque, or other simple contract debt, the plaintiff may make an endorsement of the particulars of his claim, upon the Writ of Summons, and copy thereof for service, and if the defendant does not appear to such writ within the time allowed, the plaintiff may sign judgment for the amount of his claim so endorsed, and issue execution at the expiration of eighteen days from the day of service of the writ. This it will be observed gives the creditor a summary and cheap mode of recovery.

Appearance.—The defendant, if a resident within the Province, has ten days allowed him to appear and defend in every action. If he resides without the Province, such further time as may be mentioned in the writ, depending upon his residence, and the time necessary to communicate.

Declaration.—If the defendant appears, or if the writ was not specially endorsed, the plaintiff must file and serve a declaration setting forth carefully and clearly the grounds of his action. With the declaration a notice to plead is usually served, requiring the defendant to plead within eight days.

Pleas.—If the defendant does not plead or demur within the eight days, the plaintiff may enter judgment and issue execution for his debt. If the defendant pleads or demurs,

the cause then goes to issue, either at law or fact, and comes down for hearing at term or at court, as the case may be. In case a suit be brought in the Superior Court, if it appear to the Court, or a Judge thereof, that the action is brought to recover a claim or amount liquidated by the act or signature of the parties, and that no difficult questions of law or fact are likely to arise upon the trial, an order will be made that the same be tried at the County Court, next holden after the granting of such order; thus enabling the plaintiff to get judgment earlier than he otherwise would.

Judgment.—The judgment is founded and entered upon the finding of a jury at the trial, the decision of the court upon the points of law at issue, or upon the award or certificate of an arbitrator appointed by the court. It being provided that if at any time after a writ has issued, it be, upon the application of either party, made appear to the satisfaction of the court or a Judge, that the matters in dispute consist wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, the court or judge may order such matter to be referred to an arbitrator, whose finding is equal to a verdict of a jury.

The judgment may in the Superior Court be entered on the fifth day of term next after the verdict, and in the County Court on the third day of the term next following the verdict. The defendant having until this time to make such motion as he may be advised against the verdict or state of the cause.

It is within the power of the Judge who tries the cause, however, to certify under his hand upon the back of record, "that in his opinion execution ought to issue forthwith," or at some day to be named in the certificate. It has now become the usual practice in actions upon accounts, promissory notes, etc., where there is no reasonable ground for believing that the defendant can make any substantial motion, to order execution in four or six days. The result of such a certificate is that the plaintiff is not delayed until the ensuing

term, but may enter judgment upon the day specified in the certificate.

Execution.—As soon as proceedings are finally determined in favor of a party, and he has obtained judgment, he is entitled to issue out an execution against the goods and chattels of the opposite party, for the recovery of his debt and costs, or costs alone, as the case may be. All the goods, chattels, cheques, bills of exchange, promissory notes, mortgages, bonds and securities for money are liable to seizure, and as to, are bound from the placing of the Writ in the Sheriff's hands. Negotiable instruments, &c., are bound only from the time of actual seisure. There are certain exemptions, composed of necessary beds, bedding, wearing apparel, cooking utensils, dishes, &c., and also the implements of the debtor's trade to the value of sixty dollars. An execution is liable to be affected by a landlord's claim for rent, which cannot exceed one year's rent, due. If the claim is *bonâ fide*, the execution creditor should pay the landlord his claim (not exceeding one year's rent) and instruct the Sheriff to make the amount so paid, in addition to the execution debt.

The next and most frequent obstacle is likely to be a chattel mortgage covering the debtor's property. These are frequently *malâ fides* and often void from technical informality, &c. If the creditor desires to contest the validity of the mortgage, he can do so by an interpleader issue. Should he accept it as valid, he should pay off the mortgage, if due, or sell subject to it.

Prior executions also frequently interfere; many of which are executions held at the request of the judgment debtor, for the purpose of protecting his property from the liability of his just debts. It is for the creditor to decide whether he will contest these prior liens or submit to them. If he submits to them he can force a sale of the goods and chattels, the proceeds being first applied upon the prior claims, and the balance upon his execution. If there be no impediments, he

can (unless the execution debtor sooner go into insolvency), after advertising eight days, proceed to sell the goods seized. If from any reason he cannot realize enough to satisfy his claim from personal property, and the sheriff return "No goods" he can issue a writ against the lands of the execution debtor, which will bind all the lands and estate of such debtor, over which he has the power of disposal, from its delivery to the Sheriff of the county in which such lands lie. No sale of lands can take place under any such writ, until it has lain in the hands of the Sheriff for one year, and such lands have been advertized in the Canada Gazette for at least six weeks, and in some local paper or by poster in the Sheriff's office, or upon the door of the Court House, for the space of three months. All sales must take place, subject to prior incumbrances, by way of mortgages, &c.

Interpleader.—In case a claim be made to any goods or chattels taken under any process of the court, or to the proceeds or value thereof, then upon the application of the Sheriff or officer to whom the writ or process is directed, the Court or Judge may, by rule or order, call before such Court or Judge the parties issuing such process as well as the party making the claim, and may dispose of the matter; or, as is usually done, order an issue to be tried, to determine by a jury the ownership of the property in question. This protects the Sheriff or officer in performance of his duty, prevents after actions for damages, and is a cheap and expeditious mode of settling the question of ownership.

Examination of Debtors.—If the Execution creditor is unable to realize from goods and chattels of the debtor, he may obtain an order that the debtor he examined as to any and what debts are owing to him, and that he produce all books of accounts, documents, &c., in his possession; or as to the property and means he had when he incurred the liability, and the means he has at time of the examination of discharging such debt, and as to the disposal be may have made of

any property after incurring such indebtedness. If he neglect to attend, or refuse to answer, or does not answer satisfactorily, or if it appears that he has concealed or made away with any of his property, to defeat or defraud his creditor, the court may order such debtor's imprisonment for any term not exceeding twelve months, or direct a Writ of *Capias ad Satisfaciendum* to issue against him.

Garnishee.—If an execution creditor, by means of such examination, or otherwise, discovers that some third person is indebted to the execution debtor, he may, by an application to a Judge, obtain an attaching order, which, when served upon such third party, prevents him paying the debt so attached to the execution debtor. It should be observed that these attaching orders take priority in the order of their issue and service, and not of the executions upon which they are founded.

Such third party is called a garnishee. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, or dispute the debt claimed to be due from him to the judgment debtor, he may order execution to issue forthwith, and the amount levied from the garnisher.

If the garnishee disputes his liability, the Judge may order that the judgment creditor be at liberty to proceed against him by writ, calling upon him to shew cause why he should not pay over, and if the liability of the garnishee is established, the judgment will have execution against him. All payments made by a garnisher, under such process, are equal to payment made to his original debtor; and this is the case, though the garnishee's proceedings be afterwards set aside or reversed.

Attachments.—If a creditor, his servant or agent, can make an affidavit (supported by the affidavits of two other credible persons) that he has good reason to believe and doth verily believe that a debtor, in a sum exceeding one hundred dollars

hath departed from this Province with intent to defraud such creditor of his just dues, or to avoid being arrested or served with process, he may obtain an order that a Writ of Attachment do issue against the estate and effects of such debtor. It is the duty of the Sheriff, in whose hands such Writ is placed, to attach and keep all the debtor's real and personal property, credits, and effects, securities, books of accounts papers, &c., or the proceeds of a sale of such as are perishable until such debtor shall have put in special bail as required by the Writ, or until the creditor shall have proceeded to judgment and execution. Any person having commenced a suit in any Court of Record, before the issue of an attachment, does not thereby lose his priority, although he may be, upon the order of the Court or Judge, subject to the costs of issuing out the attachment.

When several persons sue out Writs of Attachments against an absconding debtor, the proceeds of the property and effects attached is ratably distributed among such of the plaintiffs as obtain judgments, and sue out execution in proportion to the amounts actually due upon such judgments, and the Court or a Judge may delay the distribution in order to give a reasonable time for the obtaining of judgment.

Arrest.—If a party have a cause of action amounting to one hundred dollars or upwards, and shows by affidavit such facts and circumstances as satisfy a Judge, that there is good and probable cause for believing that the debtor, unless he be forthwith apprehended, is about to quit the province, with intent to defraud his creditors generally, or the party applying in particular, an order may be obtained for a Writ of Capias, for the arrest and detention of the debtor, until he shall give such bail as the Judge may order. Such bail as required having been filed and approved, the Plaintiff must proceed to judgment and execution as in an ordinary action, upon which he is entitled to proceed either against the estate and effects of the defendant, or his sureties, or person, as the case may be.

Recovery upon Judgments.—If a party having a judgment recovered here, upon which he is unable to realize, discover that the defendant have property in Great Britain, or any of the dependencies or provinces, or in the United States, he may sue upon such judgment and recover in the country or place where such property exists. The process is cheap and exceedingly simple, the judgment being proved by an exemplification, certified by the seal of the court.

Judgment may be obtained here upon foreign judgments in the same manner and upon quite similar proof.

SECTION IV.

INSOLVENCY.

The Insolvent Act of 1864 materially effects a creditor's remedies, and in many cases must entirely change his course of procedure for the purpose of recovery. It is difficult to say what have been and will be the full effects of the Act. We believe it to be the opinion of professional and business men, who have had the best opportunity of seeing its working, that in its present form at least, it is unadapted to accomplish the desired purpose; that it has oftener assisted a dishonest man to defraud his creditors, than it has an oppressed debtor to regain his standing—and that from its general working it has tended to weaken the foreign credit of our mercantile men.

In reading the Act of 1864, it should be remembered that it is divided into thirteen sections with their several sub-sections. Each section having a special heading and confined to a special matter, evidently intending to be as complete as possible in itself. And though the Act must be considered and construed generally—as a whole—yet each division may be looked upon, as peculiarly controlling the substantial points to which it is devoted.

To whom Act applies.—Section 1, as far as the Province of Ontario is concerned, removes the old distinction between

traders and non-traders, and makes the Act applicable to both. It seems, therefore, that an infant, married woman, and even a lunatic, may take advantage of the Act under certain circumstances. We think a fair test would be, could the estate of the party be made liable under an execution at common law.

Section 1 has, however, one exception, that is the case provided for by sub-section 2 of section 3, which is confined to traders exclusively. The Act gives no definition (as do the recent English statutes) of the term, as intended to be used in its application. We can, therefore, only construe it, by such an interpretation as it has received by general use, and by the courts, in considering other and different statutes. A "trader" as commonly used, means a person engaged in traffic or merchandize—a dealer in buying and selling or barter. By 13 Eliz., chap. 7 and 21, Jac. 1, chap. 19, it was provided that every person seeking a living by buying and selling, was liable to bankruptcy as a trader. And this, although, he did not sell the wares he purchased, but converted them into saleable commodities which he afterwards sold, so in case of an artisan who purchased materials, afterwards to be used in manufacturing articles for sale.

Buying nor selling alone will not constitute a trader. But it seems if there be a buying and selling, either with or without change of the nature of the articles, for the purpose of a living, followed at the time of the passing of the Act, the party is a "trader" for the purpose of sub-sec. 2 of sect. 3, in Ontario, and the Act generally in the Province of Quebec.

Voluntary Assignments.—Any person unable to meet his engagements may make an assignment of his *estate.*

Whether or not a voluntary assignment can be made when there is *no estate*, incidentally arose in the matter of one Smith, an insolvent, upon an appeal against his discharge by Wm. Darling of Montreal. Adam Wilson, J., held there was an estate, but remarked, "What conclusion he might have

formed as to the validity of an assignment when there was no estate, if he had been obliged to consider it, he was not prepared to say." Prac. Ct. Rep. vol. 4, p. 89. S. J. Jones, Esq., judge C. C., Brant, held *in re* W. Perry, an insolvent, L. J., 1866, p. 75, that a consent to a discharge of an insolvent is operative, even *without an assignment*, provided the insolvent makes and files an affidavit that he has *no estate* or effects to assign. In this case the only notice given was the notice of consent to discharge; and an order confirming the insolvent's discharge was granted.

It would seem remarkable if an Act evidently passed for the benefit of insolvents, should ignore the one so fully insolvent, that he has *no* estate. The preamble of the Act, however, reads, "whereas, it is expedient that provision be made for the *settlement of the estates* of insolvent debtors." Sec. 2, only provides for an assignment of the insolvent's *estate*. Section 9, sub-section 1 and 2 provides for a deed of composition and discharge. Sub-section 3 of section 9, provides for a consent to a discharge *after* an assignment. There can be no *composition* without an estate, out of which to pay it; and the assignment is simply of the *estate*. There is no clear way, therefore, of carrying out the Act, and notwithstanding Judge Jones' decision *in re* Perry, there is strong reason for believing that when the point comes to be finally decided it will be held that a party *without* an estate is debarred from the benefit of the Act.

A voluntary assignment can now be made under section 2 of the Amending Act of 1865, to an official assignee, without any of the formalities or notices formerly required. Neither is it necessary that a copy of the list of the insolvent's creditors be attached. Hingston vs. Campbell, L. J., 1866, p. 299. The assignment must be made to an official assignee residing within this Province. White vs. Cuthbertson, 17 C. P. 377. This opinion has been concurred in by the Hon. Justice Loranger, of Lower Canada, while the Hon. Judge

Monk, we believe, held differently in the case of Wright, an insolvent, vs. Armstrong.

Not only must it be made to an assignee residing within the Province, but to one of that county in which the insolvent resides or carries on business, Hingston vs. Campbell, L. J., 1866, p. 299.

An insolvent may still call a meeting of his creditors as provided by section 2 of the Act of 1864, in which case the creditors may appoint what assignee they choose. The assignee so chosen by the creditors need not be an official assignee, neither need he reside within the county in which the insolvent resides or carries on his business.

Property Conveyed by Assignment.—An assignment vests in the assignee all the estate and effects real and personal, and securities held or possessed by the insolvent; except such as are exempt from seizure and sale under execution, and such as are held by him as trustee, or otherwise for the benefit of others, subject, however, to *bona fide* prior liens, mortgages, rents, &c., and executions which have been in Sheriff's hands for thirty days prior to such assignment, or the issuing of an attachment, and the costs of suits where the executions have been in the Sheriff's hands for less than thirty days.

A singular point arose in the case of Thomas vs. Torrance, C. P. 17, p. 445. The facts were briefly as follows: J. and C. Parsons made an assignment of all their estate, for benefit of creditors, not under the Insolvent Act, to Thorn on June 5th, 1865. On the 6th of June, 1865, Torrance obtained a judgment against J. and C. Parsons, and placed an execution in the sheriff's hands. On July 1st, 1865, Torrance issued a Writ of Attachment in insolvency against J. and C. Parsons. Upon an interpleader issue between Thorn and Torrance, it was held, that the assignment to Thorn not being in accordance with the provisions of the Insolvent Act, was an act of insolvency and could not be supported, and that it was

by the issue of the Writ of Attachment displaced and rendered void; that Torrance, although having proceeded to judgment and execution, with full knowledge of all the facts, and afterwards becoming the attaching creditor, was not put to his election, but might proceed in insolvency as well as upon his *fi. fa.*: and that having got rid of the first assignment by proceedings in insolvency, his execution came in as a prior lien upon the estate.

It certainly never could have been the intention of the framers of the Act that it should be a means to get rid of an assignment, made for the benefit of creditors, and to let in an execution as a first charge, and then to leave the other creditors to help themselves as they best could. This, however, seems to be its legal effect, and the holding in Thorn vs. Torrance, has since been followed in Rose *et al.* vs. Brown, 17 C. P. p. 477.

Compulsory Liquidation.—A debtor is deemed insolvent, and his estate subject to compulsory liquidation:—

1. If he absconds, or is about to abscond from this Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or conceals himself within the Province with a like intent;

2. If he secretes or is about to secrete any of his estate with intent to defraud his creditors, or to defeat or delay their demands or any of them;

3. If he assigns or removes any of his property, or is about or attempts to do so, with intent to defraud, defeat or delay his creditors or any of them;

4. If with such intent he has procured his property to be seized or taken in execution for an indebtedness exceeding two hundred dollars.

5. If being a trader he permits an execution issued against him, to remain unsettled until within forty-eight hours of the time fixed by the Sheriff, for the sale of his property or estate;

6. If he be actually imprisoned or upon the gaol limits for more than thirty days in a civil action, founded on a contract for the sum of two hundred dollars or upwards ;

7. If he wilfully neglects or refuses to appear on any rule or order requiring his appearance to be examined into his debts ;

8. If he wilfully refuses or neglects to comply with any such order made for the payment of his debts or any part of them ;

9. If he wilfully neglects or refuses to obey any order of the Court of Chancery or a Judge thereof for the payment of money ;

10. If he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by the Insolvent Act ;

11. If a trader ceases to meet his commercial liabilities generally as they become due, any two or more creditors, for sums exceeding in the aggregate five hundred dollars, may make a demand on him, requiring him to make an assignment of his estate and effects for the benefit of his creditors ; and if the trader does not within five days after service of such demand, call a meeting of his creditors, nor make an assignment, nor apply by petition to the Court, to have further proceedings under such demand stayed.

Where the act of insolvency is one of *omission*, proceedings to place the estate in compulsory liquidation must be had within three months after such act, and the act relied upon must have been committed during the existence of the debt of the creditor making the application.

Writ of Attachment.—An order for a Writ of Attachment, placing the estate of an insolvent in compulsory liquidation, is obtained, upon an affidavit of the creditor showing that he is a creditor of the insolvent for a sum of not less than two hundred dollars, supported by the affidavits of two credible persons, containing facts and circumstances as satisfy the judge of the debtor's insolvency.

Whether or not the debt upon which an attachment may be obtained, must be a debt *due*, such as a suit at common law might be instituted, there seems to be some question. The Judge of the County Court of the county of Frontenac, in Darling vs. Rudston, granted an order for an attachment, upon promissory notes, unexpired. The validity of the order was not so questioned as to obtain a final decision upon the point.

We think the better opinion is that the debt need not be, necessarily, due. If it were held otherwise, the benefit of the act would in many cases be entirely destroyed; for instance, *in re* Ruston, the attachment was only placed in the Sheriff's hands, as he was offering the estate for sale under an execution, collusively obtained on the part of the Bank of Upper Canada, which would have swallowed up the estate, and deprived the other creditors of all benefit.

It is the duty of the Sheriff to at once take possession of the estate of the insolvent, under the attachment, and hand the same over to a proper official assignee, to hold as guardian; and in case of there being no such official assignee, then to some responsible person.

Such guardian continues to hold the estate, and make an inventory thereof, until an assignee be appointed by the creditors, or the Judge, as the case may be, at a meeting legally called for that purpose.

Assignee.—It is the duty of the assignee to publish all notices, attend all meetings, and be guided by the lawful instructions of the creditors and of the Judge. He should call all meetings of the creditors, and carry on all proceedings at the place where proceedings were instituted—except perhaps where otherwise specially ordered by the Judge—*In re* William Atkins, an insolvent L. J. 1866, p. 25. The notices must also be published in a newspaper, at or nearest the place where the meeting is to be held.

All power vested in an insolvent, which he might legally

execute for his own benefit, rests in the assignee, and may be executed in the same manner and to the same effect, as they might by the insolvent himself. These powers should be prudently exercised by the assignee in winding up the estate, under the guidance of the creditors, as provided by the act.

An assignee may be removed for misconduct, fraud or dishonesty, either by the creditors, at a meeting called for that purpose, or by the Judge, and after removal, as before, he remains subject to the summary jurisdiction of the Court or Judge, in the same manner and to the same extent as the ordinary officers of the Court.

Creditors Voting.—Considerable difficulty was found to exist, in settling under the Act of 1864, as to what creditors were entitled to vote at different meetings and for different purpose. It was therefore enacted by Sec. 21, of the amending Act of 1865, that if the creditors representing claims of one hundred dollars and upwards, do not represent a sufficient proportion of the creditors, such proportion may be completed by the votes or concurrence of creditors holding claims of less than one hundred dollars, and by Sec. 22, in the nomination of an assignee, in the granting of an allowance to the insolvent, in the execution of a deed of composition and discharge in the consent to a discharge, and in every other matter, where the right of a creditor to vote depends upon the amount of his claim, every creditor whose claim amounts to, or exceeds one hundred dollars, shall have such right; subject always to the provisions of the Act, respecting the voting and action of secured creditors; and the proportions of creditors so voting or concurring, shall be ascertained by computing all claims entitled so to vote or act.

A creditor, voting or acting, after the appointment of an assignee should first prove his claim by affidavit filed with assignee. The Judge has only an appellate jurisdiction in respect of the proving of debts. They cannot therefore be proved before him, although, if necessary, he will adjourn

a matter to allow a creditor to properly prove his claim before the assignee. *Re* Stevenson L. J. 1865, p. 52.

Debts due, but not at the time actually payable, are as well as debts due and payable, entitled to proof and to rank upon the estate ; subject to such rebate of interest as may be reasonable.

A creditor's claim may be questioned either by the assignee or some other creditor, in which case it is the duty of the assignee, to take evidence, under oath, and make an award which shall be final, unless appealed from by the party disatisfied within three days from the communication of such award to him.

Dividends.—The assignee must declare dividends at the expiration of two months from the insertion of the advertisement giving notice of the assignment, and afterwards from time to time at intervals not exceeding six months.

Not only are primary creditors entitled to dividends, but also sureties of the insolvent who subsequently pay such debts, and to stand in the same position as the party to whom he was a surety might. So a creditor upon a contract, depending upon a condition, is entitled to have a dividend reserved to him, until the condition or contingency is determined, but if such condition might detain the estate an undue length of time, he may be compelled to submit to an award, of the present value, of such conditional claims.

If a creditor holds any security from the insolvent, he must state the value of such security under oath. It is then optional with the assignee, under the authority of the creditors, to allow such creditor to rank on the estate for the balance of his claim ; or for the assignee to take the security, at an advance of ten per cent upon such specified value, and allow the creditor to rank for the then balance.

A creditor is only entitled to rank upon the amount due him, upon each separate item of his account, at the time of an assignment or attachment, and no claim can rank more

than once. Thus, if A holds the promissory note of the insolvent endorsed by B for $100, and receives from the estate at dividend of $60. Then B takes up the note, paying A the remaining $40, B can only rank upon the estate for the remaining $40, and not over again for the whole amount of the note. If he could he might recover for more than the $40 paid by him.

If an insolvent owes debts both individually and as a member of a firm, or as a member of two different firms, the claims against him rank, first upon the estate by which the debts they represent were contracted, and only upon the other, after the creditors of that other have been paid in full.

Clerks in the employ of the insolvent are entitled to receive, in full, three months wages remaining unpaid at the time of an assignment or attachment, and to rank as ordinary creditors for the balance of their wages.

Fraud and Fraudulent Preferences.—1. All gratuitous contracts or conveyances without consideration, made within three months next preceding the date of an assignment or the issue of a writ of attachment, and all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming insolvent with a person knowing such inability, are presumed to be made with intent to defraud his creditors.

2. A contract or conveyance for consideration by which creditors are injured or obstructed, made within thirty days of an assignment or writ of attachment, is liable to be set aside by a court of competent jurisdiction.

3. All contracts made and acts done, with an intent to delay, defeat or defraud his creditors, and in effect doing so, and so made with a person knowing such facts, are null and void, though in consideration or in contemplation of marriage.

It is actual knowledge and notice that is necessary in this case, and not mere constructive notice. Leys and wife vs. McPherson, 17 C. P. p. 266.

4. Any sale, deposit, pledge, or transfer, made in contemplation of insolvency, by way of security or payment to any creditor, whereby such creditor obtains an unjust preference, such sale, deposit, pledge, transfer or payment, is null and void, and the subject thereof may be recovered back, for the benefit of the estate by the assignee; and if the same take place within thirty days, before an assignment or attachment, it will be presumed to have been made in contemplation of insolvency.

Under this sub-section, the knowledge of the creditor of the debtor's inability to pay his debts, or of a fraudulent intention on his part to impede, obstruct, or delay his creditors, is not material to make the transfer null and void, and even the existence of a fraudulent intent is not necessary. It is the policy of the Act to distribute the insolvent's effects ratably among all his creditors, and if one obtains payment in full by the means stated above, while the others get nothing, it is an unjust preference, Adams vs. McCall, 25 B. R. p. 219.

5. Every payment made within thirty days of an assignment or attachment, by a debtor unable to meet his engagements in full, to a person knowing, or having reasonable grounds of knowing such inability, is void.

The general wording of this sub-section would lead one to think that all payments made within thirty days would be void, whether voluntary or not. It is quite evident, however, from several English cases, bearing strongly upon the point, that it does not apply to payments made under pressure of law, as under an execution or distress; but only to payments voluntarily made.

6. Any transfer of a debt due by an insolvent, made within thirty days next previous to an assignment or attachment, or at any time afterwards to a person knowing, or having reasonable grounds for believing the insolvent to be unable to meet his engagements, or about to pass into insolvency, are null and void as to the estate of the insolvent, and for the purpose of enabling the transferee to set it up by way of set off or compensation, to a debt due to the insolvent.

7. Any person purchasing goods on credit, or procuring advances of money, knowing or believing himself to be unable to meet his engagements, and concealing the fact, with intent to defraud such person; or by false pretences obtaining a term of credit, for the payment of money, with intent to defraud; and who shall not afterwards have paid the debt so incurred, is guilty of fraud and liable to imprisonment for any term not exceeding two years.

8. If an insolvent retains or receives any portion of his estate, papers, books, documents, or evidences of debt, from the assignee, without lawful right, and refuses to deliver them over upon an order of the Judge, he is liable to be imprisoned for any term not exceeding one year.

9. If a creditor directly or indirectly takes from an insolvent any payment, gift, gratuity, or preference, as a consideration or inducement to consent to the discharge of such insolvent, he is liable to forfeit treble the value of such payment, gift, gratuity, or preference, to be recovered by the assignee, and passed to the general assets of the estate.

10. Every assignee is an agent within the meaning of the forty-third, and four following sections, of the ninety-second chapter of the Con. Stat. of Canada, and for any misapplication of goods and chattels, securities or moneys, passing to him as such assignee, is liable to indictment, and fine or imprisonment under said act.

Two things are necessary to bring a party within this subsection; first,—an *intent to defraud*, to defraud at the time the purchase was made, or the advance obtained; second,—the result of that intention flowing from the act.

