THE ELEMENTS

OF

COMMERCIAL LAW

BEING A COMPILATION

FOR THE USE OF COMMERCIAL COLLEGES, BUSINESS UNIVERSITIES, HIGH SCHOOLS, COLLEGIATE INSTITUTES AND OTHER EDUCATIONAL INSTITUTIONS.

COMPILED BY

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PREFACE.

THIS BOOK has been compiled at the request of the Business Educators' Publishing Co., for use as a text book in the various Commercial Colleges included in their Association, and for use in such High Schools, Collegiate Institutes, or other educational institutions as may desire to give their pupils an insight into the principles of Commercial Law.

It need hardly be stated that this book is not intended for the professional man. It is not a legal text book, but is rather a compilation of those general principles applicable to mercantile law, which it is desirable that every business man should be acquainted with, and a knowledge of which is absolutely necessary to the student who essays to attain the high standard of excellence required by the Association.

To the general reader, as well as to the student in Commercial Law, it is hoped these pages may be of use.

One thing, however, must be remembered by all who read the work, and that is, that no attempt has been made to set out a complete statement of the law on all points, leading principles and general rules only having been given. In many cases these general rules and principles are subject to many minute exceptions, but since to go into these exceptions and set out all the variations, and apply all the cases would not only render the work unwieldy, but would be foreign to the purpose for which the book was written, the author has contented himself with simply stating the leading propositions which will guide the student in his study of Commercial Law.

The author is sensible of the many imperfections of the work, and bespeaks for it a recognition of the intent with which it was prepared, rather than a criticism of the manner of the preparation.

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COMMERCIAL LAW.

CHAPTER I.—INTRODUCTORY.

1 Law in General.—Municipal Law comprises all the rules of conduct prescribed by the supreme powers of the state for the citizens and inhabitants of the state. It is composed of

(a) Statute or Written Law, and
(b) Common or Unwritten Law.

2 Statute Law.—Statute Law is the expressed written will of the Legislature.

3 Common Law.—Common Law as distinguished from Statute Law is that great body of law partly arising (as has been supposed) from Statutes which have been forgotten owing to the lapse of time or the destruction or loss of the records containing them, but principally arising from the methods of business and the habits and customs of mankind, greatly solidified by time and approved by judicial decision.

4 The Common Law of England (as Sir Matthew Hale says) is not the product of the wisdom of some one man or society of men in one age, but of the wisdom, counsel, experience and observation of many ages of wise and observing men.

5 Divisions of Law.—Municipal Law is considered under two great heads, one portion dealing with property and civil rights, and another portion dealing with acts that are criminal.

6 Law of Property and Civil Rights.—The Law of Property and Civil Rights is divided into two branches: The Law of Contracts and the Law of Torts.

7 Torts.—The Law of Torts deals with those cases in which one party suffers a wrong (not amounting to a criminal act) at the hands of another, or by reason of any action of another not arising out of contract. These wrongs are independent of contract, and do not grow out of contract. Libel, slander, false imprisonment, nuisance, trespass, and similar matters are torts.

8 Contracts.—Contract Law comprises all that portion of the Statute and Common Law which deals with agreements express or implied.

9 The subsequent pages are intended to deal with those portions of the Law of Contract which are most usually required to be understood by persons engaged in commercial undertakings and pursuits, and have been compiled with special reference to the needs of students in Commercial and Business Colleges.

CHAPTER II.—ON THE CONTRACT IN GENERAL.

10 Definition of Contract.—A contract is an agreement (enforcible by law) between two or more persons that they or some or one of them shall do or forbear to do some specified act or thing.

11 Elements of Contract.—In the formation of every contract there must be five elements either expressed or implied. These elements are :

(1) The parties to the contract.
(2) The agreement or mutual assent.
(3) The subject matter of the contract.
(4) The consideration for the making of it and
(5) The terms comprised in it.

12 Contracts of Record; by Deed; Written; or Verbal.—Contracts are either

(a) Of record (that is by judgment or recognizance), or
(b) By deed (that is under seal), or
(c) Written, or
(d) Verbal (or oral).

13 Simple Contracts. Special Contracts.—Verbal (or oral) contracts and contracts by writing only, without seal, are called simple or parol contracts, and contracts by deed are called special contracts.

14 Express Contracts.—Contracts are also either express or implied or partly express and partly implied.

15 An express contract is one in which all the terms have been arranged between the parties to it and expressed by them either in words or in writting.

16 Implied Contract.—An implied contract is one which arises by implication of law from the situation in which the parties have placed themselves.

(a) By any contract, or
(b) With the intention of creating a contract.

17 Executory and Executed Contracts.—Contracts further are either

(a) Executory, that is to be performed at some future time, or
(b) Executed, that is already performed, or they are
(c) Partly executed and partly executory.

18 They may also be executed as to what was agreed to be done by one of the parties, and executory as to what is to be done by the other party.

19 Contracts are also

(a) Void, or
(b) Voidable.

20 Void Contract. - A void contract is a contract which never came potentially into existence. The term is inaccurate, but is intended to describe the result of the action of parties who desire to make a contract but fail to carry their intention into practical legal effect, because of some fault or disability either in one or both of the parties, or because of some illegality touching the subject matter.

21 Voidable Contract.—A voidable contract is one in which circumstances give an option to one or more of the parties thereto to withdraw therefrom. Whenever the validity of an irregular transaction depends on the confirmation of one or more persons, that transaction is voidable.

CHAPTER III.—PARTIES TO CONTRACTS.

22 Ability to Contract.—The general rule with regard to the persons entitled by law to make contracts is that every one is presumed to be able to enter into a contract.

23 Disabilities.—But certain persons labor under disabilities in the matter of contracting, and these disabilities may be made the ground of defence or attack in proceedings on contract. The fact

giving rise to the disability must, however, always be pleaded. The most important cases in which these disabilities may arise are the following:

24 Infant.—*First.* Generally an infant (that is a person under twenty-one years of age) is incapable of binding himself by any contract except for necessaries.

25 Necessaries.—Whatever goods, commodities or services are reasonably necessary for the use and benefit of a person in the circumstances and conditions in life of the infant party are said to be necessaries. For all such things infants may make contracts, which will bind them and which are enforcible against them.

26 What may be necessaries in any particular case it is impossible to define, because each case will depend upon its circumstances. The things which in one case may be held to be necessaries will not be so held in another, owing to the different positions in life of the respective parties, and owing to the various and different natures of the commodities which may have been supplied to them as alleged necessaries.

27 Misrepresentation as to Age.—An infant may lose his right to use the defence of infancy by misrepresenting his age. (Confederation Life Association *v.* Kinnear 23 A. R. 497.)

28 Statutory Contracts.—Infants may by statute make certain forms of contract. For example:

They may insure if over fifteen. (R. S. O., 1897, Chap. 203, Sec. 150 [6].)

May become members of Benevolent, etc., Societies. (R. S. O., 1897, Chap. 211, Sec. 11.)

Or of Loan Corporations if fifteen years of age or upwards. (R. S. O., 1897, Chap. 205, Sec. 51.)

May, if over sixteen, in certain cases contract to serve for wages. (R. S. O., 1897, Chap. 161, Sec. 5.)

29 Contracts for Infants' Benefit.—The contracts of an infant are binding upon him during his minority if they are necessary and for his benefit and advantage, but speaking generally may be avoided by him on his coming of age. (Addison.)

30 If not so avoided they become binding on him by acquiescence.

31 Infancy a Personal Privilege.—Infancy is a personal privilege of which no one can 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. (Bac. Abr. Infants [T] [4].)

32 Other Contracts by Infant.—Other contracts made by infants are said to be void. They are more strictly speaking voidable, because they are capable of confirmation or ratification when the infant arrives at the age of twenty-one years. This ratification must be in writing. (See R. S. O., 1897, Chap. 146, Sec. 6.)

33 Married Women.—*Secondly.* Married women. The law at one time placed married women under great disabilities in respect of contracts, but these disabilities have been nearly all removed. At the present date married women may make any kind of contracts and bind themselves thereby with the sole exception that they cannot bind themselves as to any separate property which they may have and which is under restraint against anticipation or alienation. They may make contracts as traders and may conduct business on their own account. But a judgment against them is limited to separate estate.

34 Statutes as to Contracts of Married Women.—The principal provisions with regard to the rights of married women in matters of contract are contained in R. S. O., 1897, Chap. 163, a synopsis of which is printed in the appendix. See also R. S. O., 1897, Chap. 165 as to conveyances by married women.

35 Idiots, Lunatics and Drunkards.—*Thirdly.* Persons under a natural or self imposed inability to deal with property and their own rights are persons who, by reason of idiocy, lunacy, or intoxication, are either wholly or partially deprived of their senses, and those persons are incapable of making contracts except for necessaries.

36 Difference as to Executed Contracts.—A distinction, however, is drawn in the case of lunatics between contracts executory and executed. If the lunatic, although incapable of making a contract by reason of the unsoundness of his mind, is yet apparently sane, he will be bound by any contract he makes which is executed, that is one in which the consideration for the promise of the lunatic has been wholly or partially paid or performed so that it would be impossible to avoid the contract without injustice being done.

37 Partial Intoxication.—The same rule applies as to persons partially intoxicated, if the intoxication is not apparent.

38 Intoxication will prevent the formation of a contract where the person with whom the contract has been made has himself procured the intoxication.

39 Statutory Provision re Lunatics' Contracts.—See as to lunatics contracts R. S. O., 1897, Chap. 65, Sec. 16.

40 Alien Enemies.—*Fourthly.* Alien enemies are also incapable of making contracts, and if a contract is made with an alien friend and not completely performed before the declaration of war between the countries of the contracting parties, the parties then become alien enemies, and the performance of the contract is either suspended or the contract becomes void.

41 Agents.—*Fifthly.* Agents are under some disabilities with regard to contracts made by them for their principals, but these disabilities are not personal but relative, and are described more fully in later chapters dealing with the law of agency.

42. Corporations.—*Sixthly.* Corporations are also under some disabilities as to the contracts they may make, and those disabilities will be taken up when the subject of incorporations is dealt with.

CHAPTER IV.—CONTRACTS—MUTUAL ASSENT.

43 Mutual Assent.—The making of a contract depends upon the assent of both parties to the proposition to be embodied in the agreement between them.

44 It is obvious from the definition of a contract that whatever the contract is about each party must give his assent to the terms which are proposed, and any variation, however slight, between them, will be fatal to the formation of an agreement.

45 **Proposal and Acceptance.**—The making of a contract usually takes the form of a proposal and an acceptance. If, in answer to the proposal, the person to whom it is made gives an unqualified assent he is then said to accept the proposal, and his communication is an acceptance.

46 **Counter Proposition.**—If, on the other hand, he accepts part of the proposal and not all he is then said to make a counter proposition which, in its turn, may be met either by an acceptance or by a further proposition, and so on until the parties agree.

47 **When Contract is Complete.**—When the parties have arrived at one set of terms to which they both agree, the contract is said to be complete.

48 **Withdrawal of Proposal.**—A proposal may always be withdrawn before acceptance, and even though the person making the offer gives a specified time within which the offer may be accepted, yet in the meantime he may withdraw it before acceptance, unless there has been some consideration for the agreement to hold the offer open.

49 **Contract by Correspondence.**—The making of a contract by means of the mutual assent of both parties to one set of propositions is simple enough when the parties are face to face, and the propositions are discussed and settled upon without the intervention of time and distance. But it is evident the case is different when parties desire to make a contract by correspondence. The following rules of construction have been adopted in order to meet the necessities of the case.

50 **When Offer is Considered Made.**—An offer by letter (or telegram) is considered as being made to the person to whom the letter is addressed at the time he reads the letter.

51 **When Revocable.**—The revocation of an offer made by letter or telegram must, in order to be effective, reach the person to whom it is addressed before he has accepted the offer. After the despatch of the acceptance the offer or proposition cannot be recalled, even though the acceptance does not reach its destination.

52 **When Acceptance is Complete.**—The party accepting cannot retract his acceptance after despatching it, though prior to his correspondent's receipt of it, nor, indeed, if it never be received.

53 Cases in which the mutual assent of the parties is either given by mistake or induced by fraud will be dealt with in subsequent chapters on "Mistake" and "Fraud."

CHAPTER V.—THE FORMATION OF A CONTRACT—THE SUBJECT MATTER.

54. **The Subject Matter of a Contract** may be anything that is within the realm of human dealing, but it must of course be something existing or something that is intended to exist.

55 **Article to be Brought into Existence.**—It is not necessary that the subject matter of a contract should actually exist at the time the contract is made, since a contract may be good although it be for the manufacture of an article which has not yet been commenced.

56 **Non-existence not Known.**—If the subject matter of the contract is supposed to exist at the time the contract is made, but is really non-existent, though its non-existence is not known to the parties, the matter is one of mutual mistake, and will be dealt with under that head.

57 **Impossibility.**—The subject of a contract must not be one which is impossible of performance. The impossibility however does not refer to the inability of the party from financial or other similar causes to perform his agreement, but refers to the absolute impossibility of carrying out the agreement that has been made. In other words, the thing promised must be *in itself* possible and such as the promisor is legally competent to perform.

58 Certainty.—Further, the thing promised must either be certain and definite or be capable of being rendered certain or definite by reference to some standard.

59 Since the subject matter of a contract is also involved in the question of consideration, further information may be found under that head.

CHAPTER VI.—THE CONSIDERATION IN A CONTRACT.

60 The Consideration for a contract is that, whatever it may be, which induces the making of a promise or the performance of an act.

61 Benefit to Promisor or Detriment to Promisee.—It may consist either *(a)* of the transfer of money or of some other article, or the making of promises, or the doing of anything else, creating a right or conferring a benefit to in or upon the person making the promise or performing the act; or *(b)* of some loss, detriment, injury or inconvenience to the person to whom the promise is made or for whom the act is performed.

62 Consideration must Move from Promisee.—As a consideration is an inducement for the making of a promise, it must come from the person to whom the promise is made and move to the person who makes the promise.

63 A Consideration Coming from a Third Person, outside the supposed contract, would not form a consideration which would induce an enforcible promise because it would not move from the person to whom the promise was made.

64 Mutual Considerations.—In every contract there are two considerations as there are two parties. In the sale of a table there is the buyer who agrees to pay so much for the table, and the seller who agrees to sell the table for so much. Each takes part in the contract, the one agreeing to pay money and the other agreeing to deliver the table.

65 Consideration may be Acts or Promises.—The consideration for the promise of the buyer to pay money is either the delivery of the table to him or the promise of the seller to deliver it. The consideration for the delivery of the table is the payment of money or the promise of the payment of money by the buyer. If, therefore, the case is looked at from the standpoint of the buyer the consideration (the price of the table or the promise to pay that price) moves from him to the seller and forms the inducement to the seller to deliver or promise to deliver the table. Looking at it from the standpoint of the seller the consideration (the delivery of the table or the promise of delivery) moves from him to the buyer and forms the inducement to the buyer to pay or promise to pay the price.

66 This may be stated thus:

$$\left.\begin{array}{c}\text{SELLER}\\ \text{Delivery of}\\ \textit{or}\\ \text{Promise to deliver}\end{array}\right\} \text{ Table draws } \left\{\begin{array}{c}\text{BUYER}\\ \text{Payment of}\\ \textit{or}\\ \text{Promise to pay}\end{array}\right\} \text{ Money}$$

$$\left.\begin{array}{c}\text{BUYER}\\ \text{Payment of}\\ \textit{or}\\ \text{Promise to pay}\end{array}\right\} \text{ Money draws } \left\{\begin{array}{c}\text{SELLER}\\ \text{Delivery of}\\ \textit{or}\\ \text{Promise to deliver}\end{array}\right\} \text{ Table}$$

67 Consideration of Detriment to Promisee.—"The loss or abandonment of any right or the forbearance to exercise it for a definite or ascertainable time" (Pollock) will form a consideration falling within the second branch. Compromise of doubtful rights, or granting leave to use the property of or to cause inconvenience to the promisee, are under the same head. The result may or may not be a benefit to the promisor, but that is not material; the inducement, the *quid pro quo*, is the detriment (slight or great) suffered by the promisee, and which moves the promisor to the making of his promise.

68 Adequacy of Consideration.—Though the law requires the presence of a consideration it does not (except in some special cases,

such as contracts with expectant heirs, contracts with insolvents, etc.,) concern itself with the adequacy thereof. It leaves the contracting parties to put their own value on what they give or what they receive.

69 **Deed Imports Consideration.**—In the case of contracts under seal (with the exceptions noted above and with the exception also of contracts in restraint of trade) the use of the seal imports a consideration even if none is mentioned.

70 Specific performance of a deed shown to have been voluntary (that is without consideration) will not be granted.

71 **Matters Antecedent.**—Matters which have occurred before the making of a contract cannot form any consideration therein.

72 **Voluntary Contract not Enforcible.**—A contract in which no consideration is found, either expressed or implied or imported, is incapable of enforcement.

CHAPTER VII.—THE FORMATION OF A CONTRACT—THE TERMS.

73 Terms.—Under this heading will fall those expressed or implied stipulations arranged between the parties as to the carrying out of the contract and all those implied conditions which are by law appended to contracts.

74 Expressed or Implied Stipulations between the parties may be divided into three classes. They are:

(1) Representations, or
(2) Warranties, or
(3) Conditions (conditions being *(a)* precedent or *(b)* concurrent or *(c)* subsequent),

and while these matters are, to some extent, similar there are many distinctions between them which have practical effect. (See also heading Performance of the Contract.)

75 Representation.—A representation is a statement or assertion made by one party to the other before or at the time of the contract as to some matter or circumstance relating to it.

76 A representation, even though contained in a written instrument, is not an integral part of the contract, and hence it follows that even if it be untrue the contract in general is not broken, nor does the untruth furnish any cause of action unless made fraudulently, in which case the false representation becomes a fraud.

77 A Warranty is a representation or statement made during the course of the bargain to which it refers and as part of it. It is not an antecedent representation made by the vendor as an inducement to the buyer, and it is not a condition of the contract. It is a statement made at the time of a contract by the seller of an article as to its conditions or quality or ownership.

78 A General Warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer.

79 Warranty of Title.—A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title unless it be shown by the facts and circumstances of the case that the vendor did not intend to assert ownership but only to transfer such interest as he might have in the chattel sold. (Benjamin.)

80 Warranty of Quality.—As far as quality is concerned the maxim "*caveat emptor*" is applicable to all sales of chattels.

81 Implied Warranty.—But this does not apply where the chattel is to be made or supplied, nor does it apply where the chattel is furnished for a particular purpose or under a particular trade name, for then there is an implied warranty that the chattel is reasonably fit for the purpose for which it is intended or is merchantable under the name given.

82 Warranty on Sale by Sample.—Implied warranties also exist in cases where chattels are sold by sample, as, for instance, that the sample is equal to the bulk, subject to this however that the sample itself is assumed to be free from secret defects. Delivery therefore of the bulk answering to the sample was held not sufficient in a case where the sample itself contained a defect not apparent to the buyer. (Heilbutt *v.* Hickson, L. R. 7 C. P. 438.)

83 Remedy for Breach of Warranty.—On a breach of warranty the purchaser is entitled to return the article and recover back payments made on account of the purchase money as for a failure of consideration.

84 Precedency of Conditions.—It has been said (Jones *v.* Barclay, 2 Douglas 684) that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.

85 Condition not Precedent.—Where a day is appointed for doing any act and the day is to happen, or may happen, before the promise by the other party is to be performed, the latter may bring action before performance by him which is not a condition precedent.

86 Condition Precedent.—But it is otherwise if the day fixed is to happen after the performance, for then the performance is deemed a condition precedent.

87 Independent Covenant.—When a covenant or promise goes only to part of the consideration, and a breach of it may be paid for in damages, it is not a condition but an independent covenant.

88 Mutual Conditions Precedent.—Where the mutual promises go to the whole consideration on both sides, they are mutual conditions precedent: formerly called dependent conditions.

89 Intention as to Condition Precedent.—Where from a consideration of the whole instrument it is clear that the one party relied upon

his remedy and not upon the performance of the condition by the other such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.

90 **Alteration of Condition.**—A condition precedent may be altered in character by the acceptance by the other party of partial performance.

91 **Conditions Precedent must be Strictly Performed** before the party bound to fulfil them can demand compliance from the other.

92 **Difficulty or Impossibility of Performance.**—The impossibility of performing the condition, or that its performance is difficult or ruinous, will furnish no excuse if the performance be in its nature possible.

93 Where the impossibility is caused by the act or default of the other party the performance of the condition precedent is excused.

94 And the performance is equally excused where a legal impossibility supervenes.

95 Or where the other party waives the performance of the condition.

96 **Performance Must be Shown by Covenantor.**—The person who desires to claim the performanceof an agreement in which there has been a covenant or condition precedent by him must show the performance of the covenant or condition subject to the exceptions above set out.

97 **Conditions Concurrent.**—Where each party is to do an act at the same time as the other (as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer), these are concurrent conditions, and neither party can maintain an action for breach of contract without averring that he performed, or offered to perform, what he himself was bound to do.

98 **Conditions Subsequent** do not affect the performance of the contract in the same way conditions precedent do. They are collateral stipulations growing out of the contract and to be performed according to their tenor, but their non-performance does not excuse the performance of the contract by the other party, but only gives rise to a right of action either for damages or for diminution of price or as the case may be.

CHAPTER VIII.—PROOF OF CONTRACTS—THE STATUTE OF FRAUDS.

99 Common Law Rules as to Proof of Contracts.—In addition to the principles governing the formation of contracts there are rules of law referring to the evidence by which contracts are made manifest. Contracts might at common law have been proved by verbal testimony, but to remove the inconvenience (which admittedly existed) of allowing contracts to rest on verbal testimony alone statutes have at different times been passed providing that certain forms of contracts must be evidenced in a certain way or by certain acts.

100 The Statute of Frauds.—Many of these statutes will be cited as they come naturally into the text, but there is one statute which will appear so frequently and which touches so many kinds of contracts that it will be desirable to treat of it here. This enactment is known as the Statute of Frauds (29 Charles 2nd, Chap. 3). The two sections which more particularly refer to contracts within the scope of this work are the 4th and 17th.

101 The 4th Section reads as follows: "And be it enacted that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

102 The 17th Section of the same Statute reads as follows: "And be it enacted that from and after the said four and twentieth day of June (A. D., 1677) no contract for the sale of any goods, wares, or merchandises for the price of ten pound sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum 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."

103 Effect of these Sections.—All contracts therefore falling within the scope of either of these two sections are, as to their evidentiary character, taken from the domain of parol evidence and must be made to appear not only from the evidence of the persons setting them up, but through or from some act of the person sought to be charged, performed by him and inconsistent with any theory save that a contract existed between the parties. When therefore the defendant by his own act has admitted that some contract exists between himself and the plaintiff parol evidence is admissible to show what the terms of the contract were except in those cases in which the only act of the defendant is the writing which he has signed, in which cases the writing itself must furnish the details of the agreement.

104 Contracts for More than One Year.—We must note under the 4th section, as a general rule applicable to all kinds of contracts, the clause providing that any contract not to be performed within the space of one year must be in writing. This refers to cases in which by the terms of the contract itself it is not to be performed by both parties within one year. If the contract (not being otherwise required to be in writing) may be performed within the space of one year either by one party or another, or by both, then it is not within the Section and may be proved orally.

105 Example of Contract for More than One Year.—A familiar example of a contract within the Section would be an agreement made on the 15th of the month to take employment (for instance as book-keeper) for one year, commencing from the first of the following month. This would be an agreement which could not possibly, by the terms of it, be performed by either party within one year from the making of the contract, and therefore such a contract must be in

writing within the terms of the 4th Section or it is not enforcible. No action could be brought to charge any person upon it.

106 Statement of Consideration in the Memorandum.—With regard to the requirements as to the note or memorandum in writing it will be sufficient to examine the sections together, merely mentioning here that a distinction has been drawn between the 4th Section and the 17th Section as to what is a sufficient note of the bargain made. In Wain *v.* Warlters (5 East 10) it was held that where the consideration for the promise was not stated in the writing parol proof was (under the 4th Section) inadmissible, and the promise was therefore void for want of consideration. The case turned on the word "agreement," which was held to include all the stipulations of the contract showing what both parties had to do, not the mere promise of what the party to be charged undertook to do. But in cases under the 17th Section the construction has been more liberal, as we shall see when we consider that part of the statute later on.

107 Consideration in Guaranties.—As to contracts of suretyship a subsequent statute (The Mercantile Law Amendment Act) provided that the consideration need not appear in the writing.

CHAPTER IX.—PROOF OF CONTRACTS—STATUTE OF FRAUDS—THE FOURTH SECTION.

108 Section does not Avoid Contract.—It will be noticed that by the terms of the 4th section the penalty for non-compliance with its provisions is that no action shall be brought upon the contract. The contract itself is not invalidated and may be used for collateral or defensive purposes. In other words it is a rule of procedure only.

109 Special Promise by Executor or Administrator.—An executor (one appointed under a will to distribute the testator's estate) or an administrator (one appointed by a Surrogate Court to distribute an an intestate's estate, or an estate in respect of which no executor has been appointed,) would not incur by virtue only of his appointment any personal liability in respect of the debts of the deceased, and if a contract to incur such a liability is alleged against him, it must be evidenced in writing.

110 Guaranty.—The promise to answer for the debt or default of another under this section refers to debts for which the other party remains still liable. The contract is one of suretyship, and will be dealt with under the head of Principal and Surety. If the other party does not remain liable the contract then merely results in placing one debtor in place of another and is called a "Novation."

111. Agreement in Consideration of Marriage.—A promise made in consideration of marriage does not mean a promise to marry, but a contract, the consideration of which is a marriage about to be solemnized.

112 Ante-nuptial Agreement.—An ante-nuptial agreement by which property is settled by or upon an intended husband or wife, must be in writing. If in writing it is effectual, not only as between the parties, but as against creditors.

113 Post-nuptial Agreement.—If an ante-nuptial settlement is not in writing it can be made binding as between the parties to it by a post-nuptial note or memorandum in writing, but not so as against creditors.

114 Sale of Lands.—A contract for the sale of lands or any interest therein must be in writing or it cannot be enforced. Courts of equity have introduced a modification of this in cases in which there has been a part performance, and this will be mentioned under the heading of Real Property.

115 Contracts not to be Performed within One Year.—As this covers all kinds of contracts special reference has been made to it, and attention has been drawn to the fact that this clause applies to all contracts which by their terms cannot be fully performed within a year from the making thereof. A contract not enforcible under some other clause (as, for example, because it is of guaranty or relates to

lands) may be also obnoxious to this provision because it is not to be performed within a year.

116 The Agreement itself is the Test.—But the mere fact that the parties may not or do not perform, or even do not expect to perform within the year, does not render a writing necessary within this clause, provided such contract, as fairly and reasonably interpreted, does not postpone performance beyond the year.

117 And if a contract will be performed upon the happening of a certain contingency that may or may not occur within a year, it need not be in writing. Thus an agreement to support another during life, being fully performed if that other dies, is not within the statute for the party to be supported may die within a year. So with an agreement to serve during the life of either party, or to pay during another's coverture, or whatever may be the contingency provided for, if it may happen within a year.

118 But an agreement to employ one for more than a year, or for a year only, the service to begin on a day later than that upon which the contract is made, must be in writing under the statute. So, of a contract to deliver goods or pay money in instalments covering more than a year, to marry after five years, to lease land for one year, the term to commence on a future day, or to deliver to the promisee the crops grown in three successive years. (Spencer.)

119 The Memorandum in Writing.—As already intimated the requirements and decisions with regard to the writing will be considered under this head in the 17th Section, the two sections being practically identical on this point with the exception noted in Section 106.

CHAPTER X.—PROOF OF CONTRACTS—STATUTE OF FRAUDS—THE SEVENTEENTH SECTION.

120 Certain Contracts not Allowed to be Good.—It will be noticed under this section that any contract falling within its provisions "shall not be allowed to be good" unless it is brought within certain exceptions. But this as well as the provision in the 4th Section practically comes down to a rule of procedure and means that Courts will not allow evidence to be given as to any contract within the section unless certain acts have been done as therein provided.

121 Amendments by Ontario Statutes.—The word "price," which was the word used in the original act, has been changed to "value," and the statute has been made to cover executory contracts (see R. S. O., 1897, Chap. 146, Sec. 9).

122 "Contracts for Sale of Goods."—In considering this phrase it is necessary to distinguish between sales of goods and contracts to perform work and labor and to provide materials. The rule may be stated in this way: If the contract is intended to result in transferring for a price from B to A, a chattel in which A had no previous interest, it is a contract for the sale of the chattel.

123 The section does not apply to incorporeal rights and property, and it does not apply to real estate or any interest therein, such contracts being governed by other sections of the statute. The section therefore does not apply to any chattels which form part of the realty.

124 Chattels Attached to Soil.—Where the agreement is to transfer the property in anything attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is transferred to the purchaser, it is an executory contract for the sale of goods. For example, the sale of standing timber which was to be cut down by the owner of the land would be a sale within this section.

125 Where there is a sale in which the property in the goods is to pass to the buyer before severance a distinction is made between the natural growth of the soil, as grass, timber, fruit, or trees, etc., and fruits produced by the labor of man, such as wheat, etc., the former being an interest in land, the latter being chattels.

126 Thus where the contract was for the purchase of a quantity of potatoes then in the ground to be turned up by the purchaser it was held that there was a contract for the sale of goods because it was a contract which gave the purchaser an interest in the growing product of the land which constituted its annual profit and was produced by labor and expense, and was not the natural production of the soil in the same sense that apples would be.

127 Growing Crops if natural products are part of the soil before severance but become chattels by being severed, while growing crops produced by the labor of man are chattels whether before or after severance.

128 $40 or Upwards.—In considering what contracts are for the value of $40 or upwards a distinction must be drawn as to separate contracts between the same parties and one contract with separate items. If the value of goods sold under any one contract, whether with one or many items, either at the commencement or the conclusion of the contract amounted to, or exceeded, the value of $40, the section will apply.

129 Acceptance and Receipt.—The section then goes on to provide that under certain excepted circumstances the sale shall be allowed to be good, although it is of chattels of the value of $40 or

upwards, and the first exception is embraced in the words "except the buyer shall accept part of the goods so sold *and* actually receive the same. There must be a union of both acceptance and receipt, acceptance without receipt, or receipt without acceptance, being insufficient.

130 The Acceptance may be either actual or constructive, and may precede or accompany the receipt or may be after the receipt.

131 While delivery to a carrier is constructive delivery to the purchaser of the goods, at all events where the goods are to be delivered at the place of sale, yet the carrier as such has no authority to accept goods within the meaning of this section.

132 The acceptance may be constructive also where there is delay or acquiescence or some dealing with the goods.

133 It has been considered (though on this point there has been much conflict of opinion) that the acceptance necessary to satisfy this section (that is to let in parol evidence of the contract) may be different from the acceptance which affords conclusive evidence of the contract having been fulfilled, or in other words, that the purchaser might be entitled to reject the goods as not having satisfied the contract he actually made, although he may have sufficiently accepted them for the purpose of this section.

134 (It must be remembered that the object of the section is to require some act on the part of the defendant consistent only with the existence of a contract between himself and the plaintiff, and such an act on the part of the defendant would be his receipt of (for example) goods packed in barrels. Having received into his warehouse or premises the barrels without having objected that he had made no purchase, that is, without having rejected them on the ground that he had not bought any goods, and, having therefore accepted the barrels containing the goods, he may afterwards, on opening the barrels, insist that the goods were not equal to sample. If he had made no contract for the purchase of goods in barrels, he would hardly have taken them into his premises without objection, and, therefore, the fact that he received them in this way, or, in other words, that he accepted the delivery to him, indicates that there must have been some contract made by him by virtue of which goods in barrels were to be delivered to him. Thus the object of the statute is attained by making the act of the defendant an admission

of the existence of a contract, while it is not necessary in order to satisfy the section that in case of such receipt and acceptance the defendant should be precluded from afterwards objecting that the goods were not equal to sample. In other words, an acceptance which will satisfy the section will not preclude the defendant from afterwards objecting to the goods).

135 Actual Receipt.—But it is not only necessary that there should be acceptance, there must be also the actual receipt of the goods. In the case last supposed there would be the acceptance and receipt of the goods, but all cases are not of this simple character.

136 The goods may at the time of the sale be in the possession (1) of the buyer as bailee or agent of the seller (2), of a third person, whether or not bailee or agent of the seller, or (3) of the seller himself.

137 (1) When the goods at the time of the contract are already in possession of the buyer and it can be shown that the buyer has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be shown by parol evidence and may be equivalent to actual receipt.

138 (2) When the goods are in possession of a third person at the time of the sale, an actual receipt takes place when the seller, the buyer, and the third person agree together that the latter shall cease to hold the goods for the seller, and shall hold them for the buyer.

139 (3) Where the goods are in possession of the seller at the time of sale, if the buyer removes the goods from the seller's possession and takes them to his own, there is an actual receipt.

140 It is necessary here to renew the observation that the inquiry is now confined to the validity, not the performance of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, *if taken as part of the bulk, and by virtue of his purchase*, is an actual receipt and acceptance sufficient to make the contract good under this section, although a serious question may and often does arise at a later period whether there has been an actual receipt of the bulk. (Benjamin).

141 Earnest or Part Payment.—The provision as to part payment of the purchase money and the giving of earnest seems to call for little remark. But the earnest is not equivalent in meaning to part pay-

ment, although it has the same effect. Earnest may be money or some gift or token (among the Romans usually a ring) given by the buyer to the seller and accepted by the latter to mark the final conclusive assent of both parties to the bargain.

142 **Memorandum in Writing.**—If the plaintiff is unable to show in the case of a sale of goods of the value of $40, or upwards, that there has been *(a)* acceptance and receipt, or *(b)* part payment, or *(c)* the giving of earnest, he must produce some note or memorandum in writing, or his alleged contract will not be allowed.

143 This section does not refer to cases in which the parties have expressed their agreement in formal written contracts. The intention of the statute was to prevent the enforcement of parol sales of goods of the value mentioned, unless there could be shown some act of the defendant consistent only with the existence of a contract, such acts as the acceptance and receipt of goods or the payment of money, or the giving of earnest, or the signing of some note or memorandum.

144 **Parol Evidence to Alter Memorandum.**—This note or memorandum is of the bargain that has been made, that is the bargain is made antecedently, verbally, and then expressed in the written memorandum. Parol evidence is therefore admissible on the part of the defendant to show that the note or memorandum preferred by the plaintiff is not a note or memorandum of the bargain which has been made, by reason of the omission of terms or otherwise. But the plaintiff who sets up a writing as a memorandum of the contract is not allowed to add by parol evidence terms or conditions not contained in it.

145 **Parol Evidence to Complete Partial Memorandum.**—If the note or memorandum is not in a single document, as for example, if the contract is contained in letters or telegrams, parol evidence is not admissible to connect these letters in order to make out of them one complete contract.

146 The letters or other documents must be connected either physically or by reference. And if there is no such connection between them there is no contract. And the separate papers which it is desired to connect by showing from their contents that they refer to the same agreement must be consistent and not contradictory in their statement of the terms.

147 **Parol Evidence in Explanation.**—Parol evidence, while not admissible to add to, vary, contradict or alter a written memorandum is admissible to identify the subject matter of the contract, and to show the circumstances and the situation of the parties at the time the writing was made, and to show the date and the usage of trade, and to explain a latent ambiguity, and also to show a common mistake in preparing the memorandum; and parol evidence is admissible to show that a written document was delivered as in the nature of an escrow, or was to be modified upon some future contingency.

148 **Evidence of Subsequent Bargain.**—With regard to parol evidence of a subsequent bargain, modifying the bargain set out in the memorandum, it is admissible or not, according to the following rules: Where the bargain, as altered by parol, is one which, by this or any other statute, requires writing to evidence it, the alleged parol variation will not be admitted. If the bargain, as altered by parol, is one which might have been originally made by parol, then the evidence as to the subsequent alteration is admissible.

149 But verbal evidence may be given as to alterations or additions subsequently made by parol, where these additions or alterations are not such as to result in what is practically a new contract.

150 The written memorandum must be signed before the action is brought.

151 **Contents of Note.**—The memorandum under this statute need not be in any particular form, but it must, of course, contain all the material terms of the contract; as, for example, the names or descriptions of the parties, the subject matter, the price, if any was mentioned, and the terms, if any were arranged.

152 **Description of Parties.**—While the memorandum must show the parties, it will suffice if they are mentioned by description instead of name. If the writing shows by description with whom the bargain is made then the statute is satisfied, and parol evidence is admissible to apply the description; that is, not to show with whom the bargain was made, but who the person described was, so as to enable the Court to understand the description. For in every case where written evidence is required by law, there must be parol evidence to apply the document to the subject matter in controversy. A familiar example of a case of this kind is where an agent signs his own name instead of the name of his principal.

153 **Letter Repudiating Contract.**—A letter repudiating a contract may be so worded as to satisfy this section. In Wilkinson *v.* Evans, L. R. 1 C. P. 407, the defendant refused the goods, writing on the back of the invoice the reason for which he returned them, and it was held that as the invoice contained all the terms of the contract, and the defendant's objection related only to the performance of it, his signature on the back of the invoice was sufficient.

154 **Acceptance by Parol.**—A written memorandum containing an offer to contract is sufficient as against the party signing the writing, though the acceptance is by parol only.

155 **Signature by Party to be Charged.**—The 17th section requires the writing to be signed by the parties to be charged, and the 4th section by the party to be charged; but in both sections the only signature required is that of the party against whom the contract is to be enforced, so that if signed by one person only, the contract, by force of the decisions upon this part of the section, is good or not at the election of the party who has not signed.

156 **The Signature Required** by the statute is not confined to the actual subscription of a name. A mark, or the holding of the top of the pen while another person writes the signature, so long as there is a signature, or a mark intended for a signature, will be sufficient. But a mere description of the person is insufficient (as where a letter was signed "Your affectionate mother" without the addition of the mother's name).

157 **Signature by Agent.**—With regard to signature by an agent, it is sufficient here to note that the agent who is to sign the writing may be appointed by parol. The general subject of signature by agents will be dealt with under the heading of "Agency."

CHAPTER XI.—PERSONS AFFECTED BY CONTRACT.

158 Parties Affected by Contract.—Having stated briefly the mode in which contracts are formed it will be in order next to consider what parties are affected by contracts.

159 Generally only Contracting Parties Affected.—The general rule on this point is that the legal effect of a contract is confined to the persons by whom the contract is made. In other words, considering a contract as giving rise to duties to be performed by one party to it (who in respect of these duties is the *debtor*) and to the right of the other party to it (who in respect to this right is called the *creditor*) to demand the performance of such duties, the effect of the contract must remain with the debtor and creditor (or their representatives—meaning by this term the persons succeeding, whether by death or assignment, to the general rights and liabilities of any person under a contract) and cannot affect any *third person*, that is one not a party to the contract either originally or by representation.

160 The Original Parties to a Contract must be Ascertained at the Time the Contract is Made.—"A party cannot have an agreement with the whole world; he must have some person with whom the contract is made." (Squire *v.* Whitton, 1 H. L. C. 333.)

161 A mere offer, though made in general terms (as by an advertisement offering a reward), does not become a contract until someone accepts the proposition. Thus an offer at Dutch Auction is

addressed to a number of persons but is not a contract until accepted by someone. A merchant, in his advertisement, offers to sell goods at a certain price but there is no contract created until someone has accepted his offer.

162 **No Contract can Impose Liabilities on Third Persons.**—This is evident because every contract necessarily takes from the contracting parties some of the liberty he before enjoyed with regard to his property, and this (in the law of contracts at all events) can only be done with his consent.

163 **Novation.**—A debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. If the substitution is with the creditor's consent this (which is practically a new contract) is called *Novation*.

164 **Performance to Third Person.**—No third person can become entitled by the contract itself to demand the performance of any duty under the contract. Apparent exceptions to this rule occur in respect of trusts and marriage settlements, which are, however, outside the scope of these outlines. Apart from these matters a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may.

165 **Devolution on Death.**—On the decease of a contracting party his executor or administrator is entitled to the benefit of and (to the extent of the estate liable to the payment of debts devolving upon him) is subject to the obligations created by the contract of the deceased.

166 **The Assignment of a Contract** so as to give the assignee a right to sue in his own name was, at common law, not allowed. The doctrines of equity were more favorable to assignees. At the present time the law as to assignments is contained in R. S. O., 1897, Chap. 51, Sec. 58, Subsection 5, which reads as follows:

167 (5) **Assignment of Choses in Action.**—Any absolute assignment (made on or after the 31st Dec., 1897)
By writing under the hand of the Assignor (not purporting to be by way of charge only),
Of any debt or other legal chose in action
Notice of which assignment has been given to the debtor, trustee or other person

from whom the assignor would have been entitled to receive or claim such debt or chose in action,

Shall be effectual in law

(Subject to all equities which would have been entitled to priority over the right of the assignee if this section had not been enacted)

To pass and transfer from the date of such notice

(a) The legal right to such debt or chose in action, and

(b) All legal and other remedies for the same, and

(c) The power to give a good discharge for the same without the concurrence of the assignor.

168 (6) The debtor, trustee, or other person liable in respect of such chose in action

If he has notice that such assignment is disputed by the assignor or any one claiming under him,

Or has notice of any other opposing or conflicting claims

To the debt or chose in action may either

(a) Call upon the several parties to interplead, or

(b) May pay the debt into the High Court under the Trustee Acts.

(R. S. O., 1897, Chap. 51, Sec. 58, Sub-secs. 5 and 6.)

169 The assignee of a contract is under two inconveniences. The first is that he may be met with any defence which would have been good against his assignor.

170 The second is that he must prove his own title and that of the intermediate assignees, if any; and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part, provided against by agreement of the parties. "It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge; but such a stipulation will neither affect the rights of intermediate assignees, nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights."

171 In order to give an assignee the benefit of the enactment above cited, it will be noticed that

(a) The assignment must be absolute;

(b) Notice in writing must be given to the debtor.

172 The assignee must take the rights assigned to him "subject to all equities."

173 The use of the word assignee in a contract, or its omission therefrom, may extend or restrict the assignability of a contract; but as to this the terms of any particular contract will govern. Care should therefore be taken in the use of this word when contracts are being prepared.

174 **Difference Between Assignability and Negotiability.**—Though nearly all contracts are with either few or many restrictions transferable or assignable, this capability must be carefully distinguished from negotiability. Bills of exchange and other similar commercial instruments are negotiable. Contracts in general are only assignable. The difference is an important one. If the contract is merely assignable, the assignee gets only what the assignor had—the same title, subject to the same defects and equities. If the contract is a negotiable one, the assignee may take by the transfer a better title than the assignor had.

175 **Transfer of Shares.**—The transference of shares in partnerships and incorporated companies will be hereafter dealt with.

176 **Transfer of Property Subject to Obligation.**—In the law of real property some obligations are attached to ownership of and interests in land, and these obligations, both as to the burden and benefit thereof, are said to run with the land. But at common law no obligations can be attached to chattel property where the right of property, as well as possession, passes by the contract.

177 But by statute (See R. S. O., 1897, Chap. 145, Sec. 5, Subsections 1 and 2) the endorsement of a bill of lading operates as a transfer of the contract, whenever by the law merchant it operates as a transfer of the property in the goods.

CHAPTER XII.—UNLAWFUL AGREEMENTS.

178 Contracts Must be Lawful.—An agreement, as we have already seen, is not enforcible by law, unless it fulfills certain conditions, such as capable parties, a subject matter, consideration, and (in some cases) writing, etc. But more than these things are required in a valid agreement. The contracting parties must not agree to do something which the law has forbidden to be done, nor must they agree not to do that which the law has commanded to be done. That contract is not a legal contract, the purpose of which is contrary to law.

179 Illegality will not be Presumed.—The law considers every man innocent until his guilt has been proved. And where a contract is capable of two constructions, the one making it valid and the other making it void, the courts will adopt the first.

180 Illegality, how Arising.—Contracts may be illegal because they are

(a) Contrary to positive law.
(b) Contrary to positive morality as recognized by law.
(c) Contrary to the well being of the state or its subjects.

Generally these are referred to as *(a)* Illegal, *(b)* Immoral, *(c)* Against Public Policy.

A.—AGREEMENTS CONTRARY TO POSITIVE LAW.

181 1. **Agreement to Commit Crime.**—The simplest case is an agreement to commit a crime or an indictable offence: "If one bind himself to kill a man, burn a house, maintain a suit, or the like it is void." (Shep. Touchst. 370.)

182 2. **An Agreement to Commit a Civil Wrong** to third persons. Such as, for example, agreements in fraud of creditors (parties to a composition) to give a secret advantage to some creditor over another. "Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the other for a release from them to the debtor in consideration of the release by him. Where any creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is wholly void—not only can he take no advantage from it but he is also to lose the benefit of the composition." (Mallalieu *v.* Hodgson, 16 Q. B. 789.)

183 3. **Agreements Illegal by Statute.**—In the multiplicity of modern regulative Acts so many things are forbidden that to deal with them all would be impossible within the limits of these outlines.

184 Rules as to Statutory Illegality.—In determining whether any contract is illegal because of any statutory provision the following rules must be considered;

185 *(a)* **When a Transaction is Forbidden the Grounds of Prohibition are Immaterial.**—Courts of justice cannot take any note between *mala prohibita* (that is things which, if not forbidden by positive law, would not be immoral) and *mala in se* (that is things which are so fobidden as being immoral).

186 Thus under R. S. O., 1897, Chap. 140, Sec. 1, no miller shall take more than one-twelfth for grinding and bolting. By R. S. O., 1897, Chap. 203, Sec. 85, Insurance Companies, unless registered, shall not make contracts of insurance. By R. S. O., 1897, Chap. 138, Sec. 125, no person shall join in making or procuring any fraudulent entry or evidence. The first two are not in themselves immoral, while the third is, yet they are all equally illegal because forbidden.

187 *(b)* **The Imposition of a Penalty** by statute on any specific act or omission is *prima facie* equivalent to an express prohibition.

188 Thus R. S. O., 1897, Chap. 136, Sec. 95, does not enact that no person shall make unauthorized entries in registry books, but inflicts a penalty not exceeding $100 on any person who makes such unauthorized entries.

189 *(c)* **The Absence of a Penalty** or the failure of a penal clause, in the particular instance, will not prevent the Court from giving effect to a substantive prohibition.

190 Thus a cove keeper is by R. S. O., 1897, Chap. 145, Sec. 9, forbidden to hold goods in pledge for more than six months, but no penalty is enacted as attaching to any breach of this prohibition.

191 *(d)* **Evasion of Statute Forbidden.**—What the law forbids to be done directly, cannot be made lawful by being done indirectly.

192 Thus when R. S. O., 1897, Chap. 147, Sec. 2, prohibits a conveyance by an insolvent to one of his creditors to the prejudice of the rest, it equally prohibits a conveyance by the debtor to a third person, who in turn conveys to the creditor if the indirect transfer was intended as an evasion of the statute.

B.—AGREEMENTS CONTRARY TO MORALS OR GOOD MANNERS.

193 1. **Lord's Day Act.**—A familiar instance in the law of contracts is found in the statute known as the Lord's Day Act (R. S. O., 1897, Chap. 246), which provides, by Sec. 1, against Sunday sales or work by any merchant, tradesman, farmer, solicitor, mechanic, workman, laborer, or other person whatsoever, and makes null and void, by Sec. 9, all sales and purchases, and all contracts and agree-

ments for sale, or purchase of any real or personal property whatsoever, made by any person or persons on the Lord's Day.

194 2. **Other Prohibitions.**—Contracts for the printing or sale of immoral literature are also illegal. And there are other matters, contracts upon which would be invalid under this head, but they are outside the consideration of Commercial Law.

C.—AGREEMENTS CONTRARY TO PUBLIC POLICY.

1. As Touching the External Relations of the State.

195 *(a)* The declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse, except with the license of the Crown, is illegal.

196 *(b)* The effect upon existing contracts of the declaration of war is to suspend them during hostilities, unless the nature or objects of the contracts should be inconsistent with suspension, in which case the contract is dissolved and the parties are released from further performance of it. If on a declaration of war one or both of the belligerent parties allow time for the performance of a contract, the full effect of the declaration upon contracts is postponed until the expiry of the period allowed.

197 *(c)* Neutral trade with belligerents is at risk of capture only and is not unlawful.

2. Matters Affecting Good Government and the Administration of Justice.

198 *(a)* **Corrupt Acts.**—Contracts for corrupt or improper acts of or influence on public officers or legislatures are wholly void.

199 *(b)* **The Sale of Public Offices** is prohibited not only by various statutes but at common law.

200 *(c)* **Assignments of Salaries** and pensions are not allowed. At common law a pension for past services was considered assignable, but this rule has been in most cases changed or abrogated by the Act or authority under which the pension is payable.

201 *(d)* **Compromises of Criminal Proceedings** (unless the offence is not of a public character as where the injury might have been the

subject of a civil action) are forbidden and contracts founded upon or made in consideration of such compromises are void.

202 *(e)* **Maintenance and Champerty.** — Maintenance (which signifies the helping by money or otherwise of any party to an action in which the person maintaining has no interest) and champerty (which has been aptly described as maintenance aggravated by an agreement to have part of the thing in dispute) are strictly forbidden by statute and common law, and any agreement founded on either of them is illegal.

3. **Contracts Annulling Individual Rights,** in which the public are interested, are void. The following are instances:

203 (*a*) **Agreements in Restraint** of marriage are void. Conditions in wills in this respect may or may not be void, their validity depending on the terms in which they are expressed and the form in which they are put.

204 (*b*) **Agreements in Restraint** of trade, if general and unlimited, are void.

205 The general rule is that a man should not be permitted to enter into any contract which will prevent the exercise of his own business craft or occupation, so as to deprive the public of his skill and ability and the benefit of his competition with others. Partial restrictions, however, have been admitted, because it is of more advantage that a man should feel free to impart the secrets of his trade to an apprentice or student, who has by contract agreed not to compete with his master, than that the apprentice or student should be, so far as the master is concerned, ill-taught, and not fully instructed in the secrets of his craft.

206 The reasons why agreements in unlimited restraint of trade should not be allowed are because they tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as to themselves; they prevent competition and enhance prices, and they expose the public to all the evils of monopoly.

207 On the other hand partial restraints of trade, which are usually agreements by the seller of a business not to compete with the buyer, or agreements by a partner or retiring partner not to compete with the firm, or agreements by a servant or agent not to com-

pete with his master or employer after his term of service or employment is over, are distinctly for the benefit of the community; and these partial restraints will be allowed if they are founded upon a valuable consideration, and if the restriction does not go in its extent as to space or otherwise beyond what, in the judgment of the Court, is reasonably necessary for the protection of the other party, regard being had to the nature of the trade or business.

208 Consideration was at one time considered to be the subject of examination of the Court as to its adequacy, but it now seems to be settled, that when there is shown to be a valuable consideration, the Court will not too narrowly scrutinize the question as to whether it is adequate to the occasion.

209 The consideration must be shown by the person alleging the contract, even in those cases in which the contract is under seal.

210 While a verbal agreement, if otherwise satisfactory, would be sufficient, yet since agreements of this kind are usually to cover an extended period, the provisions of the 4th section of the Statute of Frauds as to agreements not to be performed within one year must be remembered.

211 The restraint, if partial, may be partial only as to either time or space and unlimited as to the other branches of it, provided always that it keeps within the measure of restraint which the Court may consider necessary; thus an agreement by a traveller unlimited in time but restricted to the district in which the traveller was employed, was held reasonable; and a contract by a traveller unlimited as to space but limited in time to two years after the severance of the relation between the parties was also held reasonable.

212 When the restriction is in point of distance, the distance is to be measured "as the crow flies," that is on a straight line on the map neglecting curves and inequalities of surface. This is the rule of construction adopted by the Court, but it will of course give place to any other standard of measurement which the parties may have contracted for.

213 General Rules as to Illegal Contracts.—Having thus dealt with the main classes of illegal agreements so far as they concern our present enquiry, it may be desirable to add a few general rules as to the treatment which the Courts adopt in dealing with agreements which are void for illegality.

214 1. A lawful promise made for a lawful consideration is not invalid only by reason of an unlawful promise being made at the same time for the same consideration. This is of course upon a supposition that the two promises are severable, in which case the illegal promise may be rejected and the legal promise retained.

215 2. If any part of the consideration for a promise or set of promises is illegal, the whole agreement is void.

216 3. When the agreement cannot be performed without doing some act unlawful in itself, or the performance of which is not allowed on ground of public policy, the contract is void.

217 4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then if the unlawful intention is, at the date of the agreement, common to both parties, or entertained by one party to the knowledge of the other, the agreement is void. Thus, if goods are sold by a vendor, who knows that the purchaser means to apply them to an illegal purpose, he cannot recover the price.

218 If, however, the unlawful intention of one party is not known to the other at the date of the agreement, the contract is voidable at the option of the innocent party. If, for instance, after an agreement to sell is made, the seller discovers the intention of the purchaser to make an illegal use of the goods, he may decline to carry out the contract.

219 5. Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.

220 6. Money or property paid or delivered under an illegal agreement cannot usually be recovered.

221 7. Where the performance of a contract, lawful in its inception, is made unlawful by any subsequent event, the contract is thereby dissolved.

CHAPTER XIII.—IMPOSSIBLE AGREEMENTS.

222 Impossibility of Contract.—An agreement may be impossible of performance either (1) at the time it is made, or (2) when it is to be performed.

223 At its Inception.—An agreement may be impossible when it is made, either *(a)* if it is so inconsistent or contradictory in its terms as to be logically impossible.

224 *(b)* Or because the thing agreed to be done is physically impossible in the nature of things (as, for instance, a contract to make water by itself run up hill), or having regard to the limitations imposed by the contract itself (as, for instance, where a lessee agrees to dig 1000 tons of clay on certain land and the land contains only 500 tons).

225 *(c)* Or if the contract is to do something contrary to a legal principle (as where a stranger to the contract is authorized to sue upon it).

226 At Time of Performance.—An agreement may be impossible when it is to be performed *(a)* because of the intervention of some positive law; or

227 *(b)* By the destruction of the subject matter where the contract is with regard to some particular specified thing; or

228 *(c)* By the death or inability of the person where the contract is personal (as where the contract is to sing and the vocalist dies); or

229 *(d)* By the default of the promisee.

230 **If an Agreement is Impossible in Itself it is Void.**—And this on the ground that the parties, as reasonable men, could not be supposed to have entered into such a contract with any intention of making themselves responsible for the performance of it.

231 **Relative Impossibility.**—But *relative* impossibility will not make an agreement void. Thus, if a man agrees to pay $100, and has neither the money nor the means of obtaining it, it is impossible for him to perform his promise, yet the impossibility will not excuse him.

232 **Legal Impossibility.**—An agreement which, when made, is impossible by law, or which by law becomes impossible of performance, is void. Thus, if A agrees to sell a certain piece of land to B, and before conveyance the land is expropriated, A is excused from the performance of his contract.

233 **Impossibility in Fact.**—If the agreement becomes impossible simply in fact, the contract is not void. The promisor will not, of course, be compelled to perform something which it is itself impossible to perform, but if the contract is absolute and unconditional, he shall pay damages to the promisee.

234 **Contingent Contract.**—When the contract is not absolute; that is, where upon the construction of the contract the Court is of the opinion the parties had in their minds that the contract could not be fulfilled, unless when the time for fulfillment arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

CHAPTER XIV.—MISTAKE.

235 Mutual Assent Necessary.—It is stated, with regard to contracts, that they must be made by consent. Not only is this so, but the consent must be true, full and free; and, therefore, anything which prevents the assent of the minds of the contracting parties to the contract, as propounded, is sufficient to invalidate it, if the mistake was common to both parties.

236 Effect of Mistake.—If, in the inception of an agreement, there should occur some mistake of both parties in some material part of the agreement, it may be supposed that if the parties had known the facts they would not have entered into the agreement.

237 Waiver.—The contract, however, is not, on this account, void (if there is nothing in it which would render it impossible of performance), because the parties may waive the rights which they have acquired by reason of their mutual mistake and may carry out the contract as it is.

238 Right to Rescind Contract.—In the absence of any such waiver, since the contract does not express the true intent and mean-

ing of the parties, they are entitled to set it aside. But this right of rescission cannot be exercised, unless the parties to the contract can be put in their original position. If this is impossible the contract will not be avoided, but the parties will be left to such other remedy, if any, as may be applicable to their particular case.

239 If the contract has been wholly performed by one party, and if restitution or compensation cannot be made, the contract cannot be rescinded.

240 The mistake may prevent the formation of any contract. This was held in Bolton *v.* Jones, 2 H. & N. 564, a singular case of mutual mistake. One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop to the plaintiff Bolton, and on the same day Jones, ignorant of the sale, sent a written order for goods to the shop addressed to Brocklehurst, and Bolton supplied them. Jones consumed the goods not knowing that they had been supplied by Bolton, and when payment was asked for declined on the ground that he had a set off against Brocklehurst with whom alone he had assented to deal. The Court held that there had been no contract, Jones having intended to deal only with Brocklehurst, and having a special reason (the existence of the debt) for dealing only with him.

241 Mistake of One Party Only.—If the mistake is the mistake of one party only, then the contract must stand unless the mistake was known to or induced by and taken advantage of by the other party, in which case it would be dealt with as a fraud.

242 Apart from this if the mistake is of one party only the contract must stand.

243 To this rule there is one exception, namely, that money paid under a mistake of fact may be recovered back.

244 Mistake as Excluding True Consent.—There may be in the formation of a contract

(*a*) Error as to the nature of the transaction as where an illiterate man signs a deed the effect of which he misunderstands. (Thoroughgood's Case 2 Co. Rep. 9 B.)

(*b*) Error as to the intention of the other party, as in Bolton *v.* Jones, *supra*.

(*c*) Error as to the subject matter.

(1) As to the specific thing supposed to be the subject of the contract as where the cargo of the ship "Peerless" was purchased, but the purchaser understood he was dealing with the cargo of another ship of the same name. (Raffles *v.* Wichelhaus, 2 H. & C. 906.)

(2) Error as to kind, quality, or quantity, but here the difference must amount either to a difference in kind, or to a difference in quality or quantity equal to a difference in kind, and the error must be common to both parties. (Heilbutt *v.* Hickson, L. R. 7 C. P. 438.)

(*d*) **Error in the Existence of the Thing Contracted for.**—And in these cases the contract may be rescinded.

245 Where there is a common mistake as to the existence of the subject matter, it may be said that no contract is created. If A agrees to sell to B, and B agrees to buy from A, a particular horse, which at the time the agreement is made is dead, it cannot be said that the contract is voidable, and it is not quite satisfactory to use the word void. The agreement did not become a contract, because a contract is an agreement about something, and here was an agreement about nothing.

246 When there is a common mistake as to the ownership of the subject matter, as if A agrees to purchase property which is already his, the result is the same, though this is rather on the ground of total failure of consideration.

247 Mistake in Expressing True Consent.—In these cases the contract will be reformed, if the true terms consented to can be shown. As, for example, when what was intended to be a mortgage was made in the form of an absolute conveyance. If, however, the real intent of the parties cannot be discovered, the contract (if not wholly unreasonable, or repugnant, or oppressive, or impossible,) must be performed as it is.

CHAPTER XV.—FRAUD.

248 Misrepresentation is the innocent statement of that which is not true. If A sell B a horse, stating that the horse is not blind, there is a sale with a representation. If the horse is, in fact, blind, though A believed the horse could see, there is a sale with a misrepresentation, though the misrepresentation was innocently made. If A knew that the horse was blind, and yet stated, for the purpose of making the sale, that the horse was not blind, this misrepresentation is a fraud.

249 Fraud has, of course, its criminal side, but it will be treated of here only in its relation to contracts.

250 Fraud Renders all Contracts Voidable.—Note that fraud does not render a contract void, but only voidable. It is open to the party defrauded to ratify the contract if he pleases.

251 Innocent Misrepresentation will not, of itself, avoid a contract. In order to avoid a contract for fraud, the false statement must either be made fraudulently, or be made recklessly, without any belief in its truth.

252 Misrepresentation by Silence.—A mistaken belief may be caused actively or passively, but silence alone is not positive, unless the party is under some obligation to speak.

253 Latitude in Commending Goods.—A vendor is at liberty to praise what he has to sell, just as a buyer is at liberty to depreciate it, and, therefore, a reasonable amount of latitude must be allowed to a vendor, when his remarks are not warranted by the actual quality of the article he is disposing of.

254 Matters Requiring Proof in Actions for Deceit.—In order to rescind a contract for fraud, or to bring an action for damages on account of fraud, the plaintiff must be able to prove (1) misrepresentation (either fraudulent or made without belief in its truth) made to the plaintiff as part of the transaction, (2) as to some matter material to the contract, (3) and that the false representation was believed by the plaintiff; (4) and formed in itself the inducement to the plaintiff to enter into the contract; (5) and damage resulting proximately and not remotely from the defendant's misrepresentation.

255 If the parties to a contract voidable for fraud cannot be put in their former position the remedy is not by rescission but in an action for damages.

256 Contract must be Repudiated Promptly.—After the plaintiff has discovered the fraud he must act promptly in repudiating the contract. If he delays he will be taken to have waived the fraud. This is constructive waiver. But the waiver may be also express. The waiver cannot be retracted.

257 Rules as to the Passing of Property.—In a sale of goods where the sale has been induced by fraud the property passes if the facts show an actual sale. The vendor may sue for the price of the goods and thus affirm the contract, or he may sue for the return of the goods and this disaffirms the contract. In the meantime if before the vendor has elected the purchaser transfers the goods for value to an innocent third party the rights of the original vendor are subordinate to those of the innocent third party.

258 But if the intention of the vendor was not to pass the property but merely to part with the possession of the goods, there is no sale and the person obtaining such possession by fraud cannot convey the property in the goods to any innocent third party.

259 These rules are subject to the statutory right to retake goods after a conviction for fraud.

260 If a purchaser has been induced to buy goods by the fraud of the vendor he may refuse to accept the goods if the fraud is discovered before delivery, or he may return them if otherwise; and if he has paid the price he may recover it on returning or offering to return the goods.

CHAPTER XVI.—THE PERFORMANCE OF THE CONTRACT.—GENERALLY.

261 Every Contract Contains at Least Two Parts—the part which is to be performed by one party, and the part which is to be performed by the other party. Thus, in a contract made by A with B for the sale of a horse, A promises to deliver the horse and B promises to pay the money. When A has delivered the horse he has performed the contract, so far as the performance of the contract lies with him. B satisfies the obligation of the contract, so far as he is concerned, by paying the money.

262 As was pointed out in the chapter on terms, the performance may fall under one of three classes.

1. A is to deliver the horse and B is to pay the money at the same time.
2. A is to deliver the horse before B pays the money.
3. B is to pay the money before A delivers the horse.

263 In the first instance, B cannot sue for delivery of the horse without averring his readiness and willingness to pay; in the second instance, B may compel the delivery of the horse without either paying or offering to pay; and in the third instance, he cannot compel the delivery of the horse until he has paid or tendered the price.

264 Delivery of Goods.—In sales of goods, after the contract has been completed, the general and immediate duty of the seller is to deliver the goods to the buyer.

265 The buyer is entitled to have the goods delivered to him, but in the absence of a contrary agreement, either express, or implied

from the course of trade, or the dealings of the parties, the seller is not bound to send or carry the goods to the buyer; he does all he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction.

266 Delivery and Payment Concurrently.—Where nothing is said as to payment the law presumes that the parties agree to make payment of the price and the delivery of the goods concurrent conditions. The vendor cannot insist upon payment without delivering or alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without paying or alleging that he is ready and willing to pay the price.

267 Sale on Credit.—But where the goods are sold on credit the buyer is entitled to possession before payment.

268 If the delivery by the vendor is to take place after the purchaser has done certain acts the vendor is not bound to deliver until informed by the purchaser of the performance of such acts.

269 Unless otherwise agreed the goods are to be placed at the buyer's disposal at the place where they are sold.

270 If the Vendor Agrees to Deliver he must, in the absence of express stipulation as to time, deliver within a reasonable time.

271 The vendor must not deliver more or less than the quantity sold. If he delivers more the purchaser is not bound to pick out from the larger quantity the exact extent of his order, but may refuse the whole consignment.

272 Where the vendor is to send goods delivery to a common carrier is sufficient. If the vendor contracts to deliver at a distant point the carrier is his agent. If otherwise the carrier is the purchaser's agent. If a manufacturer at Hamilton sold goods F. O. B. cars at Hamilton the delivery to the railway company at Hamilton would be delivery to the purchaser, the common carrier (the railway company) being the agent of the purchaser to accept delivery by the terms of the contract.

273 Performance Must Follow Terms of Contract.—In all classes of contract the performance of the contract must necessarily follow the terms of the contract. "The performance of a contract should be a fair and reasonable performance of that which the parties intended should be done—not a performance which merely satisfies the letter of the agreement, but a substantial *bona fide* compliance with

its spirit. When and by whom a contract should be performed, and whether or not certain acts amount to a performance, are questions which can only be answered by referring to the agreement itself." (Am. & Eng. Ency., 1st Ed., Vol. 3, p. 895.)

274 The result of impossibility on the performance of the contract has already been noticed.

275 Contracts, whose performance depends on the continued existence of a specified thing, are put an end to by the destruction of the thing from no fault of the promisor.

276 Alternative Performance.—If a contract contains an option to the promisor, under which he may perform his part of the contract in one of two ways, and performance in one of these ways becomes impossible, he must perform his contract in the remaining possible way.

277 Partial Performance.—The promisee is not bound to accept a partial performance of an entire promise, but if he does so accept, he is bound to pay for as much as he has received, as much as it is reasonably worth.

CHAPTER XVII.—PERFORMANCE OF THE CONTRACT.—PAYMENT AND TENDER.

278 Debtor Must Pay According to Contract.—A person whose duty it is to pay money under any contract, is bound by the terms of the contract, in so far as the mode, time, date or place of payment may be provided for.

279 And Must Seek the Creditor.—And in the absence of any provision in the contract, it is the debtor's duty to seek out his creditor and pay him the amount due.

280 Sale on Credit.—On a sale of goods the purchase money is supposed to be forthwith payable in the absence of any agreement to the contrary. If a future time of payment be provided for, the sale is said to be on credit.

281 At the expiration of the period of credit provided for by the contract, the money becomes due, and must be paid by the debtor to his creditor; and the debtor must, in this case also, find out his creditor, and pay him the money which is due.

282 Effect of Giving Security.—If a promissory note or bill of exchange, or other security is given for the amount of the purchase money, the right of action for the price will be suspended until the date of the maturity of the security which has been given, at which date the right to sue for the price revives, and the creditor may then either bring action upon the consideration (that is, the price) or upon the security, at his option.

283 Security of Third Person.—If the security which is given is not the security of the debtor, but the note or bill of exchange of a third person, the debtor is not released from his liability, but the right to sue for the indebtedness is suspended until the maturity of the security given.

284 Security Accepted in Lieu of Original Debt.—But it may be agreed between the debtor and the creditor (and this of course is a question of fact) that the security shall be taken as an absolute release of the indebtedness; that is, that the security shall be sold to the creditor for the amount of the indebtedness, and if this is actually the case, then the debtor is released.

285 Duty of Creditor when Security of Third Party Given.—If the security of a third party is given in payment of an indebtedness the creditor is under no liability to the original debtor in respect to the security given, but if the bill or note of the third party is given by way of security then the creditor is responsible for any loss which may occur by his negligence in dealing with such security.

286 Forged or Worthless Securities.—Where forged securities are given in payment, or where securities are given which are known to the debtor to be worthless, the right to the original purchase money

still remains, even though it was agreed that the securities were to be substituted for cash payment.

287 Payment to Agent.—Payment of an indebtedness may, of course, be made to the creditor or his agent, but in the case of payment to an agent, care must be taken to see that the agent has authority to receive the money.

288 Apparent or Real Authority.—For example, an assistant in a shop has, by virtue of his position there, the apparent right to receive money paid to him as cash for articles sold by him in the store, and the payment to him will bind his employer; but such an agent would have no apparent authority to collect money from debtors outside the shop. His authority to so collect must be express, and persons who deal with him will be responsible for the money paid to him unless they can show that he had authority from his employer to make collections in that way.

289 Agent Must be Paid in Cash, not Credit.—In any event payment to an agent must be made in cash and in the ordinary course of business. For example, the debtor cannot pay the agent of his creditor by merely setting off against the debt due to the creditor a debt due to the debtor from the agent.

290 Payment to Principal to Prejudice of Agent not Allowed.—If the purchaser has been dealing with the agent he is not allowed to pay the purchase money to the principal so as to cut out the agent's right to a lien.

291 Agent Apparently Principal.—If an agent is allowed by his principal to take entire charge of the principal's business, so as to be able to represent himself as the principal, then payments made in good faith to the agent, as principal, may be binding upon the real principal by estoppel.

292 Appropriation of Payments.—If payments on account are made from the debtor to the creditor, the debtor has a right to appropriate the payment to any items of the indebtedness. (See Sec. 306.)

293 If the debtor does not make the appropriation when paying the money, then the creditor has a right to appropriate, and he may appropriate the money even to items which are barred by the Statute of Limitations.

294 The creditor's election to appropriate the money to any particular items is not binding upon him until it has been communi-

cated to the debtor, so that in the meantime he may change his mind and appropriate the money to some other item of the account.

295 In the absence of any appropriation, either by the debtor or creditor, the law will appropriate the money to the earlier items of the account, or to the interest upon the account, if the account bears interest, and only the balance upon the principal after satisfaction of the interest. (See Sections 304 and 305.)

296 Partial Payment Accepted in Satisfaction.—It was formerly the law that a payment of part of the amount due under a contract could not be taken as satisfaction of the contract, because there was no new consideration for the acceptance of the part in lieu of the whole. If, however, anything was paid or done which operated as a consideration, the agreement to accept the part in lieu of the whole would become a binding contract. Now, however, by R. S. O., 1897, Chap. 51, Sec. 58, Sub-sec. 8, "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

297 Tender, Effect of.—If the creditor will not accept payment the debtor may tender payment to the creditor, and this tender will have the same effect as to interest and costs, and as to the position of the debtor, as if the money had actually been paid; but where the tender is made it must be made unconditionally, and the person making the tender must have the money in hand and offer it to the creditor, and the money tendered must be legal tender.

298 Legal Tender.—Cheques or bank notes will not be legal tender if objected to on that ground by the creditor. Dominion of Canada bills, and gold will be legal tender. Silver coin of the Dominion of Canada or of the Provinces of Ontario, Quebec or New Brunswick is a legal tender up to $10, and copper or bronze coin of the same origin is a legal tender up to twenty-five cents. (See R. S. C., Chap. 30, Sec. 5.)

299 Conditional Tender.—If the tender is made conditionally it is no good, and will not have the effect of stopping interest or costs.

300 Proof of Tender.—It should preferably be made in the presence of a witness, so that it may be readily proved if denied.

301 Waiver of Formalities.—The creditor may waive any of the requirements of a legal tender, but if they are not waived they should be strictly observed.

302 Tender Must be Before Action.—Tender must always be before action brought in order that it may have its full effect, though tender of amends or goods, and payment into Court are sometimes resorted to after action.

303 Interest.—If the contract between the debtor and creditor makes provision for interest, then interest will be payable according to the terms of the contract, subject to the provisions of the Statutes of Canada on the subject of interest. (See R. S. C., Chap. 127.)