The intent would naturally be inferred from the position and conduct of the party. And though sub-sec. 8 enacts that in every case the Plaintiff shall prove the fraud charged, it cannot be presumed to mean that he shall do more than offer such evidence as would satisfy a jury, after a consideration of all the facts, that fraud existed in the intent and act-

Order of Discharge.—There are three modes of obtaining a discharge under the act :—

1. By obtaining a deed of composition and discharge, executed by a majority of the creditors who are respectively creditors for sums of one hundred dollars and upwards, and who represent at least three-fourths of the liabilities of the insolvent. But in case the whole of the creditors holding claims against the insolvent, for sums of one hundred dollars and upwards, do not represent the proportion in *value* of the liabilities of the insolvent, subject, to be computed in giving validity to the deed, then such proportion, or amount, may be completed by creditors holding claims of less than one hundred dollars.

The deed of composition and discharge may be made either before, pending, or after proceedings upon an assignment or attachment. It can doubtless be made before an assignment is executed, but there are very strong reasons for believing—not without due respect for the opinion of Judge Jones *in re* Perry L. J. 1866, 75—that an assignment is necessary, at least, before the full completion of a discharge.

2. By a consen t simply in writing, signed by the said pro portion of creditors, to the discharge of a debtor after an assignment, or after due attachment.

In either case the insolvent should file his deed of composition and discharge, or consent, as the case may be, and after giving due notice, as required by the act, should apply to a Judge for a confirmation.

Upon such application, any creditor may appear and oppose the confirmation, upon the ground of fraud or fraudulent preference, or evil practise in procuring the compromise or consent of creditors, or the insufficiency in number or value of the consenting creditors, or of the fraudulent retention and concealment by the insolvent of part of his estate, or of evasion or false swearing on the part of the insolvent, or the want of properly kept cash books and such other books as

are suitable to his trade, or having kept them, has refused to deliver them to the assignee.

The Judge, upon hearing all parties, will confirm or annul the discharge, or confirm it absolutely, conditionally or suspensively; which order, unless appealed from within eight days, becomes final.

A deed of composition and discharge or consent to a discharge, sufficiently executed, is not without effect, before confirmation by the judge. If it were void until then, it would not admit of being annulled.

The principal effect of a confirmation is to change the nature of evidence. Until the confirmation, the burden of proof of the discharge being completely effected, rests upon the insolvent; after confirmation, an authentic copy of the judgment confirming the same, is sufficient evidence, as well of such discharge as of the confirmation thereof.

3. After the expiration of one year from the date of an assignment, or the issue of an attachment, (not having obtained a deed of composition and discharge, nor a consent to a discharge) he may apply to the judge by petition, (having first given the necessary notice) for a discharge.

Sec. 11, sub-sec. 1, provides, in effect, that all notices must not only be published in the "Canada Gazette," and in some local paper, but that notices thereof shall also be mailed by the party giving the same to all creditors, and to all representatives of foreign creditors, within the province, post paid.

The learned Chief Justice of Upper Canada, held (*in re* Waddell, an insolvent, in appeal, L. J. 1866, p. 242) that this section did not apply in application for a confirmation of a deed of composition and discharge, or of a consent to a discharge, or a discharge after the expiration of a year from the date of an assignment, or the issue of a writ of attachment. Such cases being governed wholly by sub-secs. 6 and 10, of sec. 9.

A discharge, though final, unless appealed from in due notice, is not so when obtained by fraud or fraudulent preference, or by means of the consent of any creditor, procured by the payment of such creditor of any valuable consideration for such consent. In all such cases it is null and void from the beginning.

Upon an application for a discharge, the insolvent himself should be present, that he may be examined by the Judge or any creditor desiring to do so. *Re.* Stevenson, L. J. 1865, p. 52. If any fraudulent preference appears, or a neglect to keep proper books, the inclination is strong against any leniency. *In re.* Lamb, an insolvent; (upon appeal, Prac. Rep. vol. 4, p. 16) Mr. Justice Hagarty most wisely remarked, "we have in this country in our legislation done everything to favor debtors and render their escape from liability as easy as possible to them. It will be well at all events that the very easy requirements of the Insolvent Act on debtors, asking for their discharge, should be peremptorily insisted on, and proper punishment awarded to any breach of the trader's duties in conducting his business."

Examination of Insolvent and others.—Immediately upon the expiry of the period of two months from the first insertion of the advertisement giving notice of an assignment, or the appointment of an official assignee, the assignee must call a meeting, by advertisement, of the creditors, for the examination of the insolvent, and shall summon him to attend such meeting, and the insolvent may then be sworn before the assignee, and examined by any creditor present, in his turn,

He may also be examined, before the Judge, by the assignee or a creditor, upon an order or a subpœna for that purpose, in any case where an attachment has issued against his estate. So may any other person, although a creditor, (*Re.* Hamilton and Davis, Insolvents, Logie. Co. J. U. C. L. J. 1865, p. 52) in every case, who is believed to possess information respecting the estate of the insolvent liable to examination before

the Judge, upon an order obtained for that purpose. Such witness is not, however, bound to be sworn until his expenses are paid. The insolvent himself, when attending, is not so entitled to pay, and he may be examined before as well as at, or after the meeting mentioned in sub-sec. 1 of sec. 10 after act, Worthington vs. Taylor, 10 U. C. L. J. 304.

The insolvent must also attend all meetings of his creditors, when summoned to do so by the assignee, and must answer questions put to him touching his estate, for which attendance he is entitled to such sum, as may be ordered at such meeting, but not less than one dollar.

Effect of a Discharge.—A discharge, whether obtained under a voluntary assignment, or compulsory liquidation, fully frees and acquits (with a few exceptions) the insolvent from all debts and liabilities, existing at the date of such assignment, or the issue of the writ of attachment, and which are disclosed by the insolvent or by the creditors themselves. A law which has a retrospective character is generally considered repugnant to a strict sense of justice. The Insolvent Act, has, however, a retroactive effect, and discharges an insolvent, as fully from debts and liabilities incurred before its passing, as since.

But it does not effect a discharge, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by the Insolvent Act, nor to any debt due as damages for personal wrongs, or as a penalty for any offence of which the insolvent has been convicted, or as a balance due by the insolvent as an assignee, tutor, curator, trustee, executor or public officer, though such parties may claim and accept a dividend thereon from the estate. Neither does it operate nor produce any change in the liability of any person or company secondarily liable for the debts of the insolvent, either as drawer or endorser of negotiable paper, or as a guarantor surety, or otherwise, nor of any partner or other person liable jointly

or severally with the insolvent for any debt, nor any mortgage, lien or security held by and credited as a collateral security.

We have only given a brief and general synopsis of the act, and the holding of the different Courts upon points already arisen under it; not too brief, however, we hope to be of some benefit to the reader. There are some sections of the act that we have left unreferred to; believing, that from their ambiguous, if not confused character, there would be more danger than benefit to the unprofessional reader, in any dictum, excepting that bearing with it judicial strength.

CHAPTER V.

IMPORTANT ENACTMENTS.

SECTION I.

FRAUDULENT ACTS.

It has long been the object of legislation, and of the Courts, to prevent, as far possible, acts and conveyances, intended to delay and defeat creditors in the recovery of their just claims. The law is now most stringent, and every protection seemingly afforded; yet, the designing and dishonest find various means of avoiding it.

By 13 Eliz., c. 5, if a person makes a conveyance of any property which is liable to the payment of debts (*unless* for *valuable consideration* and *bonâ fide*, to a person who has no notice of a fraudulent intent), and at the same time, or immediately afterwards, is indebted to such an amount that he has no ample means available to pay the debts, such conveyance is fraudulent and void as against the creditors.

The property coming within the statute is such as is liable to sale under an execution for debt. As every interest in real estate that a person can dispose of is now made saleable, the effect of the statute is materially extended. It has, however, been held, in Kilbride *v.* Cameron, C. P. R., Vol. 17, p. 373, that though a sale of land may be fraudulent as against creditors, yet, where the execution debtor (the vendor) had not raised the crops, the subject of seizure, or furnished the means of so doing, but the labour and means

had been contributed by the vendee alone, the crops were the sole property of the vendee as against the execution creditor.

In the case of Pegg *v.* Eastman, Chan. R., Vol. 13, p. 137, it appeared that a person having a claim against a party in insolvent circumstances made a present of it to his sister, the wife of the insolvent, in order that she might thereby obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party, who conveyed the land to her; and the Court set aside the conveyance at the instance of a creditor of the husband, as void under the Statute 13 Elizabeth and the Indigent Debtor's Act of this Province.

There need not be an indebtedness at the time of transfer. The conveyance may be fraudulent and void, as against creditors, although no debt be in existence at the time, if made in contemplation of becoming indebted, and in such a manner as to satisfy a jury that it was colorable and fictitious, and for the purpose of defrauding. Bank B. N. A. *v* Battenbury, vii. U. C., Chan. R. 383.

By the Statute 27 Eliz., c. 4, the object of which was to give full protection to subsequent purchasers for valuable consideration, against voluntary prior conveyances, a prior conveyance is deemed void as against a subsequent purchaser or mortgagee, whether with or without notice.

Neither of these statutes, Eliz. 13 nor 17, prevented a debtor from disposing of his property, or giving a preferential lien by way of mortgage to one creditor to the prejudice of others. So could goods and chattels be handed over, or passed by bill of sale, or encumbered by mortgage with the same effect; or a judgment and execution allowed to be obtained, to the delay and prejudice of remaining creditors.

But by C. S. U. C., Chap. 26, Sec. 17, it is enacted that in case any person being insolvent or unable to pay his debts in full, or knowing himself to be on the eve of insol-

vency, voluntarily or by collusion, with a creditor gives a confession of judgment, *cognovit actionem*, or Warrant of Attorney to confess judgment, to defeat or delay his creditors wholly or in part, or with intent to give an undue preference, every such confession, *cognovit actionem*, or Warrant of Attorney to confess judgment, shall be deemed and taken to be null and void, as against the creditors of the party giving the same, and shall be invalid to support any judgment or Writ of Execution.

It was held in Young *v.* Christie, 7 Chan. R. 312, that entering an appearance to one action, and allowing judgment by default in another, is not a fraudulent preference within this section; though complete in effecting that purpose. But if there be any collusion between the debtor and creditor, as in the case of White *v.* Lord, the judgment so obtained will be set aside as fraudulent.

By Sec. 18, if a person being insolvent, or upon the eve of insolvency, or unable to pay his debts in full, makes or causes to be made any gift, conveyance, assignment, or transfer of any goods, chattels or effects, or delivers or makes over, or causes to be delivered or made over, any bills, bonds, note, or other securities or property, with intent to defeat or delay the creditors of such person, or with intent of giving any one or more of the creditors of such person a preference over other creditors of such person, every such gift, conveyance, &c., is null and void as against the creditors of such persons.

By Sec. 19, if any person destroys, alters, mutilates or falsifies any of his books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or any one of them, he is guilty of a misdemeanor, and liable to be imprisoned in the common jail for any term not exceeding six months. And by Sec. 20, any person who makes or causes to be made any gift,

conveyance, assignment, sale, transfer, or delivery of any of his lands, hereditaments, goods or chattels, or who removes, conceals, or disposes of any of them with intent to defraud his creditors, or any of them, and any person who receives such property, real or personal, with such intent, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding twelve months, and to a fine not exceeding eight hundred dollars.

By Section 1, Chap. 45, C. S. U. C., every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which is not attended by an *immediate delivery* and an *actual and continued change of possession*, or a true copy thereof, must be filed in the office of the Clerk of the County in which the mortgagor resides, and if not a resident of the Province, then of the County in which the property is situated within five days after its execution.

The Courts of Common Pleas and Queen's Bench were formerly at variance as to whether such mortgage took effect from the time of execution or filing, whereupon 26 Vic., Chap. 46, S. I, was passed, giving it effect from the day of its execution. A person's property may therefore be covered by a mortgage for four days without any means of discovering the fact; thus rendering the original intention of chap. 45 seemingly inoperative for that period.

Every such mortgage, and copy thereof, so filed, must be accompanied by an affidavit of a witness thereto, of the due execution thereof, and an affidavit of the mortgagee or his agent, stating "that the mortgagor, therein named, is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him."

Unless the mortgage and affidavit be not so executed and registered, they are absolutely void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

Nothing requires greater care than the drawing and executing of Chattel mortgages. If there be anything wanting in the mortgage itself, the description of the property, the affidavit, or the execution, our Courts are strongly and justly inclined to hold against its validity as against creditors. Many persons were so long accustomed to make fraudulent sales of their personal property, or to clandestinely encumber it with mortgages while they retained its possession, and any benefit from its use and mercantile credit, that every means is still sought to evade the law, and accomplish the same purpose, at least so far as to give a preferential lien, or defraud a creditor. The strictest holding of the Courts cannot prevent the evil; all it can do is to remedy it as far as possible.

Every such mortgage becomes void as against creditors, subsequent mortgagees and purchasers, in good faith for valuable consideration, unless it be renewed, by filing within thirty days next preceding the expiration of one year from the filing thereof, a true copy of such mortgage, together with a statement of the interest of the mortgagee in the property mentioned therein, and a full statement of the amount of principal and interest still due thereon, authenticated by an affidavit of such mortgagee or his agent; which affidavit must also state "that the said mortgage has not been kept on foot for any fraudulent purpose."

Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, must be in writing, under 22 Vic., chap. 45, C. S. U. C., accompanied by an affidavit of a witness thereto after due execution thereof, and an affidavit of the bargainee, or his agent,

duly authorised in writing to take such conveyance, "that the sale is *bonâ fide* and for good consideration, as set forth in said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor."

Such conveyance must be registered in the same time and manner as a chattel mortgage, otherwise the sale is absolutely void as against the creditors of the bargainor, and as against subsequent purchasers and mortgagees in good faith.

A bill of sale, though requiring to be filed in the same manner as a chattel mortgage, does not require renewing to keep it alive.

A chattel mortgage may be made securing a party against future advances, for the purpose of enabling the borrower to enter into and carry on business, also against the endorsement of bills and notes, or any other liability, the time for repayment, nor the liability extending beyond a year from the date of such mortgage. It must state clearly and fully the terms, nature, and effect of the agreement, and the amount of liability intended to be created; also an affidavit of execution, and an affidavit of the mortgagee, or his duly authorized agent, "that the mortgage truly sets forth the agreement entered into between the parties thereto, and the extent of the liability intended to be created, and covered by the mortgage, and that it is executed in good faith, and for the express purpose of securing the mortgagee repayment of his advances, or against the payment of the amount of his liability for the mortgagor, as the case may be," &c.

SECTION II.

PROPERTY OF MARRIED WOMEN.

Formerly the notion of an unity of person between the husband and wife—it being held that they were one person in law, so that the very being and existence of the woman

was suspended during marriage, or entirely merged or incorporated in that of her husband—established the principle of law that those chattels which belonged to the wife before marriage, were, by the act of law through marriage, vested in the husband, with the same degree of property and with the same power, as the wife, when sole, had over them. In real estate he only gained a title to the rents and profits during coverture; for that depending upon feodal principles, remained entire to the wife after the death of her husband, or to her heirs, if she died before him; unless, by the birth of a child, he became tenant for life by the curtesy, as it is called.

But in chattel interests the sole and absolute property vested in the husband to be disposed of at his pleasure, if he chose to take possession of them.

The interest of the husband in his wife's property, whether such property came to her before or after marriage, was not only under his own control, but also liable to sale under execution for his debts. The only way of protecting her property was by a marriage settlement.

This state of the law has been materially altered, so as to protect the interest of married women in their separate property, by chap. 73, C. S. U. C.

By Sec. 1, every married woman, who has married since the fourth day of May A. D. 1859, without any marriage settlement or contract, shall have, hold and enjoy all her real and personal property, whether belonging to her before, or acquired after marriage, free from the debts of her husband, and from his control or disposition in as full and ample a manner as if she had continued unmarried.

By Sec. 2, every woman, who had married on or before the fourth day of May A. D. 1859, without any marriage contract or settlement, shall have, hold and enjoy all her real estate not then taken possession of by her husband, and all her personal estate not then reduced into his possession, free

from his debts and obligations, and from his control and disposition without her consent, as fully as if she had remained unmarried.

The act, however, provides that a married woman's property shall not be protected from seizure, upon an execution against her husband for her torts, and that no conveyance by her shall deprive her husband of any estate he may become entitled to as tenant by the curtesy.

The married woman has still no power to contract so as to bind herself in law, though her separate property, whether real or personal, not settled by an ante-nuptial contract, is liable for a separate contract made or debt incurred by her before marriage. And every husband who takes any interest in the separate estate or property of his wife, under any contract or marriage settlement, is liable upon the contracts made or debts incurred by her before marriage, to the extent or value of such interest only, and no more.

There are certain contracts which a married woman might enter into so as to make her separate estate liable in *equity*, in case she was forced to apply to equity to have her rights protected in connection with such contract.

A married woman may be sued upon a contract made or debt incurred before marriage, (but her husband must be joined in such action, if residing within the province of Ontario) and the amount of judgment recovered out of her separate estate: the husband only being liable for costs in case he puts in a false plea or answer to the question.

A married woman being of the age of twenty-one years, may convey her real estate by deed, executed by her jointly with her husband. Such deed, if executed in Ontario, must be executed before one of the Judges of the Courts of Queen's Bench or Common Pleas, or a Judge of the County Court, or two Justices of the Peace for the county in which she resides, and such Judge or two Justices must examine her apart from her husband respecting her free and voluntary consent to

convey, and endorse upon the back of the conveyance a certificate prescribed by chap. 85, sec. 2, C. S. U. C. If the deed is executed out of Ontario, it must be done before, and the certicate signed by certain officials mentioned in said chap. 85.

She may also dispose of her estate, real and personal, by devise or bequest, executed in presence of two or more witnesses, neither of whom is her husband, to or among her children, issue of any marriage, and failing any issue, then to her husband, or as she may see fit; but her husband is not deprived by any such devise, of any right as tenant by the curtesy.

If she die intestate, her separate personal property passes one-third to her husband, and two-thirds to her children, and if there be no children then the whole to her husband.

The law effecting the descent of the real estate of an intestate, is too voluminous and intricate to be set forth in a work like the present. Where it becomes a matter of interest, a trusty counsel should be consulted before any action whatever in relation to it is taken.

The effect of the law, as we have stated it, is, a married woman may take hold and enjoy a separate estate, real or personal, without the assistance of any trust deed or marriage settlement, free from her husband's control, disposition or debts; it is liable in law for debts contracted by her before marriage, and in many instances for the contracts after coverture; that she may dispose of it with her husband's consent, and pass it by devise to her children, and if she have none, then as she may see fit.

ADDENDUM.

The laws respecting Patents, Trade-Marks, and Registration of Designs existing in the Provinces of Ontario and Quebec, are identical. The reader is referred for information on these subjects to *post* Chapter II, in the Treatise of the Laws of Quebec, (Lower Canada.)

A COMPENDIUM

OF THE

MERCANTILE LAW OF THE PROVINCE OF QUEBEC.

INTRODUCTION.

The mercantile law of the Province of Quebec—formerly Lower Canada—is derived, 1st. From the *Coutume de Paris* introduced by Louis XIV, in 1663 ; 2nd. Such of the French King's Edicts and Ordinances as were enregistered in the Superior Council of Quebec ; 3rd. The ordinances of the Governor and Legislative Council passed from 1774 to 1792 ; 4th. The Statutes of the Province of Lower Canada from 1792 to 1838 ; 5th. The ordinances of the Governor and Special Council from 1838 to 1841 ; 6th. The Statutes of the Parliament of Canada from 1841 until now ; 7th. The English rules of Evidence in proof of Commercial facts ; 8th. The English law relating to Bills of Exchange and Promissory Notes, in matters wherein the laws of this Province are silent ; and 9th. The English Vice-Admiralty Law, and the Act of the Imperial Parliament, entituled : The Merchant Shipping Act of 1854.

This Treatise will be divided into four Books. The First, concerning Mercantile Persons ; the Second, Mercantile Property ; the Third, Mercantile Contracts ; the Fourth and last, Mercantile Remedies.

CHAPTER I.

OF MERCANTILE PERSONS.

Trade may be carried on by Individuals, Partnerships, Corporate Companies, Corporations, and their respective agents.

SECTION 1.

OF SOLE TRADERS.

Traders are defined to be those persons who are engaged in Commerce, and who make it their habitual occupation. The manifest intention to make of commerce a habitual occupation, although the sales be few or unfrequent, constitute a Trader. So also will the mere opening of a shop for the sale of goods, or purchasing goods for sale. The following persons, amongst others, may be considered as Traders:— Merchants, Manufacturers of goods, Factors, Commission Merchants, Bankers, Dealers in Commercial paper and Secucurities, Brokers, Auctioneers, Insurers, and Underwriters, Common Carriers for hire by land or water, Hotel, Tavern, Eating-house, and Boarding-house keepers, Warehouse-men and Wharfingers, also Mechanics and Tradesmen, who buy merchandize, either in the form of raw or partially manufactured materials, with intent to sell, before or after having them improved, or converted into something else; such as Merchant Tailors, Shoemakers, Builders, Millers, Printers and Butchers.

Any individual is at liberty to assume the functions of a Trader, unless he falls under some special prohibition: such as idiots, lunatics, persons interdicted from contracting by a Judgment of the Court, by reason of imbecility or prodigality.

Minors, are persons below the age of twenty-one. As a general rule, they cannot contract during their minority, but when at the age of fourteen, they can engage themselves for hire, and sue in their own name, for the recovery of wages, to the amount of fifty dollars. A minor engaged in trade is also reputed of full age for all acts relating to such trade.

A Married Woman may engage in trade, and when such trade is different to that followed by the husband, she may not only bind herself for all that concerns her commerce, but him also if there be no separation of property between them.

SECTION II.

OF PARTNERS.

1. *Partnership— What.*
2. *How formed.*
3. *How dissolved.*
4. *Rights of Partners between themselves.*
5. *Rights of Third Persons against Partners.*
6. *Rights of Partners against Third Persons.*
7. *Limited Partnership, or partnership en commandite.*

Partnership— What.

1.—Partnership is the result of a contract whereby two or more persons agree to combine property or labor for the purpose of a common undertaking and a common profit. It is essential that it should be for the common profit of the Partners, each of whom must contribute to it property, credit, skill, or industry. This contract need not be limited as to time. It may continue for an hour, or last for centuries.

How formed.

2.—A Partnership, though generally created by a Deed, may also be formed by a verbal agreement. And though it is, as between the Partners themselves, the result of an

agreement, yet a person may, without entering into any contract, impose on himself the liability of a Partner with regard to third persons. He who declares himself, or leads third parties to believe him to be a Partner, is liable for the supposed Partnership engagements towards them, whether he have any interest in the firm or not. As a rule, no new member can be admitted into a firm without the consent of all the Partners.

In partnerships for trading, manufacturing, or mechanical purposes, or for the construction of roads, dams and bridges, or for the purposes of colonization, the Partners must deliver to the Prothonotary of the Superior Court of the District and to the Registrar of the County wherein such Partnership is formed, or where its place of business may be established, a declaration in writing,* containing the names, address, and occupation of the Partners, the name of the firm, and the date of its formation. The omission so to deliver such a declaration does not render the partnership null, but subjects the contending parties to a penalty. And any Partner not mentioned in the declaration may be sued with the Partners mentioned therein.

How dissolved.

3.—Partnership is dissolved by lapse of time, by mutual consent, by the accomplishment of the business for which the partnership was contracted, by extinction or loss of the partnership property, by bankruptcy of the firm, and by the death, or civil death, or bankruptcy, or a judicial declaration of business incapacity of one of the Partners. Partnerships not limited as to time may be dissolved by the will of any one of the Partners. The dissolution of a partnership, limited as to duration, may be demanded by any one of the Partners, before the expiration of the term, when a co-partner fails to fulfil his engagement, or is guilty of gross misconduct,

* See form A in Appendix.

or from mental or physical infirmity is unable to attend to the business of the firm. It may be stipulated that in case of the death of one of the Partners, the partnership shall continue with his legal representatives, or only between the surviving Partners. A partnership may be also dissolved at the instance of a Partner who was induced to enter it by false representation.

Rights of Partners between themselves.

4.—The laws existing in the Provinces of Ontario and Quebec, regulating the rights and liabilities of Partners between themselves, are almost identical. The reader is therefore referred to page *ante* 22, *et seq.*, for a succinct statement of their substance. In addition it may be added, that in the Province of Quebec no Partner can carry on privately any business which deprives the Partnership of a portion of his skill and attention, or any share of that portion of the capital belonging to the firm. If he does so, he is obliged to account to the partnership for the profits he may acquire by such business. Each Partner is liable to the firm for any damages occasioned by his fault, and while in the event of difference of opinion between Partners as to the best manner of carrying out the purposes for which the firm was established, the minority must submit to the majority. Yet, a Partner, charged with the management of the business of the partnership by a special clause in the contract, may perform all acts connected with his management, notwithstanding the opposition of his Partners, provided he act without fraud. But if such power of management be given him subsequent to the contract of Partnership, it is revokable in the same manner as any ordinary appointment.

Rights of Third Persons against Partners.

5.—The rights of third Persons against Partners, as are laid down in pages 26 to 30 inclusive, are likewise existing

in the Province of Quebec. But the law as explained in the remainder of the section on this subject in the Treatise on the law of Ontario, is partially inapplicable to this Province. The following will exhibit such additional information as to the liability of Partners to third Persons as may be sufficient for the purpose of this work.

A person cannot release himself from the existing liabilities of a firm by his withdrawal. He can, however, protect himself from any *future* liability by depositing with the Prothonotary of the district, and the Registrar of the County, in which the business of the firm is conducted, a notice of his withdrawal, according to a form, in the Appendix.*

When a Partner dies, and the Partnership is dissolved by his death, the creditor has his remedy against the legal representatives of the deceased, jointly and severally, along with the surviving Partners. But the separate estate of the deceased Partner, as contra-distinguished from his Partnership estate, will be applied to the payment of Partnership debts only after his personal liabilities have been paid. And if the deceased Partner is supposed to have died insolvent, his heirs may relieve themselves from any personal liability beyond the value of the estate by accepting it conditionally, or as it is called in law, *sous bénéfice d'inventaire.*

When the right of action upon a Partnership or joint debt has been prohibited by lapse of time, no member of such Partnership or joint debtor will lose the benefit of this prohibition, so as to be chargeable by reason of any promise in writing, or of any part payment, made by any other Partner or joint debtor. And as regards Bills and Notes, it has been held, in Appeal, in *Bowker* v. *Fenn*, X. L. C. Jurist, 120, that even a part payment and a promise to pay (in this case equivalent to one in writing), were insufficient to give a right of action on a note, which had been due more than five years

* See Form B Appendix.

previous to the institution of the action, although the promise and the payments had been made by the Person against whom the suit had been brought. This decision, it is believed, will now apply under the code to all debts of a commercial nature.