304 Interest on Partial Payments.—If partial payments are made, there are two modes of computing interest. They are as follows:

(1) Apply the payment made in the discharge of the accrued interest as far it will go. If the payment exceeds the interest apply the balance in the reduction of the principal.

(2) Charge interest upon the principal sum without regard to the partial payment, and deduct the partial payment on the final reckoning of the account with interest upon it for the time it has been paid in.

305 The difference between the two will be seen by comparing the following figures:

Debt $100; interest 6% due 1st January, 1897; partial payments $50 on 1st June and $10 on 1st August; balance paid 31st December.

1st January, - -	$100 00	1st January, - -	$100 00
1st June—Interest, -	2 50	31st Dec.—Interest, -	6 00
	$102 50		$106 00
Payment, - -	50 00		
	$ 52 50		
1st August—Interest,	53	*Cr.*	
	$ 53 03	1st June, - -	$50 00
Payment, - -	10 00	31st Dec.—Int.,	1 75
	$ 43 03	1st August, -	10 00
31st Dec.—Interest,	1 07	31st Dec.—Int.,	25
			$ 62 00
Balance due, -	$ 44 10	Balance due, -	$ 44 00

306 The creditor of course is not bound to accept partial payments or prepayments. If he does accept them he should credit them according to the first method.

CHAPTER XVIII.—THE PERFORMANCE OF THE CONTRACT.—REMEDIES IN DEFAULT.

307 Breach of Contract; Remedy by Action.—If parties to a contract refuse to carry out the provisions which the contract contains, the only remedy available is by action.

308 No matter how strongly in an agreement a person is bound to do a certain thing, it is yet open to him to decline to do it, notwithstanding his agreement; and upon this declination, if persisted in, a right of action accrues to the other party.

309 Specific Performance or Damages.—If the declination has been wrongful the Courts will award an appropriate remedy by way of specific performance or in damages.

310 Plaintiff Must First Perform His Part of Contract.—In order that the person who feels himself wronged, by the refusal of another to carry out the agreement, may succeed in his action, he must first be careful to see that he himself has performed, or offered to perform, those parts of the contract which he was bound to carry out, in so far as the performance of the contract by him was precedent to or concurrent with the performance by the other party.

311 If this has been the case, then the refusal of the other party, if without lawful excuse or reason, is wrongful, and is a cause of action.

312 Manner of Proceeding.—It is not within the scope of this work to enquire into the different modes of bringing an action, since in every case the particular Rules of Court and Statutes will have to be applied, and it is not the intention here to go into matters of practice.

313 But whatever the remedy may be, it will be dependent upon the proper conduct of the plaintiff in so far as any duty devolves upon him.

314 Trial, Judgment and Execution.—When an action has been brought it must proceed by the regular forms down to trial, when the whole matter is laid before the Court, and the parties are heard and their witnesses examined, and judgment is given on their claims or defences. The person in whose favor judgment is given is entitled, upon complying with the necessary formalities, to issue a writ of execution, under which the goods and lands of the party in default are seized and sold to satisfy the claims against him.

315 Exemptions.—A list of the goods exempt from seizure under execution will be found in the Appendix.

CHAPTER XIX.—SALES OF GOODS.—THE CONTRACT.

316 A Bargain or Sale of Goods may be defined as the transfer of the absolute or general property in a thing for a price in money. The contract for the sale of goods, like every other contract, requires the elements described in Chap. II., in order that it may exist as an agreement, enforcible in law.

317 The Transfer of the Absolute or General Property in the thing sold. In chattel, as well as in real property, there may be two concurrent rights; as where property, owned by A, is lent by him to B for a consideration. Here A is the owner of the goods and has the general property in them, while B, during his contract, has a right of possession, and, therefore, a special property.

318 The transfer of the general property, for a price in money, is a *sale*; the transfer of a special property is not a sale.

319 Transfer for a Price in Money.—The definition includes the transfer of the general property *for a price*. The exchange of one chattel for another chattel is not a sale but a barter. The sale must

be for money paid or promised. Goods may be and often are parted with for valuable considerations other than money or the promise to pay money. The legal effect of such contracts of barter or exchange may be the same as in the case of a sale (though this is not always the case), but they are not sales.

320 Form of Contract at Common Law.—At common law all sales of personal property, of whatever amount, were valid and enforcible, so long as the necessary elements of a contract (that is, parties, subject matter, mutual assent, consideration and the terms [if any] agreed upon,) appeared in evidence, whether the evidence was oral or written.

321 If, by the terms of the contract, the property in the goods was to pass immediately from the seller to the buyer, then the contract was called a bargain and sale of goods; but if the property in the goods was only to pass to the buyer on the performance of certain conditions, whether such conditions were to be performed by the buyer or the seller, or both, the contract was called an executory agreement.

322 The common law has been considerably modified by statutes, as, for example, by the Statute of Frauds. 29 Car. 2, c. 3. (See Chapters VIII.-X.)

CHAPTER XX.—SALES OF GOODS.—EFFECT OF THE CONTRACT IN PASSING PROPERTY.

323 Sale of Goods, Executory Agreement.—As we have seen, a present sale of goods is called a bargain and sale, and a sale of goods to be delivered in the future is called an executory agreement. In the first, A sells to B and the goods become the property of the buyer as soon as the contract has been formed; in the other, A promises to sell to B and the property does not pass until the contract has been executed.

324 Passing of Property in Goods.—The question whether the property in the goods has passed is often one of great importance. It cannot be settled merely by the possession of the goods, for there may be, and often is, possession without property, as well as property without possession. The question must be settled either by reference to the contract itself, or, if that is silent or ambiguous, by reference to the rules of construction governing this class of contracts.

325 The General Principles Governing this Branch of the Subject cannot be better stated than in the clear and concise language of Chief Justice Bovill, in the case of Heilbutt *v.* Hickson, L. R. 7 C. P. 449: "Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done: such as, for instance, in most cases, delivery; in some cases, actual payment of the price, and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up the casks, or the like. In the case of executory contracts, where the goods are not ascertained, or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but where certain goods have been selected, and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval and delivery of some kind, before the property would be considered as intended to pass, and, upon that taking place, the property might pass, if it was intended to do so, equally as in the case of a contract for specific and ascertained goods.

326 Division of Subject.—The subject naturally divides itself into five heads.

1. Where the sale is of a specific chattel unconditionally.
2. Where the chattels are specific but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

These will be considered in their order.

327 Sale of a Specific Chattel Unconditionally.—Shepherd's Touchstone, page 224, gives the common law rules as follows: "If one sell me his horse, or any other thing, for money or other valuable consideration, and, first, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or, secondly, all; or, thirdly, part of the money is paid in hand; or, fourthly, I give earnest-money, albeit it be but a penny to the seller; or, lastly, I take the thing bought by agreement into my possession where no money is paid, earnest given or day set for the payment; in all these cases there is *a good bargain and sale of the thing to alter the property thereof*. In the first case I may have an action for the thing, and the seller for his money; in the second case I may sue for and recover the thing bought; in the third case I may sue for the thing bought, and the seller for the residue of the money; in the fourth case, where earnest is given, we may have reciprocal remedies, one against another; and in the last case the seller may sue for his money."

328 In Simmons *v.* Swift (5 B. & C. 862), Bayley, J., said: "Generally where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price.

329 So in Dixon *v.* Yates (5 B. & Ad. 313), Park, J., said: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself *the vendor appropriates to the vendee a specific chattel and the latter thereby agrees to take that specific chattel* and to pay the stipulated price, the parties are then in

the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is *equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract therefore is to vest the property in the bargainee.*''

330 ''By the law of England, by a contract for the sale of specific ascertained goods the right to the goods immediately vests in the buyer and a right to a price in the seller, unless it can be shown that such was not the intention of the parties.'' (Gilmore *v.* Supple, 11 Moore P. C. 566.)

331 These authorities are clear and distinct as to the effect of a sale of specific chattels unconditionally in passing the property in the thing sold.

CHAPTER XXI.—SALES OF GOODS.—EFFECT OF THE CONTRACT IN PASSING PROPERTY.—(Continued.)

332 Sale of Specific Chattels Conditionally.—Where goods are sold subject to something to be done thereto by the seller, that is, where the vendor is to do some act or perform some condition before he can deliver the goods to the buyer pursuant to the contract, (or, as it is phrased, ''put the goods into a deliverable state,'') the property in the goods will not pass to the buyer until the condition has been performed.

333 Statement of Authorities.—In Rugg *v.* Minett (11 East 210), a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale twenty-five lots were to be filled up by the vendors out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity by weight, and the last two lots would then be weighed and paid for according to the actual weight. The plaintiff bought the last two lots and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up but a few remained unfilled, and the last two lots had not been weighed, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The Court held that the property had passed in those lots only which had been filled up, because, as Lord Ellenborough said, "Everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bayley, J., said that "it was incumbent on the buyer to make out that something remained to be done to the goods by the sellers at the time when the loss happened."

334 Acts to be Performed to Ascertain Price.—Where goods are sold, but are to be weighed or measured as to quantity, or tested as to quality, before the amount of the price can be ascertained, the property will not pass until this has been done.

335 Logan v. LeMesurier (6 Moore P. C. 116).—In this case the sale was on the third of December, 1834, of a quantity of red pine timber, then lying above the rapids, Ottawa River, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchaser's notes at ninety days from the date of sale, at the rate of 9½d. per foot measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at 9½d.; and, if it fell short, the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive the raft was broken up by a storm, and a great part of the timber lost before it was measured and delivered. Held that the property was not transferred until measured, and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

336 Condition to be Performed by Buyer.—Where, under the contract, any condition is to be performed by the buyer before the property is to pass to him, then the property will remain in the seller until the condition has been performed, even though the buyer may have been put in possession.

337 Act Respecting Conditional Sales.—An abstract of the Ontario Act respecting conditional sales of chattels, will be found in the Appendix.

338 Acts to be Performed by Buyer for His Own Satisfaction.—Where, under the contract, the buyer, for his own protection or satisfaction, has reserved a right to weigh, measure or test the goods, the property will, nevertheless, pass to him, if nothing remained to be done by the vendor to put the goods into a deliverable state.

339 If the Buyer assumes the risk of delivery, and the goods are destroyed, the question will not be so much as to the passing of the property but whether the destruction came within the risk assumed.

340 Sales Where Seller is to do Something After Delivery.—The property will pass in goods sold where the seller is by the terms of the contract to do something to the goods after the purchaser has been put in possession, as where on the sale of a piano the seller agrees to tune it after delivery.

341 Unfinished Chattel.—As a rule the property in an unfinished chattel remains with the seller until the chattel is completed in pursuance of the contract. This, of course, will give way to an *express* intention that the property shall pass, but in the absence of such an expression of intention the rule will govern.

CHAPTER XXII.—SALES OF GOODS.—EFFECT OF THE CONTRACT IN PASSING PROPERTY.—(Continued.)

3. Sale of Chattel Not Specific.

342 When the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass.

343 Until the parties are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold. It can make no difference although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. In such a case the reason still applies; the parties did not intend to transfer the property in one portion of the stock more than in another, and, therefore, the law, which only gives effect to their intention, does not transfer the property in any individual portion.

344 There is little difficulty in the application of this rule. In one case the sale was of "50 tons of Greenland oil, allowance for foot dirt and water as customary." The vendors gave an order

on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfinger and the order was then countermanded by the vendors, nothing having been done on it. Held that the property had not passed. So in another case the vendor had about eighteen tons of Riga flax in mats, lying at the defendant's wharf and sold ten tons of it, giving an order to the purchaser on defendant for ten tons of Riga flax, *ex Vrow Maria*. In order to ascertain what portion of the flax was to be appropriated to this order it was necessary to weigh the mats, and this had not been done when the buyer became insolvent, and the vendor thereupon countermanded the order. Held that the property had not passed. (Benjamin.)

345 In White *v.* Wilks the sale was of twenty tons of oil out of the vendor's stock in his cisterns. In Austin *v.* Craven the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In Shepley *v.* Davis, of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing.

346 In Gillett *v.* Hill, Bayley, J., stated the law very perspicuously in the following words: "The cases may be divided into two classes: one in which there has been a sale of goods and something remains to be done by the vendor, and until that is done the property does not pass to the vendee so as to entitle him to maintain trover. The other class of cases in which there is a bargain for a certain quantity, ex a greater quantity, and there is a power of selection in the vendor to deliver what he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable till that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided.*"

347 The Subsequent Appropriation of Specific Chattels to an Executory Agreement.—After an executory contract has been made it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract

has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in Rhode *v.* Thwaites, "The selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell, into an actual sale, and the property thereby passes."

348 **Appropriation by Vendor Only.**—The only difficulty that can arise on this question is in cases where the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor is by the express or implied terms of the contract, entitled to make the selection.

349 A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty *to appropriate the goods to the contract.* The difficulty is to determine what constitutes the appropriation; to find out at what precise point the vendor is no longer at liberty to change his intention. It is plain that the vendor's act in simply selecting such goods as he *intends* to send cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him and no longer revocable.

350 As to the election itself the law is clear, that the party to the contract by whom the first act is to be done is the one who is to elect what goods are to be appropriated to the contract, and when he has done this the election is complete, and the executory contract has become an actual sale.

351 **Delivery to a Carrier,** by order of the purchaser, is equivalent to delivery to the purchaser himself; the appropriation is determined, and the property vests immediately.

352 Conditional Appropriation.—If the appropriation is conditional, the property will not pass unless the condition is performed.

353 Election by Seller Must Conform to Agreement.—Where the seller is to elect, he must elect in conformity with the agreement. For example, he cannot send eleven pounds when the contract specifies ten. The purchaser is not bound to take out ten and return the excess, but may return the whole as not being delivered in conformity with the contract.

354 Assent by Buyer.—"In order to the passing of property, either manufactured to order or bought from a larger quantity of the same class of goods, there must, as a general rule, not only be an appropriation on the part of the seller, but an assent to the appropriation on the part of the purchaser." (Gowans *v.* Consolidated Bank of Canada, 43 U. C. Q. B. 318.)

CHAPTER XXIII.—SALES OF GOODS.—EFFECT OF CONTRACT IN PASSING PROPERTY.—(Continued.)

355 Retention by Seller of Property in Goods.—It is quite competent for the seller, notwithstanding the rules of construction which deal with the passing of property in goods, to provide by the mode in which the contract is carried out, that the property in the goods shall remain in him, notwithstanding that he has appropriated the goods to the contract and has sent them forward to the buyer.

356 Two Purposes Answered by This.—The obvious reason is that the goods shall not pass into the hands of the purchaser until

payment has been made for them. A secondary result is the opportunity, by means of a bill of exchange or other appropriate contract, of anticipating the payment of the purchase money.

357 Thus, for example, A in Liverpool receives from B in New York an order for ten cases of goods. The goods are packed and shipped and the bill of lading is taken so as to make the goods deliverable in New York to A or order. The bill of lading can either be sent to the agents in New York of A, with instructions to deliver it on payment of the purchase money, or if A wishes to use the money at once he may annex the bill of lading to a bill of exchange drawn on B and discount this bill. It is in this latter way that many purchasing and commission merchants carry on their business; that is, by shipping to their consignees and drawing against the bills of lading.

358 Delivery to Carrier as Bailee.—Where goods are delivered on board a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried.

359 Presumption where Bill of Lading taken in Name of Seller.—If a bill of lading makes the goods deliverable to the order of the seller it indicates his intention that the property shall not pass to the buyer, and this contention will prevail unless it is rebutted by proof that the seller in so doing did not, in fact, intend to retain control of the property.

360 Where Goods Delivered on Board Buyer's own Ship.—The delivery of goods on board the buyer's own ship is a delivery to the buyer and passes the property, yet even in this case the seller may by special terms restrain the effect of such delivery and reserve the *jus disponendi*, even in cases where the bill of lading shows that the goods are free of freight because owner's property.

361 Buyer Cannot Retain Goods and Refuse to Accept Bill.—If a bill of exchange drawn upon the buyer for the price of the goods sold is forwarded to the buyer, accompanied by the bill of lading for the goods, he cannot retain the bill of lading unless he accepts the bill of exchange, and the retention of the one without the acceptance of the other will not give the buyer any right to the bill of lading or to the goods represented by it.

CHAPTER XXIV.—SALES OF GOODS.—(Continued).
STOPPAGE IN TRANSITU.

362 How Right of Stoppage Arises.—If, after the vendor has delivered the goods out of his own possession and put them in the hands of a carrier for delivery to the buyer (which is such a constructive delivery as divests a vendor's lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession.

363 By Whom Right may be Exercised.—The right of stoppage *in transitu* is highly favored on account of its intrinsic justice. It may not only be exercised by vendors, properly so called, but has been allowed in the case of a factor, who has bought goods with his own money or on his own credit; and in the case of an agent of the vendor, to whom the latter has indorsed the bill of lading; and in the case of a vendor of an interest in an executory agreement. It has also been thought that a surety for the buyer has this right after he has paid the vendor.

364 Against Whom the Right may be Exercised.—The vendor can only exercise this right against an insolvent or bankrupt buyer. By the word insolvency is meant a general inability to pay debts. The fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage *in transitu*.

365 If the vendor stop *in transitu*, where the buyer is not insolvent, he does so at his own peril. If, on the arrival of the goods at destination, the buyer is then insolvent, the premature stoppage will avail for the protection of the vendor; but if the buyer remains solvent, the vendor would be bound to deliver the goods.

366 How Long the Transit Continues.—The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it; that is to say, from the time when the vendor

has so far made delivery that his right of retaining the goods and his right of lien are gone, to the time when the goods have reached the *actual* possession of the buyer.

367 The contract with a carrier to carry goods does not make him the agent or servant of the person with whom he contracts. As soon as the goods are appropriated by the vendor to the contract, and are placed on board, the property passes to the purchaser, and as between the vendor and the purchaser there is a delivery to him, constructive, not actual. Delivery of goods by a vendor to a carrier is only constructive, even though the carrier is nominated and hired by the purchaser. Till the goods are in the actual possession of the purchaser the transit is not at an end, and it is immaterial that their ultimate destination has not been communicated by the purchaser to the vendor.

368 Where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues only until they arrive at that place of destination. Thus, delivery at a packer's warehouse on behalf of the vendee, or to the vendee's forwarding agent, will determine the vendor's right to stop.

369 Goods are said to be sent to their "destination" when they are sent to the purchaser, or to a particular person at a particular place.

370 The question and the sole question for determining whether the *transitus* is ended, is: In what capacity are the goods held by him who has the custody? Is he the buyer's agent to keep the goods, or the buyer's agent to forward them to the destination intended at the time the goods were put in transit?—(Benjamin.) Or to put the question in another form: Has the person who has the custody of the goods got possession as an agent to *forward* from the vendor to the buyer, or as an agent to hold for the buyer?—(Blackburn.) It will thus be seen that the question in every case is merely one of fact.

371 How Right Defeated.—The right to stop *in transitu* may be defeated by the goods arriving in the actual possession of the consignee.

372 The right will also be defeated in the following cases:

1. Where the goods had been delivered at the consignee's own warehouse.
2. Where they had been delivered on board his ship.

3. Where they had been taken possession of by the assignees of the consignees.
4. Where they had been delivered at a warehouse which the consignee was in the habit of using for the purpose of receiving consignments, unless notice is given that delivery is not to be made to the consignee until payment.
5. Where they have been delivered at a place where the consignee means them to remain until a fresh destination is communicated to them by his orders.
6. Where the consignee has determined the transit by doing any act which is equivalent to taking possession on his own account, *e. g.*, by requesting the carrier, after notice of their arrival, to allow them to remain until further orders, the consignee taking samples.
7. Where the carrier, before the arrival of the goods, agrees to hold the goods as the consignee's agent.
8. Where the bill of lading has been assigned *bona fide*.
9. When the consignee, under a bill of lading, takes possession of part of the goods consigned with the intention of exercising dominion over the whole.

(Where the vendee takes possession of a part of the goods with the view of separating the part delivered from the rest, and not meaning thereby to take possession of the whole, then the transit is determined only as to that part and not more.)

373 The Right will not be Defeated—

1. By a claim of the carrier against the consignee.
2. By a pledge of the bill of lading.

(The right of stoppage *in transitu* is not discharged absolutely by an indorsement of a bill of lading by way of security or pledge, but it remains subject to a charge in favor of the indorsee of the bill of lading, which must be paid off, and when this is paid off the person entitled to and exercising the right of stoppage *in transitu* will stand in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading. No sale "to arrive" by the consignee to sub-purchasers, even with payment, will put an end to the right of stoppage unless the bill of lading is indorsed).

3. By a mere sale of the goods by a consignee.
4. By a creditor attaching the consignee's right without obtaining actual possession.
5. By delivery of part of the goods.
6. By part payment, or giving bills which are in the hands of third parties.
7. By delivery to a carrier. (See Sec. 367.)

CHAPTER XXV.—AGENCY.—DEFINITIONS AND DIVISIONS.

374 Agent Defined.—An agent is a person duly authorized to act on behalf of another, or one whose unauthorized act on behalf of another has been duly ratified. In every definition of an agent the one element in common is the recognition of the derivative authority of the agent; and this element is really the *differentia* of an agent.

375 Principal Defined.—The person from whom the authority is derived is generally called the principal or employer, more rarely the constituent; whilst the agent is sometimes called an attorney, delegate, or proxy.

376 A principal may be disclosed or undisclosed. A person is not an undisclosed principal in respect of a contract, unless the

parties who allege that he is a party to the contract as such principal may be sued by him as well as he by them.

377 The contract which exists between the principal and agent is called a contract of agency; the right of the agent to act in the name or on behalf of another is termed his authority or power; and this, if conferred formally by an instrument under seal, is said to be conferred by a letter of attorney or power of attorney.

378 An agent will not be permitted to turn himself into a principal and deal with his real employers or principals on that footing without full and fair disclosure.

379 Varieties of Agents.—Agents are divided

(a) In respect of the extent of their authority, into
Universal;
General;
Special or particular agents;

(b) In respect of the nature of the agency, into mercantile and non-mercantile agents:

(c) In respect of their liability in selling, into
Del credere agents and
Such as are not del credere:

(d) In respect of the extent of their duties and of the amount of skill required of them, into
Gratuitous and
Paid agents;
Professional and
Unprofessional agents.

380 A number of other divisions might be readily framed by assuming other points of difference as the basis of division.

381 General and Special Agents.—General agents are such as are authorized to transact all business of a particular kind, whilst a special agent is authorized to act only in a single transaction.

382 The distinction between special and general agents is of little or no practical value, so far, at least, as regards the principal and third parties. Whenever a dispute arises between them with reference to the authority of the agent, the question is not simply whether the authority is special or general, but is mainly whether the agent's acts are within the apparent scope of his authority. (See Chap. XXIX.)

383 If the agent exceeds his special authority, and, in so doing, makes his principal liable, the latter is entitled to claim compensation from the agent for such damages as have resulted from the unauthorized act.

384 Factors.—A factor is an agent for the sale of goods in his possession or consigned to him. He is often called a commission merchant or consignee. He is called a supercargo, if authorized to sell a cargo which he accompanies on the voyage. He is to be distinguished from a mere salaried agent who is entrusted with goods for sale.

385 Del Credere Agents.—Del credere agents are distinguished from other agents by the fact that they guarantee that those persons to whom they sell shall perform their part of the contract. A del credere agent is not responsible to his principal in the first instance, though the contrary opinion at one time prevailed.

386 Brokers.—The true definition of a broker, it has been said, is that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation.

387 A Broker is a Mere Negotiator between the other Parties.—If the contract which the broker makes between the parties is a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. Whatever may be the effect of a contract as between the principals, in either case, no effect goes out of the broker. If he signs the contract his signature has no effect as his, but only because it is in contemplation of law the signature of one, or both, of the principals; no effect passes out of the broker to change the property in the goods.

388 When the goods sold are in existence the broker now frequently passes a delivery order to the vendor to be signed, and on its being signed he passes it to the vendee. In so doing he still does no more than act as a mere intervener between the principals. He himself, as broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods should be delivered to buyer or seller or either. He is throughout merely the negotiator between the parties.

389 Provided the broker acts as broker, and makes no contract in his own name, he cannot be sued by either party to the contract for any breach of it.

390 An agent who merely negotiates a personal contract for work and labor is not a broker. According to the business in which they engage, brokers are called exchange brokers, stock brokers, merchandize brokers, ship brokers, and insurance brokers.

391 Insurance Brokers.—An insurance broker "is agent for the assured and also for the underwriter. He is agent for the insured first in effecting the policy, and in everything that has to be done in consequence of it; and then he is agent for the underwriter as to the premium, but for nothing else; and he is suppose to receive the premium from the insured for the benefit of the underwriter; but the whole account with respect to the premium after the insurance is effected remains a clear and distinct account between the underwriter and the broker." Exclusive of fraud and other similar circumstances, the premium is paid for all purposes as between the insurer and the insured when it is paid to a duly authorized agent.

CHAPTER XXVI.—AGENCY.—(Continued.)—PARTIES.—APPOINTMENT.

392 Right to Make Contract of Agency.—An ancient law maxim is that he who can do a thing in his own right may do it by an agent. Any person capable of making a contract for himself can make that contract through another. Hence the disabilities which either wholly or partially prevent the making of contracts (see Chap. III.), will apply to a contract of agency so far as the principal is concerned.

393 So far as the agent is concerned a different rule obtains. The agent is not acting for himself but for another. He is not entrusted by the law with power to act but he is entrusted by the principal. The agent is for many purposes considered as merged in the principal, just as much as a man's signature is said to be written by him, though it was written by him with a pen. The man directed the pen, and the pen acted as directed by the man, though the pen of itself could not make the signature. Thus an infant can make as agent a contract which he could not make as principal.

394 Disabilities Resulting from Agency.—An agent is also under a disability resulting from his agency in the matter of dealing in the subject of the agency for his own advantage. For example: An agent to purchase cannot sell his own property to his principal (at all events without the assent of the principal made upon full knowledge of all the facts). See further on this the duties of an agent in subsequent chapters.

395 Appointment.—Agency being the result of a contract, the contract of agency (that is, the appointment of an agent,) may be express, either by deed or by parol (written or oral); or may be implied from particular circumstances. The question of agency is one of fact.

396 There must be shown either appointment (express or implied), ratification, or estoppel. Otherwise no agency has been created.

397 If the agent is to execute a deed for his principal, the appointment of the agent must also be by deed.

398 In contracts under the Statute of Frauds, the agent signing the note or memorandum in writing may be appointed orally.

CHAPTER XXVII.—AGENCY.—(Continued.)—DELEGATION.

399 Delegation means the act of investing one or more persons with authority to do some act or acts.

400 The authority to be delegated may be original or derivative. A, the owner of land has in himself original authority to sell it. A may delegate that authority to B. B will then have authority to sell the land. If B, having this derivative or delegated authority, gives authority to C to sell the land, he will delegate his authority to C.

401 What Authority may be Delegated.—If the authority is original it may be delegated. If the authority is a delegated authority it cannot be delegated to another, subject to the exceptions to be referred to. The rule as to original and derivative authority may also be stated thus. If a man has power as owner, or in his own right, to do a thing, he may do it by an agent; but if the authority is derivative it cannot be delegated.

402 If the authority is original, the exceptions to the rule allowing full delegations are:

(*a*) The case of an illegal act
(*b*) Where the act is of a personal nature

As to (*a*) it needs no argument to show that since a contract to commit an illegal act is necessarily void, a contract to commit an illegal act for another is also void. (*b*) For example: Homage or fealty cannot be done by an agent.

403 Delegation of Derivative Authority, when Allowed.—If the authority is derivative (that is, if it has been derived from someone else by delegation) it cannot be delegated, unless

(*a*) The original delegation expressly or by implication so provides, or

(*b*) Unless the further delegation is necessary and proper for the purpose of carrying out the principal's behest.

404 Delegation Authorized. (1) **Expressly.**—Wherever an agent is expressly authorized by the terms of his agency to appoint a substitute or sub-agent, he may of course do so (provided the subject matter of the agency is one which can lawfully be delegated).

Further, an agent may appoint a deputy and delegate authority to him

405 (2) **By Custom.**—Whenever he is allowed to do so by lawful custom or usage.

406 (3) **Ministerial Act.**—Where the act is purely ministerial or mechanical.

407 (4) **Where Principal Acquiesces.**—When the principal tacitly consents or acquiesces.

408 (5) **Where Further Delegation Necessary.**—When the powers delegated require for their proper performance the aid of others, whether the assistance of these others is required by way of substitution or sub-agency, the agent is not only at liberty but is required to make a delegation of his authority. Thus an agent (not a licensed auctioneer) instructed to sell goods by auction, must employ a licensed auctioneer; an agent employed to sell and convey or purchase land, may employ a solicitor; an agent collecting money, may employ a banker; and so on.

CHAPTER XXVIII.—AGENCY.—(Continued.)—RATIFICATION.

409 Meaning of Ratification.—To ratify is to give sanction and validity to something done without authority by one individual on behalf of another.

410 Result of Ratification.—After ratification, the principal is bound by the act whether it be for his detriment or to his advantage to the same extent and with all the consequences which would follow if the act had been done in pursuance of his previous authority.

411 Elements of Ratification.—In order that a ratification should bind the principal to the extent indicated, the following elements must be present:

412 (1) **Act Done Must not be Void.**—The act done must not be void (for there can be no confirmation of what is void), but one which the intended principal can ratify. Thus there can be no ratification of an indictable offence. The contract (as between the third person and the principal) must be voidable only, not void. The rule by which void and voidable contracts may be distinguished is that whenever the validity of an irregular transaction depends on the confirmation of one or more persons, that transaction is voidable only, and not void.

413 (2) **Must be One Principal Could Do.**—If the contract is one which the proposed principal could not himself have made, it

is impossible that any ratification of it can be allowed, because ratification is equivalent to a previous authority, and an authority which does not exist cannot be delegated.

414 (3) **The Act Must be Done on Behalf of the Person Who Ratifies.**—This is evident from the definition of agency. If it was not done for him the person doing it did not intend to act as his agent.

415 (4) **Principal Must be Ascertained.**—It follows from the last rule that there can be no ratification except by a person ascertained at the date of the act. Thus a company cannot ratify a contract made (professedly) on its behalf before it came into existence.

416 (5) **Principal Must Know the Facts.**—A ratification will not bind the proposed principal unless there has been a full disclosure of all the facts, or unless the principal has waived the disclosure, intending to take the liability without it.

417 (5) **Principal Must be Capable of Ratifying.**—The intended principal must be capable of ratifying the act.

418 (6) **Necessary Formalities Must be Observed.**—When formalities are necessary they must be observed.

419 Ratification May be Either Express or Implied.—When an individual deliberately, whether with full knowledge or without enquiry, ratifies the act or conduct of another, no question arises respecting the fact of ratification. But when there has been no express ratification, ratification may be implied from the circumstances surrounding the case.

420 Ratification Cannot be Retracted.—If the principal once ratifies he makes the contract his, and having entered into that contract, he cannot withdraw from it without the consent of the other party any more than he could if he had originally made it.

421 Ratification of a Part is equivalent to ratification of the whole. In other words, one cannot approbate and reprobate. The principal cannot affirm a part of what has been done and disaffirm the other part. He must not blow hot and cold.

422 The Effect of a Ratification when established is to make the unauthorized act an authorized act. Ratification is equivalent to a previous command, and the act, when ratified, becomes the act of the principal with all the consequences which naturally or legally result from such a position.

CHAPTER XXIX.—AGENCY.—(Continued.)—AUTHORITY, GENERAL AND SPECIAL.

423 General and Special.—An authority may be, as to its extent, either general or special.

424 Meaning of These Terms.—We shall first consider what is meant by the terms—a general authority and a special authority. There is little difficulty in understanding the ordinary meaning of those terms. Some confusion, however, is apt to arise from the fact that what is a special authority as between the principal and the agent may be a general authority where third parties are concerned. This consequence is due to the operation of the rules established with respect to the effect upon the principal's liabilities of allowing the agent to assume wider authority than his express instructions warranted, these instructions being unknown to third parties.

425 Definition.—Taking the terms as they stand, a general authority may be defined as an authority to act in a certain character; and a special authority as an authority to do a particular act.

426 Distinction.—In the former case the authority—unless it is restricted to a smaller limit, and the restriction is known, or ought to be known, to third parties—carries with it all the ordinary powers incident to that character, whilst in the case of a special authority the agent's power is directly derived from the principal and limited accordingly. This appears to be the fundamental distinction between the two kinds of authority.

427 In practice, nevertheless, it often becomes a matter of difficulty to determine whether an authority is special or general. And in order to determine whether a principal is liable it may be necessary to consider, first, whether the agent's authority was general or special; and, secondly, whether his acts were within the apparent scope of his authority.

428 General and Special or Particular Authority.—The distinction drawn by Lord Ellenborough between a general and a special or particular authority is that the former imports not an unqualified authority, but an authority which is derived from a multitude of instances, whereas the latter is confined to an individual instance. The distinction drawn by Paley is that an authority is general or special with reference to its object, *i. e.*, according as it is confined to a single act, or is extended to all acts connected with a particular employment. A special agency properly exists where there is a delegation of authority to do a single act; a general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment.

429 Difficulty Arising from Apparent and Express Authority.—The difficulties then which have arisen in considering the extent of an agent's authority, are, as has been already remarked, due in some degree to an incongruity existing between the apparent and the express authority of the agent. In considering the extent of his authority it is not enough, under all circumstances, to ask whether the authority is general or special. We must learn whether the question at issue concerns the relative rights of the principal and agent only, or the principal and third parties. In the former case the answer to that question would mark out the limits of that authority; not so in the latter case.

430 If a man by conduct holds out another as his agent by permitting him to act in the character of, and deal with the world as, a general agent, he must be taken to be the general agent of the person for whom he so acts, and the latter is bound, though in a particular instance the agent may have exceeded his authority.

431 Effect of "Per Procuration."—There is another question in this connection which relates to the effect of the expression "per procuration," in compelling third parties to learn the extent of the authority of a general agent. The expression "per procuration" does not always necessarily mean that the act is done under procuration.

All that it in reality means is this: "I am an agent not having any authority of my own." If the mere use of the words "per proc." had at law the effect of putting third parties who dealt with a general agent upon inquiry into his authority, it would be absurd to stop there. The principle would have to be carried to the full extent that the agent's instructions must be inquired into upon every fresh transaction. If strictly followed, the introduction of such a rule would have the effect of crippling commercial intercourse by checking the utility of the whole body of mercantile agents.

432 Secret Limitations of Agent's Authority.—It proceeds as a corollary from what has been already said that wherever a special agent or a general agent, with a secret limit to his powers, has been placed by his principal in a position where his apparent exceeds his real authority, the principal is not entitled to be relieved against any contract entered into merely upon the ground that he had previously instructed his agent not to enter into a contract except under certain circumstances, these instructions being unknown to the other contracting party.

433 Summary.—The distinction between general and special agents serves at least as a basis for the distribution of all varieties of authority into two classes, each of which has definitely marked points of contrast with respect to the liability of the principal when the authority has not been duly executed. Nevertheless it will be borne in mind that general agents and special agents may have their powers controlled, limited or extended, by the operation of certain rules, which will be discussed hereafter.

434 Necessity for Enquiry as to Powers of Special or Particular Agent.—Third parties dealing with an agent, who has merely a special or particular authority, must make themselves acquainted with the limits of that authority. If they neglect to do so and the agent exceeds his authority, the principal will not be bound unless he is estopped by his conduct from pleading the actual terms of the authority; unless, for instance, he has held out the agent as possessing a larger authority than was actually conferred.

CHAPTER XXX.—AGENCY.—(Continued.)—POWERS PRIMA FACIE INCIDENT TO EVERY AUTHORITY.