In Partnerships of a non-commercial character, such as between professional men, &c., the Partners are liable to the creditors for the debts, in equal shares only. They are liable to this extent although their shares in the Partnership may be unequal.

Rights of Partners against Third Persons.

6.—See *ante* 33.

Limited Partnerships (*en commandite.*)

7.—The object and nature of Limited Partnerships may be understood by the following illustration. A and B have carried on, or intend to carry on, business as co-partners, in the name of A B & Co. They have insufficient capital. C is a man of wealth, and is willing to risk, say five thousand dollars, in their business, but is unwilling to assume any risk or liability, either toward them or their creditors, beyond that amount. To secure this object, he deposits this amount, as a special Partner, under the provisions of the statute, and deposits with the Prothonotary of the District and with the Registrar of the County where the business of the firm is conducted, a declaration to that effect, according to a form in the Appendix.* In this declaration the name of the firm, the nature of the business, the names of and address of the general and special Partners, the amount of capital contributed by each special Partner, and the period at which the Partnership commences and that of its termination must be

* See Form C. in Appendix.

inserted. This species of Partnership is not deemed to be formed until this statement is thus made and recorded. A and B are called the general Partners, and C becomes the special Partner.

The general Partners are jointly and severally liable, in the same manner, as ordinary Partners under a collective name. The special Partner is liable only to the amount contributed by him to the capital of the firm.

The general Partners only can be authorized to transact business, and sign the name of the firm.

If any false statement be made in the declaration or certificate of Partnership, all the Partners, special and general, thereby become liable to the creditors as ordinary Partners.

In case of any renewal of the Partnership beyond the time originally fixed be agreed upon, a certificate thereof must be filed and recorded in the same manner as was the original certificate, otherwise the renewal will be deemed a general Partnership. So also, under a like penalty, must be registered every alteration in the names of the general Partners, in the nature of the business, or in the shares specified in the original certificate.

The special Partner will also become liable as a general partner, if he allows his name to be used in the title or name of the firm; or if he transacts any business for the firm, either as Partner, or as an Agent.

He may, however, from time to time, examine into the affairs of the partnership, and advise as to its management.

No part of the sum which any special Partner has contributed to the capital can be withdrawn by him or paid to him in any way during the continuance of the partnership; but he may annually receive lawful interest, of six per cent, provided the payment of such interest does not reduce the original amount of the capital; and he may also, with a like proviso, receive his portion of the profits.

If, by the payment of the interest, or supposed profits,

the original capital be reduced, the special partner, receiving the same, is bound to restore the amount necessary to supply the deficiency, with interest.

In the event of Insolvency of the firm, no special Partner is allowed to claim as a creditor until the claims of all the other creditors have been satisfied.

No dissolution of the partnership can take place until after notice of dissolution has been registered by the Prothonotary and Registrar in the offices where the certificate of formation had been recorded, and published once in each week, for three weeks, in a newspaper published in the district where the partnership has its principal place of business, and for the same time in the *Canada Gazette*.

The general Partners are liable to render an account to the special partners, for the management of the affairs of the firm, in the same manner as are ordinary Partners to each other.

SECTION III.

PRINCIPAL AND AGENT.

1. *Definition of the Contract of Agency and General Principles by which it is governed.*
2. *Obligations of the Agent toward his Principal,*
3. *Obligations of the Principal toward his Agent.*
4. *Obligations of the Principal toward Third Persons.*
5. *Rights of Third Persons against Agent.*
6. *Rights and Power of Agent.*
7. *Brokers and Factors.*
8. *The Termination of the Agency.*

Definition of the Contract of Agency and the General Principles by which it is Governed.

1. Agency (Mandate) is a contract by which a person called the Principal (Mandator) commits a lawful business

to the management of another called the Agent, (Mandatory) who, by his acceptance, obliges himself to perform it. This acceptance may be expressed, or implied; in some cases, the silence, or an omission, to refuse the agency, will be considered sufficient to bind the Agent.

Agency will be considered to have been fulfilled gratuitously unless there has been an agreement, or an established usage to the contrary in respect to agency of a like nature. In all agencies of a commercial nature, a gratuitous performance of the agency cannot be presumed.

For the purpose of sale or mortgage of real estate special authority must be given, in writing to the Agent, to enable him to sign the deeds or mortgage on behalf of his Principal.

The Agent cannot bind his Principal beyond his express or implied authority, nor can he be the buyer and seller of the thing which he has been entrusted to buy or sell for his Principal.

Obligations of the Agent to his Principal.

2. The Agent is liable for the damages resulting from the non-execution of the agency while his authority lasted, and he is also obliged, if after the termination of the contract, when the termination is occasioned by the death of the Principal, to complete business of a nature which cannot be delayed without a risk of loss or injury. He is also bound to follow his instructions as strictly as possible and to exercise all reasonable skill and care; but if his services be rendered gratuitously, the Courts may moderate the rigor of the liability arising from his negligence or fault, according to circumstances.

When the Agent has not been empowered to appoint a substitute, he is answerable for the substitute he may appoint, and the Principal may repudiate the acts of the latter. But when a Commercial Agent acts through his clerk, the latter will not be deemed a substitute, in the transaction of a com

mercial agency. The Agent is answerable in like manner when he is empowered to substitute, if he appoints one notoriously unfit. In both these cases the Principal can recover also from the substitute, for the losses occasioned by his conduct.

When several Agents have been appointed to act together, they become jointly and severally liable to the Principal for each other's acts, unless the contrary be stipulated.

Whenever reasonably demanded, the Agent is bound to render an account to his Principal, and to pay over any money he may have received even though it may not be due. He may retain therefrom all his lawful charges, and he is bound to pay interest on all money of the Principal which he may unnecessarily detain, or employ for his own use. He has a right to refuse to return to his Principal any goods entrusted him by the latter, until all lawful charges and disbursements are paid.

By a provincial statute 22 Vict. c. 92. sec. 43, now in force, it is enacted, that if any money, or *security*, having been entrusted to any Agent *with a direction in writing*, to apply such money or the proceeds of the security for any purpose specified in such writing, and such Agent, contrary to the direction, applies the money or proceeds to his own use, he shall be guilty of misdemeanor and liable to imprisonment.

By the 44th section of the same statute, it is further enacted, that if any Agent having been entrusted for *safe custody* with any chattel or valuable security or any Power of Attorney for the sale or transfer of any public stock or fund, or in the fund of any corporate body, or company, or has been so entrusted with such property or Power of Attorney for any other special purpose, but *without* any authority to sell, negotiate, or pledge, such property; and who, contrary to the purpose for which such property may have been entrusted to him, sells, transfers or pledges it, he shall be guilty of misdemeanor, and liable to imprisonment.

By sect. 46, if any Agent intrusted for the purpose of sale with any goods, or intrusted with any Bill of Lading, Warehousekeeper or Wharfinger's Receipt, or certificate or order for delivery of goods, deposits or pledges, for his own benefit, any of such goods, or any of the said documents, he shall be guilty of misdemeanour, and liable to the same punishments as are provided in the preceding sections. The same punishment is also applied by the 54th sect. to any person entrusted with a Power of Attorney to sell property, and who fraudulently sells or transfers it, or converts such property to his own use; and by the 55th sect. any person, as for instance a Warehouseman, or Guardian, intrusted with the property of another, who fraudulently takes or converts the same to his own use, is held to be guilty of larceny. But no Agent can be held liable under the preceding sections who, in good faith, pledges any goods, or securities, for the amount of his claim against his Principal, or to enable him to pay the amount of any Bill or Draft, drawn by, or on account of such Principal, and accepted by the Agent.

In case of the bankruptcy of an Agent who has pledged the goods of his Principal, and the owner redeems the same, he will in respect to the sum paid by him for such redemption, be held to have paid for the use of his Agent before bankruptcy; or, if he does not redeem them, the owner is deemed a creditor of the agent for the value of the goods so pledged; and may, in either case, claim or set off the sum paid, or the value of the goods from the Agent's estate.

Obligations of the Principal toward his Agent.

When the remuneration to be paid the Agent for his services has not been agreed upon between the parties, it must be settled according to custom or usage. The Principal is bound to indemnify the Agent for all obligations contracted by him toward third persons, within the limit of his powers,

and for acts of the Agent exceeding his powers whenever they have been expressly or tacitly ratified. These will include all obligations which it may be presumed a prudent man, acting for himself, would have considered necessary, as for instance, the insurance of goods or other property, placed in any extraordinary danger.

When there is no legal fault imputable to the Agent, the Principal is not released from any of his liabilities toward him, although the business has not been successfully accomplished. Nor can he reduce the amount of the re-imbursement upon the ground that the expenses and charges might have been made less by himself, if they are not unreasonable, according to the circumstances of the case. He is also liable for the loss suffered by his Agent in the execution of the Agency, when they are not occasioned by the fault of the latter. The Principal is obliged to pay interest upon all money advanced by the Agent; and the Agent has a privilege, or lien, for the payment of his expenses, upon the goods placed in his hands, and upon the proceeds of the sale.

Obligations of the Principal toward Third Persons.

The Principal is liable to third persons for all acts done by his Agent in the execution, and within the scope, of the agency. The extent of this liability may be regulated by the Agent's authority, or by the nature of his business. Wherever there is reasonable ground for presuming authority, the Principal will be presumed to have given it, and made liable accordingly. Courts act on the principle that where one of two innocent parties must suffer from the fraud of a third, he who enabled that third party to commit the fraud should be the sufferer. The measure of the Agent's presumed authority to bind his Principal in any case, will depend upon the special circumstances of such case. An Agent authorized to draw bills for his Principal is not presumed thereby to

have power to endorse. Where he has had authority to draw Bills, or Notes, he may bind him by subsequent ones, though his authority has been withdrawn, and the proceeds never reached the Principal, where the third party had no notice of such withdrawal. A Merchant's clerk is presumed to have authority to receive money for his Employers, paid in the course of business in which he is employed, but he has no implied authority to receive money on matters beyond the business, such as Bonds or Mortgages. A Merchant's clerk has also an implied authority to collect claims due to his Employer, in the business in which he is engaged.

An Agent intrusted with the possession of goods, or documents of title thereto, such as Bills of Lading, Warehouse Receipts, &c., may bind his Principal to third parties as fully as if he were the actual owner.

A ratification or assent of the Principal of such acts committed by the Agent beyond his authority, will exonerate the latter and make the former liable. Such ratification may be inferred if he accepts any part of the act or contracts wherein such excess of authority forms a part.

A person is also liable to third parties who in good faith contract with another, who is not his Agent, under the belief that he is so, when he has given them reasonable cause for the belief. The Principal is likewise liable for the damages caused by his Agent, in the performance of the agency; and also for such acts of his Agent, after the withdrawal of the agency, which are necessary, and where loss or damage might have resulted from their non-performance. So also, is he liable to third parties for all acts of the Agent done after the withdrawal of the authority, if the withdrawal be unknown to them.

Rights of Third Persons against Agent.

On this subject the reader is referred to *ante* 48 and 49. In addition to what is there stated, it may be added, that in

this Province, an Agent, whose Principal resides in another country, is personally liable to third parties with whom he contracts, whether the name of the Principal be known or not. The Principal in this case is not liable on such contracts to the third parties, unless it is proved that the credit was given to both Principal and Agent, or to the Principal alone.

Rights and Powers of Agents.

Some of these rights are mentioned in a preceding page under the head of obligations of the Principal toward his Agent. There are others which it is necessary to advert to here. Formerly an Agent, entrusted with goods, or documents of title thereto, for the purpose of sale, could not bind his Principal by pledging such goods or documents. It was found that this restriction was sometimes injurious to commercial success. By a recent statute, now embodied in the code, the restriction is abolished.

Any Agent entrusted with the possession of goods, or with the documents of title thereto, is now deemed the Owner thereof for the following purposes:

1. To obtain loans, advances, and exchanges, and the Owner shall be liable for such, to third parties in good faith, though made with notice of the Agent not being the owner, but without notice that the Agent was acting without authority.

2. To entitle the Consignee of goods consigned by such Agent to a lien thereon, for any money or negotiable security advanced by him in good faith to the agent, and without notice of the Agent's want of authority.

Any person having a valid lien on goods, or documents of title thereto, or negotiable security, arising from an advance upon a contract with an Agent, gives up the same to such Agent, and takes other goods or personal property as security for the advance, this exchange, if made in good faith, is

valid; but the lien, thus acquired, cannot exceed the value of the goods or securities so delivered up and exchanged.

But no antecedent debt owed by an Agent, entrusted with the possession of goods, &c., can be the subject of any lien or pledge of such goods.

An Agent possessed of any document of title to goods is deemed to be entrusted with the possession of the goods represented by such title.

Bills of lading, warehouse, and wharfinger's receipts or orders for the delivery of goods, bills of inspection of pot-ash and pearl-ash, and all other documents used in the ordinary course of business as proof of the possession or control of goods, or purporting to authorize, either by endorsement or delivery, the possession of any such document to receive goods thereby represented, are deemed to be documents of title.

In any of the foregoing cases, the Owner may redeem the goods or documents of title which have been pledged, before they have been sold, upon re-payment of the amount of the lien; or he may recover from the person with whom any goods or documents have been pledged, the balance remaining, on the produce of the sale, after deducting the amount of the lien.

Brokers and Factors.

There is a difference between the powers of Brokers and Factors or Commission agents. A Broker has not the possession, but a mere power to sell and to buy. He negociates between the Vendor and Vendee, and may be, at the same time, the Agent of both parties, and bind both by his acts in the business for which he is engaged for them.

A Factor, or Commission merchant, has the possession of the goods entrusted to him to sell. He has a special *lien* on them for any money advanced or charges on them. Towards third parties in good faith, he stands in the position of

owner, and may sell the goods in his own name. He may also be engaged to buy for his Principal, for which he usually receives a compensation, commonly called a commission. And he is clothed with the powers and subjected to the responsibilities stated in the preceding pages.

THE TERMINATION OF AGENCY.

An agency terminates by:

1. Revocation.
2. By the resignation of the Agent.
3. By the natural or civil death of the Agent or Principal.
4. By the interdiction by a Court of Justice, or by bankruptcy of either party.
5. By the cessation of authority in the Principal.
6. By the impossibility of the performance of the agency.

SECTION IV.

JOINT STOCK COMPANIES.

For information upon the nature, mode of formation, and liabilities of Joint Stock Companies, the reader is referred to *ante* p. 50; the law of the Provinces of Quebec and Ontario being identical upon these questions. It may, however, be added to what is stated in the preceding pages, that the provisions of the chap. 63 of the Consolidated Statutes of Canada, are, by 29 Vict., chap. 20, extended to skating Rinks, and by 29 Vic., chap, 21, to Petroleum Companies.

SECTION V.

CORPORATIONS.

See *ante* 53. The principles laid down there, and in the following pages on Corporations, are applicable also to this Province. With reference to the liability of Shareholders

toward third parties, it may be necessary to state, that here their responsibility is limited by the extent of their interest in the corporation. That is to say, a Shareholder is not liable beyond the amount paid for his shares. If, however, a Corporation becomes insolvent, and the Shareholder has not paid the full price of the shares he represents, he is liable to the Creditors of the Corporation for the balance. The extent of this liability is sometimes increased by the charter or statute creating the Corporation. In some cases it is enacted that they shall be liable for double the amount of their shares; and there are Corporations existing wherein the liability is unlimited.

CHAPTER II.

MERCANTILE PROPERTY.

Section 1. *Legal incidents of Mercantile Property.*
" 2. *Shipping.*
" 3. *Patents.*
" 4. *Trade Marks.*
" 5. *Registration of Designs.*

SECTION I.

LEGAL INCIDENTS PECULIAR TO MERCANTILE PROPERTY.

The Legal incidents peculiar to Mercantile Property are set forth in *ante* 59 to 63, and are mainly applicable to the Province of Quebec, with the exception of those exempting certain goods from seizure, and as to the removal of Fixtures. The law of this Province, respecting these exceptions, may be found explained under the section of Lease and Hire, *post*.

SECTION II.

SHIPPING.

The laws affecting the Building, Ownership, Mortgaging, and Registering of Vessels, are of the same in the Provinces of Ontario and Quebec. The reader is referred to ante 63, and following pages, for information on these matters.

SECTION III.

PATENTS.

Under the head of Mercantile Property, the Laws regu-

lating Patents for Inventions, and for the protection of Trade marks and designs may be properly introduced.

Who may obtain a Patent and how.—By a statute of the Parliament of the late Province of Canada, it is enacted, that any British subject, *residing in this Province*, having discovered or invented :—

1st. Any new and useful art; or

2nd. Any machine, manufacture, composition of matter ; or

3rd. Any design for a manufacture ; or

4th. Any design for the printing of silk, woollen, or cotton fabrics ; or

5th. Any design for a Statue, Bust, or Bas-relief, or composition in *alto*, or *basso relievo ;* or

6th. Any new ornament ; or

7th. Any pattern, design, or print, to be worked, printed, or cast ;

He may obtain a Patent therefor, provided the invention, or discovery, sought to be patented, has not been previously known or used by others " *in this Province";* and not being, at the time of the application, in public use, or for sale, with the consent of the Inventor or Discoverer.

The " Province," as it existed at the time of the passing of this statute, having included the present Provinces of Ontario and Quebec, which have since merged into the Dominion of Canada, it may be presumed, the words " in this Province" now extend to the Dominion. Therefore, any British subject, a resident of the Province of Ontario or Quebec, may now obtain a Patent from the General Government which will be operative throughout the Dominion, under the conditions of, and upon compliance with the terms of the statute.

Duration of Patents—The Duration of Patents is limited to fourteen years from the date of the grant, which may be extended to seven years more, upon application under special circumstances. It is available not only to the grantee, but also to his heirs, and assigns.

Patents to Representatives of deceased Inventor.—The executors, or other legal representatives of any person deceased who in his lifetime may have been entitled to a Patent, may also apply for it, on behalf of the heirs of the deceased.

Patents in Foreign Countries.—A Discoverer or Inventor, who possesses the qualifications for claiming a Patent, will not be deprived of his right to it, by having previously taken out one in a Foreign Country, provided it has not been obtained for six months or more, from the time of his making the application in this country.

Inventions brought by Canadians from Foreign Countries.—An inhabitant of this Province, who in the course of his travels in a Foreign Country, has discovered or obtained the knowledge of any Invention or improvement not known or in use here, may obtain a Patent therefor. But this privilege does not extend to Inventions or Improvements made in Great Britain or in the United States. Hence it is, that no invention or discovery made in the States, can be patented here; nor if made in Great Britain, unless the applicant be a resident of this Province, and possessed of the qualifications already specified.

How Patents may be obtained.—Patents are obtainable by Petition to the Governor of the Dominion setting up the name and address of Petitioner, that he is a British subject, or resident of this Province, the nature of his Inventions or discovery, and his prayer for a Patent. The Petition must be accompanied.

1st. By a declaration, under oath, stating that the Petitioner believes he is the true Inventor or Discoverer. If the application be upon the introduction of a discovery patented in any Foreign Country, it must contain a statement, that it was not seen or patented in Great Britain, or the United States.

2ndly. By a written description, in duplicate, of the Invention, and of the manner of making or compounding the same.

This must be signed by the Petitioner, and attested by two witnesses. In the case of any machine, it must explain wherein the Invention differs from other similar inventions.

3rdly. This description must be accompanied by drawings in dupliacte illustrating the Invention.

4thly. If the Patent be for a machine, a model of it must be sent.

While it is deemed necessary to give these explicit instructions as to the mode of application for Patents, it is proper to add, that an Inventor may save himself trouble and expense, and not jeopardize the loss of his rights, by employing a Patent agent or a professional man to make the application, rather than to attempt it himself.

Patented articles to be marked as such.—Every Patentee, or his assignee, is required to mark or stamp on the article patented, the fact and date of the Patent; a neglect to do so, is a misdemeanor, and is punishable by fine or imprisonment, or both. So also, any person who imitates the name of any Patentee upon an article for which he has obtained a Patent; or affixes the words "Patent", "Letters Patent", "Patented" on any article similar to that Patented by another, for the purpose of deceiving the Public, is guilty of a misdemeanor, and punishable as in the preceding case.

Annulling of Letters Patent.—A Patent may be declared null, and be repealed by the Superior Court.

1st. Where it was obtained by a fraudulent suggestion, or where a material fact has been concealed by the Patentee, or with his knowledge and consent;

2nd. Where it has been granted by mistake, or in ignorance of some material fact;

3rd. When the Patentee, or his heirs or assigns, have done, or omitted to do, an act in violation of the terms and conditions on which such letters Patent were granted, or for any other reason have forfeited their rights in such Patent.

Amending Patents.—Whenever a Patent is inoperative

or defective by reason of a defective description, made by inadvertence, and without fraud, the Patentee may surrender such Patent, and obtain a new one, for the residue of the unexpired term of fourteen years, after he has removed the defect from the specifications and drawings upon which the original Patent issued.

Assignment of Patents.—A patent may be assigned in whole or in part, by an Instrument in writing, which must be recorded in the office of the Minister of Agriculture within two months from the execution. An Assignment of the Patentee's rights may be also made anterior to the existence of the Patent; and, if required, the Patent may issue in the name of the Assignee, after the registration of the Assignment as aforesaid.

Rights of Patentees, &c., to things Patented.—Any person who without the consent of the Patentee, or his legal representatives, first obtained *in writing*, imitates or infringes upon the rights secured by the Patent, is not only liable to the damages which may be awarded by a Jury, but also to the payment of treble costs.

But it, in such an action, it is proved that the specification filed by the Patentee, with the Government, does not contain the whole truth, or contains more than is necessary, for the purpose of deceiving the Public; or, that the thing secured by Patent was not originally discovered by the Patentee, or had been in Public use in this country, anterior to the supposed discovery of the Patentee, or that, the Patent had been surreptitiously obtained,—in any of these cases, the action would be dismissed, and the Patent declared void.

The sale of a Machine by the Inventor, before this issuing of the Patent, will not, however, affect the validity of the Patent, except upon proof of the abandonment of the discovery to the Public, or the sale or prior use for more than a year previous to the application for the Patent.

SECTION IV.

TRADE MARKS.

It has been customary for some Manufacturers to affix a certain mark, brand, or name upon Merchandize, for the Manufacture of which they may have obtained a valued reputation. It is therefore important to them, that such marks or devices should not be imitated by another, whereby an inferior article might be imposed upon the Public as of their production, and to the detriment of their business. The Legislature has therefore wisely provided for the ascertainment of those to whom the exclusive use of any trade mark may belong, and for the punishment of those who may infringe it.

What shall be deemed Trade marks.—All names, marks, brands, lables, packages, or other business device, adopted by any person for the purpose of distinguishing any manufacture, by him made, or offered for sale, whether applied to the article, or to the package or vessel containing it, is to be considered as his trade mark, and may be registered for his exclusive use.

How Trade marks may be registered.—By application to the Secretary of the Board of Registration and Statistics, with a drawing and description of such trade mark, a declaration that such description is correct, and not in use by any other person, to the knowledge of the applicant. A fee of five dollars must be transmitted with the application. The mark is thereupon examined by the Secretary, and if he finds it does not conflict with any other registered, he will cause it to be registered, and give a certificate of the date of registration to the applicant.

Penalty for using another person's Trade mark.—Any person who shall imitate the trade mark, thus registered by another or any part of it, and apply it to Merchandize, whereby the public may be deceived into the belief that it was made or produced by the person to whom the trade mark belongs, will

be held guilty of misdemeanor, and liable to a penalty of not less than twenty and not exceeding one hundred dollars, which shall be paid to the proprietor of such trade mark, together with the costs.

A penalty of not less than ten nor more than fifty dollars is also affixed to any counterfeiter of a trade mark not registered, when belonging to a person not resident in this country.

SECTION V.

REGISTRATION OF DESIGNS.

How obtained.—Upon similar conditions, and in a similar way, by which patents are granted, a registration of a design may be obtained, and the exclusive use thereby secured for a specified time.

Duration of the Copyright of a Design.—In respect of the application of a design for ornamenting any of the following articles, the duration of the copyright is *seven* years :—

1. To articles of manufacture wholly or chiefly composed of metal or mixed metals.

2. To articles of manufacture wholly and chiefly composed of wood ; or to ornamenting of ivory, bone, papier maché, and other solid substances.

3. To articles wholly or chiefly composed of glass or earthenware.

4. To carpets, floor or oil cloths, shawls (except those designs consisting solely by printing of colours upon tissue or textile fabrics described in following class 2.)

5. Of woven fabrics composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if design be by printing, or by any other process by which colours are, or may be hereafter, produced upon tissue or textile fabrics, such woven fabrics being or coming within the description called furniture, and the repeat of the design whereof shall be more than 12 × 8 inches.

6. Of lace, and of any article of manufacture not comprised in the preceding and following classes.

The duration of the copyright of a design applied to the following articles is *three* years :—

1. To paper hangings.

2. To shawls, if solely by printing or colours upon tissue or textile fabrics.

3. To yarn, thread, warp, if the design be applied by printing or other process by which colors are, or may be hereafter produced.

4. To woven fabrics, composed of linen, cotton, wool, silk, or hair, or if any two or more such materials if design be by printing, or by any other process by which colours are, or may hereafter be produced upon tissue or textile fabrics excepting articles mentioned in class of preceding number 5.

5. To woven fabrics not included in any of the preceding classes.

6. To articles of Manufacture having reference to some purpose of utility.

Penalty.—The registration and date of registration of the design must appear upon the article bearing it; and an imitation of a design so registered, without permission *in writing* of the proprietor, is punishable by a fine of not less than twenty and not exceeding one hundred and twenty dollars, payable to the proprietor, with costs.

So also any person who places the word "Registered," or, "Rd," on an unregistered article, or upon an article the copyright of which has expired, becomes liable to forfeit for every such offence not less than four nor more than thirty dollars, one half to be paid to the complainant.

The proprietor of a registered design has also a right of action in the Superior Court against the counterfeiter, for the damages he may have sustained by the imitation.

Registered designs are assignable, in whole or in part, and the assignment must be recorded in the office of the Board of Registration and Statistics.

CHAPTER III.

OF MERCANTILE CONTRACTS.

Section 1. *Bills of Exchange and Promissory Notes.*
" 2. *Contracts of Sale.*
" 3. *Contracts of Debt.*
" 4. *Contracts with Carriers.*
" 5. *Contracts of Affreightment.*
" 6. *Maritime Liens.*
" 7. *Maritime Insurance.*
" 8. *Insurance Against Fire.*
" 9. *Lease, and Hire of Clerks, &c.*
" 10. *Guarantees. (Suretyship.)*

SECTION I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Stamps of Bills and Notes.*
2. *Presentment of Bills and Notes for Payment.*
3. *Days on which Bills and Notes cannot be presented.*
4. *Limitation of Action.*
5. *Release.*
6. *Interest.*

The law respecting Bills of Exchange and Promissory Notes, as laid down in Chapter III. of the preceding treatise on the Laws of the Province of Ontario, is applicable to this Province, with the undermentioned exceptions:—

Stamps of Bills and Notes.—Contradictory decisions exist

here, as to within what time double stamps must be affixed to Bills or Notes. In the Courts of Quebec, one Judge has held they might be affixed even after action was brought, while another Judge has maintained the reverse, and pronounced the note to be thus null and void. It may be assumed, that a fair interpretation of the Statute requires, that in cases where the stamp has not been affixed at the time of making, double stamps should be affixed within a reasonable time after it comes into the possession of the claimant, and before suit, as has been held in the Province of Ontario.

Presentment of Bills and Notes for Payment.—Bills or Notes payable at a particular place, are here presumed, as against the maker and acceptor, in the one case, and as against the maker and payee in the other, to have been presented at the place of maturity; unless the Defendant specially denies the presumption and fyles an affidavit with his plea, that at the maturity, provision for payment had been made at the place specified for payment.

Days on which Presentment of Bills and Notes cannot be made.—In this Province, Bills or Notes, falling due on any of the undermentioned days, cannot then be presented for payment, namely: Sundays, New Year's day, the Epiphany, the Annunciation, Good Friday, the Ascension, Corpus Christi, St. Peter and St. Paul, All Saint's day, Christmas day, and any other day fixed by Proclamation, as a day of general fast or thanksgiving. And Bills and Notes become due, and are presentable on the next following day, if it does not fall within any of the foregoing exceptions.

Limitation of Actions on Bills and Notes.—There is no right of action here upon any Bill or Note, or on any contract of a commercial nature, five years after maturity. Formerly it was held, that a payment on account, or a promise in writing to pay, or a verbal promise to pay, admitted under oath by the party liable, was sufficient to suspend the operation of the Statute of Limitations until five years from the

date of such payment or acknowledgment; but it is now held that no payment on account, or promise, will be sufficient, unless such promise be in writing, and sufficient to constitute a new contract.

Release.—By the common law, the surrender of the original title of an obligation, to one of several debtors, is available in favour of his co-debtors. But an *express release to one debtor, does not* discharge the others. With regard to Bills and Notes, it is apprehended a different rule will now prevail, with regard to a special release to one debtor where there are others liable. Anterior to the code, the laws regarding Notes and Bills were to be found in the Provincial Statutes; in matters wherein they were silent, the law of France prevailed; and wherein the law of France was silent, then the law of England ruled. But our code has now established, that in all matters relating to Bills and Notes, which it has not provided for, recourse must be had to the laws of England in force on the 30th May, 1849. The Law of England rules that a release of a joint maker or acceptor is a release to all; and this rule it is believed will be now considered in force here. A discharge to a subsequent indorser does not however release a prior indorser, but otherwise, where the prior indorser has been discharged.

Interest.—Interest on Bills and Notes is regulated as in the Province of Ontario. With regard to open accounts, no interest can be recovered here, except from the date of the action, unless it has been promised by the debtor. An agent can, however, recover interest on advances from his principal, without any express agreement.

SECTION II.

CONTRACTS OF SALE.

1. *The effect of Vendor being the Owner of goods sold.*
2. *Of the Capacity to Buy or Sell.*
3. *Statute of Frauds.*
4. *Implied Warranty.*

As in Bills and Notes, so in Contracts of Sale of a commercial nature, the laws of the Provinces of Ontario and Quebec, are in some respects identical. We shall therefore, in treating upon the question of contracts of sale, confine ourselves to those points wherein the law of this Province differs from that of Ontario. Beyond this, we refer the reader to *ante* Chap. III. Sect. II. p. 124, where the rules laid down, in so far as they do not conflict with the following, are the same as those in force here.

The effect of Vendor not being the Owner of goods sold.—In commercial matters, the purchaser has an action to enforce the sales against the seller, although the latter may not be owner of the thing sold.

If a thing lost or stolen be 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 re-imbursing to the purchaser the price he has paid for it.

If the thing lost or stolen be sold under the authority of law, as for instance, under a writ of Execution, it cannot be reclaimed from the purchaser.

Of the Capacity to Buy or Sell.—Husband and wife cannot enter into a Contract of Sale with each other ; nor can any of the following persons become buyers, either by themselves, or through third parties, namely:—Tutors or Curators of the property of those over whom they have been appointed, except in sales by judicial authority ;—Agents of the property which they are charged with the sale of ;—Administrators or Trustees of the property in their charge.

Statute of Frauds.—This Statute, whose provisions are explained in *ante* p. 125, is applicable here, in all commercial transactions, where the sum of money, or value in question, exceeds fifty dollars. In any action of a commercial nature for the recovery of a sum not exceeding fifty dollars, proof of the contract by the verbal testimony of one witness, is sufficient, provided it be not a balance of a debt under a contract which cannot be proved by verbal testimony. In the latter case, the creditor, while he cannot prove the contract, by verbal evidence, may in that mode, prove a promise made by the debtor to pay, and recover accordingly.

In all actions for payment of goods sold and delivered, proof of sale, or a promise to pay, made by one witness, is sufficient.

Implied Warranty.—Here, the seller is not only obliged to warrant the buyer against latent defects in the thing sold, but he is equally liable, though the defects were not known to him at the sale, unless the contrary was expressly stipulated. He is not, however, bound for defects which were apparent, and which the Buyer might have known himself at the purchase. Our law draws no distinction between the manufacturer and the merchant as to the amount of responsibility against latent defects in goods sold as is done by the law of Ontario.

SECTION III.

CONTRACTS OF DEBT.

1. *Place of Payment.*
2. *How Payment or Tender must be made.*
3. *Duty of the Creditor.*
4. *Limitation of Right of Action.*

Place of Payment.—Payment of a debt must be made in the place expressly or impliedly indicated by the contract. If no place be indicated, the payment, if it be of a specific thing,

must be made where the thing was, at the time of contracting. In all other cases, payment must be made at the domicile of the Debtor. The expenses attending payment, that is to say, in giving the discharge, must be borne by him.

Duty of the Debtor.—But while it is held that debts are payable at the domicile of the Debtor; unless the contrary be expressly or impliedly stipulated, in all commercial matters, the Debtor is placed in default, and liable to be sued, at any time after the delivery of the goods, or consideration of the debt, if no term of credit be given, and if credit be given, by the mere lapse of the time. It is therefore prudent for the Debtor, in all cases, where practicable, to pay at the domicile of the Creditor, if he wishes to avoid the expense of a law suit. But if he will not go beyond the strict requirements of the law, he must notify his Creditor, in writing, that he is ready to make payment, which will exempt him from liability to costs, if the Creditor should afterwards sue, provided he is able to establish that, at the time of the notification, he was actually provided with the money, at the place for payment.

How payment or Tender must be made.—When a Creditor refuses to receive payment, it becomes the duty of the Debtor to tender him formally the debt. This is usually done through a Notary, and should be accompanied by a notice of the tender in writing. If the Creditor sues subsequently, a copy of the notice of tender, together with the amount tendered, should be deposited in Court with the defence, and if the tender be declared by the Court sufficient, the Plaintiff will be condemned in the costs of the action.

It is necessary to the validity of a tender:

1. That it be of the whole sum of money, or other thing payable, and of all arrears of interest, and where costs are due, the amount of the costs, with a sum for costs, the amount of which is not known, saving the right to make up any deficiency.

2. That if the debt be payable in money, it be in current

coin of this Country, or of Great Britain, or in gold coin of the United States of America; and the notice or tender should contain an enumeration and specification of the coins tendered.

3. That the tender be made at the place of payment, where a place has been specified in the contract.

Where payment is to be made by a Bill or Note, payable at a certain period, the Creditor can, upon delivery of the goods, demand such Bill or Note. A refusal on the part of the debtor, gives the Creditor an immediate right of action for damages, and the measure of the damages is the price of the goods. In this respect, our law differs again from that of the Province of Ontario.

Duty of the Creditor.—Where a tender has been duly made to a creditor, it becomes his duty to accept. For if he afterwards commences an action, the proof of the tender, accompanied by a payment of the amount into Court, will subject him to the payment of the costs; unless he can prove a subsequent demand and refusal. Such tender will also prevent interest from running against the Debtor.

A receipt is not conclusive evidence of payment as against a Creditor. It is competent for him to prove that it had been given by mistake, or that a less sum was received than that expressed in the document.

Limitation of Right of Action.—Formerly a lapse of *six* years was required to extinguish a debt upon a mercantile contract. The time is now reduced to *Five*, and the operation of this law cannot be suspended by verbal promise to pay though proved by the mouth of the Debtor. An express promise in writing, sufficient in itself to create a contract, is alone sufficient to prevent extinguishment of a mercantile debt.

SECTION IV.

CONTRACTS WITH CARRIERS.

1. *Liability at Common Law.*
2. *Damages.*

Common Law Liability.—In addition to what is stated *ante* p. 137, on these contracts, it may be here added that, in this Province, notice by Common Carriers of special conditions limiting their liability, is binding only upon persons to whom it is made known; and notwithstanding such notice, and knowledge thereof, carriers are liable wherever it is proved that the damage is caused by their fault, or the fault of those for whom they are responsible.

Damages.—We are of opinion that the damages which may be claimed by the Consignee, on a breach of contract by the Carrier, would be in our Courts estimated on a somewhat wider basis, than that in the case supposed in *ante* p. 140. Here, the measure of damages would be not only the depreciated value of the cloth at the place of delivery, but the loss of profit sustained by the non-sale of the caps, through the delay in the delivery of the material. The rule is, that the damages due to the owner are the amount of loss he has sustained, and the profit of which he has been deprived.

SECTION V.

CONTRACTS OF AFFREIGHTMENT.

1. *Assignment of Bills of Lading.*
2. *Delivery of Goods, within what time.*
3. *Time allowed for the Discharge of Cargo.*
4. *Demurrage.*

The principles of law regulating contracts of Affreightment as laid down in *ante*, Section V., p. 140, are likewise in force in this Province. In addition to these there stated, the following may be added:

Assignment of Bills of Lading.—In Fowler *v.* Meikleham, it was held by the Superior Court, in Montreal, that the mere delivery of the Bill of Lading, without indorsement, was sufficient to pass delivery of the goods to the holder of the Bill.

Delivery of Goods.—Whenever any vessel has arrived at its destination, at any port in this Province, and the master has notified the consignee, either by public advertisement or otherwise, that the cargo has reached the place designed in Bill of Lading, the latter is bound to receive his goods within twenty-four hours after notice, thereafter, and such cargo, so soon as placed on the wharf, is at the risk and charges of the consignee or owner.

Time allowed for Discharge of Cargoes.—When the cargo of a vessel consists of coal, such coal must be discharged at the rate of 40 chaldrons *per diem*; when of metal, the freight of which is estimated by the ton, not less than sixty tons; when of salt or grain, not less than two thousand minots; when of salt in sacks, not less than one thousand sacks; when of sawed lumber, not less than fifty thousand feet; and when of bricks, not less than twenty-thousand, *per diem*.

Demurrage.—If the time of loading and unloading the ship, and the rate of demurrage, be not agreed upon, they are regulated by usage of the port, in so far as such usage may not conflict with any law existing there.

SECTION VI.

MARITIME LIENS.

See *ante*, Section VI., p. 147.

SECTION VII.

MARITIME INSURANCE.

The reader is referred to *ante*, p. 148. Section VII, for information on this question.

Abandonment.—But with regard to what is stated on the subject of abandonment in that section, (*ante* p. 158,) it should be here added, that in this Province it cannot be made without sufficient cause. For instance, abandonment on the ground of the vessel being disabled by stranding cannot be made, if she can be raised and put in a condition to continue her voyage to the place of destination.

The notice of abandonment must be explicit, and contain the grounds of abandonment. If these grounds be sufficient, and the abandonment be accepted, it cannot be revoked by any subsequent event, without the consent of both parties.

SECTION VIII.

FIRE INSURANCE.

1. *Assignment of the Policy.*
2. *Liabilities of Insurance Companies at Common Law.*
3. *Proof of Value of Goods Insured.*
4. *Mutual Insurance Companies.*

Referring the reader to *ante* Sect. VIII., p. 160, for information respecting the nature of the interest required to be possessed by the Insured in the property,—the mode of describing the property to be insured,—the warranties and effect of fraudulent concealment,—and the conditions annexed to Fire Policies,—we will here confine ourselves to brief remarks on the assignment of Policies, and the liabilities of Fire Insurance Companies generally, and on the proof of value of the object insured.

Assignment of Policies.—The Insurance is rendered void by the transfer of the interest in the object of it, unless the transfer is with the consent or privity of the Insurer. A transfer without notice, by one to another of several Partners, or owners of undivided property, does not avoid the policy. Nor is notice of assignment required in the case of

rights acquired by succession, nor in case of an official assignee, succeeding under the Insolvent Act to the interest of an Insolvent.

Liabilities of Insurance Companies at Common Law.—The Insurer is not only liable for all losses suffered by the Insured by fire, but also for those resulting from fire; as for instance, for damages by the water used to extinguish it, or in removing the goods. He is also liable for losses caused by the insured himself, otherwise than by fraud or gross negligence. Also, for losses caused by the faults of the servants of the insured and committed without the knowledge or consent of the latter. In case of loss, the Insurer is liable for the whole amount, not exceeding the sum insured, without deduction or average. The Insurer is not liable for losses caused merely by excessive heat in a furnace, stove, or other usual means for communicating warmth, when there has been no actual burning or ignition. When by the terms of the Policy a delay is given for the payment of the renewal of premium, the insurance continues, and if a loss occur within the delay, the Insurer is liable, deducting the amount of premium due.

These are among the liabilities established by the common law, but they may be modified, and some of them extinguished by the conditions annexed to the Policy.

A person should therefore carefully examine the conditions annexed by a Company to a Policy before effecting an insurance.

Proof of Value.—The sum insured does not, however, constitute any proof of the value of the objects of the insurance. The value must be established according to the conditions of the Policy, or by the usual mode of proof, unless there is a special valuation in the Policy, and then no further proof of value can be sustained. The Insurer, on payment of the loss, is entitled to a transfer of the rights of the Insured

against the Persons by whose fault the Fire or loss was caused.

Mutual Insurance Companies are, in this Province, established under chapter 68 of Consolidated Statutes of Lower Canada. The conditions of the Statute of the Province of Ontario, explained in *ante* p. 163, are similar to those in force here.

SECTION IX.

LEASE, AND HIRE OF CLERKS.

1. *Obligations and Rights of the Lessor.*
2. *Obligations and Rights of the Lessee.*
3. *Termination and Renewal of Lease.*
4. *The contract of Hire as regard to Clerks, &c.*

It is believed to be within the scope of this work to give a summary of the law of Lease and Hire, in so far as it effects the leasing of shops and warehouses, and the engagement of Clerks and Storemen.

Obligations and Rights of the Lessor.—The Lessor is obliged :—

1. To deliver to the Lessee the building leased ;

2. To maintain it in a fit condition for the use for which it has been leased ;

3. To give peaceable enjoyment of the thing during the continuance of the Lease. But he is not obliged to warrant the Lessee against disturbance by the mere trespass of a third party. If the Lessee's right of damages against the trespasser be ineffectual by reason of insolvency, he may obtain a proportionate diminution of the rent, or a rescission of the Lease, according to circumstances. If the disturbance be in consequence of a claim concerning the right of property, the Lessor is obliged to suffer the loss of a proportional diminution of the rent, and to pay damages, provided the Lessor be duly notified of the disturbance by the Lessee.

The Lessor is obliged to make all necessary repairs during the Lease, unless the contrary be stipulated, and even then he is liable to keep the roof, chimneys, walls, and foundation, in good condition.

The Lessor has for the payment of his rent, a privilege over other creditors, upon the goods, fixtures, and furniture in the premises. This privilege includes the effects of the sub-tenant in so far as he may be indebted to the Lessee; also to goods belonging to third persons, and being in the premises with their consent, but not if such goods be only transiently or accidentally there, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired, or to an auctioneer to be sold. In the exercise of this privilege, the Lessor may seize the goods and furniture which are subject to it, and upon the premises, or within eight days after their removal. If the things consist of merchandize, they can be seized only while they continue to be the property of the Lessee.

The Lessor has also the right of action:

1. To rescind the Lease: First, when the Lessee fails to furnish the premises, if a house, with sufficient furniture; if a warehouse or store, with sufficient goods to secure the rent, unless other security be given; secondly, when the Lessee commits waste upon the premises; thirdly, when the Lessee uses the premises for illegal purposes, or contrary to the evident intent for which they are leased.

2. To recover possession where the Lease has been rescinded, or where there has been cause for recission, or where there has been non-payment of rent, or where the Lessee continues in possession more than three days after the expiration of the Lease or after the presumed termination of the Lease, where there has been no written Lease, and contrary to the will of the Lessor.

If the ground for recission be simply non-payment of the rent (and non-payment of rent for one quarter, if payment

has been stipulated to be made quarterly, is sufficient for right of action), the Lessee may avoid recission at any time before rendering of the judgment by payment of the debt and costs.

Obligations and Rights of the Lessee.—The Lessee must use the building in a prudent manner, and for the purpose only for which it was designed, or intended to be used by the Lease. He is responsible for all injuries, unless he proves they were not occasioned by his fault, or are the result of reasonable wear and tear. When loss by fire occurs on the premises, there is a legal presumption that it was caused by the Lessee or his family; and unless he proves the contrary he is answerable to the Lessor for the loss. This presumption is in favor of the Lessor only, and does not extend to the Proprietor of a neighbouring property, which may be injured by the fire. If, during the Lease, the building be in urgent want of repairs, which cannot be deferred, the Lessee is obliged to suffer them to be made, although he may thereby be deprived of the enjoyment of a part of the building during the making of the repairs. If such repairs were needed *before* the making of the Lease, he is entitled to a diminution of the rent, and in any case, if more than forty days be spent in making the repairs, the rent must be accordingly diminished. The Tenant is also obliged to make the *lesser* repairs at his own expense, namely, to hearths, chimney-backs, and grates; to the plastering of the interior walls and ceiling; to floors when partially broken, but not when in a state of decay; to window-glass, unless broken by hail or inevitable accident; to doors, window-shutters, blinds, partition, hinges, locks. But the Tenant is not liable for any of these repairs when they are deemed necessary by age, or by irresistible force. The Tenant can also remove any fixtures he may have erected, but in removing them he must not deteriorate the building.

The Tenant has a right to sub-let the premises, unless the

contrary be stipulated in the Lease; and the property of the sub-Tenant on the premises is only liable as security to the Lessor for the amount of rent due by the sub-Tenant to the Lessee. In case of insolvency, the assignee under the Insolvent Act, may sub-let the premises, notwithstanding a prohibition in the Lease, or annul the Lease, if it may be for the interest of the Insolvent's estate.

The Lessee has a right of action against the Landlord:

1. To compel him to make the repairs and improvements stipulated in the Lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such Lessor; or if the Lessee declares his option to obtain an annulment of the Lease in default of such repairs or improvements being made within a stipulated time; and

2. To recover damages for violation of any of the obligations of his Landlord arising from the Lease, or from the voluntary use and occupation of the premises.

Termination and Renewal of the Lease.—The Lease of a house, or warehouse, when no time is specified for its duration, is held to be annual, terminating on the first day of May in each year, when the rent is at so much per year; for a month, when it is at so much per month; for a day, when it is at so much per day.

When the term of Lease is uncertain, or the Lease is verbal, or presumed by the occupation by the sufferance of the owner, neither party can terminate it, without giving notice to the other, with a delay of three months, if the rent be payable at terms of three months or more. If the rent be payable at terms of less than three months, the delay is to be regulated according to the terms of payment.

The Lease, if written, terminates without notice, at the expiration of the term.

If the Tenant remains on the premises beyond three days from the expiration of the term, without the consent of the Landlord, he may be ejected. If he remains in possession

for eight days after the expiration of the Lease and no action for ejectment be taken in the meantime, the law presumes a renewal of the Lease for another term.

The sale of the property annuls the Lease, but not for the current year. If the Tenant wishes to prevent his Lease from being annulled by the sale of the property, he must have it registered. This is a new rule introduced by the code, and as the want of it has hitherto created much injustice and loss, a Tenant should now in all cases when he desires to secure the premises for the term of the Lease, comply with this requirement without delay.

The foregoing rules of law apply equally to dwelling-houses, warehouses, and stores.

The Contract of Hire as regards Clerks, &c.—The hiring of bookkeepers, clerks, and other servants for employment in commerce, is held to be a mercantile contract, and it may therefore be proved by parol testimony. The hiring of seamen is regulated by a statute of the Imperial Parliament, intituled, *The Merchant Shipping Act*, 1854, and by an Act of the Parliament of the late Province of Canada. See *Con. Stat., Canada*, cap. 55.

This contract is usually made for a limited term, but like the leasing of Houses, it may be prolonged by tacit renewal. It is not only terminated by death of the party hiring, but by the non-fulfilment of certain obligations by either party.

Where no express term is agreed upon, the term is presumed according to the rules stated in a preceding page, respecting the leasing of Houses, wherein no time is specified in the Lease, and where there is no Lease. If a clerk has been engaged for one year, the entering into a second year will presume a re-engagement for another year. But if a clerk is engaged simply at the *rate of* so much per annum, it is held not to be an engagement for any specific time. If the salary be paid quarterly, and no specific term agreed upon, three month's notice must be given by either party,

before the contract can be rescinded. If no time is specified and the salary be payable monthly, then one month's notice will be sufficient.

It was held in *Charboneau* v. *Benjamin*, II L. C. JURIST, 103, that a merchant is justified in dismissing his clerk before the close of the term of engagement, for a breach of duty or discipline, namely, for absenting himself from his employment, without leave. In *Bourret* v. *Boisseau*, in the Circuit Court, Montreal, it was ruled, by Mr. Justice Monk, (Dec. 1864), that where a merchant had given his clerk leave of absence during a Monday, and the clerk failed to return till the following Wednesday, the former had no grounds for dismissal, the clerk having been engaged for a year. In such case, damages only could be recovered. It would have been otherwise had no leave been given.

Where a clerk who has been wrongfully dismissed, claims salary from his late employer for the unexpired term, he must tender his services, with the demand. But no such tender is required where he only claims damages for breach of the contract.

The Employer cannot retain wages due, should his servant quit his employment before the time agreed on, but he has an action of damages against such servant, which are usually fixed at the extra amount the Employer had to pay a person to replace him, and for the losses he may have otherwise sustained thereby.

In case of Insolvency, the clerks, apprentices, journeymen, and storemen, are, after the Landlord, entitled to be paid, *by privilege*, on the goods *in the warehouse, store or workshop only*, for a period of arrears of salary, not exceeding three months. They will rank as ordinary creditors, for the balance, if any.

SECTION X.

GUARANTEES. (*Suretyship.*)

1. *The Nature and Extent of Suretyship.*
2. *The Liability of the Surety to the Creditor.*
3. *The effect of Suretyship between the Debtor and Surety.*
4. *The effect of Suretyship between the Sureties.*
5. *The Extinction of Suretyship.*

Nature and Extent of Suretyship.—A Guaranty, or suretyship, is the act by which a person engages to fulfil the obligation of another in case of its non-fulfilment by the latter. The person who contracts this engagement, is called the Surety, or Guarantor. Suretyship can only be valid for the fulfilment of a valid obligation. If the obligation is invalid by the legal incapacity of the principal debtor to contract, or, by fraud, or want of consideration, the Surety becomes discharged. Suretyship must be contracted in writing, it cannot be presumed, or extended to a greater sum, or upon more onerous conditions than the principal debt. It may be contracted without the knowledge or consent of the party for whom the Surety may bind himself, and the liability, if undischarged at death, passes to his heirs. When the Surety becomes Insolvent, another must be found, or a right of action on the obligation, for which the Surety was given, is immediately created.

The Liabilty of the Surety to the Creditor.—The surety is liable only upon the default of the Debtor, unless he has renounced the right of having the Debtor first sued, his property seized, and applied toward payment. But the Creditor, after the maturity of the obligation, is not bound to sue the principal debtor first, even where the Surety has not renounced this privilege, unless the latter by this plea indicates property, in this province, belonging to the Debtor, and tenders sufficient money for the suit and seizure.

When more than one becomes Sureties for the same Debtor and for the same debt, each of them is bound for the whole debt; nevertheless, each may, unless he has renounced the benefit of a division of liability, require the Creditor to divide his action, and reduce it to the share and proportion of each Surety. If, at the time of this division, some of the Sureties were insolvent, such Surety is proportionably liable for their insolvency, but he cannot be made liable for insolvencies happening after the division.

The effect of Suretyship between the Debtor and Surety.—The Surety may recover from the Debtor all he has paid on his behalf, with interest. He has also a right to be re-imbursed the expenses in notifying him of the suit, and for payment of whatever damages he may have suffered by the suretyship. He is also, after payment, clothed with all the rights the Creditors possessed on the Debtor; and is entitled to whatever collaterals the Creditor may have held. When there are more than one Debtor, jointly and severally liable, their Surety has his remedy against each, for all he has paid.

The Surety who has bound himself with the consent of the Debtor, may even before paying, proceed against the latter to be indemnified;

1. When he is sued for payment;

2. When the Debtor becomes Insolvent;

3. When the Debtor has obliged himself to effect his discharge within a certain time;

4. When the debt becomes payable by the expiration of the stipulated term, without regard to the delay given by the Creditor to the Debtor without the consent of the Surety;

5. After ten years, when the term of the principal obligation is not fixed. This rule does not apply to Sureties given by Public Officers, or other Employees. Such Sureties have a right, at all times, to free themselves, by giving sufficient notice, unless it has been otherwise agreed.