435 [Classification of the Questions Relating to Nature and Extent of Authority.—

(A) Powers *prima facie* incident to every ascertained authority.

(a) All the necessary and usual means of executing the authority with effect. (Chap. XXX.)

(b) All the various means justified by the usages of trade.

(c) Other powers contained in authorities of a particular kind. (Chap. XXXI.)

(B) The limits of an agent's authority. (Chap. XXXII.)

(a) When the authority is given by a formal instrument.

(b) When the authority is given by an informal instrument.

(c) When the authority arises from implication.

(d) When the instructions are ambiguous.

(C) The construction of an agent's authority. (Chap. XXXIII).

(1) Of the extension of an agent's authority.

(a) By parol evidence:

(1) Of custom and usage. (Section 438.)

(2) In other cases. (Chap. XXX and XXXI.)

(b) By conduct of principal. (Chap. XXXII.)

(2) Of the limitations of an authority.

(a) As between principal and third parties.

(b) As between principal and agent.

(D) The execution of the authority. (Chap. XXXIII.)]

436 (A) Powers Incident to Every Authority. *a* **Usual Means of Executing Authority with Effect.**—There are certain powers incident to every authority unless the principal has taken the precaution of forbidding their exercise. Amongst such powers are those which arise under the rule that every authority carries with it an implied

authority to the agent to employ all the necessary and usual means of executing the principal authority with effect. The operation of this rule has no effect in weakening the salutary principle that an authority must be strictly pursued, as it is never allowed to be so construed as to confer an authority different in kind from the power conferred by the original authority.

437 Instances of the Application of the Principle.—A power of attorney to sell and convey land would include authority to appoint a solicitor to draw the conveyance. Where an agent employed by the indorsees of a bill to get it discounted warranted the bill to be a good one, his principals were bound by the act, and were held liable to refund if the bill were afterwards dishonored by the acceptor. An authority to settle losses on a policy includes a power to refer to arbitration. An authority to effect a policy contains an authority to adjust a loss under the policy.

438 Usages of Trade.—The parties are presumed to contract with reference to the usages of trade. Thus when a contract for the purchase and sale of shares has been entered into between individuals through their respective brokers, or with the intervention as purchasers or sellers of members of the stock exchange, the lawful usages and rules of the stock exchange are incorporated into and become part and parcel of all such contracts and the rights and liabilities of the parties to any such contracts are determined by the operation upon the contracts of these rules and usages.

439 Payments Made by Reason of Agent's Default.—Although the authority of an agent *prima facie* includes an authority to act in accordance with established and reasonable usage, yet such authority will not be extended to cases where the agent is compelled by usage to make a payment in the course of his agency by reason of a default of his own.

440 Appointment of Sub-Agents.—An authority to appoint a sub-agent or substitute between whom and the principal a privity will exist may be implied, where from the conduct of the parties to the original agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute.

CHAPTER XXXI.—AGENCY.—(Continued.)—IMPLIED AUTHORITY OF PARTICULAR CLASSES OF AGENTS.

441 Authority of Agent for Sale.—When an agent is commissioned by a vendor to find a purchaser, he has authority to describe the property and to state any fact or circumstance which may affect the value so as to bind the vendor. If an agent so commissioned makes a false statement as to the description or value, though without authority, which the purchaser is led to believe and upon which he relies, the vendor cannot recover in an action for specific performance. An authority to let a house contains an authority to describe the property truly, to represent its actual situation, and to represent its value. An authority to find a purchaser implies the same incidents.

442 Authority to Receive Money.—An authority to an agent to receive money implies that he is to receive it in cash. There is no implied power to receive otherwise. If the agent receives the money in cash the probability is that he will hand it over to his principal, but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over. It would very much diminish the chance of the principal ever receiving it. To the same effect Lord Tenterden says "An authority given by a principal to his agent to receive money cannot be construed into an agreement not to receive money but to allow the debtor to write off so much as may be due from the agent to him."

443 Auctioneer Agent for Both Parties.—As a rule one of two contracting parties cannot act as agent for the other, but in sales by auction the auctioneer is considered to be agent of both parties so as to bind either the buyer or seller by his memorandum.

444 His Authority and Lien.—An auctioneer has sufficient property in the goods sold to maintain an action against the buyer,

but he has not a possession coupled with an interest, nor a bare custody like a servant or shop man. There is no difference whether the sale be on the premises of the owner or in a public auction room. The auctioneer has also a special property in such goods with a lien for the charges of sale, commission, and the auction fees. The catalogue and conditions may afford evidence that he has contracted personally, and so be liable for non-delivery of goods and the like. A bidding may be withdrawn at any time before the lot is knocked down.

445 An auctioneer has implied authority—

(*a*) To prescribe the rules of bidding and the terms of sale.

(*b*) To bind his principal by his declarations made at the time of sale, provided such declarations are consistent with the written conditions.

(*c*) To sue the buyer in his own name.

446 But he has no implied authority—

(*a*) To receive the purchase money for lands sold by him.

(*b*) To employ another person to sell the property entrusted to him.

(*c*) To sell on credit.

(*d*) To allow the contract to be rescinded.

(*e*) To sell by private contract. It is no excuse that he has acted without fraud and obtained a larger sum than the price fixed.

(*f*) To buy property which he is commissioned to sell.

447 **A Broker** has implied authority—

(*a*) To sign the bought and sold notes and so bind both parties.

(*b*) To sell on credit in the absence of a usage to the contrary.

(*c*) To adjust a policy if employed to subscribe it.

448 A broker has no implied authority—

(*a*) To buy or sell in his own name.

(*b*) To receive payment for goods sold for his principal.

(*c*) To make freight under a charter party entered into by him for his principal, payable to himself.

(*d*) To delegate his authority.

(*e*) To pay losses for the underwriters who employ him.

449 **A Factor** has implied authority—

(*a*) To sell in his own name.
(*b*) To sell upon reasonable credit.
(*c*) To warrant.
(*d*) To receive payment and give receipts.
(*e*) To insure consignments on behalf of his principal.

450 **Insurance Made by Factors.**—Probably he may insure in his own name. Circumstances may occur under which the factor will be justified in effecting an insurance on cargo consigned by his principal to third parties, of which consignment the factor has merely been advised by receiving the bill of lading and invoice with instructions to transmit them to the consignee.

451 A factor has no implied authority—

(*a*) To barter his principal's goods.
(*b*) At common law to pledge the goods intrusted to him. This rule still holds good except as far as it is modified by Statute law. (See Factors Act in Appendix.)
(*c*) To delegate his authority.
(*d*) To receive payment in any other than the usual mode.
(*e*) To compound the debt, or receive a composition in discharge.
(*f*) To accept or endorse bills on behalf of his principal.

452 **The Master of a Ship** has an implied authority—

(*a*) To enter into lawful contracts relative to the usual employment of the ship.
(*b*) To give a warranty in such contracts.
(*c*) To enter into contracts for repairs and necessaries to the ship, *e. g.*, for the supply of things necessary to the due prosecution of the voyage, such as provisions or money (provided the power of communication with the owner is not correspondent with the existing necessity, *i. e.*, provided the master in pledging the owner's credit acts as a prudent man would under the circumstances.)
(*d*) To hypothecate the ship, freight and cargo, if such a step is necessary, *i. e.*, provided the master cannot obtain personal credit, and provided the hypothecation is made in order to meet a high degree of

need, a need which arises when choice is to be made of one of several alternatives, under the peril of severe loss if a wrong choice should be made. (But see Sec. 453.)

(e) To sell the ship; but this authority is conditional on the existence of a twofold necessity, namely, inability to prosecute the voyage and an immediate necessity to sell.

(f) To borrow money on the security of the cargo for the purpose of the cargo only, *i. e.*, on *respondentia*.

(g) To give to a creditor a right *in rem* in cases other than bottomry bonds and respondentia; as, for instance, to draw a bill of exchange upon the shipbroker for necessaries supplied in a colonial port, so as to enable the shipbroker to proceed against the ship as for necessaries supplied in default of payment of the amount due by the shipowner, the master being otherwise unable to obtain credit.

(h) To sell the cargo provided he establishes—

(1) A necessity for the sale and

(2) Inability to communicate with the owner and obtain his directions.

453 Limitations of His Authority to Hypothecate.—The power of the master to hypothecate arises out of the necessity of the case. The rule therefore being, that necessity is the foundation of the master's authority, limitations of that authority have been established, which have been stated by Sir Robert Phillimore to the following effect:

(1) The master must first endeavor to raise funds on the personal credit of the owners.

(2) The money to be raised must be to defray the expense of necessary supplies or repairs of the ship, or to enable the ship to leave the port (in which the loan is effected or the bond given) and to carry the cargo to its destination.

454 The master of a ship has no implied authority—

(a) To agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters:

(b) To give a bottomry bond—

(1) For necessaries already supplied, unless such bond has been stipulated for previous to the supply of the necessaries.

(2) For his own debt.

(3) To free himself from arrest.

(4) For general average charges.

455 Partners.—A partner has implied authority to deal with the partnership property for partnership purposes.

456 Bailiffs.—A bailiff acting under a warrant of distress has an implied authority to receive the amount of rent and costs.

457 A bailiff has no implied authority to do illegal as distinguished from irregular acts.

(The authority of a bailiff to distrain is conferred upon him by his employer usually by a writing called a "warrant of distress" or "distress warrant"; but the distress may be made without any express authority, provided the person in whose behalf the distress was made assents to the act of the bailiff.)

458 Married Woman.—The implied authority of a wife to pledge her husband's credit flows from—

1. The fact of marriage.
2. The law relating to principal and agent.

459 The liability which flows from the fact of marriage differs in one respect from the ordinary liability of a principal for the contracts of his agent, inasmuch as the obligation cannot be determined at the will of the husband. For though, like any other principal, he is at liberty to revoke any authority which the wife exercises simply as his agent, the consideration of the marriage prevents any revocation of the wife's authority *qua* wife.

460 A wife has implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confined to the wife's management, and which are necessary and suitable to the style in which her husband chooses to live.

461 But no authority will be implied if the order is of an extravagant nature; or if the wife has a separate income; or if credit was given exclusively to the wife; or if she has no authority in fact and the husband has not held her out as having such authority; or if

the goods supplied were not necessarily suitable to the style in which her husband lived; or if the wife was supplied with a sufficient allowance; or if the tradesman has had express notice not to give credit.

CHAPTER XXXII.—AGENCY.—(Continued.)—OF THE LIMITS OF AN AGENT'S AUTHORITY.

462. The Authority May be Extended in Various Ways.—The authority with which an agent is invested is not necessarily confined to the performance of those actions alone which are authorized by the bare words in which an authority is conveyed. On the contrary it is rarely so confined. Generally speaking the authority may be extended in a variety of ways by the operation of a number of rules and principles, some of which have already been discussed. There now remains for consideration the influence of the principal's conduct in extending the original authority.

463 Influence of the Principal's Conduct.—The rule applicable to this branch of law has been laid down with the greatest clearness in the work of a learned writer upon mercantile law. The only ground of liability on the part of a principal to third parties dealing with an agent for the acts of the agent done in excess of the power given him, is such action on the principal's part as would be a relevant ground for the plea of estoppel against his pleading the actual terms of the authority given to the agent. Where the principal, by his words or conduct, wilfully causes another to believe in the existence

of certain powers in the agent, and induces him to deal with the agent in that belief; where the principal has, by words or by conduct, made a representation to another as to the agent's authority in order to induce others to act upon it; and where the representation or conduct complained of, whether active or passive in its character, has been intended to bring about the result whereby that other dealing with the agent has altered his position to his loss—in such a case, and in such a case alone, will the doctrine of estoppel apply to bar the principal from pleading against the third party the terms of the real authority which he gave to the agent. Mere negligence is not of itself a ground of estoppel. The importance of the rules defining the limits of an agent's authority will fully appear when it is remembered that an agent's power to bind his principal is limited to the *apparent* scope of his authority.

464 The Principal's Liability Depends Upon the Apparent Scope of the Authority.—The question to be considered so far as the liability of the plaintiff to third parties is concerned is whether the agent's act is within the apparent scope of his authority. Thus where the agent of a wharfinger, whose duty it was to give receipts for goods actually received at the wharf, fraudulently gave a receipt for goods which had never been received, the principal was held not to be responsible, because it was not within the apparent scope of the agent's authority in the course of his employment to give such a receipt.

465 Questions Between Principal and Agent to be Distinguished from those Between Principal and Third Parties.—In considering the true limits of the authority of an agent a distinction must be made. Questions may arise either between a principal and third parties who have dealt *bona fide* with the agent of that principal, or between the principal and the agent. The construction of the authority will be different in each of those cases respectively. In the former case, the true limit of the agent's power to bind the principal will be the apparent authority with which the agent is invested; in the latter case the true limit of his authority will be marked by the express authority or instructions given to the agent; nor will it be extended by the addition of any implied powers inconsistent with such authority and instructions.

CHAPTER XXXIII.—AGENCY.—(Continued.)—THE AUTHORITY.—ITS CONSTRUCTION AND THE MODE OF ITS EXECUTION.

THE CONSTRUCTION OF THE AUTHORITY.

466 Construction of Formal Instrument.—Where the authority of the agent is conferred by a formal instrument the meaning of general words in the instrument will be restricted by the context and construed accordingly.

467 Authority Construed Strictly.—The authority will be construed strictly so as to exclude the exercise of any power not warranted either by the actual terms used or as a necessary means of executing the authority with effect, and parol evidence is inadmissible to enlarge the operation of the power.

468 Construction of Ambiguous Instrument.—Where the instructions are ambiguous and susceptible of two different meanings the agent will be protected if he adopts one of them in good faith and acts upon it.

THE EXECUTION OF THE AUTHORITY.

469 General Rule as to Execution of Authority.—If an agent strictly observes his authority, it will depend upon the form and construction of the contract into which he enters whether his act will bind his principal and not himself.

470 Circumstantial Variance Not Usually Regarded.—A circumstantial variance is not usually sufficient to nullify the act of the agent.

471 If Variance Material, Principal Not Bound.—But if there is a material variance, the principal is not bound; as where an agent was authorized to sign a note at six months and signed one at sixty days.

472 Where Agent Does More or Less than Authorized.—If the agent does more or less than he is authorized to do, the principal is not bound, unless the acts are severable, or the excess or omission can be clearly distinguished.

EXECUTION OF AUTHORITY UNDER SEAL.

473 When Deed Binds Principal.—If the deed is executed in the principal's name and on his behalf, and this fact appears on the face of the instrument, the principal will be bound.

474 Agent if a Contracting Party will be Liable.—If the agent makes himself a contracting party he will be liable on the deed though he may profess to be acting for a third party.

475 Deed Executed by Agent May be Void.—Where the agent has by the words of the deed in his own name assumed to do something with the property of the principal which he had no power to do in his own name, the deed will be void.

EXECUTION OF PAROL CONTRACTS.

Bills of Exchange.

476 Bill Addressed to Principal.—If a bill addressed to the principal is accepted by a duly authorized agent in the principal's name, the principal will be liable.

477 Bill Addressed to Agent.—If the bill is addressed to the agent personally he will be liable as an acceptor, although he accepts for and on behalf of his principal.

478 Bill Drawn by Agent.—The agent will be personally liable on a bill drawn in his own name, notwithstanding he was duly authorized by a principal to draw a bill.

PROMISSORY NOTES.

479 Note Must be Signed in Name of Principal.—If the note is made in the principal's name the agent, if duly authorized, will not be liable.

480 Distinction Between Words Descriptive of Agent's Office and Words Importing Agency.—The difference is material between words descriptive of the agent's office or character and words importing agency. Thus, a note signed A. B. *and* C. D., Directors, would create a personal liability. But if the note ran We, by and on behalf of the X. Y. Company, promise to pay, etc., and was signed A. B. *and* C. D., Directors, the company would be bound.

BOUGHT AND SOLD NOTES.

481 Signature of Agent or Use of Words Importing Agency.—Bought and sold notes are signed by the broker as agent for buyer and seller respectively. The agent may avoid personal liability (if duly authorized) by either signing as agent or using in the contract words importing agency.

CHAPTER XXXIV.—AGENCY.—(Continued.)—THE DUTIES OF AN AGENT TOWARDS HIS PRINCIPAL.

482 Duties of an Agent Towards His Principal.—Since an agent is one who is employed by and works for another, and since the business done by the agent is the business of the principal, it follows that the duty of an agent toward his principal is, generally

speaking, to so act that the interests of the principal will be best conserved. The agent must lose sight of himself; he must be, and demean himself as, the instrument by which the principal does his work.

483 The general duty of an agent being thus stated, it will naturally follow that the various forms in which this duty will arise must in every case be simply a re-statement in other terms of the leading principle.

484 Digest of Rules.—The duties of an agent to his principal in relation to the business of the principal will present themselves in the following ten rules :

485 Rule 1.—The agent must perform the duties he has undertaken.

486 A distinction is drawn between paid agents and agents who act gratuitously, so far as entering upon the employment is concerned. In the case of a paid agent, he must commence and carry out the duties of his employment. In the case of a gratuitous agent, he is not bound to enter upon the duties of his employment, but if he does enter upon them he is bound to carry them out as agreed.

487 Rule 2.—The agent must act in the name of his principal.

488 This, of course, is so that the principal may obtain the benefit of the contract, and does not refer primarily to the escape of the agent from personal liability.

489 Rule 3.—The agent must act in person.

490 The reason for exceptions to this rule have been dealt with in the chapter on "Delegation of Authority."

491 Rule 4.—The agent is bound to obey instructions and observe the terms of the authority.

492 Since the agent is doing the business of the principal, at the risk and expense of the principal, he is bound to act as the principal directs. (Cf. the proverb: "He who pays the piper sets the tune.")

493 If the agent is not an insurer he is, however, justified in departing from the tenor of his instructions should there arise any sudden and unforeseen emergency (not due to the fault or neglect of the agent) without opportunity of consulting the principal. In such a

case the agent may well be deemed as to the matters then in question to be without authority, and he would then act as set out in the next rule.

494 As we have already seen the agent who acts in good faith upon one view of an ambiguous authority will be substantially within the rule even though the principal may have intended that the agent should have taken some other course.

495 Rule 5.—In the absence of instructions as to the mode in which the duties of the agency are to be performed the agent must conform to usage or the recognized modes of dealing.

496 Where there exists in relation to the subject matter of any contract or agency a usual or customary mode of dealing with it, the law imports into the contract a term that the agent will carry out the subject matter in the usual way.

497 But any express directions will, of course, prevent this implication from arising. The usage or custom is only annexed where it is capable of being coupled with the authority without introducing any inconsistency.

498 Rule 6.—The agent must act with the utmost good faith.

499 This is necessary because the position of the agent is one of trust. The principal reposes confidence in the agent and the agent invites that confidence by entering into the contract.

500 Rule 7.—The agent must use reasonable skill and ordinary diligence.

501 Reasonable skill means the skill and no more than the skill ordinarily possessed and employed by persons of common capacity engaged in the particular trade, business, or employment. Ordinary diligence, that degree of diligence which persons of common prudence are accustomed to use about their own business and affairs.

502 Rule 8.—If the agent has any interest in the business or matter of the agency adverse to that of the principal, he must make a full disclosure thereof to the principal.

503 This is put in other words thus: An agent will not be allowed to place himself in a position in which his duty and his interest are in conflict. The principal is entitled to the best services of the agent; this he cannot obtain if the interest of the agent is pulling him in a direction opposite to that in which his duty lies.

504 **Rule 9.**—The agent must, whenever called upon by his principal to do so, render full accounts of his receipts and disbursements.

505 Since the receipts and disbursements by the agent are of the moneys of the principal, it is obvious that the agent cannot with any degree of propriety refuse to account for what he has done with the principal's money.

506 **Rule 10.**—The agent must keep the goods and money of the principal separate from his own.

507 There are many reasons for this rule. They are all founded on the possibility that if a partial loss occurs to a mixed fund or chattels, the interest of the agent will come into direct conflict with his duty to his principal, and this position the law will not permit an agent to put himself into.

508 "If a person having trust property and property of his own chooses to mix the two together, the whole becomes trust property, subject to the qualification that whatever he can distinguish as his own he may take out; whatever he cannot distinguish remains for the benefit of the trust until that trust is satisfied: at all events, the trust must be satisfied before the trustee who has mixed the two funds can have a shilling paid to him." (Frith *v.* Cartland, 34 L. J., Ch. 301.)

509 **Agent in Fiduciary Position.**—If the agent occupies a fiduciary position, that is, if the relation is one of confidence (as, for example, in the cases of guardian and ward, solicitor and client, physician and patient,) the foregoing rules are more rigorously enforced than in ordinary cases.

510 **The Liability of an Agent** towards his principal in the carrying out of the contract of agency are of course founded upon his duties to the principal, as above set out.

511 **The Measure of Damages** for a breach of any of these duties must be ascertained by the general rule of law which is appliable to all contracts; that is, when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (that is according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

CHAPTER XXXV.—AGENCY.—(Continued.)—LIABILITY OF AGENTS TO THIRD PARTIES.

512 Authority Properly Executed.—If the agent duly and properly executes the authority conferred upon him he incurs no liability whatever to the third person with whom the contract is made. The contract is the contract of the principal, and the benefit and liability under it are the principal's alone.

513 Where Agent Knows He Had No Authority.—If an agent acts without authority, the following cases may arise: He may know he has no authority, but either (1) Fraudulently or (2) Innocently (expecting ratification) acts as if he had. He will then (in the absence of any ratification by the assumed principal) be personally liable to the third person (if the want of authority was not known to the third person) not on the contract, but by way of damages, the measure of damages being the loss sustained by the third party as a result of the agent's action.

514 Agent Mistakenly Supposing He Has Authority.—Here the same result will follow as in cases in which the agent is aware of the absence of authority.

515 Agent's Authority Determined Without His Knowledge.—If the agent believes his authority to be still in force, whereas it has in fact ceased, he will be personally liable to the same extent as if no authority had ever been conferred upon him.

516 But if in the case last supposed the agent makes no representation of authority, but simply gives to the third party such information as would enable the other equally with himself to judge

as to the existence and scope of the authority under which he proposed to act, he will incur no personal liability. (Smout *v.* Ilbery, 10 M. & W. 1.)

517 Contract by Agent in His Own Name.—When an agent makes a contract in his own name he is usually liable personally, so far as the third party is concerned, but under some circumstances parol evidence is admissible to show the undisclosed principal.

518 The effect of this evidence will be to enable the third party to elect either to continue the agent as his debtor, or to charge the principal.

519 If the contract is made by the agent in his own name, and the third party elects to charge him, the election will not be questioned.

520 Agent for Unnamed Principal.—If the agent signed in his own name, but as an agent for an unnamed principal, he does not incur personal liability, unless the third party makes the contract only upon the credit of the agent, or unless there is a custom in the particular trade or business to recognize the agent as personally liable where the principal is not named.

521 Where a person makes a contract and calls himself an agent for an unnamed principal, it is open to the other contracting party to show that the so-called agent was in fact the principal.

522 Receipt of Money by Agent.—Where the agent has received money he is not personally liable to repay it (if it has, in fact, been mispaid) where the agent has paid over the money to his principal without notice; or where, before notice, the situation of the agent has been altered by anything done by him upon the assumption that the payment was good.

523 But the agent will be personally liable to the third party where the agent pays over money to his principal after notice.

524 Where the agent is a stakeholder, and pays over the money before the conditions are performed, or where the agent retains money in satisfaction of an illegal debt, and pays it over to his principal, he will be liable.

525 Payment by Agent to Third Party.—Where the principal directs payment to a third party, the agent who has received money from his principal or for his principal, is liable to the third party in an action.

526 But in order to render the agent liable to the third party, there must be a specific appropriation of the money to the use of such third party, assented to by the agent.

527 When a principal directs his agent to pay money over to a third party, the direction may be countermanded until it is executed, or until the agent has altered his position in consequence of the direction.

CHAPTER XXXVI.—AGENCY.—(Continued.)—RIGHTS OF AGENT AGAINST PRINCIPAL.

528 Principal Bound to Pay Commission.—Unless in the case of a gratuitous agent, a principal is bound to pay to the agent the commission agreed upon, or, in the absence of agreement, such amount as the services of the agent may entitle him to.

529 When Agent Not Entitled.—But the agent is not entitled where the authority which he received has not been properly executed, or where the authority has not been executed, unless in cases in which the principal has himself prevented the execution of an authority not subject to revocation, or which has not been revoked. For example, in the case of an agent appointed to sell property, his right to remuneration upon a sale made by the principal will depend upon the contract which was made, but as a general rule it may be stated that unless there has been a revocation, the agent is entitled to complete the work which was committed to him, and if, by the wrongful act of the principal, he was prevented from carrying out the work on which he had been employed, he would be entitled to a reasonable remuneration for what he had done.

530 Commission Where Agent's Work Useless.—If the agent's work is useless owing to his want of skill, that is, if the proceedings are wholly abortive, the agent is not entitled to recover compensation; but if the work is not altogether useless, the agent is entitled to recover upon a *quantum meruit.*

531 Agent not Entitled to Secret Commission from Third Parties.—The agent, as before stated, is not entitled to have any interest in a contract opposed to the interest of his principal, and, therefore, is not entitled to claim any secret commission or allowance from the parties with whom he is dealing.

532 Agent's Right to Indemnity.—In addition to being paid his commission the agent is entitled to be indemnified against the consequences of all acts done by him in pursuance of the authority conferred upon him, provided the act is not illegal; and where disbursements have to be made by the agent in pursuance of the terms of his authority, he is entitled to call upon his principal to put him in funds for that purpose.

533 Agent's Right to Lien.—In some cases agents are entitled to a lien upon the property of the principal in respect to their charges.

534 Liens are either general or particular, and are either by Common Law or by Statute.

535 A General Lien is the right to retain the property of another on account of a general balance due from the owner to the person who has possession.

536 Particular or Specific Lien is a right to retain the property of another for charges incurred, or trouble undergone, with respect to that particular property.

537 To establish a common law lien there must be possession by the claimant or his agent; the possession must be continuous; must be acquired in good faith, and in the ordinary course of business; and the claimant must obtain possession and claim lien in the same character.

538 Statutory liens depend upon the provisions of the statute under which they are obtained.

539 A claim to lien is not a waiver of personal remedies against the debtor, but the taking of any security from the debtor is, as a general rule, a waiver or abandonment of the lien. (As to this point

in the case of Mechanics' Liens, see Mechanic's Lien Act, in Appendix.)

540 Right to Account.—An agent who is paid by a percentage may sometimes be entitled to an account against the principal in order to ascertain the amount of the percentage to be paid.

541 Right of Stoppage in Transitu.—An agent has the right of stoppage *in transitu* when he has made himself liable for the price of goods consigned to his principal, by obtaining them in his own name and on his own credit.

542 The right however does not exist, if at the time of the consignment the agent is indebted to the principal on the general balance of account in a sum larger in amount than the price of the goods, and if such consignment has been made to cover the balance. Nor does the right exist if the agent is only a surety for the price of the goods, unless possibly if he has paid the price.

543 How Right Exercised.—The right of stoppage may be exercised either by obtaining actual possession of the goods or by giving notice of the claim to the person in whose custody they are during the transit.

544 How Right May be Defeated.—(See as to this, and generally as to the law of stoppage *in transitu*, Chap. XXIV.)

545 Right to Interplead.—Under some circumstances an agent has a right to call upon rival claimants to goods or moneys held by him to interplead as to their respective rights.

CHAPTER XXXVII.—AGENT.—(Continued.)—RIGHTS OF AGENT AGAINST THIRD PARTIES.

546 Agent Entitled to Bring Action.—An agent is entitled to bring an action against third parties upon contracts

1. Where the agent has contracted as agent for an undisclosed principal.
2. In certain cases where the agent is the real principal.
3. Where the agent has a special interest in the subject matter of the contract.
4. In some cases where money is paid on a contract which turns out to be illegal, or where it is paid by mistake.

547 Where an Agent has Contracted for an Undisclosed Principal.—When a contract 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 position, at the time of the disclosure of the real principal, as if the agent had been the real contracting party.

548 Where the Agent is the Real Principal.—If at the time the agent discloses the fact that he is the real principal, and that the principal named in the contract has no interest therein, the contract is wholly unperformed, it is the better opinion that the other contracting party may refuse to accept it. In many such cases the skill or solvency of the pretended principal might have formed an inducement to the making of a contract which might never have been entered into if it had been known that the supposed agent was in fact acting for himself.

549 If, however, the contract in such a case has been partly performed with a knowledge that the agent was, in fact, the principal, the performance of the balance of the contract cannot be refused.

550 Or if the third party has received the benefit of the contract, there is nothing to prevent the agent suing in his own name, after notice of his real character has been given to the third party.

551 Where the Agent has a Special Interest.—If the agent has advanced money to the principal on account of the contract, or where the agent has a lien on the goods sold, or in any other case in which he has an interest in the contract differing from, though not adverse to, the interest of the principal, he may maintain an action on the contract.

552 Where Money is Paid by Mistake or Under an Illegal Contract.—Where money has been paid by an agent for his principal under a mistake of fact, either the agent or the principal may sue for its recovery.

553 The same rule applies where the money is paid by an agent on a contract which turns out to be illegal owing to facts of which the agent was ignorant.

554 General Rule.—Subject to the exceptions set out in this Chapter, the general rule is that an agent who has made for a named principal a contract authorized by the principal has no right to bring an action on the contract. All rights under the contract itself, including the right of action upon it, belong to the principal in such a case.

CHAPTER XXXVIII.—AGENCY.—(Continued.)—RIGHTS OF PRINCIPAL AGAINST THIRD PARTIES.

555 General Rule; Right of Principal to Sue.—On a contract made in the principal's name by an agent duly authorized, or whose acts have been duly ratified, the rights of the principal against the other contracting party are precisely those he would have if he had made the contract himself without the intervention of an agent.

556 Subject to Declarations, etc., of Agents.—This right of the principal is, of course, affected or modified by the declarations, misrepresentations, concealments and fraud generally, of the agent acting within the scope of his authority.

557 Where Agent Contracts as Principal.—If the principal has allowed the agent to contract as principal with the third party without notice, the right of the principal is subject to all the equities and rights of which the other contracting party might avail himself in the transaction as against the agent, assuming the latter to have been a principal.

558 Principal's Right of Action Paramount.—The right of the principal to sue is paramount to that of the agent, and in cases where either may bring an action, the former, by giving notice to the other contracting party, puts an end to the agent's right of action, except in cases where the agent has a lien upon the subject matter of the action equal to the claim of the principal.

559 Right to Recover Money Wrongfully Paid or Applied.—Where money is paid by an agent which ought not to have been paid either the agent or his principal may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent.

560 Right to Follow Property.—Wherever the property of the principal has been wrongfully misapplied the rightful owner is entitled to retake the property if its identity can be traced, or recover the proceeds. The right to follow ceases when the means of ascertainment fail.

561 The Factor's Act.—If a principal clothes his agent with an apparent authority he is bound by what the agent does thereunder, though the agent may have exceeded his real authority. If goods are entrusted to a wharfinger whose proper business is not to sell, but simply to store, goods, a person buying from him could not allege that his apparent authority was to make a sale. But it would be different if the goods had been consigned to a factor whose business is to sell, not to store, goods. Here the apparent authority might easily be greater than the real authority. To regulate the extent to which rights acquired from a factor might prevail over the rights of the owners, an Act called the Factor's Act (R. S. O., 1897, Chap. 150, an Act respecting Contracts in relation to Goods entrusted to Agents) has been passed. This Act will be found in the Appendix.

562 It was not the intention of the Legislature in passing the Factor's Act to give all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. The intention was to make it law that when a person was entrusted goods, or the documents of title to goods, to an agent who, in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled anyone who deals in good faith with the agent and makes a purchase from, or an advance to, him without notice that he was not authorized to make the sale or procure the advance.

CHAPTER XXXIX.—AGENCY.—(Continued.)—LIABILITY OF PRINCIPAL TO THIRD PERSONS.

563 Extent of Liability.—The rights and liabilities of a principal in respect of a contract made for him by his agent are usually, and as a general rule, reciprocal. The contract, if properly and duly made by the agent, is in fact the contract of the principal, and the liability of a principal upon a contract properly made by his agent is just the same as the liability would be under a contract made directly by himself.

564 When an Agent Executes His Authority Strictly, the principal is absolutely liable, just as much as he would have been if he had contracted without an agent, unless in cases in which credit was in fact given exclusively to the agent, the principal being known.

565 Where the Principal is not Disclosed the question, "To whom was credit given?" becomes material. If the credit was given entirely to the agent, then while the principal may, by disclosing himself, obtain the benefit of the contract, he may not be liable to the third party upon the contract, because there cannot be, under a contract, a liability of both agent and principal.

566 Rule as to Foreign Principal.—It is taken to be a general rule that the agent in this country of a foreign principal does not pledge the latter's credit, but remains personally liable.

567 Right of Third Person to Elect Whom to Charge.—If a person sells goods (supposing at the time of the contract he is dealing with a principal) but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have

debited the agent with it, he may afterwards recover the amount from the real principal; subject however to this qualification, that the state of the accounts between the principal and the agent is not altered to the prejudice of the principal.

568 Election to Charge.—The third party, on discovering that the supposed principal was, in fact, an agent only, may, as has been already stated, elect between his right against the agent whom he has charged as principal, and his right to sue the newly discovered principal. Up to the moment of the election, two persons may be severally liable upon the contract. The election once made is irrevocable, that is, the third party cannot, after knowledge of all the facts, make the agent his debtor, and then afterwards, upon the failure of the agent, turn and charge the principal.

569 As to questions of election or waiver of right to elect, each case will, of course, depend upon its peculiar circumstances, but as a general rule, anything that may be done by a third party, after notice of the undisclosed principal, going to show that he has accepted the liability of the principal, will indicate his election to release the agent.

570 The question of election is one of fact, but where the third party has sued the principal or agent to judgment, it is a conclusion of law that he has made his election.

571 Principal Not Liable for Unauthorized Act.—Where the agent has exceeded the instructions received, the principal will not as a rule be liable, unless the act of the agent, though outside his real authority, is within his apparent authority, since as between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested. If, however, the act which exceeded the instructions given to the agent, was afterwards ratified by the principal, then as previously shown, the principal would be liable for the act of the agent as if it had been originally an authorized act.

CHAPTER XL.—AGENCY.—(Continued.)—THE DETERMINATION OF THE CONTRACT.

572 Modes in which the Authority May be Determined.—The contract of agency, like all other contracts, may be dissolved or determined by the act of one or by the mutual consent of both of the parties to it. It may also be determined by the performance of it; or it may be determined by operation of law. These causes of determination may be classified as follows:

(a) By the original agreement, by
1. Performance of the object of the agency, by
2. Efflux of time, or by
3. The operation of any provisions for determining the contract before complete performance.

(b) By the parties by act subsequent to the original agreement, by
1. The principal—by revocation of authority, or by
2. The agent—by renunciation of the agency, or by
3. Both parties—by mutual consent.

(c) By operation of law on the
1. Death,
2. Bankruptcy, or
3. Insanity

Of either principal or agent; or by

4. The destruction.
5. Illegality, or
6. The taking (by paramount authority)

Of the subject matter of the agency.

573 **Performance of the Object of the Agency.**—The agreement when made is executory. When the agent has done the work or carried out the business committed to him the contract is executed so far as he is concerned, and when after that the principal has paid or compensated the agent, nothing more remains to be done on either side and the employment has terminated.

574 **Effluxion of Time.**—If a salesman is engaged for one year, the contract is determined when the year expires. The employment may continue, but it will be then under a new contract express or implied.

575 **Provisions for Determining the Contract.**—If in the contract of hiring it is stipulated that it may be terminated on certain notice, or in a certain event, the giving of the notice (for the time agreed upon), or the happening of the event, as the case may be, will determine the agency.