Effect of Suretyship between Sureties.—When more than

one become Sureties for the same Debtor, and the same debt, the Surety who discharges the debt, has his remedy against the other Sureties, each for an equal share. But he can only exercise this remedy when his payment has been made under one of the five last preceding cases specified.

The Extinction of Suretyship.—Suretyship becomes extinct by payment,—by release,—by the substitution by the Debtor and Creditor of a claim different to that for which the Surety became liable,—by the performance of the obligation becoming impossible,—by lapse of five years from maturity of a commercial debt,—and by any other condition which may be specially agreed upon between the parties.

The Surety who became bound with the consent of the Debtor is not discharged by the delay given to the latter by the Creditor. He may, in the case of such delay, sue the Debtor, at any time after the expiration of the time originally agreed upon, in order to enforce payment.

The Suretyship is extinguished by the voluntary acceptance by the Creditor of real estate, or any other thing, in payment, though the Creditor should be afterwards evicted of it. So also it is at an end, when, by the act of the Creditor, the Surety can no longer be subrogated in the rights and privileges of the former.

In case of Suretyship required by law, or order of a Court, the Surety must possess sufficient real estate in this Province; and he cannot demand the discussion of the property of the principal Debtor.

CHAPTER IV.

MERCANTILE REMEDIES.

Section 1. *Saisie Conservatoire. Stoppage in Transitu.*
" 2. *Pledge and Lien.*
" 3. *By Civil Suit.*

SECTION I.

SAISIE CONSERVATOIRE, STOPPAGE IN TRANSITU.

1. *Right to stop Delivery.*
2. *Right to take Possession after Delivery.*
3. *Right of Privilege on Price.*

In this Province the Vendor may, in certain cases, prevent delivery of goods to the Vendee, while on their way to the latter. This privilege is in England called Stoppage *in Transitu*. Or, he may retake possession, after their delivery; or, when under a judicial seizure, at the suit of another creditor, he may claim a privilege on the price. These two latter privileges may be secured by a *Saisie Conservatoire*. They will be examined separately. We will first explain:—

Right to stop Delivery.—In ordinary cases, a delivery of goods by the Vendor to the Carrier, to be conveyed to the Purchaser, is a delivery to the latter. The Seller cannot lawfully demand them back, or intercept their delivery, unless any of the undermentioned conditions arise:—

This right of stoppage may be exercised, when goods have been sold for cash, and the Debtor has failed to pay, or, if, before delivery, he becomes insolvent, whether the goods were sold for cash or on credit. It is not barred by the actual receipt of the goods by the Buyer's agent, as may be seen by a perusal of the following judgment, in *Hawesworth et al* vs. *Elliott et al*, and *Brown* Assignee,—rendered by Mr. Justice Berthelet, in the Superior Court of Montreal, 10 L. C. JURIST, p. 197.

On the 9th February, 1866, the Plaintiffs, at Sheffield in England, sold Defendants a cask of cutlery. The goods were in due course delivered to the Defendant's shipping agent in Liverpool, and forwarded by him to the Defendants in Montreal.

On their arrival, they were bonded by the Defendant's Custom House Broker, and more than fifteen days after, they were, by the Plaintiffs, as the unpaid Vendors, *seized* in the hands of the Customs.

The Defendants pleaded that the delivery to the Shipping Agent of Defendants in Liverpool, was a delivery which deprived the Plaintiffs of their remedy, because more than fifteen days—the time limited by the Insolvent Act—had elapsed before the seizure was made. And secondly, that the entry in the Customs in Montreal, by the Defendants' Broker, more than fifteen days before the Attachment, was again such a delivery as deprived the Plaintiffs of the privilege they sought for.

The Plaintiffs denied these pretensions, and alleged that, at the time of the delivery of the goods in Liverpoool, the Defendants were Insolvent; and shortly after the seizure was made, it appears their estate was vested in an Assignee, under the Insolvent Act. The Assignee thereupon appeared in the suit, and claimed the goods on the same grounds as those set up by the Defendants.

The Court held, that the word "delivery" in the 12th

Section of the Insolvent Act, means actual and final delivery. The delivery to the Agent at Liverpool and the entry and bonding of the goods in Montreal, did not separatively or collectively constitute a delivery contemplated by the Act in question. It was necessary that the goods should have been actually on the shelves of Defendants' warehouse, to enable them, or the Assignee, to deprive the Plaintiffs of their privilege.

Right to retake Possession after Delivery.—The unpaid Vendor of a thing has two privileged rights :—

1. A right to re-take possession of the thing.

2. A right of preference upon its price. In the case of Insolvent Traders, these rights must be exercised within fifteen days of the delivery.

The right to regain possession is subject to four conditions :

1. The sale must not have been made on credit ;

2. The thing must still be entire, and in the same condition as when sold ;

3. The thing must not have passed into the hands of a third party who has paid for it ;

4. It must be exercised in eight days after delivery, but with regard to Insolvent Traders, the delay is extended to fifteen.

If the thing be sold pending the proceeding to regain possession ; or if, when the thing is seized at the suit of a third party, the Vendor be within the delay, and the thing in the conditions above mentioned, the latter has a privilege upon the proceeds of the sale in preference to all other Creditors except the Landlord, or the Pledgee. But if the Debtor be not a Trader, and the goods in the condition above mentioned, this privilege on the price exists in favour of the Creditor at any time.

Right of Privilege on Price of Goods Sold on Credit :— Where goods have been sold on credit, and the Debtor becomes Insolvent, the Creditor may, within fifteen days after the insol-

vency of the Debtor, (if a Trader,) claim to be paid on the proceeds of the sale of such goods, in preference to the other creditors, except the Lessor or Pledgee. If the Debtor be not a Trader, this privilege, we believe, may be exercised at any time within five years from the delivery, provided the goods are entire, and in the condition they were in when sold. That is to say, that the character of the goods be not changed. As, for instance, if the goods sold consisted of a certain number of boards, the conversion of them into articles of furniture, would be that change of condition contemplated by the law, in restricting the exercise of this right.

SECTION II.

PLEDGE AND LIEN.

1. *Pledge—What.*
2. *How Lien may be acquired.*
3. *Rights of Possesso · of a Lien.*
4. *Order of Priority of Liens.*
5. *How Lien may be lost.*

Pledge—What.—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, in security for his debt. This right of retention is called *Lien.* This thing may be given him either by the Debtor or by his agent on his behalf.

How Lien may be acquired.—A lien may not only be acquired by special agreement, but may also be obtained by the mere operation of law on property not pledged by the owner. It exists in favour of the unpaid vendor, as is explained in the preceding section; of common carriers upon the goods carried; of innkeepers on the baggage of transient guests; of shipowners, for freight; of pilots, for pilotage; of captains and seamen, for wages for the last voyage; of ship's husband,

or other agent, for advances; of shipbuilders; of rescuer of goods from peril of sea for salvage; of mechanics and artizans who have bestowed labour upon articles placed in their hands for that purpose.

If another debt be contracted after the pledging of a thing, and becomes due before that for which the pledge was given, the Creditor is not obliged to restore the thing until both debts are paid. The pledge is indivisible, although the debt is divisible. The heir who pays his portion of the debt, cannot demand his portion of the thing pledged while any part of the debt remains due. So a common Carrier has a *lien* upon every part of the goods carried for the owner, and a tender of the freight upon each load, as discharged, and loaded on a cart is insufficient.

Liens may also be acquired by usage. The usage whence such an agreement may be applied, is either the common usage of Trade, or that of the parties themselves, in their dealings with each other.

There are two species of Liens—General Liens, and Particular Liens.

General Liens are claimed in respect to a general balance of accounts and are to be construed strictly.

Particular Liens are where Persons claim to retain goods on a specific amount advanced, or labour or care expended on them. These Liens are favored in law.

Rights of a possessor of a Lien.—Some of these rights are mentioned under the head of how Liens may be acquired. There are others which may be here briefly adverted to. As a general rule, the creditor cannot in default of payment of a debt, dispose of a thing given to him in pledge. He may after judgment, cause it to be seized, and sold under the usual course of law. It is different, however, with regard to goods represented by bills of lading, wharfingers' receipts, cove-keepers' receipts for timber, or warehousemens' receipts, for merchandize given to a Bank, or any person, as collateral

security for the payment of a Bill or Note discounted, or any sum advanced. In the event of the non-payment of such Bill or Note, or Debt, when due, the Bank, or other creditor, may, without suit, and after ten days' notice to the owner, sell the property so pledged; and after retention of sufficient of the proceeds to liquidate the debt, deliver the balance to the pledgor.

If the security consists of timber, thirty days' notice must be given, and eight consecutive advertisements in one English and one French newspaper.

But no merchandize except timber, thus pledged, can be so held for more than six months. Timber may be kept for one year only. And the Note, Bill or Debt, for which the property is pledged, must be negotiated at the same time as the transfer of the collateral.

All advances made on these securities, have a priority of privilege to the claim of any unpaid vendor, or other creditor, except claims for wages of labour in the making or transporting of timber.

Rank of Priority of Liens.—Where property has been sold by order of a Court of Justice, which is subject to more than one *Lien*, they will rank, and be paid out of the proceeds, in the following order :—

1. Carriers.
2. Hotel-keepers.
3. Consignees.
4. Borrowers, in loan for use.
5. Depositaries.
6. Pledgees.
7. Workmen, upon things repaired by them.
8. Unpaid Vendors.

How Liens may be Lost.—See *ante*, p. 172.

SECTION III.

BY CIVIL SUIT.

1. *The Courts—Their Jurisdiction.*
2. *Execution of Judgments.*
3. *Attachments.* (*Saisie arret.*)
4. *Capias,* (*Imprisonment for debt, &c.*)
5. *Recovery upon and Registration of Judgments.*

The Courts—Their Jurisdiction.—There are in this Province four Courts of Civil Jurisdiction :—1. The *Commissioners Courts,*—existing in country places, whose powers are limited to claims not exceeding twenty-five dollars. 2. The *Circuit Courts,*—having Jurisdiction to two hundred dollars. 3. The *Superior Court,*—having Cognizance of all civil matters exceeding two hundred dollars. 4. The *Court of Queens Bench,*—to which appeals, in matters involving claims exceeding one hundred dollars, may be appealed from the Circuit Court, and all cases in appeal from the Superior Court. To these may be added the *Court of Review,*—composed of three Judges of the Superior Court, to which appeals in civil cases cognizable by the Queen's Bench, may be brought, before carrying them to the latter.

In matters involving five hundred pounds, sterling, and upwards, and in cases for a less amount, but wherein the future pecuniary rights of parties may be regulated, an appeal can, as a last resort, be taken from the Queen's Bench, to the Privy Council, in England.

Execution.—In the Commissioners' Court execution may issue, if the judgment be not satisfied within eight days, from its date, unless otherwise ordered by the Judgment. In any of the other Courts of this Province, execution may issue after the expiration of fifteen days. If the Defendant be a Trader, and permits any execution against his property to remain unsatisfied till within forty-eight hours of the time fixed for

sale, he thereby becomes liable to be placed in Insolvency. Eight clear days, provided two Sabbath days intervene, constitute sufficient delay between the seizure and sale of movables, under an Execution; and four months, for real estate.

Attachments.—If a person indebted in a sum exceeding forty dollars, has absconded from this Province, or has secreted, or, is about to secrete his property, with intent to defraud, the Court, upon affidavit, by the creditor, or his agent or clerk, of such absconding or secretion, with such intent, may before suit or judgment on the claim, issue a writ to attach the debtor's property, in his possession, and also that in the hands of any third parties mentioned in the writ and affidavit. If the debt be not paid by the Debtor, the property seized may, after judgment, be sold under Execution; and the other Creditors of the Defendant can then fyle their claims, by opposition, in Court, and share equally in the proceeds with the seizing creditor; subject, however, to the prior privilege of the landlord, and of certain law costs.

When a judgment obtained in any suit without seizure, has not been satisfied after the expiration of fifteen days from its date, it is competent for the Creditor to seize, without affidavit, not only the property in the hands of the Debtor, but also that in the hands of third parties, including monies due at the time of the seizure, and monies which may thereafter come due. These third parties, are, in English law, called Garnishees,—in this Province, *Tiers Saisies*.

Capias, &c.—A Creditor may obtain the arrest of his debtor under *a Capias ad respondendum*, upon an affidavit, to be made by himself, his clerk, or agent. The affidavit must set up:

1. The amount of the indebtedness, which must exceed forty dollars.

2. That the debt originated in *this Province*.

3. That the Defendant is about to abscond from "*this Province*." Anterior to the establishment of the Dominion, "this Province" also embraced the former Province of Upper

Canada. It is to be presumed the allegation of intention to abscond must still include the present Province of Ontario.

4. Or, if unable to allege the intention to abscond,—that the Defendant hath secreted, or is about to secrete his estate, debts, and effects, with intent to defraud his creditors generally.

5. That without the benefit of Capias, to arrest the body of Defendant, the Creditor will lose his debt, and sustain damage.

The grounds for belief, that the Defendant intends to abscond, and of secretion of property, must be specially declared in the affidavit.

Capias may likewise be obtained if the affidavit establishes besides the debt, that the Defendant is a Trader, that he is notoriously insolvent; that he has refused to arrange with his Creditors, or to make an assignment to them, or for their benefit; and that he still carries on his trade.

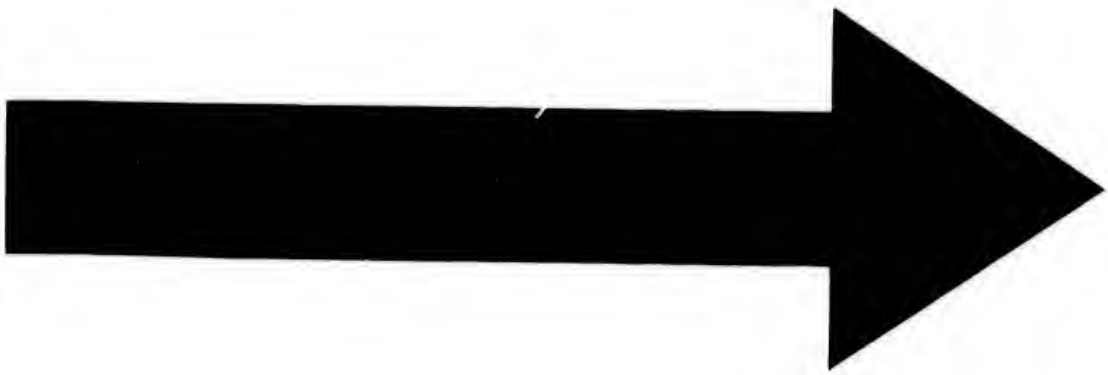
If the demand be founded on a claim for damages, the precise amount of which has not been legally established, the Capias cannot issue without an order from a Judge.

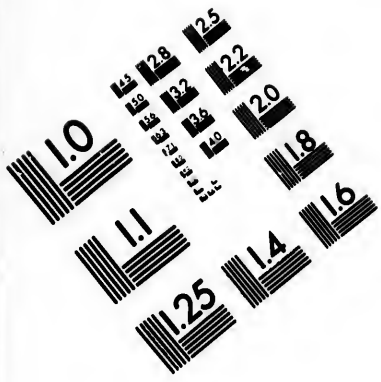
The affidavit, in such a case, must state the nature and amount of the damages sought, and the facts which gave rise to them, and the Judge may, in his discretion, grant or refuse the writ, and may fix the amount of bail.

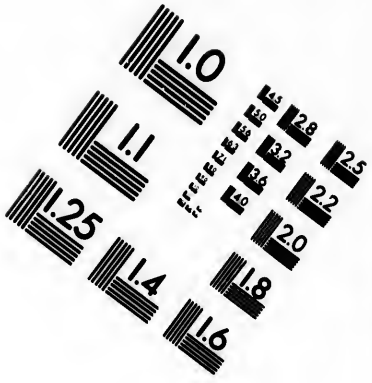
The affidavit may be made by one person only, or by several persons deposing to a portion of the necessary facts.

The Defendant, after arrest, may contest the truth of the statements of the affidavit, by a petition in a summary manner; and the legal sufficiency of the statements, by a motion to quash.

If the essential allegations are proved to be untrue, or legally insufficient, he is of course discharged from arrest; but the suit may be continued for the purpose of obtaining a condemnation of payment of the claim.







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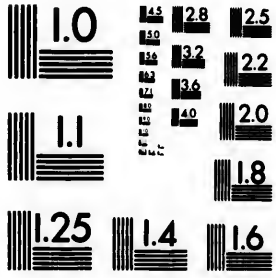

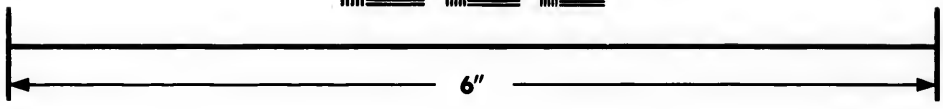

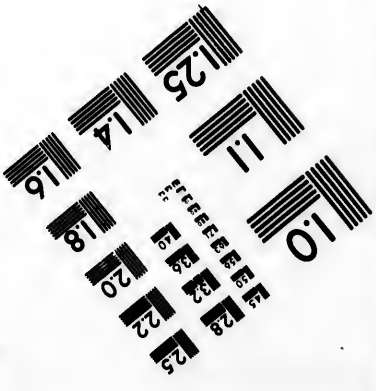

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If the arrest be maintained, the Defendant must, within thirty days from Judgment, render to the Court a statement of all his assets and liabilities, under oath; and failing to make this statement, or having made it, and the Plaintiff establishes that at any time within thirty days previous to the institution of the action, he had secreted any property, with intent to defraud, he may be condemned to imprisonment for a period not exceeding one year.

It is competent for the defendant to be released on bail, up to the time for the enforcement of the penalty.

The following persons cannot be imprisoned under a *capias ad respondendum*:—

1. Priests or Ministers of any religious denomination whatever;
2. Persons of seventy years of age and upwards;
3. Females.

The undermentioned are, however, liable to imprisonment irrespective of rank, age, or sex:

1. Tutors or curators, for whatever is due, to those whom they represented;
2. Any person indebted as a Sequestrator, Guardian, Sheriff, Coroner, Bailiff, or other Officer having charge of monies or other property under Judicial authority;
3. Any person indebted as a Judicial Surety, or for the purchase of property at a Judicial sale;
4. Any person indebted for damages by the judgment of a Court, for personal wrongs, when imprisonment has been awarded by the judgment as an alternative for payment;
5. Any person who does not pay damages arising from a fraudulent selling, as being free of incumbrance, of real estate, charged with mortgages; or, for the wilful damage of real estate by the Mortgagor; provided imprisonment has been awarded in the judgment as an alternative for payment;
6. Any person guilty of contempt of Court, or for resisting

or fraudulently avoiding the execution of any process or order.

Recovery upon and Registration of Judgments.—If the owner of a Judgment obtained in this Province, and unpaid, discovers that the Defendant has property in Great Britain, or in any of Her Majesty's Colonies, or in the United States, he may sue upon the Judgment, and recover in the place where such property exists, or the Defendant resides. The process is usually cheap and simple. The Judgment is proved by a copy, certified by the seal of the Court. Judgments may here be obtained on Foreign Judgments, in a similar manner.

If the Defendant be a non-Trader, and has real Estate in this Province, the registration of a Judgment on his real Estate, produces a mortgage. In the event of Insolvency, the mortgage thus created must be paid in preference to all subsequent mortgages, and to prior and subsequent claims not registered.

If the Defendant be a Trader, the registration of the Judgment on his real Estate will effect this privilege, provided the Defendant was solvent at the time of registration; but not otherwise.

There is no limitation of action and recovery upon a judgment till after thirty years from its date.

SECTION IV.

INSOLVENCY.

The Insolvent Act applies both to the Province of Ontario and that of Quebec. We therefore refer the reader for information as to its provisions, and decisions thereon, to *ante* Section IV, p. 190. We shall here confine ourselves to the statement, that in this Province it is limited to Traders only; and to those points wherein decisions have been rendered here, somewhat at variance to certain decisions in Ontario.

The judgment in *Thorn* v. *Torrance*, *ante* p. 193, will not now be sustained here. No lien or privilege can be created

on an Insolvent Estate by any writ of Execution, unless it has been delivered to the Sheriff at least thirty days before the execution of the Deed of Assignment. And even in this case, it will be competent for the other creditors to fyle their claims in Court, and share equally with the seizing creditor, unless he has obtained a privilege by mortgage, or otherwise than by the seizure.

The insolvency of a debtor will here make a debt become due although the term of credit may be unexpired.

It has been held in our Courts that the making a Deed of Assignment will not relieve the debtor from liability to a Capias for frauds committed anterior to the assignment.

It has been also held here, that the purchase of goods on credit, by a person whose affairs were "in a bad way" at the time of the purchase, was a sufficient ground for refusal by a Court to confirm the discharge given him by the Assignee, although the debtor might have had no intention of defrauding the Vendor. *Exparte* Tempest, XI L. C. JURIST, 57.

With regard to the legality of an assignment to an official Assignee, residing in another District or Province to that of Insolvent, a word or two need be said. According to the present decision, a voluntary assignment to be valid, must be made to an official assignee, without notice to creditors, residing in the district of the insolvent's domicile.

Judge Monk, in the Superior Court, at Montreal, has held that the assignment by an Insolvent, in one district, to an official assignee, in another district, might be made without notice to the creditors. The decision of Mr. Justice Loranger, coinciding with those of the Courts in Ontario,—(see Douglas *v.* Wright, and Brown, assignee,) has been appealed to the Court of Review in Montreal, and sustained by two of the three sitting Judges. (Judge Monk, dissenting.) It is believed the case will be submitted to the court of Appeals.

COMPENDIUM

OF THE

MERCANTILE LAWS

OF NOVA SCOTIA, NEW BRUNSWICK AND PRINCE EDWARD ISLAND.

The general principles of the Mercantile Law, having been discussed in the former pages of this work, it is now proposed to notice the alterations made in the law of Debtor and Creditor, by legislative enactments in Nova Scotia, New Brunswick and Prince Edward Island.

CHAPTER I.

ON SECURITY FOR DEBTS.

1. The security which a debtor offers his creditor, may be either (1) Real Estate, (2) Personal Property, (3) Personal Security.

2. *Security on Real Estate by Mortgage.*—S ecurity may be given on land in each of these three Provinces by Mortgage or Judgments. The nature of a mort gage security, and the general remedies to which the creditor may resort under it, are so well understood that it will only be necessary here to notice the statutory enactments regulating the sale of mortgaged lands after foreclosure in each Province.

3. In Nova Scotia, the powers of the Court of Chancery are exercised by the Supreme Court, where suits for foreclosure are brought: and in case the mortgager shall neglect to pay the amount due on the mortgage, the Court may

order the mortgaged lands to be advertised by handbills, in the county wherein the land lies, for at least thirty days, and to be thereafter sold by auction, by the Sheriff, whose deed, on being registered in the county, shall be sufficient to convey the Estate of the mortgagor in the land therein described.

4. In New Brunswick the foreclosure of mortgages is also effected in the Supreme Court; and after the decree of foreclosure and sale, and the assessing of the amount due on the mortgage, an officer appointed by the Court sells the land mortgaged, or such part thereof as the Court may decree, by auction, after three months' notice, and executes a deed to the purchaser; such conveyance, when duly registered in the Registry office of the county, is evidence that all the proceedings were rightly had.

5. In Prince Edward Island, mortgages are foreclosed in the Court of Chancery; and upon decree of foreclosure, the mortgaged premises are sold by public auction, after three months' notice. But the mortgagee may sue the mortgagor in the Supreme Court, for the amount of any mortgage not exceeding two hundred pounds; and upon the recovery of judgment, execution may issue thereon to the Sheriff, who sells the mortgaged premises in manner specified hereafter for the sale of lands taken in execution. This remedy is very seldom resorted to.

6. In each Province, the surplus arising from the sale of the mortgaged premises, after satisfaction of the mortgage debt, interest, and costs, is paid to the holders of subsequent incumbrances (if any), according to their legal priority. A system of registry of deeds exists in the three Provinces, similar in its general features; and mortgages, like other conveyances, take priority from the time of their registry.

7. *Judgment Security.*—A creditor may also obtain the security of his debtor's land by means of a judgment

recovered in the Supreme Court, upon a warrant of Attorney to confess judgment, or by a suit. In Nova Scotia, judgments bind the lands of the debtor from the time they are registered in the county wherein the land lies. Execution may be issued at any time within five years from the signing of the judgment; but no land shall be levied on until one year after such registry. The Sheriff, upon receiving an execution, shall, at the expiration of one year, levy on the land, without appraisement, sell it by auction after thirty days' notice, and deliver a deed thereof to the purchaser. When a judgment has been registered for one year, and no levy has been made on the land bound thereby, a creditor whose judgment has been subsequently registered, may, by a written notice, require the prior judgment creditor to levy on the land within three months, and if he refuses, the party giving the notice shall acquire a preference.

8. In New Brunswick, a memorial of a judgment registered in the office of the Registrar of Deeds in the county wherein the land lies, or an execution delivered to the Sheriff to be executed, shall bind the defendant's land. The judgment binds the land only for five years from the date of the registry of a memorial thereof, and so on as often as required. The Sheriff, after he has exhausted the defendant's personal property, may sell his lands on execution after six months' notice, and deliver a deed to the purchaser.

9. By the Statute law of Prince Edward Island, a judgment recovered in the Supreme Court is, immediately after it is entered up, a lien upon the defendant's land until it is satisfied, without the registry of any memorial of it. By the registry of a memorial, however, it takes priority of all unregistered conveyances previously executed by the defendant. If entered upon a warrant of Attorney, it may bind the leasehold lands of the defendant, provided it is expressed in the warrant that such is the defendant's intention.

The Sheriff must advertise freehold estates for two years, and leasehold for one year previously to sale, except in the case of judgments recovered upon a warrant of Attorney, when he may sell after six months' notice, if a consent to that effect be inserted in the defeasance of the warrant. Nearly all the warrants of Attorney used in the Island since 1861, express that the judgment to be recovered thereon shall bind the defendants' leasehold estates, and that only six months' notice of sale shall be necessary for the sale of the defendant's leasehold and freehold, under the execution.

10. *Security on Personal Property.*—The creditor may obtain the security of his debtor's personal property or chattels (1) by sale thereof by the latter to the former, or (2) by a lien thereon, or (3) by a mortgage or bill of sale, or (4) by levy under execution. The general principles of the law of contracts of sale and liens have been already discussed at sufficient length in the preceding pages. The subject of levies under executions comes under the title of legal remedies. It will, therefore, only be necessary here to refer to the various enactments in regard to bills of sales. In Nova Scotia a bill of sale only takes effect as against the assignees of the grantor under the Insolvent Debtors Act, or for the general benefit of his creditors, or against officers seizing under legal process from the time the same, or a true copy thereof, is filed with the Registrar of Deeds of the county where the maker resides. The defeasance or conditions and schedules annexed to, or forming part of the bill of sale, must be filed as well. By an Act of the General Assembly of Prince Edward Island, bills of sale may be registered with the Prothonotaries of the Supreme Court of each county, according to the county in which the grantor resides; and if the grantor is a non-resident of the Island, or has no fixed place of residence, then with the Prothonotary at Charlottetown. An unregistered bill of sale is valid, as be-

tween the parties thereto, but is void against a registered one from the same grantor, and also as against Sheriffs' Officers and others seizing the property comprised in it under legal process.

There is no provision made in New Brunswick for the registration of bills of sale.

11. *Personal Security.*—The personal undertaking or guarantee of a third person for a debtor, is governed by the fourth section of the Statute of Frauds, which is either adopted or re-enacted in all the Lower Provinces, and by which it is declared that "No action shall be brought whereby to charge an executor or administrator upon any special promise to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for the default or debt of another person; or, upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which the action is brought, or a memorandum, be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The agreement or special promise required by this section must contain (1) a *promise* to pay, &c.; and (2) in Prince Edward Island, must set out in it a valid consideration upon which that promise is founded. A guarantee in Nova Scotia and New Brunswick is good if in writing, although the consideration does not appear in the writing. The law in these Provinces is the same as that laid down in Page 165. The remedy on these guarantees may, in all the Lower Provinces, be barred by lapse of time, under the provisions of the Statutes of Limitations, by which it is enacted that no action shall be brought on these and similar contracts not under seal, but within six years, unless there be a part payment, or an acknowledgment to pay, within the six years. This acknowledgment, in New Brunswick and Nova Scotia, must be in

writing; in Prince Edward Island it may be verbal. "If the "person chargeable is a minor, married woman, insane, or "(in New Brunswick and Prince Edward Island) out of the "Province, at the time the cause of action accrued, the action "may be brought within the like period after the removal of "the disability. In New Brunswick the provisions of the "Statute of Limitations are extended to dealings between "merchant and merchant." These and all other contracts may be invalidated by the usury laws by which contracts in all the Lower Provinces, whereby a greater rate of interest than six per cent. is reserved, are declared to be null and void. In Prince Edward Island, however, all bills of exchange and promissory notes made payable within three years from the date thereof, and all contracts for the loan of money above ten pounds currency, are exempted from the operation of the usury laws. But this exemption does not extend to loans on the security of land. On contracts relieved from the penalties against usury, no greater rate of interest than six per cent. is recoverable, unless it shall appear that a different rate was agreed on between the parties.

CHAPTER II.

LEGAL REMEDIES.

To assert his legal rights against an unwilling or dishonest debtor, a creditor must of necessity have recourse to a court of justice. In this chapter, the constitution, jurisdiction, and mode of procedure of the principal courts of Nova Scotia, New Brunswick, Prince Edward Island will be reviewed.

PART I:—NOVA SCOTIA.

1. *Jurisdiction of Justices of the Peace in Civil Cases.*—In actions of debt, where the whole dealings do not exceed twenty dollars, one J. P., and when they exceed twenty dollars, two J. P.'s of the County wherein the defendant resides, or the debt was contracted, have jurisdiction. When the cause of action is between twenty and eighty dollars, either party may have trial by a Jury of three persons. Particulars of the cause of action are to be filed with the Justice, who thereupon issues a summons—a copy of which is to be served upon Defendant five days, when the amount is under forty dollars, and when forty dollars, ten days before the return thereof. The Plaintiff may arrest the Defendant in the first instance, if the debt exceeds four dollars upon affidavit that he really believes the Defendant is about to leave the country, and that the debt will be lost unless the Defendant is capiased. After judgment, execution may issue against the Defendant's goods, and for want thereof he may be committed to jail. A party dissatisfied with the judgment of the Jus-

tice's Court, may within ten days after judgment, appeal to the Supreme Court at the next sitting thereof in the county in which trial was heard, upon entering into a bond with sufficient security in double the amount of the debt to prosecute the appeal or render the appellant, and pay the appeal costs.

2. *The Supreme Court.*—The Supreme Court of Nova Scotia has the same powers that are exercised by the Courts of Queen's Bench, Common Pleas, Chancery and Exchequer in England. Its terms and sittings for the various counties are as follows :—

HALIFAX.

Two terms and two sittings of the Court are held at Halifax each year as follows :—

First Term.—To commence on the third Tuesday of July, and to continue for three weeks if required.

Second Term.—To commence on the first Tuesday in December, and to continue for four weeks if required.

First Sitting.—To commence on the fourth Tuesday of April, and to continue for three weeks.

Second Sitting.—To commence on the fourth Tuesday of October and to continue four weeks.

LUNENBURGH.

First Sitting.—At Lunenburgh, last Tuesday of April.

Second Sitting.—Second Thursday after first Tuesday of October.

QUEEN'S.

First Sitting.—At Liverpool, first Tuesday of May.

Second Sitting.—At Liverpool, first Tuesday of October.

SHELBURNE.

First Sitting.—At Barrington, second Tuesday of May.

Second Sitting.—At Shelburne, last Tuesday of September.

YARMOUTH.

First Sitting.—At Tusket, third Tuesday of May.

Second Sitting.—At Yarmouth, on Tuesday before the last Tuesday of September.

KING'S.

First Sitting.—At Kentville, first Tuesday of June.

Second Sitting.—At Kentville, second Tuesday of October.

DIGBY.

First Sitting.—At Digby, second Tuesday of June.

Second Sitting.—At Clare, last Tuesday of September.

ANNAPOLIS.

First Sitting.—At Annapolis, third Tuesday of June.

Second Sitting.—At Annapolis, first Tuesday of October.

HANTS.

First Sitting.—At Windsor, first Tuesday of June.

Second Sitting.—At Windsor, last Tuesday of September.

COLCHESTER.

First Sitting.—At Truro, second Tuesday of June.

Second Sitting.—At Truro, first Tuesday of October.

CUMBERLAND.

First Sitting.—At Amherst, third Tuesday of June.

Second Sitting.—At Amherst, second Tuesday after October.

CAPE BRETON.

First Sitting.—At Sydney, on first Tuesday of June.

Second Sitting.—At Sydney, on second Thursday after second Tuesday of October.

VICTORIA.

First Sitting.—At Baddeck, second Tuesday of June.

Second Sitting.—At Baddeck, first Thursday after fourth of October.

INVERNESS.

First Sitting.—At Port Hood, third Tuesday of June.

Second Sitting.—At Port Hood, third Tuesday of October.

RICHMOND.

First Sitting.—At Arichat, first Thursday after fourth Tuesday of June.

Second Sitting.—At Arichat, second Tuesday of October.

GUYSBOROUGH.

First Sitting.—At Guysborough, last Tuesday of May.

Second Sitting.—At Guysborough, first Tuesday of October.

ANTIGONISH.

First Sitting.—At Antigonish, first Tuesday of June.

Second Sitting.—At Antigonish, second Tuesday of October.

PICTOU.

First Sitting.—At Pictou, Thursday after the second Tuesday of June.

Second Sitting.—At Pictou, Thursday after third Tuesday of October.

3. Actions in the Supreme Court are commenced by the service of a Writ of Summons, containing the declaration or statement of the ground of action, and returnable within ten days after the service thereof if the Defendant resides in the County in which the action is brought; within twenty days, if the Defendant resides in any other County except the Island of Cape Breton; and within thirty days if the Defendant resides in Cape Breton and the action is not brought therein. Judgment may be entered against the Defendant if he shall not appear and plead within four days after the expiration of such ten, twenty, or thirty days. If a Plaintiff, at or after the commencement of a suit, show by affidavit,

to the satisfaction of a Judge or Commissioner, that the cause of action amounts to twenty dollars or upwards, that he has cause for believing the Defendant is about to leave the Province, and that he believes such debt will be lost unless the Defendant is arrested, the Judge or Commissioner may order that the Defendant be held to bail.

4. The notice of trial may be endorsed on the Writ of Summons, and shall be sufficient if served the same number of days required for the Defendant's appearance in the suit before the term or sittings mentioned in such notice. No action for the recovery of any debt shall be commenced in the Supreme Court, when the amount is less than twenty dollars; and all actions for sums under eighty dollars shall be brought in a summary manner, and the presiding Judge may determine the same or order a trial by Jury.

5. What is known as the "General Issue"—or a general denial by the Defendant of the Plaintiff's cause of action—is abolished, and every plea must specify, particularly and concisely, the facts intended to be set up as a defence. The Court or Judge has power in all cases to set aside false and frivolous pleas. This prevents, in a great measure, the unjust delay which is caused in some of the other Provinces by the Defendants being allowed to plead a false plea merely to gain time.

6. British subjects and aliens residing out of the Province may also be served with a Writ of Summons in respect (1) of causes of action which arose within the Province; or (2) in respect of a breach of contract made within the Province in whole or in part, or intended to be exacted in whole or in part within the Province; or (3), in respect of a contract between parties, one of whom at the time of the making thereof resided within the Province; and the Plaintiff may proceed to trial and judgment thereupon subject to such conditions as to the Court or a Judge may seem fit.

7. *Absent or Absconding Debtors.*—Suits for twenty dollars and upwards may be prosecuted against absent or absconding debtors. Upon affidavit of the cause of action and the Defendant's absence from the Province, a summons issues out of the Supreme Court stating the abscondency and containing the cause of action, a copy of which must be served at the Defendant's last place of abode. At and after the commencement of the suit in this manner the Plaintiff issues an attachment against the Defendant's property, and, if necessary, a summons to his agent to disclose what effects of the absent debtors he has in hand. When the goods attached are of a perishable nature, a Judge or the Prothonotary of the County orders them to be sold by auction and the proceeds are held to respond to the judgment.

8. The agent of the absent debtor must appear and file the declaration with the Prothonotary of the County wherein he resides within fifteen days after service of the summons, and also appear for personal examination if notified to do so. The absent debtor may appear at any time before judgment, and he or his agent may relieve the property attached by putting in special bail. If appearance be not entered within six months, the Plaintiff's damages may be assessed by the Court, or a judge at Chambers. But the suit cannot proceed unless some property has been attached, or the agent shall have admitted having control of goods or credits of the absent debtor. The Defendant is entitled to a rehearing at any time within three years, and the Plaintiff cannot issue execution until he shall have given security for the repayment of the monies levied thereunder in case the judgment should be reversed on a rehearing.

PART II:—PRINCE EDWARD ISLAND.

9. *Small Debt Courts.*—By law, each of the three counties of Prince Edward Island is mapped into about seven or eight districts, by the Lieutenant-Governor in council, who appoints

three Judges or Commissioners for each of these districts. These Small Debt Commissioners are unprofessional men, generally selected on account of their activity in supporting the political party in power. They hold monthly courts within their respective districts, at a time and place designated by the Lieutenant-Governor in council, and have jurisdiction in matters of debt and trover for the recovery of sums not exceeding twenty pounds, exclusive of interest. The action commences by summons, which must be served on the Defendant eight days before the day of trial. Upon the Plaintiff's making affidavit that the Defendant is indebted to him, and is about to leave the Island without paying the debt, a small debt commissioner, or the clerk of a small debt commissioner's court, or a Justice of the Peace, may issue a *capias* for his arrest. Any party dissatisfied with the judgment of a small debt court, may, within six days after the judgment, appeal to the supreme court at the next sitting thereof for the county in which the trial appealed from was had, upon executing a bond, with two sureties, to pay the judgment and costs of appeal, if against him, or render himself to the sheriff of the county. The Appellant must serve a notice of appeal on his opponent, ten days before the term of the Supreme Court at which the appeal is to be heard. If that space of time does not remain between the entering of the appeal, and the first day of the subsequent sitting of the Supreme Court, the hearing of the appeal must stand over until the next term for the same county. The judgments of these small debt courts do not in any case operate as a lien on land, neither can land be levied on or sold under a small debt execution.

10. *The Supreme Court.*—The Supreme Court of Prince Edward Island has the same powers that are exercised by the Queen's Bench and Common Pleas in England, and has jurisdiction in all matters of debt when the amount claimed

is ten pounds and upwards. The terms of the court for the Island are as follows:—

QUEEN'S COUNTY.

1. Hilary Term commences on the second Tuesday in January.
2. Easter " " " first " May.
3. Trinity " " " last " June.
4. Michaelmas Term " " October.

No jurors are summoned for Easter and Michaelmas Terms. The business of these Terms is confined to the hearing of appeals, summary suits, and arguments.

PRINCE COUNTY.

1. June Term commences on the second Tuesday in June.
2. October Term " " first " October.

Grand and Petit Jurors of the county are summoned for both these Terms.

KING'S COUNTY.

1. February Term commences on the last Tuesday in February.
2. July " " " third " July.

The Grand and Petit Jurors of the county attend at both these Terms.

11. The Supreme Court has concurrent jurisdiction with the small debt court in all actions of debt and trover, in which the sum or damages claimed amount to ten pounds and do not exceed twenty pounds. In these cases, suits in the supreme court are tried in a summary manner by the presiding Judge; but either party has the right of having the cause tried by a jury. The summary process contains the declaration or statement of the ground of action, and must be served upon the Defendant fourteen clear days, exclusive of Sundays, before the first day of the term at which the case is to be tried. All other suits (except Replevin and Ejectment) are commenced by a writ or process directed to the Sheriff of the county in which the Defendant resides, a copy of which (if not bailable) with a notice to the Defendant of the nature and intent thereof, is served upon the Defendant. The Plaintiff may also commence his suit by a bailable writ or *capias*, which is issued, as a matter of course, upon an affidavit of debt, in the following or similar form:—

"Prince Edward Island,

"Queen's County, s. s.,

"In the Supreme Court.

"John Smith, of Charlottetown, in the county and Island aforesaid, merchant, maketh oath and saith that James Brown is justly and truly indebted unto this deponent in fifty pounds for goods sold and delivered by this deponent to the said James Brown, at his request (*as the case may be*).

"Sworn at Charlottetown, in the said county, the 12th November, 1866, before me. } "JOHN SMITH.

"WILLIAM MILLER,

"Commissioner for taking affidavits in the Supreme Court for Queen's county." }

12. A Plaintiff residing out of the Island, may also commence suit by a bailable writ against a Defendant residing within it, by making a similar affidavit before a Judge of the supreme court of the Province in which he resides, and having the Judge's signature to the jurat authenticated by a Notarial certificate. Upon production of such affidavit and certificate, a Judge of the supreme court of the Island will grant a *fiat* for the Defendant's arrest. Actions in the Supreme court may also be prosecuted against persons residing out of the Island, as in Nova Scotia.

13. All writs issuing out of the Supreme Court, except summary writs, may be returnable upon any day except Sunday. Upon the return of the writ or process, the Plaintiff may either file his declaration *de bene esse* in the Prothonotary's office at Charlottetown, with a notice endorsed thereon, that the Defendant is to appear and plead in twenty days, otherwise judgment will be entered against him by default. In case the Defendant does not appear accordingly, the Plaintiff may mark judgment by default; or, the Plaintiff may file his declaration at the return of the writ, deliver a

copy thereof at the Prothonotary's office, and serve a notice upon the Defendant to appear and plead within four days after service of the notice. If the Defendant neglects to appear pursuant to this notice, the Plaintiff may mark judgment by default. In all actions wherein *damages* are claimed, the judgment obtained by default is only interlocatory, and a sheriff's jury must afterwards assess the *amount* of the damages to which the Plaintiff is entitled. In actions of "*debt*," the judgment so obtained is final, and the Plaintiff may forthwith issue execution thereon.

14. If the Defendant appears at the return of the writ, by the practice of the court, the Plaintiff must file his declaration one month before the first day of the term at which the trial is to be had. The Defendant's attorney has four days to plead, after being served with a copy of the declaration. After plea, and the cause is at issue, the Plaintiff must serve notice of trial upon the defendant or his attorney fifteen days, at least, previous to the term of the court at which the case is to be tried. If no special application is made by the defendant to put off the trial—as for the absence of a material witness—the plaintiff may docket the cause and proceed to trial at the term of the court for which he has so given notice. If the plaintiff resides out of the Island, the defendant may insist on having a bond for security for costs entered into and filed with the Prothonotary; and causes are often put over for a term by reason of the delay that the Plaintiff is put to in procuring such security.

15. *Absent or absconding Debtors.*—The Courts for the recovery of small debts, already described, may, upon affidavit of the defendant's indebtedness, issue attachments, and also a summons for the agent of the absent debtor in cases where the debt does not exceed twenty pounds. The court, upon proof of the debt, may give judgment, and upon the Plaintiff's giving security to account for the monies levied in

case it is afterwards reversed, he may, at the expiration of three months after judgment, issue execution against the attached property. The absent debtor, however, is entitled to a rehearing of the cause at any time within twelve months after judgment.

16. Attachments issued out of the supreme court for ten pounds and upwards, upon an affidavit of debt similar to that on page 289, except that the Defendant ("James Brown") must be described as "an absent or absconding debtor," by virtue of which the sheriff to whom it is directed attaches the land and goods of the absent debtor, to answer the judgment to be recovered in the suit. If the goods attached are of a perishable nature and under one hundred pounds in value, one judge—and if over that sum, two judges—may order them to be sold, and the money held to abide the event of the suit. The Plaintiff may file a declaration against the absent debtor, and serve his agent, fourteen days before the sitting of the court, with a summons annexed to a copy of the declaration. If the absent debtor has been an inhabitant of the Island, a copy of the summons, and an attested copy of the declaration, must be served at his last place of abode. Upon the return of the summons, the agent is required to file a statement of the monies or effects in his hands; and may also be personally examined on oath, touching the property or monies of the absent debtor in his possession; and if it appears that he has any such property or monies under his control, the court orders it to be secured in his hands to answer the judgment. An imparlance or postponement of the case is then granted for two terms successively, to enable the agent to notify his principal, after which the cause comes in for trial. The absent debtor is entitled to a rehearing at any time within three years, and the plaintiff, before issuing execution, must give security for the repayment of the monies to be levied under it in case the judgment is reversed on such rehearing.

PART III.—PROVINCE OF NEW BRUNSWICK.

17. *Justices of the Peace Court.*—By the Revised Statutes of New Brunswick, every Justice of the Peace has jurisdiction in actions of debt, where the sum demanded does not exceed £5. A summons is directed to the Defendant to appear before the Justice at a time not less than six, and not more than thirty days, from the time of issuing it. The Defendant's set off, if any, must be filed with the Justice two days before the trial. If either party is dissatisfied with the judgment, he may, within six days, apply for a copy of the proceedings and submit the same to a Judge of the County Courts, who, having appointed a day for the *reviewing* of the matter, shall affirm, reverse, or alter the judgment as he thinks right.

18. The City Court of St. John has jurisdiction in all actions of debt where the sum demanded does not exceed $30.

19. *County Courts.*—By an Act of the New Brunswick Legislature, passed in 1867, the Court of Common Pleas was abolished and COUNTY COURTS were established throughout the Province, having jurisdiction in all personal actions of debt, covenant, and assumpsit, wherein the damages claimed do not exceed $200. They have no jurisdiction, however, in any action relating to title to land, the validity of a will, criminal conversation, seduction, breach of promise of marriage, or in action against a Justice of the Peace for anything done by him officially. Five judges, being barristers of not less than seven years' standing, are appointed each to preside over a specific district, and are required to hold sittings of their respective courts at or near the Court House, as follows:—

1. *Charlotte.*—Second Tuesdays in January and June, fourth Tuesday of March, and first Tuesday of October.

2. *Carleton.*—Second Tuesdays in March and December, and first Tuesday in July.

3. *Victoria.*—First Tuesday in March and December, and second Tuesday in July.

4. *York.*—First Tuesdays in January, March, June and October.

5. *Sunbury.*—Wednesdays after second Tuesday in January, June and October.

6. *Queen's.*—Wednesdays after fourth Tuesday in January and June, and on the third Tuesday in October.

7. *King's.*—First Tuesdays in April, July, October and January.

8. *St. John.*—Fourth Tuesdays in April, July, October and January.

9. *Albert.*—Fourth Tuesday in June, and second Tuesdays in March and November.

10. *Westmoreland.*—Third Tuesday in June, second Tuesday in December, and on first Tuesday in March.

11. *Kent.*—Third Tuesday in January, last Tuesday in April, and first Tuesdays in July and November.

12. *Northumberland.*—Fourth Tuesday in January, second Tuesday in April, fourth Tuesday in July, and third Tuesday in October.

13. *Gloucester.*—Third Tuesdays in January and July, and first Tuesday in April.

14. *Restigouche.*—Second Tuesday in January, March and July.

Each of the above sittings are to continue till all the business is finished.

20. The writ of summons contains the declaration and commands the Defendant to appear in thirty days after the service of a copy thereof. If the Plaintiff makes affidavit of debt and endorses the amount sworn to on the writ, the Defendant is arrested and held to bail. If the Defendant does not appear and plead within the time specified in the writ, judgment by default may be entered in the cause, and twenty days there-

after the Judge may assess the damages and the clerk sign final judgment. Causes which are regularly contested are decided by a Jury of *five*, and in case they cannot agree after two hours, four may render a verdict. The parties may, however, agree to have the cause decided by the Judge alone. A party dissatisfied with the decision of the Judge, or with his charge to the jury, may appeal the cause to the Supreme Court. If the Plaintiff do not recover a larger sum than he would have recovered in a Justice's of the Peace Court, he shall not get costs; unless there was a reasonable ground for bringing the action in the County Court, or the sum claimed was reduced by set-off.

21. By the Act establishing these County Courts, provision is made for the decision of matters within their jurisdiction by Judges of competency and respectability, at comparatively trifling costs to suitors. The establishment of similar Courts throughout the other Provinces would be a vast improvement on many of the inferior tribunals now existing—tribunals, the *cheapness* of whose proceedure in individual cases is more than counterbalanced by the aggregate costs of the numerous suits and paltry litigation which they invariably foster.

22. *The Supreme Court.*—There are *four* Terms of the Supreme Court held at Fredericton each year, commencing on the first Tuesday in February, and second Tuesdays in April, June, and October, and continuing until the second Saturday next after the first day of Term. No causes are tried at these terms, but all writs are made returnable at Fredericton on certain days in Term on the Saturday following the last day of Term. For the trial of causes there are Attorneys of the Supreme Court for the County of York and Circuit Courts for every County in the Province as follows:—

1. *York.*—Second Tuesday in January and fourth Tuesday in June.

2. *St. John.*—Second Tuesday in May and third Tuesday in November, second Tuesday in August and second Tuesday in January.

3. *Charlotte.*—First Tuesday in August.

4. *King's.*—Second Tuesday in July.

5. *Queen's.*—First Tuesday in March.

6. *Albert.*—Second Tuesday in July.

7. *Westmoreland.*—Third Tuesday in July and second Tuesday in January.

8. *Kent.*—Fourth Tuesday in September and second Tuesday in March.

9. *Gloucester.*—First Tuesday in September.

10. *Northumberland.*—Second Tuesday in September.

11. *Carleton.*—Last Tuesday in September.

12. *Sunbury.*—Fourth Tuesday in January.

13. *Restigouche.*—Last Tuesday in August.

14. *Victoria.*—Wednesday before the last Tuesday in September.

Each of these Courts continues as long as may be necessary for the despatch of business.

23. All Acts relating to the Summary Practice of the Supreme Court are abolished after the 17th January, 1867; and if any action be brought in the Supreme Court that could be tried in a County Court the Plaintiff shall not be allowed any costs, unless the presiding Judge certify that there was good reasen for bringing the cause in the Supreme Court.

24. Action in the Supreme Court may be commenced by a bailable or non-bailable writ, and the Defendant has thirty days after the return of the writ to enter appearance or file common bail, as the case may require. If the Defendant do not appear within this period, the Plaintiff may file "common bail" or appearance for him, and file his declaration and notice to plead in twenty days; and if no defence is put within

this period, the Plaintiff may mark judgment by default. When judgment is thus obtained by default, the Court in Term, or a Judge in vacation, may assess the Plaintiff's damages—without the intervention of a Jury—in all actions for the recovery of a sum of money. When the Defendant appears according to the terms of the writ, he has twenty days to plead after appearance; and after the cause is at issue, the Plaintiff must serve fourteen days' notice of trial, previous to the sitting of the Court at which the cause is to be tried.

25. The Defendant may, by notice in writing, offer that judgment be rendered against him for a specified sum, and the Plaintiff shall have ten days to accept or refuse the offer. If thereafter the Plaintiff do not recover for a larger sum, the Defendant shall have judgment against him for the costs incurred after such offer. This offer to confess, if not accepted, shall not subsequently be evidence against the Defendant.

26. *Absent or absconding Debtors.*—The proceedings in Absent Debtor cases in New Brunswick differ from those in Nova Scotia and Prince Edward Island. By chapter 125 of the Revised Statutes, it is provided that if any person indebted in £10 and upwards, depart from, or keep concealed within the Province with intent to defraud his creditors, any creditor may make affidavit thereof—the departure or concealment to be verified by the affidavit of two witnesses, to the satisfaction of a Judge of the Supreme Court, or two Commissioners (who are appointed in each County for this purpose): thereupon the Judge or Commissioners issue a warrant, by virtue of which the Sheriff attaches all the real and personal estate, books of accounts, &c., of the absent debtor. The Judge who issued the warrant shall immediately publish a notice thereof in the Royal Gazette, stating that unless the absent Debtor return within three months his estate will be sold for the payment of his debts. The publication of this

notice secures the debts and property of the absent debtor in whose hands soever they may be, to the Trustees of the estate. If the absent debtor do not return within three months, the judge appoints three or more trustees for all the creditors. These trustees give public notice of the appointment in the *Royal Gazette*, and from the time of this notice all the estate of the absent debtor rests in them, and they may sue for and recover the same in their own names, and after fourteen days notice, they may sell all such estate by public auction, and execute all necessary conveyances. These trustees convert all the estate into money, and within eighteen months from their appointment by a three months notice in the *Royal Gazette* call a general meeting of the creditors to examine and pass accounts. After a deduction of all charges and commissions, they distribute the residue among the creditors proportionately, without preference, including debts not due on a rebate of interest. If the estate is not then settled they declare a yearly dividend thereafter, until the whole is closed. Creditors residing out of the Province are as fully entitled to benefit of this law as those residing within it. The accounts of the estate are to be verified by the oaths of the trustees, and filed with the Clerk of the Court for the information of all concerned.