576 **Revocation by Principal.**—If the contract contains an agreement by the agent to perform certain duties, and then an agreement by the principal to provide opportunities for the performance of these duties during a certain period, there can of course be no revocation by the principal.

577 But if A agrees to sell goods for B on a commission of ten per cent., here it is obvious that (in the absence of any provision to the contrary) B may at any time revoke the employment; or B may go out of business; or may raise the price of the goods to a prohibitive price; or may sell direct to customers; and in none of these cases could A complain.

578 Where a principal, who wants to have a portion of his business transacted in a certain town, engages an agent, and they enter into a mutual bargain; unless there is some special term in the contract that the principal shall continue to carry on his business, it cannot be implied as a matter of obligation that he shall be bound to carry it on for the benefit of the agent. (Rhodes *v.* Forward, L. R., 1 App. Ca. 256.)

579 The principal, however, cannot revoke the contract where there is a stipulation as to its continuance, or where the agent has an authority coupled with an interest, or where the continuance of the authority is necessary to effectuate any security.

580 "Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the power, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest." (Smart *v.* Sanders, 5 C. B., 895.)

581 **Renunciation by Agent.**—The agent may renounce his agency at any stage; but if the agency has been undertaken for a valuable consideration, he will be liable in damages to his principal; and the same rule will apply even in the case of gratuitous undertakings which have been performed in part by the agent.

582 **By Mutual Consent.**—Where neither the principal can revoke nor the agent renounce, both parties may by consent put an end to the agency.

583 **Death.**—The death of either principal or agent will end the contract, if it is one of bare authority. Provisions are usually introduced to modify or avoid this rule.

584 **Bankruptcy.**—As to the principal bankruptcy revokes the power, because all the interest of a bankrupt passes to the assignee. As to the agent, his bankruptcy for the same reason operates as a revocation of his authority, except in cases where the authority is merely to do a formal act which passes no interest, the performance of such an act being incumbent on the agent.

585 **Insanity.**—If the insanity is of the principal, it must be of so great a degree that the principal could make no contract and (though this point is not settled) it must have come to the knowledge of the third person. The insanity of an agent would seem to constitute a natural as well as a necessary revocation of his authority.

586 **Destruction of Subject Matter.**—If the agent is employed to rent a house and the house is destroyed by fire, there is obviously an end of the agency.

587 **Illegality.**—If the employment in which the agent is to engage is illegal, the intended contract of agency is void. If illegality occurs after the making of the contract, it operates as a dissolution of the contract.

588 Ouster by a Paramount Authority.—If the subject matter of the agency is taken by paramount authority out of the power or authority of the principal, there is an end to the authority. Thus a power of attorney from the owner of property to collect rents would be of no effect if the property was sold under power of sale or foreclosed by a mortgagee, or expropriated by authority of some Act of Parliament.

CHAPTER XLI.—PARTNERSHIP.

589 Definition of Partnership.—Every association of men for business purposes is either an incorporation or a partnership. A partnership may be defined as the voluntary association of two or more persons for the purpose of carrying on a mutual trade or business for mutual profit.

590 Partnership is the Result of a Contract.—Partnership is, like agency, the result of a contract either expressed or implied, and is subject in general to all the rules relating to contracts which have been previously set out.

591 Partners Mutually Principals and Agents.—The partners stand in relation to each other in the respective positions of principals and agents, and hence the law of agency will to a great extent cover the contracts, duties, liabilities and rights of partners.

592 Generally speaking, therefore, the duties of one partner towards the members of the firm may be said to be the same as the duties of an agent to his principal; and the liability of the various partners to third parties, and the rights of partners against third parties, on the firm's contracts, may be generally said to be the same as in cases of agency.

593 Partnership the Result of an Agreement to Share Profits.—Unless otherwise provided by contract or by statute, partnership is the result of an agreement to share profits, and a partnership may, and usually does, result when any association of individuals has this object.

594 Agreement of Partnership.—Usual Clauses.—As in most cases the agreement forming a partnership is of a formal nature, it will be convenient to consider in detail the clauses which are usually found in a well-drawn agreement of partnership, and briefly note the consequences which flow from the stipulations therein contained.

595 (1) There will be in every agreement the names and descriptions of the parties.

596 (2) A statement of the business in which they are about to engage.

597 (3) The duration of the partnership, and this of course will be qualified by a provision that the partnership may be shortened by any of the provisoes for that purpose subsequently contained in the partnership articles. If no time, during which the partnership business is to extend, is named, the partnership will be at will only.

598 (4) The place at which the partnership business is to be carried on.

599 (5) The amount of capital to be contributed by each partner.

600 (6) The proportion in which the profits of the partnership are to be divided, and the losses of the partnership shared. In the absence of any stipulation of this kind, the profits and losses will be shared and borne equally.

601 (7) The part which each partner is to take in the management of the partnership business. This stipulation is sometimes introduced for the convenience of the partners and for the due regulation of the internal affairs of the partnership, but no stipulation of this kind, unless made public, can limit the authority of a partner to transact any business operation within the range of the partnership affairs.

602 (8) The keeping of specified books of account. This would be the duty of the partnership without any stipulation, but it is very frequently the rule to provide specifically for the books which are to be kept.

603 (9) That the partners are to have access to the partnership books at all reasonable hours.

604 (10) The mode of keeping the partnership books, having reference to the annual or other statement of gains or losses, is usually provided for. In the absence of a stipulation of this kind, the ordinary course of the business men in dealing with their accounts should be followed by the partnership.

605 (11) Provisions as to the payment of the sum found to be due to each partner on the taking of accounts, and the admission of the partners as to the correctness of the accounts, and as to the addition of any portion of the profits to capital account.

606 (12) A provision as to the amount to be drawn by each partner from the profits of the business from time to time.

607 (13) A provision that no partner is to draw, accept, indorse or make any bill of exchange or promissory note, or discharge any employe, or incur any liability over a specified amount. Stipulations of this kind, like the stipulation as to the share to be taken in the partnership business affairs, are good for internal regulation, but are useless so far as the public is concerned, without notice to the public.

608 (14) A proviso that no partner shall become surety for any outside person, or incur liability as a bondsman or bail, or otherwise do any act which might have a tendency to endanger the welfare of the partnership, or the stability of the partnership business.

609 (15) A provision for recourse to arbitration in case of disputes arising in the course of the partnership business, or in regard to, or after, a dissolution of the partnership.

610 (16) A provision for the dissolution of the partnership upon a certain specified notice. In the absence of any provision of this kind, the partnership could only be dissolved by the agreement of the parties, or by effluxion of time, unless the partnership was at will, in which case, of course, it could be dissolved at will. It could also be dissolved for any of the other causes outside the acts of the parties as set out afterwards. But in the absence of these causes, and if the partnership is not at will, and unless the partners consent, there can be no dissolution of the partnership until the contract has been fully completed.

611 (17) A provision as to the carrying on or winding up of the partnership business, upon the death of any one of the partners.

612 For particular purposes or in any unusual lines of business, other stipulations varying with the circumstances of the parties may be introduced, but those which have been given are the stipulations most usually found, though they have not been set out in the precise and formal language such as would be appropriate to a legal document, but have been purposely shortened in order to give simply information as to their contents and effect.

CHAPTER XLII.—PARTNERSHIP.—(Continued.)—DUTIES OF PARTNERS TOWARDS EACH OTHER.

613 **General Rule.**—As has been noted, the duties of partners towards each other and the rules of conduct which should govern them in carrying on their mutual undertaking are analogous to the duties of an agent towards his principal. This is because each partner is the agent of the other partners within the scope of the partnership business.

614 **Power of a Majority.**—"It would seem to result from this relationship that where there is a difference of opinion the majority of the partners may, within certain limits, override the wishes of the minority. In all cases of difference between the partners, however, the partnership articles should be consulted, and their provisions with respect thereto must control; for were it in the power of the majority to act contrary to the articles, they could impose upon the minority a contract to which they had never assented. The majority cannot, against the will of the minority, admit a new partner, or change the

business of the firm, or the provisions of the articles themselves. If the articles are silent, however, the will of the majority will control with regard to matters arising in the ordinary course of the firm's business, and to their wishes the minority must yield. If the partners are equally divided, it is thought that those who forbid a change should have their way. The majority are only entitled to control when they are acting in good faith and for the benefit of the firm, and after the minority have had a chance to be heard."—(Spencer.)

615 Partners Must Act in Good Faith.—The partnership relation being one of special trust and confidence, each partner is required to act with the greatest fairness and the most scrupulous good faith, from the beginning of the negotiations for the partnership until its affairs are finally settled and the partnership connection wholly severed.

616 Partner Must Not Sell His Own Goods to Firm.—If a partner employed to buy for the firm secretly supplies and takes pay for his own goods, he must account to his partners for the profits, even though he furnished the goods at the usual market price, for the benefit of his skill as a buyer belongs to the firm. Besides which his interest would thus be adverse to the interest of his principals (the other partners). He cannot either buy from or sell to the firm without making full disclosure, nor will he be permitted to derive any profit from his dealings with the firm, unless it is mutually agreed that he is to have such profit.

617 Partner Must Deal Openly.—It is the duty of each partner to make full disclosure to his co-partners of all matters affecting the business, to have no secrets from them in relation thereto, and to be ready at all times to account to them for his management of the firm affairs.

618 Must Not Compete.—No partner may lawfully, either openly or in secret, carry on business in competition with the firm without the consent of his associates.

619 Partner Must Use the Firm Name.—In carrying on the business of the firm each partner should use the firm name in all partnership transactions, and this not to escape individual liability (since he will be equally liable in either case) but to ensure that the partnership shall have the benefit of any profit which may result.

620 Partners Must Conform to Usage.—No partner should act otherwise than in the usual and regular order of business, because on all points on which the partnership articles are silent there is an implied understanding to act in the usual course of the business or undertaking which the partners carry on, and they are presumed to have contracted on that basis.

621 Use of Firm Assets for Private Ends Forbidden.—No partner is entitled to use the partnership name or assets, whether of negotiable paper or goods, in furtherance of his own private business, or to incur any risk with regard thereto, except as authorized by the partnership agreement or by usage.

622 In short, in the carrying on of a partnership business, the partners are required to exercise the utmost good faith one towards each other, and they are not allowed to undertake anything which would have the effect of jeopardizing the interests of the partnership. This is, of course, the necessary result of their mutual relations as principals and agents.

623 Partners Must Not Jeopardize Business.—The duty of the partners to avoid anything which would jeopardize the success of the joint adventure is of a very comprehensive nature. It not only covers his conduct in carrying on the business, but in some cases relates to his private life.

624 In conducting his share of the partnership business the partners should give it such time, care and attention as the nature of the case may require, and with due regard to the demeanor and mode of procedure usually required. Thus, a partner who was so rough and insulting to the customers of the firm, or who absented himself so long or so frequently, as to render it impossible to carry on the business, or a partner who by his recklessness, or incapacity, or disregard of the partnership conventions was reducing the firm to ruin, would certainly be violating the spirit if not the letter of the partnership articles, and his misconduct would justify the unoffending partner in applying to the Court for a dissolution.

625 And where the integrity of the individual partner is of moment (as, for instance, in a firm of solicitors), the Court would dissolve the partnership if one of the partners had been publicly found guilty of personal dishonesty.

CHAPTER XLIII.—PARTNERSHIP.—(Continued.)—POWER OF EACH PARTNER TO BIND THE FIRM.

626 Each Partner a General Agent of the Firm.—Every member of an ordinary partnership is a general agent of the firm for the transaction of its business in the ordinary way. But he is not the agent of the partners individually, and cannot bind them severally, or any number of them less than all.

627 Extent of Authority.—The public must judge of a partner's powers from the nature of the business in which the firm is engaged, from the usages of others carrying on the same or similar kinds of business in the same locality, and from the usages of the firm itself. While it is competent for the partners, by agreement, to restrict the powers of a co-partner, such restrictions do not bind non-partners unless they are chargeable with notice of them. On the other hand, a partner may be specially authorized by his associates to go beyond the scope of the partnership business, when his acts will bind them to the extent of the special authority. (In other words, the apparent authority of the partner will be the measure of his power to bind his principal—the firm.)

628 Scope of the Business.—Third persons dealing with the firm through one of its members have the right, in any case, to assume that he is its general agent to carry on its business in the ordinary way, unless they are notified that his apparent authority is limited by

agreement between the partners or otherwise. Usually, then, the nature and scope of the partnership business determines the power of a partner to bind the firm to third parties. The scope of the firm business depends upon the general nature of the enterprise which the partners are carrying on, and all acts are within that scope when reasonably necessary and appropriate to its prosecution in the ordinary way.

629 If a partner, though assuming to act on behalf of the firm, goes beyond the actual or apparent scope of its business, his associates are not bound unless they specially authorized his act or have subsequently ratified it. Thus, if a partnership is formed to carry on a particular business the firm will not be bound if one of their number buys goods that are not and can not be used in that business.

630 The usages of others engaged in similar business in the same locality are to be considered in determining a partner's power to bind a firm. Third parties have a right to believe that the partners have clothed one another with power to conduct the partnership business as others conduct the same or similar enterprises in the same locality.

631 Extension of Business by Acquiescence.—A firm may, by a course of dealing known and acquiesced in by all the partners, extend the scope of its business. This is equivalent to an enlargement of the articles by common consent of all the partners, as where a firm of printers mutually engage in buying and selling pianos.

632 Trading and Non-Trading Firms.—A distinction is generally recognized between trading and non-trading partnerships, particularly with respect to the power of one partner to bind the firm by borrowing money and issuing commercial paper. All firms engaged in buying and selling as a business, whether at wholesale or retail, are trading partnerships. But solicitors, physicians, farmers, and usually those engaged in a single enterprise, are non-traders. But even in the case of non-traders one partner may be expressly authorized to borrow money, or sign notes, or such power may be conferred by implication from a course of dealing, or there may be a ratification.

633 Admissions.—The declarations and admissions of one partner as to matters within the scope of its business are evidence against the firm, though not necessarily conclusive.

634 Arbitration.—One partner cannot, without special authority, bind the firm by a submission of partnership matters to arbitration, for such a proceeding is unusual, and cannot be said to be necessary to the carrying on of its business in the ordinary way.

635 Assignment for Creditors.—One partner usually has power to sell and assign the whole of the partnership property for the purpose of conducting its business. But he has no authority to make a general assignment of the firm's assets for the benefit of creditors in the absence of peculiar circumstances, or a special authority.

636 Bills and Notes.—A partner in a trading firm has *prima facie* authority to bind the firm by making, drawing, indorsing or accepting commercial paper in the firm name for partnership purposes. But if he gives such paper for his private debt, or in a transaction outside the scope of the partnership business without the authority of his co-partners, the firm is not bound to any holder with notice. In favor of a *bona fide* holder for value, however, the firm is absolutely bound by an acceptance in the name of the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent.

637 A partner in a non-trading firm has no implied authority to bind the firm by signing commercial paper, and it lies upon the holder to show a special authority express or implied. How far this rule applies to cheques may not be certain, but the question of a partner's authority to draw them can seldom arise where the funds of the firm are deposited with the assent of all the partners.

638 Suretyship.—A partner cannot, without special authority, bind the firm by signing its name to a contract of guaranty or suretyship.

639 Borrowing Power.—Pledge.—One of the most dangerous powers of a partner is that of borrowing. In trading firms this power always exists by implication, unless the lender has notice that the loan, though ostensibly to the firm, is for the private benefit of the partner procuring it, or that the money is wanted for purposes outside the scope of the business. In non-trading firms, however, one partner has no power to borrow on the credit of the firm unless specially authorized.

640 Buying.—Each member of a firm has implied power to purchase for the firm, and on its credit, whatever is necessary to

carry on its business in the ordinary way. But if one partner seeks to bind his co-partners by a purchase outside the scope of the partnership business, special authority or subsequent ratification must be shown or the firm will not be bound.

641 Debts.—Each partner has implied power to collect and receipt for debts due the firm, and payment to one partner is payment to the firm. So he may, in good faith, compromise a debt due the firm. Each partner has implied power to pay debts due from the firm to third persons.

642 Notice to One Partner.—Notice to a partner is notice to his co-partners provided it relates to matters within the scope of the firm business.

643 Power to Sell Personalty.—It is undoubtedly within the implied power of a partner in a mercantile firm to sell, in the usual course of business, any part of the personal property which the firm holds for sale. The partner who sells may also warrant.

644 But a partner has no implied power to sell firm property not actually or apparently held for sale, and upon the continued use and possession of which the transaction of the firm business depends. The power to sell, however, must be exercised in any case without fraud or collusion to which the purchaser is a party.

645 Sealed Instruments.—One partner has no implied power to bind his co-partners by an instrument under seal.

646 Servants and Wages.—Each partner has implied power to employ such servants and agents as are necessary to carry on the firm business in the ordinary way, and may discharge them unless in so doing he acts against the wishes of his co-partners.

647 Ratification.—The unauthorized acts of a partner may become binding on the firm if his co-partners with full knowledge of the facts ratify and adopt them. The general principles of ratification laid down in the law of agency apply here.

CHAPTER XLIV.—PARTNERSHIP.—(Continued.)—LIABILITY OF PARTNERS TO THIRD PERSONS.

648 Liability Unlimited.—The liability of partners to third parties in respect to the business of the partnership is unlimited, except in cases of limited partnership, under the Statute in that behalf. (See Appendix.)

649 Individual and Firm Assets Equally Bound.—Each partner is absolutely liable for the full amount of the partnership debts, not only in respect to his interest in the partnership, but also to the full extent of his individual assets.

650 Right of Individual and Partnership Creditors.—If the partnership is insolvent, the joint creditors are entitled to the assets of the partnership in preference to the individual creditors of the partners, but the individual creditors of the partners have the preference over joint creditors in relation to the individual assets of each partner.

651 Duration of Liability.—The liability of a partner for the debts of the firm continues while he is a member of the firm, and afterwards unless his retirement is properly notified to or known by the public, or at all events by the persons with whom the firm is dealing.

652 This liability of a partner, after his retirement from the firm, is a provision of the law required in justice to those persons who have been dealing with the partnership on the faith of the credit

of each partner. If one partner was allowed, without notice, to withdraw his credit from the firm, it is evident that the creditors might suffer considerable loss, or, at all events, their interests might be jeopardized; and if the law allowed the silent withdrawal of a partner, it would be enabling the remaining partners to commit a fraud upon those members of the public with whom they deal.

653 Notice of Retirement.—If, therefore, the retiring partner desires to free himself entirely from responsibility, it is necessary that he should give notice of his retirement from the firm.

654 If the non-removal of a partner's name from the firm is the result of his own negligence, he will continue liable; but if his late partners wrongfully persevere in using his name, that will not bind him.

655 What Notice Sufficient.—Notice of dissolution will not be necessary when the partnership is dissolved by death or bankruptcy, and it is probable that notice is not necessary when the partnership is dissolved by operation of law, such as the decree of the Court, or the outbreak of war, making one or more of the partners alien enemies.

656 To persons who have not dealt with the firm, notice of dissolution in the "Ontario Gazette" will be sufficient, whether they have seen it or not.

657 To persons who have dealt with the firm, express notice ought to be given, but if a fair presumption can be raised from other circumstances that the party had actual notice, that will be enough.

658 As to the Dormant Partner.—As his name never appeared in the firm, of course it cannot be removed. He will not, therefore, be liable on the dissolution to persons who are dealing with the firm, except to those who knew of his position with the firm at the time of entering into their engagements with the firm; and to such persons he will be liable if he does not give proper notice of his retirement, or if they have not otherwise acquired knowledge of his retirement.

659 Cessation of Liability.—When a partner has duly dissolved the partnership, and removed his name from the firm, and duly promulgated notice of his withdrawal, all danger of his liability for the future acts of his companions is at an end.

660 As to the Past Indebtedness of the firm, the customary course is for the remaining partners to undertake to indemnify the retiring partner against liabilities. This, while perfectly good as

between the partners themselves, will yet not avail the retiring partner against the claims of creditors, unless those creditors have expressly agreed to release the old firm and take instead the liability of the new firm, thus making a new contract (a novation).

661 If the retiring partner is compelled to pay any of the past indebtedness, he will be entitled to compel the remaining partners, if they have agreed to indemnify him, to repay the amount he has had to pay to the creditors.

662 Lindley, L. J., in his work on partnership, thus sums up the result of the cases:

(1) An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm, either at law or in equity.

(2) And it will certainly not do so if by expressly reserving his rights against the old firm he shows, that by adopting the new firm, he did not intend to discharge the old firm.

(3) And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor to be so.

(4) But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly is strong evidence of an intention to look only to the continuing partner for payment.

(5) And a new creditor who consents to a transfer of his debt from the old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm.

663 Discharge by Transaction with Single Partner.—As an entire firm may be bound, so it also may be discharged, by a transaction with a single partner. Thus, payment or satisfaction of a debt by one partner is payment or satisfaction by them all; so a release or discharge, even without deed, to one of the several partners or joint debtors, though the debt be joint and several, is a discharge to them all. Though a covenant not to sue an individual may be pleaded by him as a release, yet such a covenant does not release the rest.

CHAPTER XLV.—PARTNERSHIP.—(Continued.)—DISSOLUTION.

664 Dissolution of Partnership.—If the partnership agreement provides for any particular mode of dissolution, then the mode agreed upon will of course bind all the partners, and, if by reason of notice or otherwise, the partnership may come to an end before the date of its expiration by effluxion of time, then the partnership is at an end by virtue of the previous agreement.

665 Where, however, the partnership articles do not provide for a premature dissolution, then, unless the parties can bring themselves within the range of the rules following, there is no way in which they can be released from their contract. Articles of partnership, therefore, should be carefully considered before being executed, and partnerships in general should not be hastily entered upon, seeing that there may be, in many cases, great difficulty in dissolving the bond of union.

666 The Cases in Which Dissolution Will Take Place may be divided into three classes :

1. Dissolution by the act of the parties.
2. Dissolution by the aid of the Courts.
3. Dissolution by operation of law.

667 Dissolution at Will.—If the partnership is at will it may of course be dissolved at any time, at the will of any of the partners, and the Courts will not interfere with the arbitrary exercise of the power of dissolution where the partnership is at will, unless in cases in which the dissolution of the firm would work great injury and hardship upon the remaining partners; but a case must be of an extreme nature to warrant the interference by the Court with the liberty of withdrawal in the case of partnership at will.

668 By Agreement.—Since a contract is simply an agreement of two or more parties, it follows that the same agreement which created the contract may dissolve it; and, therefore, any partnership may at any time be dissolved by the same persons who originally created it. That is, the partners may, by mutual consent, agree to dissolve their association. Or the original articles may provide that on certain conditions, or upon notice, the partnership may be dissolved.

669 Effluxion of Time.—If the partnership articles provide for a definite date at which the partnership is to end, then the partnership will expire or be dissolved by effluxion of time on that date. (It may, of course, be continued by the partners, but the continuation will be as a new agreement; or if there is no agreement, it will be a partnership at will.)

670 The three classes of causes, therefore, for which the partnership may be dissolved by the act of the parties, will be:

(a) The will of any partner when the partnership is at will.

(b) Consent of all the partners (whether in the original articles or subsequently).

(c) Effluxion of time.

671 Misconduct of a Partner.—If the partners are unable to agree among themselves, there is no remedy outside of a mutual dissolution by consent or outside the terms of the partnership articles, unless their dissension is of such a violent nature as to render it impossible to carry on the partnership business, and even then it would seem that the dissension must be caused by the misconduct of one of the partners.

672 If the partners are unable to satisfactorily carry on the partnership business, owing to the fact that the misconduct of one of the partners has rendered impossible that unity of purpose and mutual confidence which are indispensable in the carrying on of a

partnership business, then the Court will order a dissolution of the partnership, but the application for such a dissolution must be by the innocent partners, and not by the offending one, since the Court will not allow the offending partner to take advantage of his own wrong.

673 **Insanity.**—If one of the partners becomes insane the Court will, on the application of the remaining partners, order a dissolution, but the insanity of a partner will not be a cause of dissolution unless an application is made for that purpose, that is, it will not of itself dissolve the partnership.

674 (Whether the sickness of a partner will be sufficient cause for a dissolution may be doubted. At all events the illness must be of such a nature and of such a probable duration as to have the effect in relation to the partnership business equal to that of death; that is, a partner must be totally and permanently disabled from taking any part in the conduct of the partnership business.)

675 **Hopeless State of Partnership Business.**—If from any cause it is a matter of impossibility to continue the partnership business without causing irretrievable loss to all the parties concerned, that is, if the business is entirely hopeless, and the partners are only losing more money the longer they continue in the partnership, then the Court will order a dissolution, if one or more of the partners should be so unreasonable as under these circumstances to refuse to consent to a dissolution.

676 Dissolution may be granted by the Courts, therefore, for three reasons—

(a) The misconduct of a partner.

(b) The insanity of a partner.

(c) The hopeless state of the partnership business.

677 **Bankruptcy.**—Dissolution of a partnership by operation of law takes place when one of the partners becomes a bankrupt, it being then of course impossible to carry on the business, because by the act of the law upon the bankruptcy proceedings all the assets of the partner, including his share in the partnership business, are vested in his trustee, and to enable a bankrupt partner to continue in the business would be to introduce into the partnership a third party by the assignment of a share, and this is not allowed without the consent of the other partners.

678 Illegality.—If from any cause whatever, the business carried on by the partnership becomes illegal, as for example, if the partners became alien enemies by the breaking out of war, or if the business was declared illegal by some statute, then of necessity there would be a dissolution of the partnership.

679 Death.—And the death of a partner itself works a dissolution of the firm, since it removes one of the members and thus breaks the contract which the parties had entered into. Usually partnership articles provide for the carrying on or the winding up of the partnership upon the death of one of the partners, but without any stipulation of this kind, the death of a partner will dissolve the partnership, and the winding up must be in the usual way.

680 There are, therefore, three causes which of themselves, by operation of law, dissolve the partnership, viz.:

(a) The bankruptcy of a partner.
(b) The illegality of the partnership business.
(c) The death of a partner.

681 Winding up of the Partnership Business.—In case the partners are not able to agree in winding up the partnership business, it may be necessary for them to employ the aid of the Court, and if that is done then the partnership is duly wound up in what is known as a partnership action.

682 If the partners are able to agree by their partnership articles, or subsequently, as to the mode of winding up the partnership, it will of course be evident that the partnership assets must, in the first place, be used in the paying of all indebtedness of the firm, and only after all the creditors of the firm have been paid in full are the partners entitled to share in what is left.

683 If their interest in the partnership has been equal, then they will equally share in the balance which remains upon the winding up.

684 If their partnership has been unequal as to the amount of capital employed, then they will share in the remaining assets, if capital, to the extent of their respective shares in the capital. So far as the remaining assets are composed of profits, the partners will share these as they shared profits during the partnership. If the partnership articles contain provisions as to the distribution of the assets, these of course will govern.

CHAPTER XLVI.—CORPORATIONS.

685 A Corporation is an artificial person created by law, consisting of several natural persons, and having a continuous existence (otherwise known as the power of perpetual succession).

686 Perpetual Succession imports that on the death or withdrawal of any of the members of the corporation, the corporation may still continue and be composed of the remaining members (if enough members are left) or other persons may come in and fill the vacancies.

687 A Corporation Differs from a Partnership in the following points :

(a) Partnership is an association of natural persons, each one having all the powers of an agent of the firm; while a corporation is an artificial person, and the members are not agents for the corporate body unless appointed for that purpose.

(b) Partnerships are formed by agreement of the parties; while a corporation is created under the provisions of some special or general statute.

(c) The death of a partner dissolves a partnership; but the death of an incorporator does not affect the continuous existence of a corporation.

(d) If a partner transfers his interest, the partnership is dissolved; but if a stock-holder sells his stock the new holder takes his place in the corporation.

(e) A partnership has all the powers of the natural members of the firm; while the powers of a corporation are limited to those given by its charter, or letters patent, and by the statute under which it is incorporated, and those which are required for the purpose of carrying into effect the objects for which it is incorporated.

(f) Partners are liable for all the debts of a firm (unless the partnership is a limited one); while a stockholder's liability is limited (unless the corporation is unlimited in this respect).

(g) A partnership firm is not in a legal point of view distinguishable from the individuals composing it; but a corporation is a distinct entity apart from the persons who are members of it.

688 **General Characteristics** incident to corporations are:

1. Continuous existence.
2. The right to sue and be sued.
3. To have a common seal.
4. To choose members.
5. To make by-laws.

689 **Continuous Existence.**—This has already been referred to and defined. The term does not imply that the body shall exist forever, but that its existence is not affected by changes amongst its members.

690 Corporations are, however, sometimes formed for a limited period, and the power of succession cannot extend beyond that time.

691 **To Sue and be Sued.**—Corporations may sue and be sued in their corporate name, just as natural individuals. (In some cases companies are empowered by statute to sue and be sued in the name of an individual appointed to sue and be sued on their behalf. But this is not very usual.)

692 **Common Seal.**—A corporation has a right to adopt a common seal, and change and alter it at pleasure.

693 It was formerly held that a corporation could not contract without a seal, but this rule has been relaxed so far as to allow the

making of contracts which are of minor importance and which are customary and frequent in the carrying on of the business of the corporation.

694 To Choose Members.—The power of choosing members to occupy the places of those removed, or in addition to existing members, is, of course, incident to corporations. But, subject to the by-laws of the corporation, existing members are entitled to assign their shares and make their assignees members.

695 By-laws.—Corporations also have the power to make by-laws for their internal regulation and government, but these by-laws must not conflict with the provisions of the authority creating the corporation. (See also Sections 736-739.)

696 Classes of Corporations.—The following brief outline will show the relation of private civil corporations (with which alone we are here concerned) to other classes of corporations.

- Corporations
  - 1. Sole
  - 2. Quasi
  - 3. Aggregate
    - 1. Religious
    - 2. Lay
      - 1. Eleemosynary
      - 2. Civil
        - 1. Public
        - 2. Private

697 Sole.—A sole corporation is one that consists of a single individual who possesses corporate powers. In England the sovereign is a sole corporation, and so is a bishop of the Established Church, for these, in the eye of the law, never die, and each successive holder of the office takes the property belonging to it.

698 Corporations sole are but little known in this country, and a further consideration of them would be foreign to the purpose of this work.

699 Quasi Corporations are incorporated by statute and have only particular powers. Their duties are precise, and may be enforced; their privileges may be maintained by suits at law.

700 Aggregate.—A corporation aggregate is composed of a number of individuals united by law in one body having continuous existence.

701 Religious.—This class of corporation is sometimes called ecclesiastical, being incorporated religious societies with spiritual objects.

702 Lay Corporations include all that are not religious.

703 Eleemosynary.—An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder.

704 Civil.—This word has various meanings, and such corporations are formed for various purposes. The term includes all lay aggregate corporations not eleemosynary in their character.

705 Public Corporations are such as are formed for political or governmental purposes. Cities, towns, counties, and villages are examples of public corporations.

706 A corporation may be for the benefit of the public, and yet not be a public corporation; thus, railway companies or bridge companies construct works which are for the use of the public, but they are not therefore public corporations.

707 Private Corporations are those founded by private enterprise for the benefit of the persons who have contributed their capital to the joint undertaking, and the extent of their business, however great, will not make them public.

708 Classification of Private Corporations.—The remainder of our inquiry into the law of corporations will be confined to the subject of the law relating to private corporations, and these corporations are divided as shown in the following table:

Corporations.	For What Purpose.	How Incorporated. (In Ontario.)
A. Joint Stock Companies.	1. Banking.	1. (Dominion Incorporations only.)
	2. Loaning.	2. Special Act or Letters Patent under General Act.
	3. Insurance.	3. Special Act or Letters Patent under General Act.
	4. Railways.	4. Special Act or Letters Patent under General Act.
	5. Cheese and Butter Companies.	5. Registration under General Act.
	6. Co-operative Associations.	6. Registration under General Act.
	7. Business Generally (not including above).	7. Letters Patent under General Act.

Corporations.	For What Purpose.	How Incorporated. (In Ontario.)
B. Mutual Companies.	1. Fire Insurance.	1. Registration under General Act.
	2. Live Stock Insurance.	2. Registration under General Act.
C. Benevolent Associations and Friendly Societies.	1. Insurance.	1. Certificate of Insurance Registrar.
	2. Other Purposes.	2. Registration under General Act.

709 A Joint Stock Company is an organization resembling a partnership in that it is a voluntary association of individuals who contribute capital for carrying on certain lines of business. The association has a capital stock divided into shares. Each member holds one or more shares and is called a shareholder. The shareholders are made a body corporate by statute. The power of the Legislature merges the individual in the aggregation.

710 Incorporation of Joint Stock Companies.—While it is still necessary for some purposes to apply for a special act of incorporation, Joint Stock Companies are now usually formed under a general Act.

711 Joint Stock Companies for ordinary purposes and within the scope of a Provincial Act are (in Ontario) formed under The Ontario Companies Act (R. S. O., 1897, Chap. 191).

712 Under this Act the first step in the formation of a company is to obtain the signatures of the proposed incorporators to a stock book (in the form shown in the Appendix), and to decide upon such of the preliminary features of the proposed body as are required for the purposes of the petition for incorporation.

713 The petition (the form of which is given in the Appendix) must show—

(*a*) To whom the petition for incorporation is addressed.

(*b*) The names, addresses and occupations, or additions, of the proposed incorporators.

(*c*) The proposed name of the corporation.

(*d*) The purpose for which it is to be formed.

(*e*) The place in which the business is to be done.

(*f*) The amount of the capital stock.

(*g*) The number and amount of the shares into which the capital stock is to be divided.

(*h*) The names of the first directors of the company.

714 The stock book and petition are then forwarded to the proper office, and if the application is correctly made, letters patent will issue incorporating the persons named in the petition.

715 Some important provisions of the Act relating to the formation of companies and the necessity for careful use of the term "Limited" will be found in the Appendix.

716 Other statutory provisions relating to incorporations in Ontario are set out in the Appendix.

717 As to the companies formed under Acts of the Dominion of Canada, reference must be had to the Dominion Acts mentioned in the Appendix.

718 Any incorporation in Ontario not falling within the scope and intent of these Provincial or Dominion Acts must be formed by Special Acts.

719 The different Provinces of the Dominion have, of course, their own statutes relating to the formation of companies with Provincial purposes.

CHAPTER XLVII.—CORPORATIONS.—(Continued.)
POWERS OF CORPORATIONS.

720 Whence Derived.—A corporation derives its power from the Act under which, or the charter by which, it is incorporated, and is limited to such powers as are thereby expressly or impliedly conferred upon it.

721 Inasmuch as these Acts and Charters are of great variety, and as powers available for one class of corporations may be forbidden to another, the sections dealing with corporations must all be read as if they commenced with the words "unless otherwise directed by the Act under which, or the charter or letters patent by which, the corporation is created."

722 Construction of Powers.—The implied powers which a corporation is entitled to exercise are those which are necessary in the ordinary course to carry out the purposes for which it was created. Extraordinary powers will not be implied.

723 Nature of Corporate Title.—A severy corporation is an abstract entity, distinct from its members individually or collectively, the title to all the property of the corporation is in the corporation itself, and no member has any right thereto.

724 Power to Hold Lands.—Unless a corporation is created for the express purpose of acquiring and holding lands, the extent of its powers in this respect must be expressed. But the corporation is entitled, without special authority, to acquire and hold lands necessary for the carrying on of the business for which it is incorporated.

725 Personal Property.—A corporation may take over, acquire, use, sell, and convey such personal property as may be necessary or expedient for the purposes for which it is incorporated, and may for the like purposes erect, construct and maintain buildings and works.

726 Powers in Respect of Contracts.—Unless expressly restrained every corporation has power to make any and all contracts necessary for the purpose of carrying on its business.