27. *Judgments and Executions.*—The effect of a judgment recovered in the Supreme Court of either of the Lower Provinces, by suit or by voluntary confession, as a lien on land, has been already described in treating of "Security for Debts." A judgment is not a lien on the Defendant's goods. To reach them the Plaintiff must issue an execution and lodge it in the hands of the Sheriff. From the moment the execution is delivered to the Sheriff, the Defendant's goods are bound by it. But in New Brunswick no execution or attachment, before actual seizure, shall prejudice the title of a *bona fide* purchase of goods, provided he had no notice of such execution or attachment.

28. In Prince Edward's Island, executions, if issued in vacation, are *tested*, or bear official date on the day of the last sitting of the Court in the previous Term; an execution at the suit of the Crown, binds the defendant's goods from the day of its *teste*, and hence may take precedence of an execution at the suit of the subject, though the latter may have been first received by the Sheriff.

29. Gold and silver coins, debentures and bank notes may be taken in execution. The Plaintiff may, instead of levying on the Defendant's land or goods, issue an execution for the arrest of his person, and imprison him until he pay the debt and costs, or be discharged under the Insolvent Laws.

CHAPTER III.

INSOLVENCY.

1. No Bankrupt Law exists in any of the Lower Provinces, but there are Insolvent Laws in each of them, very similar in their general features, though somewhat different in their details. In New Brunswick and Prince Edward Island, an Insolvent Debtor, on being arrested, may apply to a Judge of the Supreme Court, or other officials appointed for the purpose; and after *seven* days' notice in the former, and fourteen day's notice in the latter Province, to the opposite party, and proof that he is Insolvent and has not made any fraudulent conveyances or assignments, he will be entitled to receive a weekly allowance of five shillings from the detaining creditor, and in default of payment thereof will be entitled to his discharge. In New Brunswick and Prince Edward Island, the Insolvent is entitled to retain wearing apparel, kitchen utensils, &c., to the amount of £15; and in Nova Scotia, to the value of $40.00. In New Brunswick, at the expiration of six months from the granting of the Insolvent Order, and in Prince Edward Island at the end of three months, the debtor who has been paid the allowance is entitled to his discharge, but in the particular suit only in which an order has been made. An Insolvent who has been discharged in one suit is still obliged to go through the same ordeal in all other suits, no matter how numerous they may be. If the debtor is possessed of any property, he must tender the whole of it to the detaining creditor, towards

satisfaction of his debt; and in case of his refusal to accept, he may sell, and pay the proceeds to his other creditors.

2. In Nova Scotia, the Judge may order the immediate discharge of the debtor, upon his making an assignment to the detaining creditor, and signing a confession of judgment, if so ordered. But if on examination, the debt appears to have been fraudulently contracted, or any fraudulent circumstances have occurred in respect to it, the Judge may remand the debtor to close imprisonment, for such time, not exceeding one year, as he may deem proper, and tax the fees of the creditor's witnesses, and if the taxed costs be not paid, the debtor is imprisoned for such further period as the Judge shall deem right.

3. A discharge under the Insolvent Law exonerates a debtor from any further arrest in respect of the same debt, but any property he may at any time afterwards own may be levied upon in satisfaction of the judgment obtained on the debt, in respect of which he may have been previously so discharged.

4. Such a system of Insolvency evidently works injustice both to debtor and creditor. The pressing creditor, by forcing his embarrassed debtor in insolvency, gets the benefit of all his property to the exclusion of those who are more lenient, and do not wish to oppress a man in difficult circumstances. It is true, debtors may execute voluntary assignments, but these, in nine cases out of ten, are necessarily unsatisfactory and unjust to creditors. A man in failing circumstances generally has recourse to friends for assistance, and struggles with the difficulties of his affairs as long as possible. The result is that when he is evidently obliged to suspend, personal friends are involved as sureties, or some vigilant creditor has security on his debts or stock, and an assignment made in such a state of affairs, almost invariably contains clauses for the preferential discharge of pre-existing

securities, and the payment of "debts of honor." These preferential claims, though introduced inevitably, and from necessity, excite the distrust of those prejudiced by them, and reduce the dividend of the general creditors to a rate altogether disproportional to the expectations they formed of the responsibility of their debtor and the value of his estate. The consequence is that the creditors are either dissatisfied with, or altogether repudiate the assignment, the debtor loses the control of his business, and finds himself in an impoverished plight from which he has seldom the power to rescue himself by industry, and from which the law affords him no means of escape. When a man, through misfortune or accident, becomes involved, and unable to pay his debts, he should not be for ever after at the mercy of his creditors. As the law now stands, an insolvent has little hope and no encouragement to retrieve his fortune. No sooner does he acquire a little property than some eager creditors pounce down upon him for an old debt. Hundreds of honest and industrious men, in all the Provinces, languish in poverty under the burden of old debts which they cannot pay off, and from which the law will not relieve them. They become disheartened in business, and too often sink into indolence or intemperance, and spend a life, which might otherwise be useful, without benefitting themselves, their families, or their creditors. A Bankrupt Law for each Province would hitherto have been but a very partial and imperfect remedy for this evil, on account of the limited area within which it would afford protection; but now that the Parliament of the Dominion can legislate for nearly al British North America, the fate of many an unfortunate debtor within its limits, urgently demands the speedy passing of a general and well-matured Insolvent or Bankrupt Law.

CHAPTER IV.

BILLS OF EXCHANGE AND CURRENCY.

1. The general principles of law relating to Bills of Exchange, as already laid down in the former pages of this work, is applicable to the Lower Provinces. It will only be necessary here to notice the statutory provisions concerning Protested Bills. In all the Lower Provinces, Protested Bills and overdue notes bear Interest although they may not be drawn with interest. Protested Bills, if drawn upon a person residing in any part of North America, out of the Provinces in which they are made, are subject to five per cent. damages; and if drawn upon a person in any other country, ten per cent. damages over and above interest. Acceptances of all foreign and inland Bills in Nova Scotia, and of inland Bills in New Brunswick, must be in writing on the Bill. As already stated all Bills and Notes in Prince Edward Island, payable within three years, are exempted from the operation of the usury laws.

2. *Currency and Legal Tender of Nova Scotia.*—In Nova Scotia, judgments are to be entered and public accounts kept in dollars and cents. The following coins are a legal tender, and their value in the currency of the Province is thus regulated by Statute :—

	N. S. Currency.
British Gold Sovereign.....	$5 00
Doubloon.....	16 00
Peruvian, Mexican, Columbian and old Spanish dollar being of the weight of 416 grains.....	1 04

The British silver crown	1 25
" half crown	0 62½
" florin	0 50
" shilling	0 25
" six pence	0 12½
" four pence	0 08

3. In Nova Scotia all bank notes are payable in specie and cannot be issued for a less sum than $20. There are Provincial or Treasury notes in circulation for as low as twenty shillings currency, which are receivable at the public departments at $4.00 each. No person is compelled to receive at one time a greater amount than $10 in silver or twenty five cents in copper money.

4.—*Currency of Prince Edward Island.*—In Prince Edward Island accounts are still kept in pounds shillings and pence. The following coins are legal tender and their value is declared as follows by an Act of Assembly.

P. E. Island Currency.

	£	s.	d.
British Gold Sovereign	1	10	0
Doubloon (of not less than 415 grs. weight)	4	16	0
American Eagle (weighing 258 grains)	3	0	0
And their subdivisions proportionally.			
British silver crown piece	0	7	6
" half crown	0	3	9
" shilling	0	1	6
and their aliquot parts at the same rate proportionally.			
U. S., Peruvian, Mexican, Chilian, and Spanish milled silver and Central American dollar, weighing 412 grains each	0	6	3
The subdivisions or aliquot parts of these are declared of the following value:			
The ½ dollar	0	3	0
¼ dollar	0	1	6
⅛ part of a dollar	0	0	9
The French 5 franc piece is	0	5	6
and its aliquot parts proportionally.			

5. Bank notes in P. E. Island are redeemable in specie, and are as various in form and value as the Banks choose to issue them. The "Bank of P. E. Island" issues notes of 5 shillings, 10s., £1, £2 and £5 currency: The "Union Bank" issues notes of $1, $2, $5 and $20; and the "Summerside Bank" notes of $1, $2, $3, $4 and $8—the dollar of each bank being of the value of 6s. 3d. currency or 4s. 2d. sterling—The "Rustico Bank" issues notes of $1, $2 and $5—each dollar being of the value of 6s. currency or 4s. sterling. There are also Provincial or Treasury notes in circulation of 5s., 10s., £1, £2 and £5 currency, which pass current at par within the Island but are *not* redeemable in specie. The Island currency is invariably a puzzle and perplexity to strangers—the general rule is that foreign money is reduced to currency by adding 50 % to its sterling value.

6. Silver coin is not a legal tender in one payment for a larger sum than £6 currency. The pence and half pence legally current in the United Kingdom, Canada, Nova Scotia and New Brunswick in the year 1849, are legal tender for pence and half pence in the Island, but no one is obliged to receive more at one time than 1s. 6d. in copper money. Any piece of copper or brass, however, of the shape of a penny, is universally received and passed for change without regard to its legality. The consequence is that the Island is flooded with copper coins of every country, age, and coinage, rendering the copper currency a perfect nuisance requiring the early attention of the Legislature.

7. *New Brunswick Currency.*—By the New Brunswick Act regulating currency and legal tender passed in 1852, all accounts might have been kept in pounds, shillings and pence or dollars and cents, and the British sovereign or pound sterling is declared to be of the value of £1.4s. 4d. or $4.86⅔ N.B. currency. The American eagle coined after 1st July, 1834, and before 1st March, 1852, and weighing 10 pennyweight 18 grains, troy, was declared a legal tender for £2.10s.

currency. The gold coins of Great Britain and of the United States coined before the last mentioned day, being multiples of the sovereign or eagle and of proportionate weight, were also declared legal tender. By an Act passed in the following year (1853) the provisions of the Act of 1852 are extended to gold coins of the United States of similar weight and denomination coined *after* 1st May, 1852, unless restrained by Proclamation of the Lieutenant Governor in Council. No legal value is conferred upon foreign silver coin, but the value of British silver coined is fixed as follows:—

	N.B. Currency.
The British Silver Crown.....	= £0 6 1
" " $\frac{1}{2}$ Crown.....	= 0 3 0½
" " $\frac{1}{5}$ Crown.....	= 0 1 2½
" " $\frac{1}{10}$ Crown.....	= 0 0 7½

8. The Lieutenant Governor by proclamation in the Royal Gazette, giving six months notice, may stop the circulation of British Silver coins.

9. By "an Act relating to accounting and currency" passed in 1860, it is rendered imperative that all the public accounts be made up and rendered in dollars and cents; but any such account may have a second column containing sums in pounds shillings and pence equivalent to the sums stated in dollars and cents. The value of the New Brunswick dollar is declared to be such that $4 shall be equal to £1 New Brunswick currency, and 20 cents equal to one shilling, and so in proportion for any greater or lesser sum. The dollar is divided into 100 cents, and every cent into 10 mills. By the same Act the United States eagle coined after 1st July, 1834, and weighing 10 dwt. 18 grs. troy, is made legal tender for $10 and its multiples in the same proportion. No one is obliged to receive more than $10 in silver or 20 cents in copper coin in any one payment. The Lieutenant Governor has still the power of stopping the circulation of British Silver coin, if necessary, in the manner specified in the Act of 1852.

APPENDIX.

FORM A.

PROVINCE OF QUEBEC,
DISTRICT OF

We of in the district of , (*Grocers, or as the case may be,*) hereby certify, that we intend to carry on (*if previous to registration they have carried on business, they will state, instead,—have carried on and intend to*, &c.") business, as (*here insert name of the business*) at in partnership, under the name or firm of , and that we are, and have been since the said day, the only Members of the said Partnership.

Witness our hands, at this day of 186 .

WITNESS,

Where some of the parties reside out of the Province, the following form may be used:—

I, (*or* We), the undersigned, of hereby certify, that I (*or* We) have carried on and intend to carry on trade and business as at in Partnership with C. D., of and E. F., of and that the said Partnership hath subsisted since the day of one thousand eight hundred and sixty- , and that WE (*or I or We and the said C. D., and E. F.,*) are, and have been, since the said day, the only members of the said Partnership.

Witness our (*or any of our*) hands, at
this day One
thousand
Witness :—

FORM B.

PROVINCE OF QUEBEC,
DISTRICT OF }

We, of
the district of , (*Here insert name of business*) formerly co-partners, doing business together as such, at the said of
under the name and firm of
do hereby certify that the said Partnership, heretofore subsisting between us, was at the said of
on the day of
one thousand eight hundred dissolved.
Witness our hands at this
day of one thousand
Witness :—

FORM C.

PROVINCE OF QUEBEC,
DISTRICT OF }

I, (*or* We), the undersigned, do hereby certify that (I, *or* We) have entered into Partnership under the name and style of A. B., & Co., as (*here insert description of the business of the firm,*) which firm consists of C. D., residing usually at the city of in the district of
and Province of (*and if more than one general partner, here add and E. F., usually residing at the*

city of *in the* *of*)
as general partners; and G. H., residing usually at
in &c., as a special partner,
the said G. H., having contributed (*here state the amount*)
to the capital stock of the said Partnership; which said part-
nership commences on the day of
one thousand, &c.
and terminates on the day of
one thousand, &c.

Dated at this
day of one thousand, &c.

Signed in the presence of } C. D.
(Name of Witness.) } E. F.
G. H.

ASSIGNMENT UNDER THE INSOLVENT ACT OF 1864

THIS assignment made between of the first part and of the second part, witnesses

(or)

On this day of before the undersigned notaries

came and appeared
of the first part, and
of the second part, which said parties declared to us notaries:

That under the provisions of "the Insolvent Act of 1864" the said party of the first part being an Insolvent, has voluntarily assigned and hereby does voluntarily assign to the said party of the second part, accepting thereof as assignee under the said Act, and for the purposes therein provided, all his estate and effects, real and personal, of every nature and kind whatsoever.

To have and to hold to the party of the second part as assignee for the purposes and under the act aforesaid.

And a duplicate of the list of creditors exhibited at the first meeting of his creditors, by the said party of the first part is hereto annexed.

In witness whereof, &c., &c.

(or)

Done and passed, &c., &c.

(L. S.)
(L. S.)

A GENERAL FORM OF ASSIGNMENT TO BE ENDORSED ON ANY INSTRUMENT.

KNOW ALL men by these presents, that I, A. B., named in the within for and in consideration of to me paid by C. D., of the of in the County of gentleman, do hereby assign unto the said C. D., his executors, and administrators and assigns, all my interest in, under or by virtue of the said existing or hereafter to exist, making and constituting him, at the same time, my lawful attorney in my name, but for his own use and benefit and at his own cost, charge and expense to take all such steps or proceedings at Law or otherwise for the complete recovery and enjoyment of the assigned promises, with power of substitution.

Signed, Sealed and Delivered, this day of A. D., 186 by me the said A. B.

In presence of } A. B. (L.S.)

ASSIGNMENT OF JUDGMENT.

THIS INDENTURE, made the day of in the year of our Lord one thousand eight hundred and

BETWEEN of the FIRST PART and of the SECOND PART:

WHEREAS the said part of the first part, on or about the day of one thousand eight hundred and recovered a Judgment in the Court of against for the sum of Damages, and Costs, making together the sum of

AND WHEREAS the said part of the first part ha agreed to ASSIGN THE SAID JUDGMENT and all benefit to arise therefrom, either at law or in equity, unto the said part of the second part, in manner hereinafter expressed.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said Agreement, and in consideration of the sum of of lawful money of Canada, to the said part of the first part in hand well and truly paid by the said part of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, the said part of the first part hath granted, bargained, sold, assigned, transferred, and set over, and by these Pr grant, bargain, sell, assign, transfer, the said part of the second part ex- ministrators, and assigns.

ALL THAT THE SAID HEREINBEFORE MENTIONED JUDGMENT, and all and every sum and sums of money now due, and hereafter to grow due by virtue thereof, for Principal, interest, and costs, and all benefit to be derived therefrom either at Law or in Equity, or otherwise howsoever.

TO HAVE, HOLD, RECEIVE, TAKE AND ENJOY the same, and all benefit and advantage thereof, unto the said part of the second part, executors, administrators, and assigns, to and for and their own proper use, and as and for and their own proper monies and effects absolutely.

AND the said part of the first part hereby constitute and appoint the said part of the second part, executors and administrators, to be true and lawful attorney and attorneys in the name of the said part of the first part, or otherwise, but at the proper costs and charges of the said part of the second part executors and administrators, to ask, demand and receive of from the said executors or administrators, the said Judgment debt, and premises hereby assigned, and on non-payment of the same or any part thereof, to obtain any execution or executions, or bring, commence and prosecute any action or actions, suit or suits, as well at Law as in Equity, for the recovery of the same, and to use all such other lawful remedies, ways and means as the said part of the first part

could or might have used or taken for the recovery of the same, and on receipt or recovery thereof, to sign and give a good and effectual receipt or receipts for the same, with full power from time to time to appoint a substitute or substitutes for all or any of the purposes aforesaid. AND the said part of the first part do hereby agree to ratify and confirm whatsoever the said part of the second part, executors or administrators, shall lawfully do or cause to be done, in or about the premises.

AND the said part of the second part hereby covenants to indemnify and save harmless the said part of the first part from all loss, costs, charges, damages, and expenses by reason or on acccount of any such proceedings as aforesaid.

IN WITNESS WHEREOF, the said parties here to *have* hereunto set their hands and seals the day and year first above written.

Signed, Sealed, and Delivered)
in the presence of)

ASSIGNMENT OF A DEBT, WITH A POWER OF ATTORNEY, &c.

KNOW ALL men by these presents, that I, A. B., of in consideration of the sum of dollars, paid to me by C. D., of (the receipt of which is hereby acknowledged,) do hereby sell, assign, and transfer unto the said C. D., all my claims and demands against F. G., and all actions against said F. G., now pending in my favor, and all causes of action whatsover against him.

AND the said A. B., doth hereby nominate, constitute, and appoint the said C. D., his executors and administrators, his attorney and attorneys, irrevocable; and doth give him and them full power and authority to institute any suit or suits against the said F. G., and to prosecute the same, and any suit or suits which are now pending, for any cause or

causes of action, in favor of said A. B., against said F. G., to final Judgment and execution; and any executions for the cause or causes aforesaid, to cause to be satisfied by levying the same on any personal or real estate of the said F. G., his executors and administrators, and the proceeds thereof to take and apply to his or their own use; and in case of buying said executions or any real estate, the said A. B., hereby empowers the said C. D., his executors and administrators, to sell and execute deeds to convey the same, for such price or consideration, and to such person or persons, and on such terms, as he or they shall deem expedient; or if he or they prefer it, to execute any conveyances that may be necessary to vest the title thereof in him or them, as all such acts and proceedings are to be at the proper costs and charges of the said C. D., without any expense to the said A. B.

AND the said A. B. doth hereby further empower the said C. D., his executors and administrators, to appoint such substitute or substitutes as he or they shall see fit, to carry into effect the objects and purposes of this authority, or any of them, and the same to revoke from time to time at his or their pleasure; the said A. B. hereby ratifying and confirming all the lawful acts of the said C. D., his executors or administrators, his or their, agent or agents, in pursuance of the foregoing authority.

IN WITNESS WHEREOF the said A. B. hath hereunto set his hand and seal this day of A. D., 186

Signed, Sealed and Delivered in presence of } (Seal.)

ASSIGNMENT OF LIFE POLICY.

THIS INDENTURE made the day of in the year of our Lord one thousand eight hundred and sixty between A. B., of the city of

in the County of merchant of the first part, and C. D., of the same place, merchant of the second part.

WITNESSETH that the said A. B., for and in consideration of the sum of dollars, of lawful money of Canada, unto him paid by the said B. C., the receipt whereof is hereby acknowledged, assigns, transfers and sets over to the said B. C., his executors, administrators or assigns, a policy for the sum of dollars on the life of the said A. B., effected by the said A. B., with the Life Assurance Company, and numbered as No. with all the interest of him the said A. B., in or under the said policy, and with all the sum or sums of money which may at any time hereafter become payable under, upon or by virtue of the said policy, and with full power to the said C. D., his executors, administrators and assigns, in the name of the said A. B., his executors and administrators, to sue for, recover, collect, receive, and give receipts for the same.

AND the said A. B., for himself, his executors and administrators covenants with the said C. D., his executors, and administrators and assigns, that he, the said A. B., has the power to execute this assignment of the premises free from incumbrances, and that he and every person claiming by, under or in trust for the said A. B., will at the cost charges and expense of the said C. D., his executors, administrators or assigns, do all acts necessary for perfecting this assignment or facilitating the recovery of the said moneys.

In testimony whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of } A. B. (L.S.) C. D. (L.S.)

E. F.

ASSIGNMENT OF A POLICY OF INSURANCE BY ENDORSEMENT.

KNOW ALL men by these presents, that I, A. B., within named, for and in consideration of the sum of dollars, to me paid by C. D., of (the receipt whereof is hereby acknowledged,) have granted, assigned, transferred, and set over, and by these presents, do grant, assign, transfer, and set over, to him, the said C. D., all my right, property, interest, claim, and demand in and to the within Policy of Insurance, which have already arisen, or which may hereafter arise thereon, with full power to use my name, so far as may be necessary, to enable him fully to avail himself of the interest herein assigned, or hereby intended to be assigned. The conveyance herein made, and the powers hereby given, are for myself and my legal representatives, to the said C. D., and his legal representatives.

In witness whereof the said A. D. has hereunto set his hand and seal this day of A. D. 1867

Signed, Sealed and Delivered in presence of } (Seal.)

ASSIGNMENT OF PARTNERSHIP PROPERTY AND DEBTS BY ONE PARTNER TO ANOTHER FOR A SUM CERTAIN.

THIS INDENTURE made in duplicate this day of one thousand eight hundred and sixty between A. B., of the City of in the County of of the first part, and C. D. of the City of in the County of of the second part witnesseth.

That whereas the parties aforesaid were lately co-partners in the business of which partnership was dissolved and determined on the day of

and whereas there are many debts due by the said firm yet unpaid, and debts owing to the said parties on account of their said co-partnership are still outstanding; and whereas, it is hereby agreed, that the said party of the second part shall sell, transfer, assign, and set over to the said party of the first part all his interest or share of all the stock in trade, goods, effects and property of every description belonging to or owned by the said firm, and in the debts, choses in action, and sums of money due and owing to the said firm, and that the said party of the first part, shall and will assume all the debts and liabilities of the said firm, and shall discharge, indemnify and save harmless the said party of the second part against all liabilities arising from the said partnership.

Now, therefore, in consideration of the sum of dollars, paid to the said C. D., and in pursuance of the said agreement, the said C. D., doth hereby sell, assign, transfer and make over to the said A. B., his executors, administrators and assigns, all his interest, right, title, and share in all the stock in trade, goods, machinery, tools, books, leasehold premises, and effects belonging to the said partnership, of whatever kind or nature; also, all his right and interest, in and to all the debts and sums of money now due or to come due to the said firm, whether the same be by bond, bill, note, or account, or otherwise; and the said C. D. doth hereby constitute and appoint the said A. B. his executors, administrators and assigns, his attorney and attorneys, irrecovable, to receive all the debts and sums of money above mentioned, to his and their own use and benefit; and doth hereby authorize the said A. B., his executors, administrators or assigns, to collect, demand and sue for the said debts and sums of money, and to use his, the said C. D.'s name, in any way that the collection and recovery of the said debts and demands may render necessary, as well in Court as out of Court, but at his or their own proposed costs and charges, and without any cost or damage to the said C. D. And the

said C. D. doth further authorize the said A. B. to convey, assign, and transfer to his own name, and for his own benefit and use, all sums of money, goods and effects, real or personal estate, which may be received as taken in the name of the said firm, and to have and to hold the same free from all claims by the said C. D., his executors, administrators or assigns.

And it is further witnessed, that, in pursuance of the said agreement, the said A. B. for himself, his executors and administrators, doth hereby covenant with the said C. D. his executors and adminstrators, that he, the said A. B. and his executors and administrators, shall and will pay and discharge, and at all times hereafter indemnify and save harmless the said C. D., his executors, administrators and assigns, from all debts, duties and liabilities, which at the dissolution of the said partnership were due and owing by the said firm to any person or persons, for or concerning any matter or thing touching the said partnership, and of and from all actions, expenses, suits, costs, judgments and damages, for or concerning the said debts, duties and liabilities, unless the said C. D. shall have incurred liabilities or contracted debts, on account of or in the name of the said firm; for which, if any such exist, the said A. B. does not hereby intend to make himself responsible.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the presence of } (*Seal.*)

AGREEMENT TO FREIGHT A VESSEL.

THIS AGREEMENT made the day of in the year 186 between A. B., of the City of Kingston, in the Province of Ontario, Forwarder

Of the first part, and

C. D., of the same place, owner (or master) of the Schooner "Wave Crest" Of the second part,

WITNESSETH that the said A. B. hereby agrees and covenants with the said C. D., that he, the said A. B., will lade and freight the said Schooner "Wave Crest," for and during the ensuing season of navigation, to commence on the day of instant, when the said Schooner is to be in readiness to receive her first lading at the wharf of Glassford, Jones & Co., in the said city of Kingston, as well on her upward trips from the said city of Kingston to the city of Hamilton, in the said Province of Ontario, and the intermediate ports, as on her return trips from the said city of Hamilton to the said city of Kingston and the intermediate ports; and that the said A. B. will pay to the said C. D. freight on the same, on the delivery of each and every cargo in a safe and sound condition, after the following rates:

Freight from Kingston to Hamilton.

Merchandize.....	cents per cwt.
Sugars.....	do do
&c., &c.,	

Freight from Hamilton to Kingston.

Wheat, Corn, &c.	cents per bush.
Flour.....	do brl.
&c., &c.,	

And the said C. D. hereby covenants with the said A. B. that for and in consideration of the premises and of the freight to be paid by the said A. B. to the said C. D. after the rates aforesaid, he, the said C. D., will safely carry all such lading and freight as he may or shall receive from the said A. B., and deliver the same in as good and sound condition as when so received, according to the respective bills of lading to be furnished to him by the said A. B. or his agents.

And the said C. D. further covenants that he will regularly

ply between the said cities of Kingston and Hamilton and the intermediate ports with his said Schooner "Wave Crest," as aforesaid, during the entire season of navigation above mentioned; and that he will not occupy more than days, unless hindered or delayed by some unavoidable accident, in making a trip from Kingston to Hamilton or from Hamilton to Kingston.

And it is further understood and agreed between the parties hereto, that the said freight after the rates aforesaid shall include all the costs and charges of transportation, including tonnage, wharfage, transhipment in case it should become necessary, and all and every the charge and charges incident or relative to navigation.

And that in case goods, grains, &c., be shipped on board the said schooner at Kingston or Hamilton, for any intermediate port, or at any intermediate port for either of the said ports, or for any other intermediate port, freight shall not be payable thereon at the rates aforesaid; but the freight payable thereon shall be per cent more per mile more than the rate per mile which would have been charged had said goods, &c., been carried the whole distance from Kingston to Hamilton or from Hamilton to Kingston.

And it is further understood and agreed between the parties hereto, that all freight and lading shall be delivered to the said C. D. (at or on board of) his said schooner, and that he shall duly discharge the same at his own cost, at the pro per wharf or other place, in the proper port of discharge.

That the said C. D. shall not, at any time, be required to take on board or convey in his said schooner any description of freight other than that coming under the heads above mentioned (*vary to suit the requirements of the case*).

That in case the said schooner shall be detained at any of the said ports by the neglect, default or mismanagement of the said A. B., in procuring freight or otherwise, demurrage shall be payable for the delay occasioned thereby at the rate

of dollars for each and every day of such delay.

And that in case the said A. B., or his agents, shall neglect to procure freight, as aforesaid, for the said schooner, and in consequence of such neglect, the said schooner shall be obliged to sail without freight or without a full cargo thereof, then the said A. B., shall forfeit and pay to the said C. D. dollars per ton, on each and every ton of freight which may be wanting to make up a full cargo for the said schooner.

And that all the said conditions, stipulations and covenants shall be binding upon the heirs, executors and administrators of the said parties.

In witness whereof the said parties have hereunto set their hands and seal the day and year first above written.

Signed in presence of } A. B.
} C. D.

BOND TO SECURE FLOATING BALANCE AT A BANK.

KNOW ALL men by these presents that We, A. B., and C. D., both of the City of in the County of and Province of Quebec, are jointly and severally held and firmly bound unto E. F., and his successors, for the time being managers of the Kingston Branch of the Royal Canadian Bank, in the penal sum of dollars, of lawful money of Canada, to be paid to the said E. F., managers of the said Kingston Branch of the Royal Canadian Bank, or to his successors the managers of said Branch, or to his or their certain attorneys or assigns; for which payment well and truly to be made, we jointly and severally bind our and each of our heirs, executors and administrators, for ever firmly by these presents.

Sealed with our seals. Dated this day of in the year of our Lord one thousand eight hundred and sixty

The condition of the above written bond or obligation is such,

that if the above bounden A. B. and C. D., their or each of their heirs, executors or administrators, do and shall well and truly pay or cause to be paid whenever the said E. T. manager of the Kingston Branch of the Royal Canadian Bank or any of his successors, for the time being manager of said Branch of said Bank, shall in writing demand the same such sum or sums of money not exceeding in the whole the sum of two thousand dollars as shall then at the time of any such demand be due from the said A. B. to the said Royal Canadian Bank, on or as the balance of the account between the said A. B. and the said Royal Canadian Bank, for principal, money or interest of money lent or advanced, bills, notes or cheques accepted, discounted or paid, or on any other account whatsoever.

Then this obligation shall be void, otherwise be to and remain in full force and virtue.

Witness

CHARTER PARTY.

THIS CHARTER PARTY made and agreed upon, on the day of in the year of our Lord 186 between A. B. master and owner of the vessel called the "Lion" of hundred tons burthen of the first part and C. D. of the city of of the second part

WITNESSETH that the said A. B. hath granted and to freight letten, and by these presents doth grant and to freight let, unto the said C. D., his executors, administrators and assigns, the whole tonnage of the hold stern, sheets and half deck of the said vessel from the port of to the port of in the manner following, that is to say

The said A. B. is to have the said vessel "Lion" in readiness to receive the wares, goods and mer-

chandises of the said C. D. his agents, factors or assigns, and the goods, wares and merchandises by him or them procured or provided, at the wharf known as wharf in the city of on or before the day of and shall sail from the said port as soon as the said wares, goods and merchandises shall be properly and safely shipped on board and stowed away in the said vessel, and the weather permits, to the said city of where the said vessel is to be delivered and discharged of her said cargo within days next after her arrival at the end of the said voyage.

In consideration whereof the said C. D. for himself, his heirs, executors and administrators, doth covenant with the said A. B. his executors, administrators and assigns, and every of them, by these presents that he, the said C. D. his executors, administrators, factors or assigns, will pay or cause to be paid, unto the said A. B. his executors, administrators or assigns, the sum of dollars for the freight of the said vessel or goods (or so much per ton &c.) within days after the arrival of the said vessel, and discharge and delivery of the said wares, goods and merchandises at the said city of and that in case demurrage should be incurred by the neglect, default or misconduct of the said C. D. his agents, factors or assigns, he the said C. D. will pay to the said A. B. his executors, administrators or assigns, for the same at the rate of dollars per diem, for each and every day during which and for which the said C. D. will be liable for demurrage as aforesaid and that the said dollars will be paid daily as the same shall grow due.

And the said C. D. covenants and agrees that he will have the said goods, wares and merchandises ready and put on board the said vessel within days after he shall be at the said wharf as aforesaid, in readiness to receive them.

And the said A. B. covenants that the said vessel now is and at all times during the said voyage shall be, at the best endeavor of the said A. B. his executors and administrators, at his and their own costs and charges, made and kept in all respects seaworthy, and properly provided with men and every thing else proper and requisite for and during the said voyage.

In testimony whereof the said parties have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of } A. B. (Seal.) A. B. (Seal.)

CERTIFICATE OF ACKNOWLEDGMENT BY A MARRIED WOMAN CONVEYING HER SEPARATE ESTATE IN LAND.

I, (*or we, inserting the name, &c.*) do hereby certify that on this day of at the within deed was duly executed in my (*in our*) presence by A. B., of , wife of one of the grantors therein named, and that the said wife of the said at the said time and place being examined by me (*or us*) apart from her husband, did appear to give her consent to convey her estate in the lands mentioned in the said deed freely and voluntarily, and without coercion or fear of coercion on the part of her husband or of any other person or persons whatsoever.

CHATTEL MORTGAGE IN ONTARIO.

THIS INDENTURE, made the day of in the year of our Lord one thousand eight hundred and under the provisions of "An Act respecting Mortgages and Sales of Personal Property," between

of the first part, and
of the second part,
WITNESSETH that the said part of the first part, for and in consideration of the sum of
of lawful money of Canada, to
in hand well and truly paid by the said part of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, granted, bargained, sold and assigned, and by these presents do grant, bargain, sell and assign unto the said part of the second part, executors, administrators and assigns, all and singular the goods, chattels, furniture and household stuff, hereinafter particularly mentioned and expressed, that is to say—
(*specify property carefully*)
TO HAVE AND TO HOLD all and singular the said goods, hereinbefore granted, bargained, sold and assigned, or mentioned, or intended so to be, unto the said part of the second part, executors, administrators and assigns, to the only proper use and behoof of the said part of the second part, executors, administrators and assigns, for ever: PROVIDED ALWAYS, and these presents are upon this condition, that if the said part of the first part, executors or administrators, do and shall well and truly pay, or cause to be paid, unto the said part of the second part, executors, administrators or assigns, the full sum of
with interest for the same from the date hereof at the rate of per centum per annum, payable as follows, that is to say then these presents, and every matter and thing herein contained, shall cease, determine and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in anywise notwithstanding. AND the said part of the first part, for executors and administrators, all

and singular the said goods, chattels and property by these presents unto the said part of the second part, executors, administrators and assigns, against the said part of the first part, executors and administrators, and against all and every other person and persons whomsoever, shall and will warrant and forever defend by these present. AND the said part of the first part do hereby for heirs, executors and administrators, covenant, promise and agree to and with the said part of the second part, executors, administrators and assigns, that the said part of the first part, executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the said part of the second part, executors and administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, on the day and time, and in the manner above limited for the payment thereof. AND ALSO, in case that default shall be made in the payment of the said sum of money in the said proviso mentioned, or the interest thereon, or any part thereof, or in case the said part of the first part shall attempt to sell or dispose of, or in any way part with the possession of the said goods and chattels or any of them, or to remove the same or any part thereof out of the County of without the consent of the said part of the second part, executors, administrators or assigns, to such sale, removal or disposal thereof, first had and obtained in writing, then and in such case it shall and may be lawful for the said part of the second part, executors, administrators or assigns, with or servant or servants, and with such other assistant or assistants as may require, at any time during the day to enter into and upon any lands, tenements, houses and premises wheresoever and whatsoever, where the said goods and chattels, or any part thereof may be, and for such persons to break and force open any doors, locks, bolts, fastenings,

hinges, gates, fences, houses, buildings, enclosures and places, and any door, lock, bolt, fastening, hinge, gate, fence, house, building, enclosure and place, for the purpose of taking possession of and removing the said goods and chattels; and upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful, and the said part of the second part, executors, administrators or assigns, and each or any of them, is and are hereby authorized and empowered to sell any the said goods and chattels, or any of them, or any part thereof, at public auction or private sale, as to or any of them may seem meet, and from and out of the proceeds of such sale in the first place to pay and reimburse and all such sums and sum of money as may then be due by virtue of these presents, and all such expenses as may have been incurred by the said part of the second part, executors, administrators or assigns, in consequence of the default, neglect, or failure of the said part of the first part, executors, administrators or assigns, in payment of the said sum of money, with interest thereon as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the said part of the first part, executors, administrators and assigns, all such surplus as may remain after such sale, and after payment of all such sum and sums of money, and interest thereon, as may be due by virtue of these presents at the time of such seizure, and after the payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid. PROVIDED ALWAYS, nevertheless, that it shall not be incumbent on the said part of the second part, executors, administrators or assigns, to sell and dispose of the said goods and chattels, but that in case of default in payment of the said sum of money, with interest thereon as aforesaid, it shall and may be lawful for the said part of the second part, executors, administrators or assigns, peaceably and quietly to

have, hold, use, occupy, possess and enjoy the said goods and chattels, without the let, molestation, eviction, hindrance or interruption of the said part of the first part, executors, administrators or assigns, or any of them, or any other persons or person whomsover. AND the said part of the first part do hereby further covenant, promise and agree to and with the said part of the second part, executors, administrators and assigns, that in case the sum of money realized under any such sale, as above mentioned, shall not be sufficient to pay the whole amount due at the time of such sale, that the said part of the first part, executors or administrators, shall and will forthwith pay or cause to be paid unto the said part of the second part, executors, administrators and assigns, all such sum or sums of money, with interest thereon, as may then be remaining due.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of

AFFIDAVIT OF CHATTEL MORTGAGE.

ONTARIO. County of TO WIT: } I, of the of in the County of the Mortgagee in the with in Bill of Sale, by way of Mortgage, make oath and say—

1st, That the Mortgagor in the annexed Bill of Sale, by way of Mortgage, named, is justly and truly indebted to me the Mortgagee therein named in the sum of in the said Mortgage mentioned.

2nd, That the said Bill of Sale, by way of Mortgage, was

executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said Bill of Sale, by way of Mortgage, against the creditors of the said the Mortgagor therein named, or preventing the creditors of the said the Mortgagor therein named, from obtaining payment of any claim against him, the said Mortgagor.

Sworn before me at the of in the County of this day of A.D. 18

A Commissioner for taking affidavits in Queen's Bench in and for the said County

ONTARIO. } I,
County of } of the of
TO WIT: } in the County of make oath and say—1st, that I was personally present and did see the annexed Bill of Sale, by way of Mortgage, duly signed, sealed and delivered by the parties thereto; 2nd, that the name set and subscribed as a witness to the execution thereof is of the proper handwriting of me this deponent.

Sworn before me at the of in the County of this day of A.D. 18

A Commissioner for taking affidavits in the Queen's Bench in and for the said County

COMPOSITION WITH CREDITORS.

To all to whom these presents shall come: we whose names are here under written and seals affixed, creditors of A. B. of the city of the county of Province of Ontario, Trader, send greeting.

Whereas the said A. B. is justly indebted to us his said several creditors, in different sums of money; but by reason of sundry losses, disappointments and other damages, happened unto the said A. B. he is unable to pay and satisfy us of our full debts, and therefore we, the said creditors, have resolved and agreed to undergo a certain loss and to accept of cents for every dollar owing by the said A. B. to us the several and respective creditors aforesaid, to be paid in full satisfaction and discharge of our several and respective debts.

Now know ye that we, the said creditors of the said A. B. do for ourselves, severally and respectively, and for our several and respective heirs, executors and administrators, covenant, promise, compound and agree to and with the said A. B. by these presents, that we, the said several and respective creditors, shall and will accept, receive and take of and from the said A. B. for each and every dollar that the said A. B. owes to us, the said several creditors, the sum of cents, in full satisfaction and discharge of the several debts and sums of money that the said A. B. owes us; to be paid to us, the said several creditors, within months next ensuing the date of these presents

And that neither we, the said several and respective creditors, nor any of us, shall or will, at any time or times hereafter, sue, arrest, molest or trouble the said A. B. or his goods and chattels, for any debt or other thing now due and owing to us or any of us, his respective creditors, provided that he shall well and truly pay or cause to be paid

the said sum of cents for every dollar he owes us respectively, within the said space of months next ensuing the date hereof.

In testimony whereof we have hereunto set our hands and seals respectively the day of in the year of our Lord one thousand eight hundred and sixty

Signed, Sealed and Delivered in presence of } (Seal.) (Seal.)

RENEWAL OF PARTNERSHIP TO BE ENDORSED ON THE PARTNERSHIP DEED.

Whereas the partnership witnessed by the within deed by the terms thereof, will expire on the day of A. D. 186 (or has expired).

And whereas the parties to said deed desire to continue the said partnership as it has heretofore existed.

Now therefore this memorandum witnesses that the said partnership is by the agreement of the undersigned renewed and continued between them upon the terms, stipulations and conditions, and with respectively the same agreements and convenants, as are witnessed by the within deed, for the further term of years from the date of this memorandum.

In testimony whereof, the parties hereto have hereunto set their hands and seals this day of A. D. 186

Signed, Sealed and Delivered in presence of } A. B. L.S. C. D. L.S. E. T. L.S.

G. H.

ENDORSEMENT OF DISSOLUTION ON PARTNERSHIP DEED.

The partnership witnessed and formed by the within deed is by mutual consent of the undersigned hereby wholly dissolved this day of A. D. 186 except so far as it may be necessary to continue the same for the final liquidation

and adjustment of the business thereof, and the said exception shall be and continue in force until such final liquidation and adjustment, and no longer and for no other purpose.

In testimony whereof, &c.

Signed and Sealed } L.S.
in presence of } L.S.

NOTICE OF DISSOLUTION FOR PUBLICATION IN GAZETTE.

Notice is hereby given that the partnership heretofore carried on by Messrs. A. B. and C. D. under the name, style and firm of "B. D.," at the City of in the Province of Ontario, was this day dissolved by mutual consent, and all parties indebted to or having claims against the said firm are hereby notified to pay their said debts or render their accounts to the said A B who is authorized to wind up the affairs of the said partnership.

Dated at &c., this day of 186.

A. B.
C. D.

NOTICE TO DISSOLVE PARTNERSHIP WHEN THE DEED CONTAINS A POWER TO DISSOLVE.

SIR,

I hereby give you notice that I intend to dissolve the partnership now subsisting between us on the day of A. D. 186, being at the expiration of months from the date of this notice; in pursuance of a power to that effect contained in our deed of partnership.

Dated and signed at in the of this day of A. D. 186

A. B.

To,

C. D.
of &c., &c.

NOTICE OF EXPULSIONS FROM PARTNERSHIPS UNDER A POWER CONTAINED IN THE DEED.

SIR,

Take notice that under and by virtue of a power of expulsion contained in our partnership deed, I intend at once to dissolve the partnership now subsisting between us, on account of your negligent and improper conduct and on account of your having in violation of your agreements contained in and your duty under and by virtue of the said deed, wilfully, negligently and improperly, &c., (*describe the acts or negligence complained of*).

Also, take notice that by virtue of the power aforesaid, and of your said violation of said agreements in our said deed of partnership contained, I do expel you from the said partnership and declare it now and henceforth dissolved, and that the business thereof shall henceforth be carried on in my own name only.

But this notice shall in no wise prejudice any remedy or remedies which either of us may be entitled to as against the other for the breach or non-performance of any covenant, condition, stipulation or agreement in our partnership deed contained, previous to the dissolution of partnership.

Dated at this day A.D. 186

A. B.

To,

C. D.

of &c., &c.

RELEASE OF INTEREST IN PARTNERSHIP BUSINESS BY ONE OF TWO PARTNERS TO THE OTHER.

THIS INDENTURE made the day of in the year A. D. 1867, between A. B. of the of in the county of Province of Ontario, merchant, of the first part, and C. D. of the

same place, merchant of the second part, witnesseth that

WHEREAS an agreement for determining the partnership business heretofore carried on by the said A. B. and C. D. under articles bearing date the day of 186 has been entered into by the said parties.

AND WHEREAS one moiety of the profits of the said business has been received by the said A. B. up to the day of 186

AND WHEREAS dollars being the value of the interest of the said A. B. in the said partnership business, as ascertained by a taking of stock and an account of the partnership property had on the day of A. D. 186 has been secured to the said A. B. by a bond bearing date the day of A. D. 186

AND WHEREAS the said A. B. has been by a bond bearing date the day of A. D. 18 fully indemnified against the partnership liabilities:

Now, therefore, in consideration of the premises and of dollars paid by the said C. D. to the said A. B. the receipt whereof is hereby acknowledged, the said A. B. does by these presents sell, assign, transfer, grant and release unto the said C. D. his heirs, executors, administrators and assigns, all the interest of him the said A. B. in the said partnership and in the property and business thereof (*and in the premises wherein the said business is transacted*) with full power to the said C. D. his administrators and assigns, in the name of the said A. B. his executors or administrators, to collect, receive and recover all and singular the debts due or accruing due to the said firm, and all the legal claims and demands which the said firm now has, or hereafter would have had against any person or persons whatever, with full power

to institute any actions at Law or suits in equity for the purposes of collecting said debts and enforcing said claims, and with power to give receipts for the same, providing always, and it is hereby expressly agreed that in case any expense shall be incurred in the collection of said debts or enforcing of said claims, the same shall be borne wholly by the said C. D. and the said C. D. shall at all times keep the said A. B. indemnified therefrom.

For and in consideration of the premises the said parties hereto do mutually release each other, and each of their executors, administrators and assigns, from all demands and claims in respect to the said partnership and from all legal and equitable proceedings for enforcing the same; providing always that none of the parties to the bond given by the said C. D. to the said A. B shall be hereby in any manner released from their liability upon said bond.

In testimony whereof the said parties &c.

Signed, Sealed and Delivered in presence of E. T. } A. B. (L. S.) C. D. (L. S.)

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS THAT I, A. B., of the of in the County of and Province of merchant.

DO hereby make, nominate, constitute and appoint C. D. of the of in the County of and province merchant.

my true and lawful attorney for me and in my name, place and stead, and for my sole use and benefit to (*state purposes briefly*), and for all and every of the purposes aforesaid do hereby give and grant unto my said attorney full and absolute power and authority to do and execute all acts, deeds, matters and things necessary to

be done in and about the premises, and also to commence, institute and prosecute all actions, suits and other proceedings which may be necessary or expedient in and about the premises, as fully and effectually to all intents and purposes as I could if I were personally present and acting therein, AND also with full power and authority for my said attorney to appoint a substitute or substitutes and such substitution at pleasure to revoke. I hereby ratifying and confirming and agreeing to ratify and confirm and allow all whatsoever my said attorney or such substitute or substitutes shall lawfully do or cause to be done by virtue hereof. IN WITNESS whereof I have hereunto set my hand and seal this day of one thousand eight hundred and sixty

Signed, Sealed and Delivered in the presence of

POWER OF ATTORNEY, REVOCATION OF—

KNOW ALL men by these presents, that I, A. B., of for divers good causes and considerations, me hereunto especially moving, have revoked, countermanded, and made void, and by these presents, do revoke, countermand and make void, a certain deed-poll or power of Attorney, under my hand and seal, bearing date to C. D., of given, delivered and executed, and all powers and authorities whatsoever therein expressed and delivered.

In witness whereof I have hereunto set my hand and seal this day of

Signed, Sealed and Delivered in presence of

A. S. W.

NOTICE REQUIRING INSOLVENT TO MAKE AN ASSIGNMENT UNDER THE INSOLVENT ACT OF 1864.

INSOLVENT ACT OF 1864.

TO (name) (residence) (description of Insolvent)

You are hereby required to make an assignment of your estate and effects under the above act, for the benefit of your creditors.

(Place) (date)

(Signature of Creditor)

AFFIDAVIT IN PROOF OF CLAIM AGAINST ESTATE OF INSOLVENT.

INSOLVENT ACT OF 1864.

In the matter of

A. B.

An Insolvent, and

C. D.,

Claimant

I, C. D., of (*residence*) (*addition*) being duly sworn, depose and say:

1. I am the claimant (*or the duly authorized agent of the claimant in this behalf and have a personal knowledge of the matters hereinafter deposed to, or a member of the firm of claimants in the matter,*) and the said firm is composed of myself and of E. T., of

2. The Insolvent is indebted to me (*or to the claimant*) in the sum of dollars, for (*state nature and particulars of claim, referring, if desired, to accounts or documents annexed,*)

3. I (*or the claimant*) hold no security for the claim or I (*or the claimant*) hold the following and no other security for the claim, namely (*state the particulars of the security.*)

Sworn before me at this day of &c. } And I have signed

DEBTORS MAY BE ARRESTED

IN THE

STATE OF NEW YORK.

1. In an action for the recovery of damages, on a cause of action not arising out of contract, *where the defendant is not a resident of the State*, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct, or neglect in office or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the Plaintiff of the benefit thereof.

4. When the Defendant has been guilty of a fraud, in contracting the debt or in incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the Defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors.

The property of Debtors may be attached.—In actions against Foreign corporations or against non-residents, or against absconding or concealed debtors, or whenever any person or corporation is about to remove any of his or its property from the State, or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors.

In the United States' Court:—Debtors may be compelled to go into Bankruptcy, and submit to a decree dividing their property equally amongst all their creditors.

When the Debtor shall depart from the State or district, with intent to defraud his creditors, or being absent, shall, with such intent, remain absent, or shall conceal himself to avoid the service of legal process, or shall conceal and remove his property to avoid its being attached, or shall make any assignment, gift, sale, conveyance, or transfer of his property, or who has been arrested on mesne process, or who has been actually imprisoned seven days in an action founded on contract, or cause his property to be taken on legal process with intent to give a preference to his creditors, or who, being a banker, merchant, or trader, fraudulently suspends payment, and does not resume payment of his commercial paper within a period of fourteen days.

JAMES & FOSTER,

BARRISTERS, ATTORNEYS, SOLICITORS,

NOTARIES PUBLIC, &c.

HALIFAX, NOVA SCOTIA.

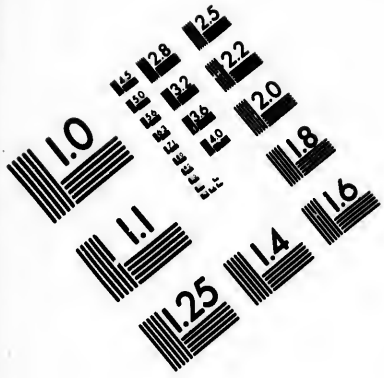
PALMER & MACLEOD,

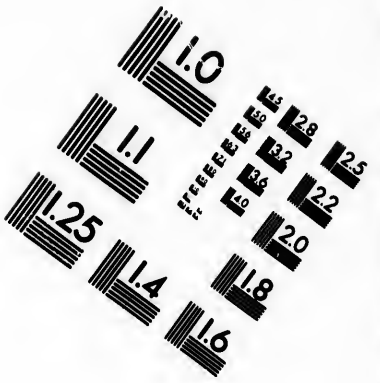
BARRISTERS AND ATTORNEYS-AT-LAW,

NOTARIES, &c.,

CHARLOTTETOWN, P. E. ISLAND.

Chs. Palmer Malcolm Macleod.





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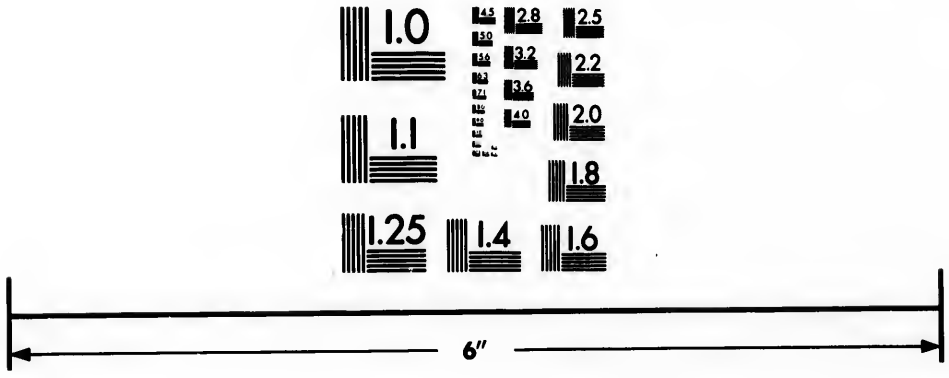

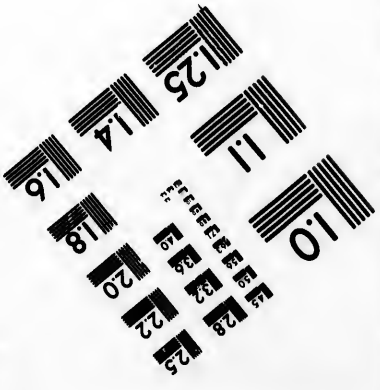

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