727 Acts and contracts beyond the scope of the purposes for which a corporation is created, as defined by the Act under which it is incorporated or by its charter, are said to be *ultra vires*, meaning, literally, beyond the lawful power or authority, not of any particular officer or agent, but of the corporation itself. Thus, should the board of directors of a bank, even by resolution duly made, attempt to authorize its agents to issue policies of insurance, such an authority, and necessarily therefore the acts of the agents under it, would be *ultra vires*.

728 Mode of Contracting.—As in respect of many contracts necessary for its purposes the law has given express direction as to their formation or authorization, it will frequently become important to ascertain what the law has provided in the particular case. When the Act under which the corporation is incorporated prescribes a mode of contracting the corporation must observe that mode.

729 A corporation may be bound by implied contracts to be deduced by inference from its corporate acts. And the duly authorized agents of a corporation may bind the corporation by parol contracts made within the scope of their authority.

730 Validity of Corporate Acts and Contracts.—We have seen that corporations are formed under general laws, for certain prescribed purposes only. When so formed they are invested with the qualities of individuality only so far as may be necessary to enable them to accomplish the ends for which they were created. If a corporation attempts to do some act or make some contract not expressly or impliedly authorized by its charter, its conduct is, in a sense, illegal and wrong. This limitation of the corporate powers is for the protection of the public as well as for the protection of those who become members of the corporation, and who contribute their capital for the accomplishment of such purposes only as are specified in the charter or articles of association, and are therefore not expected to hazard it in some different undertaking.

731 All persons dealing with a corporation are bound to take notice of its powers, for its charter or articles of organization, unlike articles of co-partnership, are matter of public law or record.

732 **Construction of Contracts.**—General words used in a corporate contract, which admit of two meanings, will be construed so as, if possible, to make them *intra vires*; that is, within the corporate powers.

733 A contract valid in part, but invalid as to the residue, will, *if severable*, be good to the extent of the part which is valid. Contracts invalid, as formed, may be validated by statute. If the invalidity is a matter of internal regulation only it may be waived by the other contracting party, or rendered valid by a general meeting of the members.

734 Generally speaking contracts with a corporation are construed just as similar contracts with an individual would be construed.

735 **Disfranchisement of Members.**—The powers of a corporation with regard to the expulsion of members or the forfeiture of a member's rights must be strictly pursued. Especially is this the case where it is provided that the forfeiture may be without notice to the member. Such a provision must be express and explicit, and will never be implied.

736 **By-laws.**—Every corporation has power to enact by-laws for the regulation of its own internal affairs and the government of its members.

737 These by-laws must not be antagonistic to or inconsistent with the directions of the statute or charter under or by which the corporation is created, but subject thereto, the by-laws of the corporation if duly and properly enacted will bind all the members.

738 The power to enact by-laws is vested in the members in general meeting. This power may be wholly or partially delegated to a smaller representative body (the directors, for instance).

739 By-laws passed in exercise of a delegated power are usually subject to confirmation.

CHAPTER XLVIII.—CORPORATIONS.—(Continued.)—CORPORATE LIABILITIES.

740 Liability to be Sued.—In contract any action will lie against a corporation, whether such action is brought by a member or by one not a member. But the right of a member to sue may be affected by by-law.

741 Upon Contracts.—Corporations are, in general, bound by all contracts, whether express or implied, within the scope of their corporate powers. Such contracts are entered into formally by having the corporate seal affixed thereto by the official having the custody thereof.

742 Contracts Under Seal.—The general rule of the common law is that a corporation is not bound by any contract not executed by means of its corporate seal. "A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable, a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party."—(Lindley.)

743 And the receipt of the benefit of a contract is not equivalent to the ratification of a contract, nor does it create an obligation on the company similar to the obligation which would have been incurred if the contract had been binding on the company in the first instance.

744 Trivial and Customary Contracts.—But this rule is subject to qualification. There are matters so trivial in their character and of such frequent occurrence that it would be impossible in every instance to attach the corporate seal on account of the inconvenience and delay.

745 Refund of Money.—And a company is bound to refund money improperly borrowed by its directors, but which was in fact in good faith applied in discharging debts or liabilities of the company which could have been enforced against it, or in good faith applied for any other legitimate purposes for which it might have come under liability.

746 The mere fact that the company has had the use of the money is not enough to create an obligation to repay it; there must have been an application of these moneys in the direction already indicated. The company is not bound by the contract because it has received the benefit, but the other contracting party is placed in the position of those parties to whom the money he advanced has been paid.

747 Contracts for Purpose for which Corporation Created.—And if a corporation is created for a particular purpose it will be bound by unsealed contracts entered into on its behalf in the ordinary course, and in good faith made for the purpose, or to carry out the purposes, for which the corporation was created.

748 By Statute.—The particular statute governing a corporation may also provide exceptions to the general rule. See R. S. O., Chap. 191, Sec. 81; Chap. 199, Sec. 39; R. S. C., Chap. 118, Sec. 35; R. S. C., Chap. 119, Sec. 76.

749 To the extent above referred to, the parol, or even the implied contracts of a coporation, will bind it if the corporation had power to make them. And such contracts are also valid if made by an agent of the corporation within the scope of his authority.

750 Ratification.—If made by an agent without authority they may become binding on the corporation (if they are not *ultra vires*) by *ratification*.

751 Estoppel.—And the company may be bound by *estoppel* in respect of the apparent authority of an agent.

752 Action by Shareholder.—Where an application is made to a Court to assist one or more shareholders against others, or against the managing body, the first matter to be considered is whether the rights which the complainants seek to enforce do or do not depend on the views which may be taken by the majority of the shareholders. The Court will interfere to prevent the violation of rights which do not depend on the views of other shareholders; but, as a general rule, the Court will not interfere between members of companies for the purpose of enforcing alleged rights arising out of matters which are properly the subject of internal regulation.

753 It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which it is illegal even for a majority to do.

754 Delay a Bar to Relief.—A plaintiff will fail to obtain redress if he has delayed his application so long as to render it unjust to interfere on his behalf. His delay naturally induces others to suppose that he is content, and to act on this supposition.

CHAPTER XLIX.—CORPORATIONS.—(Continued.)—SHARES AND SHAREHOLDERS.—TRANSFERS AND DIVIDENDS.

755 Capital Stock.—In private corporations (not being mutual, or benevolent, or fraternal associations) the members agree to contribute a certain amount to the capital required to carry on the corporate business. This capital is usually divided into a number of shares of equal amount, and each member of the corporation must hold one or more of these shares.

756 Shares.—Speaking generally, a share in a company signifies a definite portion of its capital. A share in a company, like a share in a partnership, is a definite proportion of the joint estate, after it has been turned into money and applied as far as may be necessary in payment of the joint debts. But it includes a right to receive dividends, and, ordinarily, it confers a right to vote.

757 Shareholder.—Shares in companies are, unfortunately, too often regarded by the public in the light of securities. To "Invest money in shares" is a common expression not a little calculated to perpetuate the error. But it ought never to be overlooked that a shareholder is a partner in and not (except in a technical sense) a creditor of the company to which he belongs; that if the company becomes insolvent, he cannot recover any part of the money invested until the company's debts are paid in full; that whether he is personally liable for the payment of those debts, and whether the extent of his liability is unlimited or limited, depends upon the nature of the company.—(Lindley.)

758 Limited Liability.—When a company is called "limited" the meaning is that each shareholder is liable to pay to the creditors of the company, or on the winding up of the company, such amount only as remains unpaid on his share of stock. If each share was of the amount of $100, the holder of one share could be called upon to pay all the whole amount if required, but his liability would be *limited* to that; he could not be called upon to pay any more under any circumstances. If he had paid to the company $50 out of the $100 then his liability to make further payments, either to the company or its creditors, would be *limited* to the $50 remaining unpaid and could not exceed that amount.

759 Unlimited Liability.—But not all companies are limited in this degree. Some exceed it, some are less limited. Some companies are unlimited, that is, each member is liable for the whole amount of the corporate debts to the extent to which the corporate assets fail to meet them, just as if he had been a partner in an ordinary partnership.

760 Double Liability.—In chartered banks, in the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank will be liable for the deficiency to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares.—53 Vic., Chap. 31 (Canada 1890) Sec. 89.

761 Non-personal Liability.—In specially limited companies the liability of a shareholder is limited to the amount paid or agreed to be be paid on his shares. R. S. O. 1897, Chap. 197, Sec. 5.

762 Liability by Guaranty.—If a company has no capital stock, but its members guarantee to contribute to the assets of the company

a certain stated amount in the event of its being wound up, each member will be required to pay in such amount as may be then required, not exceeding the amount guaranteed.

763 Preference Stocks.—Shares conferring on their holders preferential or differential rates of dividend, or privileges not enjoyed by the holders of other shares, are called preference shares. They can only be created when the authority to create them is given by statute or charter, or by agreement between all parties interested. Preference shareholders are members, not creditors, of the company issuing the shares. The nature of the preference which the holder of the preferential share enjoys depends on the terms on which it is issued.

764 Ordinary Shareholders.—Shareholders who neither enjoy any preference nor have their rights postponed to the rights of more highly favored members are called ordinary shareholders, the term signifying that they are shareholders in the ordinary acceptation of the term, without the enjoyment of additional rights, and free from any burden not usually common to their position.

765 Deferred Shareholders.—This term is sometimes used to indicate those shareholders who are subject to the rights of preference shareholders. The right to receive dividends is postponed either in point of time, or rate, or amount, or is contingent.

766 Debenture.—A debenture is a deed poll charging certain property with the repayment at a time fixed of money lent by a person therein named at a given interest.

767 Debenture Stock.—The terminability and fixity in amount of debentures being inconvenient to lenders has led to their being superseded in many cases by debenture stock. The issue of debenture stock will be regulated by the Act under which a particular corporation is created.

768 Right to Transfer.—One of the most important distinctions between partnerships and companies (see Section 687) is the comparatively unlimited right of members of the latter to transfer their shares. In what are called scrip companies this right is wholly unlimited; the right to the shares passing by the delivery of the scrip certificate. In other companies, also, the right to transfer is frequently unfettered.

769 Consent to Transfer.—Whether a share in a company is transferable at the will of its owner for the time being, or whether

its transfer requires the consent of the other shareholders, or of the directors of the company, depends upon the constitution of each company.

770 Generally no Consent Required.—Speaking generally, if shares are transferable, and no restriction on the right to transfer them is imposed by the regulations of the company, or by the statute or charter by which it is governed, the right to transfer is absolute, and the directors cannot lawfully prevent a transfer, even if they are *bona fide* of opinion that it is for the interest of the company that they should do so.

771 Effect of Transfer.—The transferee of a share does not become a shareholder until the forms and ceremonies, which by the constitution of each company are necessary to be observed, have been either duly complied with or waived by a competent authority.

772 Transfer in Blank.—Whatever may be the legal method of transferring shares, and whether a formal deed is or is not requisite, it is a common practice for a seller of shares to sign a deed or instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name, or without doing so resells, and hands the blank transfer to the new purchaser, who again either inserts his own name as the transferee, or resells and delivers the transfer, still in blank, to the purchaser from him, and so on.

773 A person, who signs a transfer in blank and gives it with the certificate of shares to another person, does in fact enable that person to insert his own name in the transfer as transferee and to take the transfer so filled up, with the certificate, to the company, and procure himself to be registered as owner. Nay more, the person to whom the transfer is handed, may, without filling it up with his own name, pass it and the certificate on to a third person, and he may do the like, and ultimately some holder of the transfer may fill in his own name and procure himself to be registered.

774 Negotiability of Scrip.—It has, moreover, been decided that scrip certificates may be shown to be transferable to bearer by general usage where there is no enactment or agreement to the contrary; and where this is shown the title of a *bona fide* purchaser for value of the scrip without notice of any infirmity in the title of the seller, will be unimpeachable, even although the seller himself may have had no title.

775 **Forged Transfers.**—A forged transfer is no transfer, and is simply a void document, in no way affecting the title of the person whose name is forged.

776 If the officer of a company, acting upon the faith of a forged transfer or power of attorney, wrongfully but innocently transfers the shares of one of its shareholders, the company is liable to make good the loss, and an action will lie against the company to compel it to replace the shares, and to pay the plaintiff the dividends declared since the transfer.

777 **Shares Not Fully Paid.**—It is not usual for the whole of the sum fixed upon as the capital of a company to be paid at once by the subscribers or shareholders. The capital, and the number, and the amount of the shares into which it is to be divided, having been determined upon, and such shares having been subscribed for, an instalment only of the money they represent is paid, and the rest of that money is left unpaid, subject to be called in by the directors as occasion may require. There are many cases, of course, in which the whole amount is paid up on allotment, but it is more frequently the case that only a percentage of the amount of the shares is paid on allotment.

778 Hence, the difference between paid up capital, subscribed capital, and nominal (or authorized) capital, the first being the money which the company actually has, or has had; the second being the sum to which it is entitled by virtue of the contract entered into by the shareholders; and the third being the nominal value of all the shares of the capital stock.

779 **Calls.**—*(a)* **Limited Liability.**—If the shareholder's stock is paid up, there is no further liability on his part either to the company or to the creditors. But if his stock is not paid up, he is liable to have calls made upon him by the directors; the amount of the calls, and the time when such calls may be made, and the intervals between them being regulated by the by-laws of the company.

780 *(b)* **Unlimited Liability**—In such companies the amount of calls which a shareholder may be required to pay is not limited by the amount remaining unpaid upon his stock, but depends entirely on the debts to be liquidated, and upon the number of the solvent shareholders.

781 How Enforced.—When a call is properly made, it may be enforced by action against the defaulting shareholders, and in some cases default in the payment of a call is followed by the forfeiture of all moneys previously paid upon the stock.

782 Forfeiture of Stock.—Companies have no power to forfeit the shares of their members, or of subscribers who have not yet become members, unless such power is specially conferred upon them. A clause in a company's articles enabling the directors to forfeit the shares of any member who shall take any legal proceedings against the company would be invalid.

783 The right to forfeit shares is frequently arrogated in cases where a shareholder will not pay to the company what is due to it from him in respect of his shares; and it is not uncommonly assumed that a right to forfeit in such a case is possessed as a matter of course by directors. But this opinion is erroneous, for, as already stated, a right to forfeit exists only when specially conferred, and even a majority of shareholders cannot confer it unless empowered so to do by the company's act, charter, deed of settlement, or regulations. But if there is power to forfeit for non-payment of calls, that power may be extended to non-payment of additional capital which may be authorized to be raised.

784 Unissued Shares in a company belong to the company, and although they may be placed at the disposal of the directors, the directors must account to the company for whatever they may receive in respect of such shares.

785 Action for Misrepresentation.—An action for damages will lie against directors and others who issue false reports, and thereby induce persons to take shares in a company; and an action may be maintained to rescind contracts entered into with a company on the faith of such reports.

786 Dividends.—By dividends is ordinarily meant that share of a company's profits which is payable to its members in respect of their shares. The proper fund for the payment of dividends is the excess of a company's earnings over the expense incurred in obtaining them, provision being usually made for a reserve fund or rest, and a contingent fund.

787 The power of settling questions of this kind is generally entrusted to the directors, with or without the sanction of the share-

holders; and (subject to any special provision to the contrary, and to the limits placed to the powers of directors and shareholders by the doctrine of *ultra vires*,) if there be a difference of opinion the voice of the majority must prevail.

788 Dividends Out of Capital.—To pay what are called profits, or dividends, out of capital is, under whatever disguise, tantamount to returning so much capital to the shareholders to whom such payments are made.

789 Moreover, directors who, for fraudulent purposes and in order to induce shareholders and the public to believe that the affairs of a company are in a favorable position, declare dividends out of profits when there are no profits wherewith to pay them, and pay the dividends declared, either out of the capital of the company or out of money borrowed for the purpose, are guilty of a criminal offence, punishable both at common law and by statute, and are liable for an action for damages at the instance of persons induced to take shares on the faith of such misrepresentation.

790 Dividends on Preference Shares.—Where preference shares have been issued by competent authority, the terms upon which they have been issued must, of course, be adhered to; and it has been decided in several cases, that unless there is some agreement or enactment to the contrary, preference shareholders are entitled to be paid out of the profits of the company their dividends to the amount guaranteed before the other shareholders receive anything; so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits; the ordinary shareholders taking no profits until all arrears of guaranteed dividends have been paid to the preference shareholders.

791 Bonuses or extra dividends may be declared out of accumulated profits or unexpected gains; but questions as to these seldom arise.

CHAPTER L.—CORPORATIONS.—(Continued.—THE MANAGEMENT OF THE AFFAIRS OF THE CORPORATION.

792 General Meetings.—The members of a corporation, acting through officers or representatives, hold, from time to time, meetings at which these officers or representatives are elected. (In private corporations the representatives are usually called directors.) These meetings are held at stated times and places. Other meetings (or special meetings) of the members of the corporation may be held, from time to time, as occasion may require.

793 Control by Shareholders.—The shareholders of a company cannot usually exercise any control over the management of its affairs, except at these meetings, for the directors of a company are the servants, not of the individual shareholders, but of the company. The shareholders therefore in general meeting assembled can direct the future actions of the directors and call them to account for any past actions not in accordance with the will of the majority. Where the management of the directors is complained of an aggrieved shareholder should seek redress through the company, that is at a general meeting of the shareholders, and induce it to call the directors to account.

794 Powers of Shareholders.—As regards incorporated companies one limit to the power of the shareholders is set by the doctrine of *ultra vires*, which has been already explained. That which the company cannot do, even with the consent of all the shareholders, it obviously cannot do at the bidding of any majority, however large.

795 Every company incorporated by Act of Parliament, by charter, or by letters patent, is governed by a law defining its objects,

and limiting its powers, and such law cannot be abrogated by any resolution of the members of the company however unanimous they may be. A registered association cannot alter the nature of its business as defined in the memorandum of the association, nor can even all the members of a chartered company do what they like with its property; for example, they cannot divide it amongst themselves without accounting for its value to the company, nor can even all the members of a company apply the funds to a purpose which is not authorized by the act by which the company is governed.

796 Power of the Majority.—Unless otherwise provided the majority (whether the votes are counted by individuals or shares) will govern the minority as to all matters within the scope of the corporate affairs.

797 Where there is no statutory or other provision regulating the matter, the majority of the shareholders of the company must determine how its affairs are to be conducted, and to whom and under what restrictions the management of its affairs shall be entrusted.

798 Where powers are conferred on a majority present at a meeting which is to consist of not less than a certain number of persons, or of persons representing a certain number or proportion of shares, then unless such meeting be duly convened and the requisite number of persons be present at the meeting, the powers in question cannot be exercised.

799 Notice.—Members are entitled to notice of all meetings, whether stated or special. This notice may be given in various ways as the by-laws of the corporation may provide. At special meetings only those matters which have been set out in the notice can be taken up.

800 Proxy Voting.—It is usually (though not always) provided that members of a corporation may vote by proxy, that is, they are allowed to appoint by deed some other member to vote for them at any meeting of the company.

801 Election of Directors.—The qualification required of a director, the number of directors, the mode of their election, and the term during which they are to serve, and their duties and powers, will all be provided for either by statute, letters patent, or by-law.

802 Duties of Directors.—Directors are not only agents, but to a certain extent trustees. Their position, however, is very different from that of ordinary trustees, whose primary duty it is to preserve the trust property and not to risk it. Directors have to carry on business, and that necessarily involves risk.

803 The duty of directors to shareholders is to so conduct the business of the company as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people.

804 The property of the company may not be legally vested in the directors, but it is practically under their control, and they are bound to employ it for the purposes for which it is entrusted to them. Any exercise of the powers conferred upon or vested in the directors for any other purpose than for the benefit of the company generally is a breach of trust, and will be treated accordingly.

805 Responsibility of Directors.—Directors are responsible for the loss of a company's assets if that loss is attributable to the employment of the assets in a manner and for a purpose not warranted by the constitution.

806 Although generally speaking directors have a wide discretion, yet if a case is shown of culpable negligence, or wilful indifference, and loss by the company attributable thereto is also shown, the directors will be liable to make good such loss.

807 The directors of a company are under an obligation to observe good faith towards the great body of shareholders, to attend diligently to their interests, and to act within the limits of the authority conferred upon them.

808 Liabilities of Directors.—

For improper transfers of stock. R. S. C., Chap. 119, Sec. 49; R. S. O., 1897, Chap. 191, Sec. 28.

For dividends declared when company insolvent, or which impair capital. R. S. C., Chap. 119, Sec. 58; R. S. O., 1897, Chap. 191, Sec. 83; 53 Vic., Cap. 31 (Canada, 1890,), Sec. 48.

For loans to shareholders (except in loan companies). R. S. C., Chap. 119, Sec. 59; R. S. O., 1897, Chap. 191, Sec. 84.

For wages. R. S. C., Chap. 119, Sec. 56; R. S. O., 1897, Chap. 191, Sec. 85.

For not using word "limited." R. S. C., Chap. 119, Sec. 79; R. S. O., 1897, Chap. 191, Sec. 23.

For false statements or entries. R. S. C., 119, Sec. 45; R. S. O., 1897, Chap. 191, Secs. 72, 97; R. S. O., 1897, Chap. 216, Sec. 4; 53 Vic. Cap. 31 (Canada, 1890,), Sec. 99.

809 Accounts.—The duty of keeping the accounts of companies necessarily devolves upon the managers and directors, or persons superintended by them. The shareholders are entitled to inspect such accounts; but this right is necessarily limited, for if every shareholder were at liberty to examine the accounts whenever he desired to do so, it would be impracticable for the accounts ever to be kept or made up in a proper manner. The right of shareholders to inspect accounts is usually qualified by express agreement.

810 Auditors.—The accounts of a company are usually audited by persons appointed for that purpose by the shareholders.

CHAPTER LI.—CORPORATIONS.—(Continued.)—DISSOLUTION OF CORPORATIONS.

811 Causes of Dissolution.—The reasons for which an ordinary partnership is held to be dissolved by the death, lunacy, or bankruptcy of any one of its members, or by a transfer of his interest, or by his determination to retire, have no application to companies the shares in which are transferable, and the management of the concerns of which is entrusted by all the shareholders to directors. Nor is there any authority to the effect that companies with transferable shares are or can be dissolved by, or on the happening of those events which are sufficient to dissolve, or induce the Court to dissolve, an ordinary partnership. The death, bankruptcy, or retirement of a shareholder dissolves his connection with the company, but does not dissolve the bond by which the remaining shareholders are held to each other.

812 Some of the reasons which are sufficient to induce the Court to dissolve a partnership are, however, quite as applicable to companies as to ordinary firms, *e. g.*, the impossibility of going on as contemplated.

813 Whatever doubt there may be as to unincorporated companies, there can be none with respect to companies incorporated by the Crown, or by special Act of Parliament, or by registration. A

corporation cannot by common law be dissolved by the will of all its members; for a charter cannot be got rid of without the assent of the Crown, nor can an act of Parliament be got rid of without the assent of the Legislature. What cannot be done by all the members of a body corporate is, *a fortiori*, incapable of being done by less than all, and it consequently follows that, as regards the power of an individual member to insist on a dissolution, there is no analogy at common law between partnerships and incorporated companies.

814 Corporations however may be dissolved under the provisions of statutes passed for the purpose of winding up the affairs of a corporation.

815 Winding Up.—The Acts relating to the winding up of corporations provide for winding up at the instance of creditors or contributories. Besides which there are many statutory provisions for the dissolution of insolvent companies which are set in motion for the benefit of the public.

816 Procedure in Winding Up.—Under the proceedings taken for winding up the liabilities of the company are ascertained and its assets sold or realized on. If the assets are not sufficient to pay the whole of the indebtedness a call is made upon the shareholders. For the purpose of ascertaining the liability of each shareholder a list is compiled showing all those who, in the opinion of the liquidator, are liable to contribute to pay the indebtedness of the company in liquidation. This is called a list of contributories.

817. Liability of Present Members.—The liability of the shareholders to contribute will, of course, depend upon the nature of the company.

818 Liability of Past Members.—The liability of a retired member to contribute to the payment of debts upon a deficiency of assets will depend primarily on the effect of the retirement as between himself and the other members; and secondarily, on its effect as between himself and the creditors of the company.

819 Power of Members to Retire.—In mutual companies and friendly societies members are allowed to retire, this power being usually provided for, either by the statute governing in the particular case or by the rules of the association.

820 R. S. O. 1897, Chap. 201, Sec. 6, as to cheese and butter companies, and R. S. O. 1897, Chap. 202, Sec. 10, as to co-operative

associations, provide that members may from time to time withdraw upon such terms as may be specified in the rules. The cessation of the member's liability for the amount unpaid upon his stock is not, however, provided for.

821 A member of a mutual live stock insurance company is liable only for the amount unpaid upon his premium note or undertaking. He may withdraw upon such terms as the directors may lawfully require (see R. S. O. 1897, Chap. 204, Secs. 16-17), but this would not affect his liability to creditors. To effect a cessation of this liability, the assured may pay his proportion of all assessments then payable and to become payable in respect of losses and expenses sustained up to the time of cancelling the policy, and shall then be entitled to a return of his premium note or undertaking. (Sec. 54.)

822 Similar provisions as to mutual fire insurance companies are found in R. S. O. 1897, Chap. 203, Secs. 109-111.

823 The liability of any member of a friendly society under his contract shall at any date be limited to the assessments, fees and dues of which at that date notice has been given by the society (subject to other provisions in the by-laws of the society, which, however, cannot extend the period over twelve months), and upon payment or tender of the amount so due, accompanied by notice of withdrawal, the member shall become released from all further liability. (R. S. O. 1897, Chap. 203, Sec. 164.)

824 A shareholder in a joint stock company, incorporated under "The Ontario Companies' Act" or under analogous provisions in other statutes, cannot release himself from liability in respect of the amount unpaid upon his stock (in cases of limited liability) or in respect of the amount unpaid upon twice the par value of his stock (in cases of double liability) or in respect of the amount required to be paid to creditors (in cases of unlimited liability). Where the liability arises by way of guaranty, the amount of the liability is the amount named in the guaranty.

825 In the case of a guaranty there can be no release except by payment or by express release from the liquidator, or by the Court. The assignment of the interest of a member who is a guarantor will not release him from the guaranty.

826 If the shareholder has transferred his stock to a purchaser, and the transferee has accepted the transfer, and if the transferee has

been accepted by the company in respect of the shares transferred, then on the subsequent winding up of the company the transferee, and not the transferor is the person to be made a contributory in respect of the shares transferred.

827 If the sale was made, but the transfer had not been completed before the commencement of the liquidation, the transferor will be made a contributory (unless the delay has been wholly caused by the default or neglect of the company).

828 Speaking generally, there is no power in a shareholder to surrender shares, and no power in directors to cancel shares; and, therefore, holders of shares which have ostensibly been surrendered and cancelled are liable as contributories.

829 If the company has power to forfeit shares, and the power is strictly and properly exercised, the former member will not be liable as a contributory.

830 Calls.—When the list of contributories has been finally settled, calls are made upon them for the payment of the debts, losses and liabilities of the company, and these calls are, if necessary, enforced by action.

831 Dissolution by Effluxion of Time.—A company may also be dissolved by effluxion of time if its incorporation was for a limited period (see R. S. O., 1897, Chap. 205, Sec. 8; 53 Vict., Chap. 31 (Canada, 1890, Sec. 4).

832 Revocation of Charter.—The letters patent, or other authorization of a corporation, may be revoked (R. S. O., 1897, Chap. 191, Sec. 99; Chap. 211, Sec. 22).

833 Surrender of Charter.—If so provided by law, a charter may be surrendered (R. S. O., 1897, Chap. 191, Sec. 101).

834 Loss of Corporate Rights by Non-User.—The powers of a corporation may be lost and the corporation dissolved by non-user (R. S. O., 1897, Chap. 203, Sec. 7; Chap. 205, Sec. 8; Chap. 211, Sec. 21).

CHAP. LII.—PRINCIPAL AND SURETY.—THE CREATION OF THE CONTRACT.

835 Definition of Surety.— Where one person undertakes to become responsible for the acts or defaults of another he is said to be a surety.

836 Suretyship is the result of a contract express or implied. The contract is frequently called a guaranty.

837 Form of Contract.—This contract is always threefold. Whatever the contract may be, it is not a contract of suretyship unless there are three parties to it. This does not mean that all threefold agreements are contracts of suretyship; but that all contracts of suretyship are threefold.

838 Parties Thereto.—The three parties are named the principal creditor, the principal debtor, and the surety or guarantor.

839 Consideration.—A guaranty, like every other form of contract, requires a consideration to support it. If the guaranty is under seal the deed will import a consideration. If by parol a consideration must be shown (though as will be presently noted, see Section 844), it need not appear in the written contract.

840 The consideration may be a detriment to the promisee or a benefit to the promisor. The adequacy of the consideration is immaterial. If A is asked to employ B and declines unless security is furnished for his good behavior, and C undertakes to be surety, it is certainly not straining language to say that A feels the employment of B even with security something which may be a disadvantage. The feeling may be without foundation, yet its existence certainly

supplies the consideration necessary. The disadvantage to A need not be any advantage to C. If C should say to A, "In consideration that you at my request will employ B I will guarantee his fidelity," and A employed B accordingly, it could not be doubted that a sufficient consideration had been shown.

841 Contract Must Be in Writing.—By virtue of the 4th Section of the Statute of Frauds (29 Car. II., C. 3,) all contracts of suretyship must be in writing. This section so far as these contracts are concerned runs substantially as follows: "No action shall be brought ..... whereby to charge the defendant upon any special promise to answer for the debt or default ..... of another person ..... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

842 "Debt of Another."—Careful distinction must be drawn between a contract by which a person assumes indebtedness *for* another, and a contract in which he assumes the indebtedness *of* another. The statute only applies where there is a promise to answer for the debt or default of another *for which that other still remains liable.*

843 Construction of Contract.—So far as the expression of the contract in writing under the 4th Section is concerned it will be subject to the ordinary rules governing written contracts.

844 Consideration Need Not Be Stated.—The necessity which would exist under the wording of the 4th Sec. that the consideration should appear has been removed by the 8th Sec. of R. S. O., 1897, Chap. 146, (Written Promises).

845 Liabilities Under Contract.—The liabilities of the three parties to the contract may be expressed thus:

Principal debtor to creditor—Absolute.
Surety to creditor—Contingent.
Principal debtor to surety—Contingent.

846 The liability of the principal debtor is absolute, that is, it exists in any event and is entirely independent of the surety, and is not released or affected by acts or defaults of the principal creditor which might release or affect the surety.

847 The liability of the surety to the principal creditor is contingent. That is, the principal debtor agrees to pay the debt to the principal creditor, absolutely, in any event; the surety agrees to pay the debt to the principal creditor conditionally, that is, if the principal debtor does not.

848 And the principal debtor agrees with the surety to pay him conditionally, that is, if he (the surety) has to pay the principal creditor.

849 Representations as to Credit.—For some time after the passing of the Statute of Frauds its provisions as to guaranties were frequently evaded by treating the unwritten guaranty as a verbal affirmation that the debtor was worthy of credit, upon the faith of which the creditor supplied the goods. This evasion was successfully met by Lord Tenterden's Act (see now R. S. O., 1897, Chap. 146, Sec. 7,), which enacts that "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain money, goods or credit thereupon unless the representation or assurance is made in writing signed by the party to be charged therewith."

CHAPTER LIII.—PRINCIPAL AND SURETY.—(Continued.)—THE LIABILITY OF THE SURETY, ITS NATURE AND EXTENT.—RIGHTS OF SURETY AGAINST DEBTOR.—RIGHTS OF SURETY AGAINST CREDITOR.

850 The Liability of the Surety upon any contract is measured by the extent of the contract into which he has entered.

851 Not Extended by Implication.—The contract upon a guaranty must be construed as all other contracts are, but the surety, while bound by the terms of his contract, is yet not to be charged beyond the precise terms of it, and his liability will not be extended by implication.

852 Dependent on Due Carrying Out of Contract.—The surety is not liable unless the conditions of his contract have been carried out. For example, where it was contemplated at the time the contract of suretyship was made that there would be two sureties, and the fact

that one of the contemplated sureties would not sign was not communicated to the other surety, it was held that the surety who did sign was not bound, the agreement, at the time he entered into it, being that the liability was to be shared between two.

853 **When Liability Arises.**—The liability of the surety cannot possibly arise until there has been a default made by the principal debtor.

854 **Dependent on Debtor's Liability.**—If when the principal debtor has made a default, the principal debt is not legally enforcible; then as a general rule the surety is not liable.

855 The surety's liability may sometimes continue after the debt of the principal debtor has ceased, but this is only the case when the debt of the principal debtor has been extinguished by the operation of a statute law which has preserved the liability of the surety.

856 But unless extended in some such way it is evident that the liability of the surety must cease if the principal debtor no longer remains liable, since the surety is simply the guarantor of a debt owing by another person, and if the other person does not owe the debt, then there is nothing upon which the guaranty can act.

857 **Creditor Entitled to Sue Surety.**—After a default has been made by the principal debtor, the liability of the surety at once arises, and the principal creditor may, if he pleases, sue the surety before commencing any proceedings against the principal debtor, and may do so at once upon default, because, unless the contract so provides, the principal creditor is not bound to even ask the principal debtor to make payment.

858 **Notice of Default Not Required.**—In the absence of any provision to that effect, made by the law or by the contract of the parties, notice to the surety of the default of the principal debtor need not be given.

859 **Performance of Conditions Precedent.**—If there are any provisions in the contract, by the terms of which certain things are to be done either by the principal debtor or by the principal creditor before the liability of the surety arises, then the performance of the conditions will be precedent to the liability of the surety, and if the conditions so provided are not carried out, then the liability of the surety will not arise.

860 Extent of the Surety's Liability.—The extent of the surety's liability must of necessity vary in each case, being sometimes co-extensive with the liability of the principal debtor, and sometimes less extensive; this will depend depend upon the facts in each case.

861 In a Simple Guaranty unaccompanied by conditions the limit to be placed is the amount of the principal debtor's liability. That is, if the undertaking is by A to be responsible for the indebtedness of B, the liability of A is co-extensive with the indebtedness of B, no matter to what amount.

862 If the Guaranty is Limited, that is if it provides (for example) that A shall be liable for the indebtedness of B, to the extent of $1,000, then the liability of A is limited to that sum, notwithstanding that the liability of B may go considerably beyond it.

863 For Good Behavior.—If the liability of the surety is for good behavior of one in any office, the surety is liable only for defaults within the scope of the office, and not in respect to acts done outside the scope of the official duties, though as to this there may be a liability by the principal debtor.

864 Incidental Losses.—The surety is not as a general rule liable for incidental losses, but is liable for whatever losses follow strictly the loss guaranteed against.

865 Costs—The loss of costs is a matter upon which care must be taken to distinguish between the costs which are incurred owing to the neglect or wrong doing of the principal debtor, and the costs which are incurred owing to the neglect of the surety.

866 If the debtor by unnecessary delay, or by defending an action, should put the creditor to expense for costs, it would be unreasonable that the surety should have to pay for costs which were not under contemplation at the time the bond of suretyship was entered into, and which are not strictly speaking incident to the responsibility which he undertook. But if the surety could have avoided the costs by paying the amount for which he was surety, then he will be liable to pay any costs which he might have thus avoided.

867 Continuing Guaranties.—Many guaranties are continuing guaranties. That is, they continue during an unlimited or a limited time, as the case may be, in respect of all sums which may be due from the debtor to the creditor during the period of their continuance.

868 If the guaranty states distinctly that it is a continuing guaranty no difficulty of course occurs, but there are many instances in which the instrument of guaranty is itself indefinite upon this point, and the question then arises whether the guaranty is intended as security for more than the first advance or supply.

869 As to this there are no fixed rules. Every case must depend upon its own circumstances, and the Court before whom the matter may come will construe the instrument in the light of the circumstances of the case.

870 If an instrument is held to be a continuing guaranty, then the liability continues, and the surety is responsible during the whole term of the continuance of the guaranty.

871 Revocation of Continuing Guaranty.—If, as is frequently the case, the instrument provides that it may be revocable after a certain time or upon certain notice, in that case of course the guaranty will continue only in accordance with the stipulations.

872 Even if there is no such provision in the instrument of guaranty, yet the surety may upon sufficient notice put an end to his liability as to future acts of the principal debtor, but of course he cannot make any alteration in his liability as to acts prior to the time of revocation.

873 As to what is sufficient notice to terminate a continuing guaranty, each case will depend upon its own circumstances, but it must in all cases be sufficient to avoid any loss to the creditor. If there was a contract upon consideration between the debtor and the surety that the guaranty should continue, of course this would prevent any revocation not authorized by the contract.

874 The Rights of the Surety Against the Principal Debtor.—The surety is entitled to call upon the principal debtor to relieve him from liability, as where the creditor had a right to sue the principal debtor and refused to exercise the right.

875 Right to Recover From Debtor.—After payment of the indebtedness to the principal creditor the surety is entitled to recover the amount from the principal debtor, and the right of action exists even though the surety has not paid the whole debt, but has only paid part of it.

876 Costs.—He is also entitled to recover from the principal debtor the costs of defending an action if he was authorized by the

principal debtor to defend, or where it was reasonable under the circumstances of the case that costs should be incurred.

877 Rights of the Surety Against the Creditor.—Before payment the surety has a right to compel the creditor to sue for and collect the debt, though that would be subject necessarily to the right of the creditor to demand an indemnity. But this course would be now unnecessary in most cases by virtue of the statutory provisions set out in Sec. 881.

878 Right to Ask for Dismissal.—The surety has the right to call upon an employer to dismiss the person employed and for whom the person has given a guaranty, if the creditor refuses to put an end to the guaranty.

879 Marshalling Assets.—The surety has also the right to compel the creditor to marshal the assets, that is, to have recourse first to a fund which is not available to the surety.

880 Benefit of Securities Held by Creditor.—The surety is also entitled to the benefit of all securities held by the creditor.

881 This is expressly provided in the R. S. O., 1897, Chap. 145, Secs. 2 and 3, which read as follows:

2. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty, or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty.

3. Such person shall 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 order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be a defence to such action or other proceeding by him.

CHAPTER LIV.—PRINCIPAL AND SURETY.—(Continued.) —DISCHARGE OF SURETY.

882 Discharge of Surety.—There are many grounds upon which the surety may be discharged from his liability under the contract. The contract of suretyship is one in which the utmost good faith is required, and any advantage taken of the surety and any alteration of the contract with him will result in his being wholly or partially discharged from his liability.

883 (1) Matters Invalidating Contract.—The surety may be discharged by any matters which invalidate the contract of suretyship from the beginning, such as:

884 Fraud.—*(a)* The fraud of the creditor, whether the fraud is antecedent or subsequent, and whether it is by way of *suggestio falsi* or *suppressio veri*.

885 Alteration.—*(b)* Any alteration of the written instrument by which the suretyship was created.

886 Failure of Consideration.—*(c)* The failure of the consideration upon which the instrument of guaranty was given. For example on the eve of a sale by the sheriff, a surety gave a written guaranty for payment of the judgment debt, in consideration of the postponement of the sale. It turned out that the consent of another person was necessary in order to postpone the sale, and therefore the sale took place and the consideration (the postponement of the sale) therefore failed, and the surety was held not liable.

887 (2) Revocation of Contract.—The surety may be discharged by the revocation of the contract of suretyship. This revocation may be:

888 By Act of the Parties.—*(a)* By the act of the parties such as where notice of revocation is given by the surety to the creditor (as to which see Secs. 871 to 873) or *(b)* by the substitution of a new agreement by mutual consent.

889 By Death.—*(c)* By the death of the surety (though in this case the death will not of course affect the liability in respect to past transactions). If the guaranty is determinable by notice, then undoubtedly the death of the surety will terminate the guaranty; but if the surety himself could not have put an end to the guaranty by notice then his death will not revoke the instrument, nor does it lessen or extinguish his liability thereunder.

890 (3) Discharge by Conduct of Creditor.—The surety may be discharged by the conduct of the creditor

891 Variation of Contract With Debtor.—*(a)* Where the creditor varies the terms of the original contract between himself and the principal debtor. If the alteration is material it will discharge the surety unless made with his consent. If the alteration is not material it will not discharge the surety unless in those cases in which the surety is held to have become surety on the faith of the original agreement or where the surety has made the original contract part of his own contract.

892 Variation of Contract With Surety.—*(b)* Where the creditor varies the terms of the original contract between himself and the surety the claim of the principal as against the surety is *strictissimi juris*, and it is incumbent upon the plaintiff to show that the terms of the contract have been strictly complied with.

893 Taking New Security.—*(c)* Where the creditor takes a new security from the principal debtor in the place of the old one.

894 Discharge of Debtor.—*(d)* Where the creditor discharges the principal debtor, the discharge of the principal debtor will effect the discharge of the surety (unless in cases in which the discharge of the principal debtor is by operation of any statute law which continues the liability of the surety, or in cases in which there has been an express reservation of the rights of the creditor against the surety), but in order to effect the surety's discharge there must be the actual legal release of the debtor and not the mere intention to release or understanding that he is to be released.

895 Discharge of Co-surety.—*(e)* Where the creditor discharges a co-surety if the rights of the remaining surety are thereby impaired.

896 Giving Time to Debtor.—*(f)* Where the creditor gives time to the principal debtor, unless the rights of the principal against the security are expressly reserved. But the giving of time will not release the surety unless the agreement is a binding one; that is, it must be one made on consideration, and the mere discharge from suit or a voluntary promise to give time will not release the surety.

897 The promise to give time need not be express, but it must be binding; as, for example, the taking of a promissory note from the debtor.

898 Giving Time to Surety.—*(g)* Where the creditor agrees *with the principal debtor* to give time to the surety. Where the creditor agrees *with the debtor* that he will not sue the sureties the position of the surety is changed, but this is not the case where the promise is with the surety himself.

899 Loss to Surety.—*(h)* Where loss occurs from the neglect of the creditor the loss may be occasioned by the negligence or laches of the creditor (though it would not be correct to say that every case of neglect or laches would release the surety), or by the loss of securities given for the guaranteed debt (in which case the surety, however, is only discharged *pro tanto*).

900 (4) **Fulfilment of Contract.**—The fulfilment of the purpose for which the guaranty has been given has of course the effect of completely discharging the surety. Such a fulfilment usually takes place in one of the following ways:

901 **By Payment.**—(*a*) Where payment of the amount due is made by a principal debtor, the surety is entitled to the benefit of all payments obtained from the principal whether such payments are voluntary or by compulsion.

902 The question sometimes arises as to whether the payment made by the debtor is applicable to the guaranteed account or to some other account, and for this reason the appropriation of the payments becomes of great importance. For example, if the principal debtor is indebted to the creditor in two sums, and has given a guaranty for the payment of one only, and then pays money to the creditor, the question arises as to which account the money is to be applied.

903 The rule for the appropriation of payments is that the debtor may in the first instance appropriate the payment; if he omits to do so the creditor may appropriate, but if neither one makes any appropriation the law will place the payment upon the debt which is earlier in time.

904 The same result follows with regard to the items of debit in any particular account, and the presumption of the law is, that the payment, in the absence of any express appropriation, is credited to the items of debit in the order of their date, but this presumption may be rebutted.

905 **By Set Off.**—(*b*) Where a set off exists between the principal debtor and the creditor.

906 **Payment by Surety.**—(*c*) Payment by the surety to the creditor in the terms of the contract will, of course, discharge the surety from liability to the creditor.

907 (5) **Discharged by Statute of Limitations.**—Lastly, the surety may be discharged by the operation of the Statute of Limitations. The cause of action against the surety does not arise when the instrument of guaranty is entered into, but where there has been a default of the principal debtor giving the right to the principal creditor to sue the surety, and time under the Statute of Limitations must be counted from that date.

CHAPTER LV.—BILLS OF EXCHANGE—PROMISSORY NOTES—AND CHEQUES—INTRODUCTORY.

908 Origin and History.—It is difficult, if not impossible, to fix the exact date of the invention of bills of exchange or to accurately trace their development. It is said that bills of exchange are known to be of comparatively modern origin, having been first brought into use so far as at present known, by the Florentines in the 12th century and by the Venetians in the 13th century. Their use gradually found its way into France and from thence, as the term "Bill of Exchange" *(billet de change)* shows, into England. Promissory Notes are supposed to be more ancient and have by some been found in the laws of the Romans. This antiquity is a matter of doubt, however, and at all events the promissory note in its modern negotiable form is less ancient than the bill of exchange.

909 Bills of exchange were from the first held to be by the custom of merchants negotiable, but this right was denied to promissory notes, and the authority of a statute (3 and 4 Anne, Chap. 9) was necessary in order that they might be held to be as negotiable as bills of exchange.

910 In Canada the law on negotiable instruments has been codified in the Bills of Exchange Act, 1890 (53 Vic., Chap. 33, Canada).

911 Terms.—From the definition of the bill of exchange, which will be found in the Act, it follows that some one must be the maker

of or drawer of the order, and from this fact the name of the maker has been derived. He is called the *drawer* of the bill and the person to whom the bill is addressed is called the *drawee*, or if he accepts the bill the *acceptor*. The person to whom the bill is payable is called the *payee*; if he endorses it he is the *endorser* and the person to whom it is endorsed is called the *endorsee*. If the bill is not met according to its tenor it is *dishonored* and is then *protested* for non-payment. A bill of exchange is also sometimes protested for non-acceptance.

912. Requisites of a Bill or Note.—As is shown by the definition of the bill of excharge, the order to pay must be unconditional and the writing must comply with the requirements of the statute.

913 Signature of Drawer.—The signature of the drawer must appear, and there must be a clear description or a sufficient designation of the drawee.

914 Date.—While it is customary to insert a date this is not material unless the bill is payable at any period after date. The date when inserted is a material part of the note, and cannot be altered even though the alteration may be to the benefit of the drawer or acceptor. Notes take effect only on delivery, yet when payable at any time after date the time begins to run from the expressed date irrespective of the date of delivery.

915 Order Must be Positive.—The promise or order must be positive. The statutory definition of itself would imply this. Mere terms of politeness such as "Please pay" will not rob the instrument of its character of certainty, but whatever the form of words used may be, uncertainty in the order or promise will be fatal to its negotiable character and in fact to its validity.

916 And Unconditional.—The order or promise must be unconditional. If the money is to be paid out of a certain fund this will be regarded as a conditional promise, since the fund may not be sufficient, unless in the case of a bill of exchange where the party having possession or control of the fund is the acceptor of the bill. But the mere designation of a fund may not make a conditional order. This would involve the question whether the fund designated is referred to merely as a means of reimbursement or whether it is considered as a measure of liability. In the former case the bill is valid, in the latter case it is not.

917 And for the Payment of Money.—The promise must be for the payment of money only and therefore promises to pay in work or goods,

whatever their validity in other respects, are not promissory notes, nor can such matters be the subject of bills of exchange.

918 At a Certain Time.—There must be certainty also in the time of payment. That is, the payment must be on a date which is either ascertained or capable of ascertainment, and unless this is the case the note or bill will not be valid. But the event upon which the date of payment is to be ascertained must be one which is certain to occur, such for example as death.

919 Payment by Instalments.—The payment of the note may be made by instalments, and there may be a provision introduced that upon failure to pay one of the instalments the whole bill or note shall become due.

920 Place of Payment.—The place of payment should be certain if mentioned. If no place of payment is mentioned then it is understood that the bill shall be payable at the residence of the maker or drawer.

921 The Amount Must be Certain.—And lastly the amount to be paid must be certain, that is, a promise "to account for proceeds," or an order for "whatever you may collect for me," or a fixed sum subject to deductions, will not be valid as a note or bill. But (as in law that is looked upon as ascertained which is capable of ascertainment) if the amount (though not certain upon the face of the bill or note) can be made certain, the bill or note will be valid. If there is a difference between the written amount and the figures the writing will control.

922 What Law Governs.—Since bills and notes are merely evidences of contract they are in general governed by the law of the place where they are made, so that the liability of the maker of the note or the drawer of a bill, and the formalities of execution, and the validity and effect of the act, will depend upon the law of the place where the contract is made. So the law of the place where the acceptance or endorsement is made will cover the liability of the acceptor or endorser. In the absence of evidence as to the place of making, accepting or endorsing it is customary to infer that the place of the delivery of the note is the place intended. So far as it is intended that the bill or note shall be paid in a place different from the place of making the law of the place at which the payment is to be made will govern. And when the place of payment is ascertained the law of that place will govern the endorsement and the days of grace, and the interest and the currency in which they are to be paid, and the necessity and sufficiency of notice of dishonor.

923 The Manner of Execution.—A bill or note must be signed (usually at the foot) by the drawer or maker. In the case of a partnership, if for a partnership debt, the partnership name should be signed. If the liability is individual, the individual partners should sign. If the bill or note is made by one occupying the position of an agent the signature should be the name of the principal *per* the name of the agent. If the signature is that of the agent with the added description "Agent for A. B." the agent may be liable personally. A note signed by several makers is a joint note unless otherwise indicated, but if beginning "I promise" and signed by two or more persons it is joint and several. The difference between a joint note and a joint and several note is relatively of little importance.

924 Negotiability.—A bill or note is a negotiable instrument because it is transferable by order or delivery as the case may be. Formerly it was the rule that a bill or note made payable to a certain named person without the addition of the words "or order" or "or bearer" was not negotiable, but this common law rule has been altered by statute, (see the Bills of Exchange Act) and now a bill is negotiable whether the words "or order" or "or bearer" are added or not. If the note is made payable to A or to the order of A or to A or order, then it can only be transferred by endorsement and delivery. If made payable to A or bearer it may be transferred by delivery only. It is not necessary that there should be any words importing consideration, and therefore the phrase "for value received" is unnecessary. If blanks are left in the bill or note there is sometimes the power in the holder to fill them up as he pleases. Thus the signature of the drawer after a blank acceptance, the drawee's name, the payee's name, the date, the time of payment, the rate of interest, the place of payment and the amount to be paid may be filled in by a *bona fide* holder in due course. But this only refers to blanks; it is not allowable to alter the instrument if these particulars are filled in, the power only arising where there has been the omission to insert them. If a note payable to order is endorsed in blank the endorsee may if he pleases convert the blank endorsement into a special endorsement by filling up the blank above his endorser's name.

925 Delivery.—The making, acceptance, or endorsement of a bill will have no effect until it is completed by delivery, and the making of any negotiable instrument will not import any liability unless and until the instrument has been duly delivered.

926 Delivery is usually presumed from the possession of the instrument, that is, it is presumed that delivery has been made to the holder in due course, but it may be shewn nevertheless, that delivery has not been made, as for example where the holder carried off the note by force. Bills and notes, like other contracts, take effect from the delivery only. The delivery and the date are supposed to be contemporaneous, but it may be shewn that the date of delivery does not accord with the date of the instrument. Bills and notes may also be delivered as escrows. The defence of an improper delivery will not avail against a holder in due course.

927 Parties.—As bills and notes are contracts, it will not be necessary to repeat what has already been said as to the parties to contracts and the various legal and natural restrictions which have been placed upon certain parties to enter into contracts of any kind. It might, however, be noticed that, although an infant has the power to make a contract for necessaries, he is not liable for a note or bill of exchange given in payment for the price of these necessaries. The action against him must be on the contract itself, and not on any security given for the amount of the contract.

928 Consideration.—The contract contained in bills and notes, like every other contract, will require in every case a consideration to support it, and the requirements as to consideration will be exactly the same as those laid down with regard to contracts generally.

929 As there are upon an accepted and endorsed bill of exchange several kinds of liability, as the liability of the acceptor, and the liability of the drawer, and the liability of the endorser, and sometimes the liability of the party who signs as surety, yet in every case there must be shown, as in other contracts, a consideration, and if this consideration is absent the contract is of no avail as between the parties between whom no consideration passed. But bills and notes (unlike other contracts not under seal) *import* consideration, so that it is not necessary to state what the consideration is. It will be always presumed unless the want of it is shewn. In the absence of fraud, the inadequacy of the consideration is immaterial.

930 Acceptance of Bills.—A bill of exchange is an unconditional order made by one person on another. The order, however, creates no liability in the person to whom it is addressed. If the drawee has in his hands funds belonging to the drawer and has promised to accept a bill of exchange if drawn upon him, he may be liable in damages or

otherwise to the drawer for failure to accept as agreed, but he is under no liability whatever to the holder of the bill until he has accepted the order.

931 He is then no longer called the drawee, but the acceptor, and his liability to the holder of the bill is then the liability of a debtor, and the drawer becomes his surety.

932 The acceptance must be in writing and must be signed by the acceptor. It must be according to the tenor of the bill, and the holder is not obliged to accept any acceptance which varies from the direction given by the bill, though he may, if he pleases, waive his right to a strict acceptance and take that which the drawee is willing to give.

933 The holder must present the bill for acceptance by the drawee within a reasonable time and at the address named in the bill. If the bill has been endorsed by the payee before presentment, protest for non-acceptance will be necessary in order to bind him, but protest for non-acceptance is not necessary in order to bind either the drawer (as such) or the drawee.

934 The acceptance must be made by the drawee or his agent. If made by an agent it should be made in the name of the drawee *per* the agent. If drawn upon an incorporated company or upon the official of an incorporated company, it should be accepted by the proper official or by the official named in the name of the company *per* the official, since it has frequently been held that officials accepting drafts upon them in their own name incur personal liability. The acceptance admits the genuineness of the signature of the drawer and of his right to draw the bill, but it does not admit the signatures of any endorsers.

935 Endorsement.—All bills and notes payable to a certain named individual, or to his order, must be transferred by endorsement. Endorsement must in all cases be completed by delivery, and until so completed it does not confer any right upon the person named in the endorsement, or create any liability in the endorser. An endorsement may be made at any time, even before the bill or note is drawn or signed.

936 Endorsement in Blank is the writing of the endorser's name across the back of the bill or note. An endorsement in blank renders the bill negotiable by delivery, though it may be turned into a special endorsement by the holder.

937 Special Endorsement.—Where the endorsement makes the bill or note payable to a certain named person or to his order it is said to be special; the bill or note can only be transferred by an endorsement by him.

938 Restricted Endorsement.—As where the bill is endorsed "pay to John Smith only". On a restricted endorsement the bill is payable only according to the terms of the restriction. A restricted endorsement has the effect of putting an end to the negotiability of the bill or note.

939 The Effect of the Endorsement, whether in blank, special, or restricted is to transfer to the endorsee all the rights of the endorser in the bill or note and, except in the case of a restricted endorsement, the negotiability of the note is transferred also.

940 The Endorser's Liability.—Endorsers are liable in the order in which they have signed, that is, the holder is entitled to sue the last endorser and the last is entitled to sue the one who endorsed to him and so on. By the fact of endorsement the endorser promises *(a)* that he will discharge the bill or note according to its tenor upon due presentment and notice of default made by the acceptor or maker as the case may be, *(b)* that the instrument itself and all prior signatures are genuine, *(c)* that he has the right to transfer it, and *(d)* that it is valid.

941 Notice of Default.—The endorser is not liable to the holder except as a surety and in consequence of the default of the acceptor (or, in a note, the maker) and of this default the endorser as surety must have notice, and unless this notice has been sent to him, or unless he has waived the notice, he will be freed from responsibility to the holder. It is the duty of the holder, therefore, if he wishes to preserve the liability of the endorser, to present the bill to the acceptor for payment, and upon payment being refused to notify the endorser of the refusal and that he will be held liable upon his endorsement. Every endorser who is to be held liable is entitled to notice of the dishonor of the bill by the acceptor. The endorser being a surety is also discharged by such other acts or omissions of the holder as would be sufficient (see Principal and Surety) to discharge a surety.

942 The Holder.—The person in whose hands the bill may be at any particular time, whether his title is derived by endorsement or delivery without endorsement, is called the holder, and if he has received the bill or note without notice of any adverse claim or equi-

ties, and for consideration, and before maturity, he is said to be a holder in due course. Questions which may arise between the other parties to the bill or note as to the want of consideration or other matters will have no effect whatever against the holder in due course.

943 For example: Consideration as between the acceptor and payee of the bill is presumed by law, and is, therefore, by the custom of merchants a matter in which the holder has no concern, because, the consideration being presumed and the bill being transferable from one person to another, must pass to the holder (if he takes it before maturity, and for consideration, and without notice of anything wrong) in the state in which it is presumed by the law to be at that time, and the holder will be entitled to hold it in the condition in which the law at that time presumes that it is, and this irrespective of any rights the intermediate parties may have as between themselves.

944 It is this rule (by virtue of which the holder in due course is entitled to disregard any defences which may be set up as between the immédiate parties to the bill or note) which renders it possible to negotiate these instruments.

945 There are, of course, some exceptions to the rule that the title of the holder in due course is absolute (For example: The holder in due course of a bill or note given for a patent right must take the note subject to the rights of the immediate parties, if the note has been made in accordance with the provisions of the statute governing such instruments).

946 If the holder of the bill or note in due course takes it in consideration of an existing debt he is still a holder for consideration.

947 Maturity.—When the time arrives at which according to the terms of the bill or note it is payable, it is said to mature. If it is payable in so many months, calendar months are understood. If no date is specified for payment, it is presumed to be "on demand."

948 On demand notes no days of grace are allowed, but in all other classes of notes a period is allowed beyond the period named in the note, and the holder is not entitled to exact payment until these days of grace have expired. In Canada three days are allowed as days of grace, so that if a note is drawn on the 1st of March payable one month after date it will actually be payable on the 4th of April.

949 Any proceeding therefore taken by the holder of the bill or note before that date would be premature, since the cause of action

against the person liable on the note does not commence until the date of maturity has arrived, that is, the period named in the note with the days of grace added. Transfers before maturity are permitted, the bill or note then being considered negotiable (in the fullest sense of the word), and taken free from all equities between former parties.

950 But where a note has been transferred after maturity, the holder will take it subject to the equities which attach to the bill or note between the parties thereto. If the date of the endorsement is not shewn it is presumed to have been made before maturity.

951 Upon the maturity of a bill or note the amount is immediately payable according to its tenor at the place at which the bill or note makes it payable, or (if no place of payment is named in the bill or note) at the residence of the acceptor or maker.

952 It is not necessary as between the holder and acceptor of a bill or the maker of a promissory note to present it for acceptance or or payment, presentment being necessary only to bind subsequent parties; for the same reason, notice to the maker or acceptor of non-payment at the place indicated is not necessary, though notice must always be given to the other parties in order to preserve their liability.

953 If the note is made payable at a particular bank it is the duty of the maker or acceptor to have the money there for that purpose, and not only to have the money there at the time of the maturity of the note, but to hold it there thereafter so that at any time the bearer of the bill or note can obtain payment.

954 The demand for payment may be made by the holder of the bill or his agent, and must be made (so far at all events as subsequent parties are concerned) at the time the note or bill matures and at the place named in the acceptance or in the note. If the bill or note is made payable at a bank it must be presented during the banking hours. If the bill or note is payable at any other place it may be presented during ordinary business hours.

955 Protest.—If upon presentment for payment the bill or note is not paid it is necessary to protest it and this done by the intervention of a notary. The bill is presented by the notary, and upon its refusal he solemnly protests by a notarial instrument against the dishonor, and he gives notice to all the parties to whom it is necessary to give notice in order to hold them liable.

956 Protest consists of three steps:

(1) The presentment, that is, the presenting of the bill at the place where payment is to be made and demanding payment;

(2) Endorsing the note, that is, the endorsement upon the bill or note or upon annexed paper stating the fact of the presentment and of the refusal, and

(3) The extension of the protest in which the notary sets out at length the presentment, when and by and to whom made, and the answer that was made, and the notices that were given and sent.

957 Notice of Dishonor.—A bill not paid at maturity according to its terms is said to be dishonored, and notice of dishonor must be sent as previously stated to those parties upon the bill or note whom it is desirable to hold liable upon the default of the persons by whom payment should be made in the first instance.

958 The notice is forwarded by the notary who makes the protest, and if duly mailed is presumed to have been received by the parties. If the notice is not sent the parties liable as sureties are discharged. The notice must state the names of the parties, must identify the bill or note, and should give notice to the party to whom it is sent that he will be held liable in respect of the amount due. It is only necessary that the holder should notify the person next liable to him leaving such person in turn to notify the person liable to him and so on, but as the right of the holder to recover against intermediate endorsers will depend upon the regularity of the notices given to such intermediate endorsers, it is customary for the holder to give notice to all parties upon the bill or note so that no question may arise as to their having received notice.

959 The presentment must be made within business hours of the day upon which the note was payable. The noting must be done immediately thereafter. The protest may be extended during the next business day and the notice must be mailed or delivered during that day, that is, the day after dishonor, though it is not customary to leave it until the day following the dishonor, but to send it forward at once.

960 If the person to whom the notice is addressed receives it, then no question can arise as to the sufficiency of the address, but if not received by the person to whom it was sent it is necessary to show

that it was sufficiently and properly forwarded and directed. In the absence of any indication to the contrary the residence of the parties to a bill or note will be the place at which the bill is made.

961 The Bills of Exchange Act, 1890, which is a codification of the law relating to bills of exchange, promissory notes and cheques, will be found in the next chapter.

CHAPTER LVI.—THE BILLS OF EXCHANGE ACT.

53 VICTORIA (CANADA).

CHAP. 33.

An Act relating to Bills of Exchange, Cheques, and Promissory Notes.

[*Assented to 16th May, 1890.*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

962 Part I., Preliminary.—

1 This Act may be cited as "The Bills of Exchange Act, 1890."

2 In this Act, unless the context otherwise requires,—

(*a*) The expression "Acceptance" means an acceptance completed by delivery or notification;

(*b*) The expression "Action" includes counter claim and set off;

(*c*) The expression "Bank" means an incorporated bank or savings bank carrying on business in Canada;

(*d*) The expression "Bearer" means the person in possession of a bill or note which is payable to bearer;

(*e*) The expression "Bill" means bill of exchange, and "Note" means promissory note;

(*f*) The expression "Delivery" means transfer of possession, actual or constructive, from one person to another;

(*g*) The expression "Holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof;

(*h*) The expression "Indorsement" means an indorsement completed by delivery.

(*i*) The expression "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder;

(*j*) The expression "Value" means valuable consideration.

(*k*) The expression "Defence" includes counter-claim.

963 Part II., Bills of Exchange.

FORM AND INTERPRETATION.

3 A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer:

2 An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange:

3 An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to re-imburse himself, or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional:

4 A bill is not invalid by reason—

(*a*) That it is not dated;

(*b*) That it does not specify the value given, or that any value has been given therefor;

(*c*) That it does not specify the place where it is drawn or the place where it is payable.

4 An inland bill is a bill which is, or on the face of it purports to be (*a*) both drawn and payable within Canada, or (*b*) drawn within Canada upon some person resident therein. Any other bill is a foreign bill:

2 Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

5 A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee:

2 Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6 The drawee must be named or otherwise indicated in a bill with reasonable certainty:

2 A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession is not a bill of exchange.

7 Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty:

2 A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being:

3 Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

8 When a bill contains words prohibiting transfer, or indicating an intention that it should not be tranferable, it is valid as between the parties thereto, but it is not negotiable.

2 A negotiable bill may be paid either to order or to bearer:

3 A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank:

4 A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable:

5 Where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option.

9 The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(*a*) With interest;

(*b*) By stated instalments;

(*c*) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due;

(*d*) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill:

2 Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable:

3 Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof.

10 A bill is payable on demand—

(*a*) Which is expressed to be payable on demand, or on presentation; or—

(*b*) In which no time for payment is expressed;

2 Where a bill is accepted or endorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any endorser who so indorses it, be deemed a bill payable on demand.

11 A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable—

(*a*) At a fixed period after date or sight;

(*b*) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain.

2 An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

12 Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly;

Provided that *(a)* where the holder in good faith and by mistake inserts a wrong date, and *(b)* in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date.

13 Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be:

2 A bill is not invalid by reason only that it is antedated or post-dated, or that it bears date on a Sunday or other non-juridical day.

14 Where a bill is not payable on demand, the day on which it falls due is determined as follows:—

(*a*) Three days, called days of grace, are, in every case, where the bill itself does not otherwise provide, added to the time of payment, as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

1 Whenever the last day of grace falls on a legal holiday or non-juridical day in the Province where any such bill is payable, then the day next following, not being a legal holiday or non-juridical day in such Province, shall be the last day of grace:

2 In all matters relating to bills of exchange the following and no other shall be observed as legal holidays or non-juridical days, that is to say:

(*a*) In all the Provinces of Canada, except the Province of Quebec—

Sundays;
New Year's Day;
Good Friday;
Easter Monday;
Christmas Day;

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign; and if such birthday is a Sunday, then the following day;

The first day of July (Dominion Day), and if that day is a Sunday, then the second day of July as the same holiday;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada; and the day next following New Year's Day and Christmas Day, when those days respectively fall on Sunday:

(*b*) And in the Province of Quebec the said days, and also—
The Epiphany;
The Annunciation;

The Ascension;
Corpus Christi;
St. Peter and St. Paul's Day;
All Saints' Day;
Conception Day;

(*c*) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant Governor of such Province for a public holiday, or for a fast or thanksgiving within the same, or being a non-juridical day by virtue of a statute of such Province:

3 Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment:

4 Where a bill is payable at sight or a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting, or protest if the bill is noted or protested for non-acceptance, or for non-delivery:

5 The term "Month" in a bill means the calendar month:

6 Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated—unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month—with the addition, in all cases, of the days of grace.

15 The drawer of a bill and any endorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit.

16 The drawer of a bill, and any indorser, may insert therein an express stipulation—

(*a*) Negativing or limiting his own liability to the holder;

(*b*) Waiving, as regards himself, some or all of the holder's duties.

17 The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer:

2 An acceptance is invalid unless it complies with the following conditions, namely:—

(*a*) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient;

(*b*) It must not express that the drawee will perform his promise by any other means than the payment of money;

3 Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature.

18 A bill may be accepted—

(*a*) Before it has been signed by the drawer, or while otherwise incomplete;

(*b*) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment:

2 When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

19 An acceptance is either (*a*) general, or (*b*) qualified: a general acceptance assents without qualification to the order of the drawer; a qualified acceptance in express terms varies the effect of the bill as drawn:

2 In particular, an acceptance is qualified which is—

(*a*) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; but an acceptance to pay at a particular specified place is not conditional or qualified.

(*b*) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(*c*) Qualified as to time;

(*d*) The acceptance of some one or more of the drawees, but not of all.

20 Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as

a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit:

2 In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; reasonable time for this purpose is a question of fact:

Provided, that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

21 Every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto:

Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable:

2 As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery—

(*a*) In order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;

(*b*) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill;

But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him is conclusively presumed:

3 Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22 Capacity to incur liability as a party to a bill is co-extensive with capacity to contract:

Provided, that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation.

2 Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23 No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

(*a*) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name;

(*b*) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24 Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided, that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery: And provided also, that if a cheque, payable to order, is paid by the drawee upon a forged indorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid, or no defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery; and in case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein,

who has not previously instituted proceedings for the protection of his rights.

25 A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority.

26 Where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character does not exempt him from personal liability:

2 In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

THE CONSIDERATION FOR A BILL.

27 Valuable consideration for a bill may be constituted by—

(*a*) Any consideration sufficient to support a simple contract;

(*b*) An antecedent debt or liability; such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time:

2 Where value has, at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time:

3 Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

28 An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person:

2 An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

29 A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(*a*) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact ;

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it :

2 In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud:

3 A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

30 Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value :

2 And every holder of a bill is *prima facie* deemed to be a holder in due course ; but if in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course :

3 No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract:

4 Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "given for a patent right:" and without such words thereon such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration:

5 The indorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties:

6 Every one who issues, sells or transfers, by indorsement or delivery, any such instrument not having the words "given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of a misdemeanor, and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit.

NEGOTIATION OF BILLS.

31 A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill :

2 A bill payable to bearer is negotiated by delivery :

3 A bill payable to order is negotiated by the indorsement of the holder completed by delivery :

4 Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferrer :

5 Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

32 An indorsement in order to operate as a negotiation must comply with the following conditions, namely :—

(a) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient :

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself ;

(b) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer

to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill ;

(c) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others :

2 Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding his proper signature; or he may indorse by his own proper signature :

3 Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved :

4 An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33 Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not.

34 An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer :

2 A special indorsement specifies the person to whom, or to whose order, the bill is to be payable :

3 The provisions of this Act relating to a payee apply, with the necessary modifications, to an indorsee under a special indorsement :

4 Where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

35. An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is indorsed "Pay D only," or "Pay D for the account of X," or "Pay D, or order, for collection:"

2 A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his endorser

could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so:

3 Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36 Where a bill is negotiable in its origin, it continues to be negotiable until it has been (*a*) restrictively indorsed, or (*b*) discharged by payment or otherwise:

2 Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it:

3 A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time for this purpose is a question of fact:

4 Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue:

5 Where a bill which is not overdue has been dishonored, any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor; but nothing in this sub-section shall affect the rights of a holder in due course.

37 Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable.

38 The rights and powers of the holder of a bill are as follows:—

(*a*) He may sue on the bill in his own name;

(*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

(c) Where his title is defective, (1) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (2) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

GENERAL DUTIES OF THE HOLDER.

39 Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument:

2 Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment:

3 In no other case is presentment for acceptance necessary in order to render liable any party to the bill:

4 Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40 Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time:

2 If he does not do so, the drawer and all indorsers prior to that holder are discharged:

3 In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

41 A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has

authority to accept for all, when presentment may be made to him only;

(c) Where the drawee is dead, presentment may be made to his personal representative;

(d) Where authorized by agreement or usage, a presentment through the postoffice is sufficient:

2 Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill;

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected;

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground:

3 The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.

42 When a bill is duly presented for acceptance and is not accepted on the day of presentment or within two days thereafter, the person presenting it must treat it as dishonored by non-acceptance; if he does not the holder shall lose his right of recourse against the drawer and indorsers.

43 A bill is dishonored by non-acceptance—

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or—

(b) When presentment for acceptance is excused and the bill is not accepted :

2 Subject to the provisions of this Act, when a bill is dishonored by non-acceptance an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

44 The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance:

2 Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill;

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given; where a foreign bill has been accepted as to part, it must be protested as to the balance:

3 When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

45 Subject to the provisions of this Act, a bill must be duly presented for payment; if it is not so presented, the drawer and indorsers shall be discharged:

2 A bill is duly presented for payment which is presented in accordance with the following rules:—

(a) Where the bill is not payable on demand, presentment must be made on the day it falls due;

(b) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable;

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case;

(c) Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place, as hereinafter defined, either to the person designated by the bill as payer or to his representative or some person authorized to pay or refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found;

(d) A bill is presented at the proper place,—

(1) Where a place of payment is specified in the bill or acceptance, and the bill is there presented;

(2) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;

(3) When no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known;

(4) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence:

3 Where a bill is presented at the proper place, and, after the exercise of reasonable diligence, no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required:

4 Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all:

5 Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there is, and with the exercise of reasonable diligence he can be found:

6 Where authorized by agreement or usage, a presentment through the post-office is sufficient:

7 Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business or known ordinary residence therein, and, if there is no such place of business or residence the bill is presented at the post-office or principal post-office in such city, town or village, such presentment is sufficient.

46 Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence: when the cause of delay ceases to operate, presentment must be made with reasonable diligence:

2 Presentment for payment is dispensed with—

(*a*) Where, after the exercise of reasonable diligence, presentment as required by this Act, cannot be effected;

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment;

(*b*) Where the drawee is a fictitious person;

(*c*) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill,

and the drawer has no reason to believe that the bill would be paid if presented ;

(*d*) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented ;

(*e*) By waiver of presentment, express or implied.

47 A bill is dishonored by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid:

2 Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer, acceptor and indorsers accrues to the holder.

48 Subject to the provisions of this Act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged ; Provided that—

(*a*) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;

(*b*) Where a bill is dishonored by non-acceptance and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment, unless the bill shall in the meantime have been accepted.

49 Notice of dishonor, in order to be valid and effectual, must be given in accordance with the following rules :

(*a*) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill;

(*b*) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party is his principal or not;

(*c*) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given;

(*d*) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the

holder and all indorsers subsequent to the party to whom notice is given;

(*e*) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonored by non-acceptance or non-payment;

(*f*) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor;

(*g*) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication; a misdescription of the bill shall not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby;

(*h*) Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf;

(*i*) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there is and, with the exercise of reasonable diligence, he can be found;

(*j*) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others;

(*k*) The notice may be given as soon as the bill is dishonored, and must be given not later than the next following judicial or business day;

2 Where a bill, when dishonored, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; if he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder:

3 Where a party to a bill receives due notice of dishonor, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonor:

4 Notice of the protest or dishonor of any bill payable in Canada shall, notwithstanding anything in this section contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence

or at the place at which such bill is dated, unless any such party has, under his signature, designated another place; and in such latter case such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party is other than either of such above-mentioned places, and such notice shall be deemed to have been duly served and given for all purposes if it is deposited in any post-office, with the postage paid thereon, at any time during the day on which such protest or presentment has been made, or on the next following judicial or business day; such notice shall not be invalid by reason of the fact that the party to whom it is addressed is dead:

5 Where a notice of dishonor is duly addressed and posted, as above provided, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post-office.

50 Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence: when the cause of delay ceases to operate the notice must be given with reasonable diligence.

2 Notice of dishonor is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or endorser sought to be charged;

(b) By waiver express or implied: notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice;

(c) As regards the drawer, in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment;

(d) As regards the indorser, in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the preson to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

51 Where an inland bill has been dishonored it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment, as the case may be; but, subject to the provisions of this Act with respect to notice of dishonor, it shall not, except in the Province of Quebec, be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser; but in the case of a bill drawn upon any person in the Province of Quebec, or payable or accepted at any place therein, in default of protest for non-acceptance or non-payment, as the case may be, and of notice thereof, the parties liable on the bill other than the acceptor are discharged, subject, nevertheless, to the exceptions in this section hereinafter contained:

2 Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishononed by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor, except as in this section provided, is unnecessary:

3 A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment:

4 Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting:

5 Where the acceptor of a bill becomes bankrupt or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers:

6 A bill must be protested at the place where it is dishonored, or at some other place in Canada situated within five miles of the place of presentment and dishonor of such bill: Provided that—

(a) When a bill is presented through the post-office, and returned by post dishonored, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day;

(b) Every protest for dishonor, either for non-acceptance or non-payment, may be made on the day of such dishonor at any time

after non-acceptance, or in case of non-payment, at any time after three o'clock in the afternoon:

7 A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested;

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found:

8 Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof:

9 Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence:

10 No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed.

52 When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable:

2 When a place of payment is specified in the bill or acceptance, the acceptor in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court:

3 In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonor should be given to him:

4 Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

LIABILITIES OF PARTIES.

53 A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.

54 The acceptor of a bill, by accepting it—

(a) Engages that he will pay it according to the tenor of his acceptance;

(b) Is precluded from denying to a holder in due course—

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(2) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(3) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55 The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken;

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse:

2 The indorser of a bill, by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken,

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he had then a good title thereto.

56 Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in

due course, and is subject to all the provisions of this Act respecting indorsers.

57 Where a bill is dishonored, the measure of damages which shall be deemed to be liquidated damages shall be as follows:—

(a) The holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(1) The amount of the bill;

(2) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

(3) The expenses of noting and protest;

(b) In the case of a bill which has been dishonored abroad, in addition to the above damages, the holder may recover from the drawer or any indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

58 Where the holder of a bill payable to bearer negotiates it by delivery, without indorsing it, he is called a "transferrer by delivery:"

2 A transferrer by delivery is not liable on the instrument;

3 A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59 A bill is discharged by payment in due course by or on behalf of the drawee or acceptor:

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective:

2 Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser, it is not discharged; but—

(a) Where a bill payable to, or to the order of, a third party is

paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill;

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill:

3 Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged.

60 When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

61 When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged: the renunciation must be in writing, unless the bill is delivered up to the acceptor:

2 The liabilities of any party to a bill may in like manner be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of renunciation.

62 Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged:

2 In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case, any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged:

3 A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

63 Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers:

Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in

due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor:

2 In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honor.

64 Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn:

2 A bill may be accepted for honor for part only of the sum for which it is drawn:

3 An acceptance for honor *supra* protest, in order to be valid, must—

(*a*) Be written on the bill, and indicate that it is an acceptance for honor;

(*b*) Be signed by the acceptor for honor:

4 Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer:

5 Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honor.

65 The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts:

2 The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

66 Where a dishonored bill has been accepted for honor *supra* protest, or contains a reference in case of need, it must be protested

for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need :

2 Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him:

3 Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment:

4 When a bill of exchange is dishonored by the acceptor for honor, it must be protested for non-payment by him.

67 Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn:

2 Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference:

3 Payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it:

4 The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays:

5 Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party:

6 The payer for honor, on paying to the holder the amount of the bill and notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. If the holder does not on demand deliver them up, he shall be liable to the payer for honor in damages:

7 Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

68 Where a bill has been lost before it is overdue, the person who was holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again:

2 If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so.

69 In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

70 Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill:

2 Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills:

3 Where two or more parts of a set are negotiated to different holders in due course, the holders whose title first accrues is, as between such holders, deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him:

4 The acceptance may be written on any part, and it must be written on one part only:

5 If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill:

6 When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof:

7 Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

CONFLICT OF LAWS.

71 Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows:—

(*a*) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made:

Provided that—

(1) Where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

(2) Where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canada;

(*b*) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made:

Provided, that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of Canada;

(*c*) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored;

(*d*) Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable;

(*e*) Where a bill is drawn in one country and is payable in

another, the due date thereof is determined according to the law of the place where it is payable.

(*f*) If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonor, and a notarial certificate of the service of such notice, shall be received in all courts, as *prima facie* evidence of such protest, notice and service.

964 Part III., Cheques on a Bank.

72 A cheque is a bill of exchange drawn on a bank, payable on demand:

2 Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

73 Subject to the provisions of this Act—

(*a*) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid;

(*b*) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case;

(*c*) The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

74 The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by—

(*a*) Countermand of payment:

(*b*) Notice of the customer's death.

Crossed Cheques.

75 Where a cheque bears across its face an addition of—

(*a*) The word "bank" between two parallel transverse lines, either with or without the words "not negotiable;" or—

(*b*) Two parallel transverse lines simply, either with or without the words "not negotiable;"

That addition constitutes a crossing, and the cheque is crossed generally:

2 Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank.

76 A cheque may be crossed generally or specially by the drawer:

2 Where a cheque is uncrossed, the holder may cross it generally or specially:

3 Where a cheque is crossed generally, the holder may cross it specially:

4 Where a cheque is crossed generally or specially, the holder may add the words "not negotiable:"

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

6 Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself:

7 A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines, and initialling the same the words "pay cash."

77 A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

78 Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof:

2 Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid:

Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have

had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be.

79 Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

80 Where a person takes a crossed cheque which bears on it the words "not negotiable" he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it.

81 Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

965 Part IV., Promissory Notes.

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

2 An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker.

3 A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof:

4 A note which is, or on the face of it purports to be both made and payable within Canada, is an inland note: any other note is a foreign note.

83 A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

84 A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor:

2 Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note.

85 Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement: if it is not so presented, the indorser is discharged; if however, with the assent of the indorser it has been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security:

2 In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case:

3 Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

86 Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place. But the maker is not discharged by the omission to present the note for payment on the day that it matures. But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court. If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable:

2 Presentment for payment is necessary in order to render the indorser of a note liable:

3 Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of

memorandum only, presentment at that place is sufficent to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

87 The maker of a promissory note, by making it—

(*a*) Engages that he will pay it according to its tenor:

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

88 Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

2 In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order:

3 The following provisions as to bills do not apply to notes, namely, provisions relating to—

(*a*) Presentment for acceptance;

(*b*) Acceptance;

(*c*) Acceptance *supra* protest;

(*d*) Bills in a set:

4 Where a foreign note is dishonored, protest thereof is unnecessary, except for the preservation of the liabilities of indorsers.

966 Part V., Supplementary.

89 A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

90 Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signnature is written thereon by some other person by or under his authority:

2 In the case of a corporation, where by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

91 Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded: "non-business days," for the purpose of this Act, mean the days mentioned in the fourteenth section of this Act; any other day is a business day.

92 For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill or note has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

93 Where a dishonored bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any justice of the peace resident in the place may present and protest such bill and give all necessary notices, and shall have all the necessary powers of a notary in respect thereto:

2 The expense of noting and protesting any bill or note, and the postage thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon:

3 Notaries may charge the fees in each Province heretofore allowed them:

4 The forms in the first schedule to this Act may be used in noting or protesting any bill or note and in giving notice thereof. A copy of the bill or note and indorsement may be included in the forms, or the original bill or note may be annexed and the necessary changes in that behalf made in the forms:

5 A protest of any bill or note, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be *prima facie* evidence of presentation and dishonor, and also of service of notice of such presentation and dishonor as stated in such protest.

94 The provisions of this Act as to crossed cheques shall apply to a warrant for payment for dividend.

95 The enactments mentioned in the second schedule to this Act are hereby repealed, as from the commencement of this Act, to the extent in that schedule mentioned:

Provided that such repeal shall not affect anything done or suffered, or any right, title or interest acquired or accrued before the

commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest:

2 Nothing in this Act or in any repeal effected thereby shall affect the provisions of "The Bank Act:"

3 The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend to or be in force in any Province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders which have been or may be made or uttered therein.

96 Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed and shall operate as if it referred to the corresponding provisions of this Act.

97 This Act shall come into force on the first day of September next (1890).

54-55 VICTORIA.

CHAP. 17.

An Act to amend "The Bills of Exchange Act, 1890."

[*Assented to 28th August, 1891.*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1 The paragraph lettered (*a*) of sub-section one of section eleven of "The Bills of Exchange Act, 1890," is hereby repealed and the following substituted in lieu thereof:—

"(*a*) At sight, or at a fixed period after date or sight."

2 Section twelve is amended by inserting after the word "payable" in the third line thereof the words "at sight, or."

3 Section eighteen is amended by inserting after the word "payable" in the first line of sub-section two thereof the words "at sight, or."

4 Section twenty-four is amended by adding the following sub-section:—

"2 If the drawee of a cheque bearing a forged indorsement pays the amount thereof to a subsequent indorser, or to the bearer thereof, he shall have all rights of a holder in due course for the recovery back of the amount so paid from any indorser who has indorsed the same subsequent to the forged indorsement, as well as his legal recourse against the bearer thereof as a transferrer by delivery; and any indorser who has made such payment shall have the like rights and recourse against any antecedent indorser subsequent to the forged indorsement,—the whole, however, subject to the provisions and limitations contained in the last preceding sub-section."

5 Section forty is amended by inserting in the second line thereof, after the word "payable," the words "at sight or."

6 The paragraph lettered (*a*) of sub-section two of section forty-one is amended by striking out the words "or bankrupt" in the first line thereof.

7 Section fifty-one is amended by striking out the word "becomes bankrupt or" in the first line of sub-section five thereof.

8 The rules of common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of the said Act, as hereby amended, shall apply, and shall be taken and held to have applied from the date on which the said Act came into force, to bills of exchange, promissory notes and cheques.

60-61 VICTORIA.

CHAP. 10.

An Act respecting Forged or Unauthorized Indorsements of Bills.

[*Assented to 29th June, 1897.*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1 Sub-section two of section twenty-four of "The Bills of Exchange Act, 1890," as amended by section four of Chapter seventeen of the statutes of 1891, intituled "An Act to amend the Bills of Exchange Act, 1890," is hereby repealed, and the following sub-sections are substituted therefor:—

2 If a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid, or from any indorser who has indorsed the bill subsequently to the forged or unauthorized indorsement, provided that notice of the indorsement being a forged or unauthorized indorsement is given to each such subsequent indorser within the time and in the manner hereinafter mentioned; and any such person or indorser from whom said amount has been recovered shall have the like right or recovery against any prior indorser subsequent to the forged or unauthorized indorsement.

3 The notice of indorsement being a forged or unauthorized indorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the indorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonor of a bill may be given or addressed under this Act.

CHAPTER LVII.—INSURANCE.—THE CONTRACT IN GENERAL.

967 Insurance in Canada is the subject of Dominion and Provincial Statutes in which the formation, duties and powers of the various classes of Insurance Companies and Fraternal Associations transacting insurance business are clearly set out and defined.

968 It would be impossible to give even an outline of the statutory provisions relating to insurance in a work so limited as this, but a few of the leading principles of insurance law may be stated for the information of the student.

969 Varieties of Insurance.—Insurance is of many kinds: Fire, life, accident, marine, live stock, fidelity and others. It will be convenient to treat of them separately, but one principle dominates them all, that is, the principle of indemnity.

970 Insurance is Indemnity.—All insurance is an agreement to indemnify against loss.

971 The amount stated in the policy is therefore not material except in so far as it marks the limit of the insurer's liability. And this is true even as to life insurance, but in life insurance the amount of indemnity is fixed and determined when the policy is taken out. If the assured understated his age, however, the amount payable to his representatives on his death is not the amount stated on his policy, but such an amount as would be payable to him as of his true age in respect of the premium which he actually paid. If a policy is held by a creditor as security for a debt, he cannot keep the whole amount of the policy if it exceeds his debt, but must hand over the balance to the representatives of the deceased.

972 It is, however, in the other forms of insurance that the indemnity feature is most strongly marked. If a house is insured for $1,000 and is totally destroyed by fire, the assured is not necessarily entitled to recover that amount. An enquiry is made as to the

amount of the loss which, under the terms of the contract, has been sustained by the assured. If the loss is, say $1,500, the insurer will pay $1,000, the limit of the policy. If the loss is only $500, the insurer will pay that amount.

973 And no allowance will be made in respect of the premiums which have been paid in respect of the risk, where the property has been over insured, though it is evident that in the absence of any fraudulent attempt on the part of the assured, the insurer has received compensation in respect of an amount of risk to which he was never subjected.

974 Good Faith Required.—In the contract of insurance good faith is required. It is evident that the knowledge of many circumstances is requisite to enable the insurer to judge of the risk he will have to run. The nature of the building, its situation, its freedom from incumbrance; the character, condition, and use of furniture or stock; the mental, moral and physical features of the individual; all these are material to the risk, and any enquiries made by the insurer to the assured, with regard to them, must be correctly and truthfully answered.

975 Importance of Insurance.—It is impossible to over-estimate the importance of insurance to the mercantile world. Not only does the merchant secure himself against unexpected loss, whether from the death of a partner, the destruction of his stock by fire, the unfaithfulness of an employe, or the loss of a vessel, but he finds in fire insurance, but more especially in life insurance (particularly if it takes the form of an endowment policy), a help to his credit, and a means, in an unexpected emergency, of raising money which may save him from serious loss or even from bankruptcy.

976 Terminology.—"Policy," a written instrument embodying a contract of insurance. "Interest Policy," a policy where the person assured has a real interest in the thing assured. "Mixed Policy," a policy of marine insurance which specifies both the time and the *termini* of the voyage for which the risk is limited. "Voyage Policy," a marine policy in which the *termini* are provided irrespective of the time. "Time Policy," a policy which specifies no particular voyage, but covers any voyage within a specified time. "Valued Policy," a policy in which the value of the ship or cargo is agreed on and inserted as the measure of damages in respect of total loss. "Wager Policy," a gambling policy, insurance upon property

in which the policy-holder has no insurable interest. "Open Policy," a policy in which the value is not fixed but is left to be proved by the insured in case of loss. "Premium," the consideration paid for insurance. "Beneficiary," the person other than the assured entitled to the benefit of a life insurance policy. "Insurer or Assurer," the corporation undertaking to insure. "Insured or Assured," the person insured. "Maturity," the happening of the event or the expiration of the time at which the benefit of the contract accrues due. "Underwriter," a corporation or individual undertaking insurance (especially marine insurance). "Risk," the contract of insurance on the part of the insurer.

CHAPTER LVIII.—INSURANCE.—(Continued.)—FIRE INSURANCE.—THE CONTRACT.

977 Definition.—Fire insurance is a contract by the insurer or underwriter to indemnify the insured or assured, for loss or damage occasioned by fire during a specified period.

978 The agreed consideration is called the "premium." The written instrument evidencing the contract is called the "policy." The events and causes insured against are called "risks" or "perils." The interest of the insured in the property to which the contract relates is called the "subject matter" and sometimes the "risk."

979 The Parties.—At common law any party competent to contract could enter into the contract of insurance on either side. This is still so in the absence of statute. In practice, however, the business of insuring both property and lives is in the hands of incorporated companies, as distinguished from individuals and partnerships. The organization, powers and management of such corporations are provided for in the Insurance Acts. See Sec. 967.

980 Form of the Contract.—The contract of fire insurance may, in the absence of statute or charter provision, be in any form, and may be oral as well as written. Owing to the looseness and ambiguity of many of the policies formerly in use, but chiefly to the disposition of insurers to hedge themselves about with a multitude of conditions, exceptions and limitations, rendering recovery practically impossible in the face of a contest, legislatures have in many cases made obligatory upon fire insurance companies the use of a prescribed form of policy.

981 The provisions of the policy are to the effect that the assurer, in consideration of a premium paid to him by the assured, undertakes to pay the loss sustained by the assured, not exceeding a certain named sum, if the premises described in the policy should be wholly or partially destroyed by fire.

982 Statutory Conditions.—The policy is subject to various conditions dealing with a number of contingencies likely to arise in connection with the policy, or the risk, or the loss, if any. The Insurance Act prescribes a uniform set of conditions. Variations from these statutory conditions must be printed in ink of a different color. They are held binding upon the assured only so far as they are reasonable.

983 Many of the conditions authorized by statute are such that a breach of them will completely free the insurer from liability under the policy. Great care therefore should be taken in perusing the conditions of every policy on which it is necessary to give an opinion or judge of a liability.

984 Construction.—While the general rules of construction apply to policies of insurance, they are construed most strongly against the insurer and in favor of the insured.

985 The Thing or Interest Insured.—Where the insured has no interest in the thing insured, the policy is a mere wager, and as such

is void. Policies without interest are contrary to the very principle of property insurance, which is indemnity.

986 What Constitutes an Insurable Interest.—It is difficult to define accurately an insurable interest in property. It is, however, speaking generally, such a legal or equitable interest therein as gives the insured a direct pecuniary interest in its preservation. Of course, the absolute ownership is a sufficient interest to support a policy against fire. But it may be less than this. A mortgagor has an insurable interest in mortgaged property up to the value of the buildings thereon, so long as his right to redeem has not been cut off by foreclosure. A mortgagee has an insurable interest in the mortgaged property, and so has a holder of a mortgage as collateral security. So of a partner in partnership property; a mechanic's lien holder, a bailee and others having a lien upon personal property, and, in general, executors, trustees, bailees and others who sustain such a relation to the property insured that they are, or may be, answerable in case it is lost or destroyed.

987 Re-Insurance.—One who has insured another has himself an insurable interest, which will enable him to validly insure himself in turn against loss on the risk insured. The insurer of the prior insurer is called a re-insurer and his contract is one of re-insurance.

988 Assignment of the Policy.—A policy against fire is not assignable without the consent of the company, even where it contains no clause forbidding assignment. If the insured conveys the property and assigns the policy *with* the consent of the company, a new contract arises between the insurer and the assignee, which can not, as a general rule, be defeated, by any acts of the assignor prior to the assignment, whether such acts were known to the company at the time of the assignment or not. After loss the amount due under the policy is a mere debt due the insured which he may assign without the consent of the company, and even in the face of a clause prohibiting such assignment, subject, however, to any equities existing against the assignor in favor of the company. Where the policy provides for *written consent to assignment* a mere oral promise by the agent to give such assent is of no effect.

989 Alteration—Change of Risk.—Fire policies commonly prohibit any alteration or change in the use or occupation of the premises so as to increase the risk, without notice to and consent of

the company. Whether there has been such a change, and if so, whether it was material, is usually for the jury to decide.

990 Other Insurance.—After a policy has been effected other insurance cannot be procured if the conditions of the policy so provide. In such a case the attempt to obtain a second insurance will usually avoid both policies. Great care should be taken in all cases in which concurrent assurance is desired to see that the conditions of both policies in this respect have been complied with.

991 Change of Ownership.—If the insured part with his interest in the subject of the insurance the policy becomes void. But in the absence of any special provision to the contrary, a partial disposition, such as by mortgage, lease or otherwise, does not affect the policy since the assured still has an interest in respect of which he is entitled to be indemnified.

992 The Premium is the consideration upon which the insurer undertakes the risk. The liability of the insurer does not arise until the premium has been paid.

993 The Peril Insured Against is loss caused by fire. Damage done by the means employed to put out fire, including damage done by water, is a loss by fire.

994 Cause of Fire—How Far Material.—In the absence of special provisions, the cause of the fire is immaterial so long as it was not due to the fraud or design of the insured, and it is no defence that it was due to his mere negligence or that of his servants or agents. Losses due to mobs, rioters, or military or usurped power, are commonly excluded from the risk.

995 Warranty.—A warranty in the law of insurance is a stipulation or statement inserted or referred to in, and made a part of, an insurance policy, upon the truth or performance of which the validity of the contract depends.

996 Distinguished From Representation.—A representation differs from a warranty in several repects. A representation is not a part of the policy, but merely a statement leading up to it and tending to induce the insurer more readily to accept the risk. In order to avoid the policy it must be not only false but material.

997 If a statement or undertaking be a warranty, however, the right of the insured to recover depends upon its strict and literal, or, at least, substantial performance.

998 Materiality.—A representation is material when it is of such a nature that it would probably induce an insurer of ordinary prudence to take the risk, or to take it at a lower rate of premium than he otherwise would.

999 Concealment.—The insurer has a right, in deciding whether or not to accept the risk at all and upon what terms, to know the whole truth, and a wilful withholding or suppression of a material fact by the insured is ordinarily tantamount to a false representation, both in its moral nature and legal effect. Such suppression or withholding is termed *concealment*.

CHAPTER LIX.—INSURANCE.—FIRE INSURANCE.—(Continued.)—THE LOSS AND PROCEEDINGS THEREUPON.

1000 Notice and Proofs of Loss.—Numerous requirements are always found in fire policies touching notice of the loss and proofs thereof, so framed and interpreted that a substantial compliance therewith, unless waived by the insurer, becomes a condition precedent to recovery. Their object is to protect the insurers from fraud and imposition and to aid in the detection of these wrongs by giving them an opportunity promptly to investigate the circumstances surrounding the loss. Damage, actual or probable, to the insured is not to be considered where these provisions have not been complied with, provided compliance is possible, and there has been no waiver by the company. Non-compliance absolutely defeats the policy at the election of the insurer. For this reason the insured should, as soon as possible after loss, procure his policies, examine their contents, and proceed promptly to give the notice, make the proofs, and do any other acts therein required, strictly as provided.

1001 Form and Contents of Proofs.—The form and contents of the proofs of loss required by the conditions of the policy are material. The insured is usually required to state the circumstances surrounding the loss, the cause, or probable cause of the fire, and other matters which may have a bearing on the liability of the company, and he is required to give a detailed and circumstantial account of the property destroyed by fire and an estimate of its value. Compliance with conditions such as these, wherever compliance is possible, is of course a condition precedent to recovery unless the condition has been waived by the insurer.

1002 Waiver and Estoppel.—Insurers may, and often do, by words or conduct, place themselves in such a position that they cannot take advantage of a breach of warranty, or of a misrepresentation or concealment, or avail themselves of a breach of some other condition of the policy. In such cases they are said to have waived the cause of invalidity, or to be estopped to assert it.

1003 Ordinarily, if the insurer with full knowledge of facts arising since the issue of a policy, treats it as valid, as by the receipt of premiums, by consent to its assignment, by levying assessments thereon, or in any other way, he cannot afterward assert such facts to avoid the payment of a loss.

1004 If the insurer, immediately after loss, denies all liability, this is a waiver of notice and proofs of loss, and any defect in the notice or proofs is waived where the insurer bases his refusal to pay on other grounds. Refusal by the company to send blanks for proofs of loss has been held a waiver of such proofs. Failure to notify the insured promptly and specifically of defects in his proofs of loss is a waiver of such defects. A general objection is insufficient; specific defects should be pointed out in time to enable the insured to correct them. An objection to the proofs on account of specific defects is a waiver of all other defects.

1005 The Loss and Its Adjustment.—Fire insurance is a contract of indemnity for the immediate, (but not the remote), consequences of the peril insured against, provided such loss does not exceed the amount specified in the policy. Adjustment, then, is the ascertaining of the amount of the indemnity to which the assured is entitled.

1006 Double Insurance.—Commonly there are several policies upon the same risk, especially if it is very valuable, in which case they will contain one of two provisions: (1) That the insurer shall be

liable only so far as the risk is not covered by other and prior insurance, in which case the second or subsequent insurer is liable only for what is not covered by prior policies, and then only up to the amount fixed by the contract; or, (2) That if there be other insurance upon the same interest or risk, the insurer shall be liable only for that proportion of the loss that his policy bears to the whole amount of insurance in force at the time of loss. This last is the most common provision.

1007 Subrogation.—If property insured is destroyed by the wilful or negligent act of a third person, the company will, upon paying the loss, be subrogated to the rights of the insured as against the wrongdoer, in some cases in its own name, in others in the name of the insured, to recover indemnity.

1008 An express subrogation clause is frequently appended to policies issued in favor of mortgagees providing that if the assurer claims that as against the mortgagor he is not liable, he shall be subrogated to the rights of the mortgagee under the mortgage.

1009 Arbitration.—Most fire policies provide that in case the insurer and insured cannot agree as to the amount of loss the matter shall be submitted to arbitration in the manner specified therein. Such stipulations are so framed as to be mandatory, and arbitration, or an offer to arbitrate by the insured, is a condition precedent to his right to sue and recover for the loss, unless the loss is total or the company denies all liability under the policy.

CHAPTER LX.—INSURANCE.—(Continued.)—LIFE INSURANCE.—MARINE INSURANCE.—OTHER FORMS OF INSURANCE.

1010 Life Insurance.—A contract made by the insurer in consideration of the payment of an annual or other premium based on the expectancy of life and by which the insurer agrees to pay to the representatives, nominees or assigns of the assured a fixed payment at death, or to the assured or his nominees or assigns a fixed sum or an annuity on the happening of some contingency, or arrival of some date of the lifetime of the assured.

1011 In general and by the simplest form of life policy therefore the insurer agrees to pay a certain sum of money to the executors of the will or the administrator of the estate of the insured, or to his widow or children, or to some other designated person, upon the death of the party whose life is the subject of the risk. But the contract may embody other features, Thus, in so-called endowment insurance, the insurer not only agrees to pay a specified sum in case of death happening as above, but agrees to pay the amount to the insured if he reaches a certain age, or agrees to pay a specified annuity after a certain date.

1012 Insurable Interest.—Though there must be an insurable interest at the inception of the policy, such interest need not continue

during the life of the insured or exist at the time of his death. It is sufficient that it exists when the policy is taken out.

1013 As one may insure his own life and make the proceeds payable to himself, so the insured contracting directly with the insurer, and paying the premium himself, may designate as beneficiary one who is wholly without an insurable interest in his life. The rule for insurable interest therefore applies, in general, only when the beneficiary contracts directly with the insurer.

1014 A partner has an insurable interest in the life of his co-partner, a master in the life of his servant, and a servant in that of his master. A party who has a right by contract to receive during his life support from another, has an insurable interest in the life of the party from whom such support is due.

1015 A creditor has an insurable interest in the life of his debtor. But the amount of the insurance must not be grossly excessive so as to be a mere cover for a wager. When the debtor insures his life and pays the premiums for the benefit of his creditor, the latter, in the event of death, is entitled to his debt and interest merely; and so, as a rule, where the creditor, by arrangement with the debtor, pays the premiums and charges them against the debtor.

1016 Application for Insurance.—The contract of life insurance is almost universally based upon a written application wherein the party seeking the insurance states various facts relative to the age, sex, health, occupation and habits of the insured, in response to questions propounded by the insurer.

1017 Concealment of Material Facts.—Even though the insurer does not warrant that he has disclosed all matters materially affecting the risk, if he intentionally withholds from the insurers any fact which he knows, or ought to know, to be material, the policy is avoided.

1018 The Premium.—The premium in life insurance usually consists of certain annual or other periodical payments. Unless prepayment is, by the expressed terms of the policy, a condition precedent to the risk, the policy is valid without payment in advance. In practice, however, it is usually expressly agreed that the payment of the first premium shall be a condition precedent to the formation of the contract, and that failure to pay any annual premium when it falls due, shall render the policy void.

1019 Assignment of Policy.—Unless assignment is forbidden by statute, or by the charter of the company, or by the terms of the policy itself, the insured, if himself the beneficiary and owner of the policy, may assign it without the consent of the company. Where a policy is assigned as a collateral security by way of pledge, however, the assignee, although entitled to recover the face of the policy, can retain only enough for his indemnity, and must account to the debtor or his representative for the balance.

1020 Insurance for Benefit of Wives and Children.—The policy of the law has been to favor as much as possible the retention of the benefits of life insurance to those dependent on the assured. To this end the Ontario Insurance Act (R. S. O., 1897, Chap. 203,) has created a class called in the Act "Preferred Beneficiaries," and a declaration by the assured that the amount payable under his policy shall be payable to preferred beneficiaries creates a trust in their favor, and so long as any object of the trust remains, the money payable under the insurance contract will not be subject to the control of the assured or his creditors.

1021 The manner in which this trust is created is either by some instrument in writing attached to the policy or indorsed on it, or by a will or other instrument in writing identifying the policy by its number or otherwise, or by the provisions of the policy itself.

1022 The trust may be created by the assured in respect of any policy or contract of insurance on his or her own life whether issued before or after the passing of the Act, and whether issued before or after marriage.

1023 The trust may be created in favor of the husband, wife, children, grandchildren and mother of the assured. It may also be created in favor of a future wife or future wife and children.

1024 Only the class of persons mentioned in Sec. 1023 are preferred beneficiaries. All other beneficiaries are called "ordinary beneficiaries."

1025 The effect of the statute is to preserve the benefit of the policy for the preferred beneficiaries, notwithstanding that the assured may be insolvent. The amount payable under a policy so declared, does not belong to the estate of the assured, and his creditors cannot claim any part thereof.

1026 The assured may by an instrument in writing attached to or indorsed on the policy, or identifying the policy by number, or

otherwise, apportion the moneys payable, or vary any apportionment so as to restrict or extend, transfer or limit the benefit of the policy.

1027 If no apportionment of the amount is made, the persons named or designated as preferred beneficiaries will share equally in the insurance moneys.

1028 An apportionment made by will will prevail over any other apportionment made before the date of the will.

1029 Notice and Proofs of Death.—It is usual for life policies to require formal notice and proofs of death. Similar principles govern here, as in the case of fire policies, and doctrines of waiver and estoppel apply with respect to non-compliance and defective compliance with these conditions.

1030 Marine Insurance is the oldest form of insurance, having come into use several centuries before insurance upon lives and against fire. Its rules and principles grew up as a part of the law merchant, and from them the law governing other forms of insurance has been largely borrowed.

1031 Like other kinds of insurance upon property, marine insurance is strictly a contract of indemnity. A great many of the questions arising under this head may be answered by reference to doctrines already familiar. For this reason, and for the further reason that this subject is of particular interest chiefly to those only who are directly engaged in shipping and navigation, the subject will be discussed as briefly as possible.

1032 Definition.—Marine insurance is a contract whereby one party, called the insurer or underwriter, undertakes for a specified sum, to indemnify another, called the insured, against loss arising from certain perils or sea risks to which his ship, freight, merchandise or other interest may be exposed during a certain voyage or a certain period of time.

1033 Implied Warranties.—Warranties in fire and life insurance are never implied. In marine insurance, however, there is always an implied condition that the ship shall be seaworthy. This is the case both in time and voyage policies, unless, perhaps, in the case of a time policy, the ship is at sea or in such a position that the insured can not fairly be held to know of her condition or bound to have her seaworthy.

1034 Constructive Total Loss.—Another peculiar doctrine of the law of marine insurance is, that of constructive total loss and aban-

donment, whereby the insured may, if the loss exceeds a certain portion of the value of the property insured, abandon it to the underwriters, and require them to take it and pay as for an actual total loss.

1035 Credit Insurance is a contract to indemnify the insured against loss by the failure of customers to pay for goods sold them. Technically it is not a contract of suretyship, but a policy of insurance, and is governed by similar principles.

1036 Fidelity Insurance is a contract to indemnify the insured against loss by the dishonesty or default of employees. Bonds given by fidelity insurance companies are analogous to policies of insurance, though partaking also of the nature of guaranties or contracts of suretyship.

1037 Other Forms of Insurance.—There are other forms of insurance contracts whereby the insured is indemnified against loss to property by reason of accident or otherwise. Among the perils insured against are, injuries to live stock, breaking of plate-glass, bursting of boilers and loss by hailstorms, tornadoes, etc. Fire is usually excepted by these policies. Burglary, loss by accidents to workmen, (by which form of insurance the insurer agrees to indemnify the insured against losses occasioned by his liability to employees injured in his service,) and loss by accident to others, may also be insured against.

CHAPTER LXI.—BAILMENT.

1038 Definitions.—A bailment is the delivery of goods for some purpose upon a contract expressed or implied that after the purpose has been fulfilled, they shall be redelivered to the bailor, or otherwise dealt with according to his directions or kept until he reclaims them.

1039 Care must be taken to distinguish between a bailment and a sale. In a bailment the title to and ownership of the goods are not changed; in a sale they are. An apparent exception is found in the case of grain delivered into a warehouse or elevator. In such a case it is not contemplated that the bailee shall return the identical grain.

1040 The parties to a bailment are the bailor who delivers and bailee who receives.

1041 The subject matter of a bailment may be any property of a personal nature; it cannot be real estate.

1042 The delivery of goods to the bailee implies a return of the same thing, either in the same condition or in an altered condition if so provided in the terms of the bailment. Where goods are delivered with the privilege that the bailee may return goods of the same kind and value, though not the identical goods, the transaction is called a loan for consumption, not a bailment (except in the case of grain in a warehouse).

1043 A loan of money is not a bailment because the same coin or bill is not to be returned, but money of an equivalent value.

1044 Bailments are either

1 For the sole benefit of the bailor;

2 For the sole benefit of the bailee; or

3 For the benefit of both parties.

1045 1 (*a*) "Deposit," the mere delivery of goods to be kept for the bailor, without charge, and to be returned at his request.

(*b*) "Mandate," a delivery of goods in regard to which the bailee agrees to perform some act without charge.

1046 2 A lending of goods for a certain time to be used by the bailee without payment for the use, and to be returned *in specie*.

1047 3 (*a*) A pledge of personal property as security for a debt.

(*b*) Bailments for hire.

(1) The hire of the use of the article by the bailee.

(2) The hiring of the bailee to perform some labor or bestow some services on the article, that is

Hire of (*a*) Services.

(*b*) Care and attention.

(*c*) Carriage of goods.

1048 Diligence or Negligence.—Bailees are required to use diligence in respect to things bailed, and they will incur liability in case of negligence.

1049 There are degrees of diligence and degrees of negligence. These are ordinary, extraordinary, and slight.

(*a*) Ordinary diligence is that diligence which men of common prudence exercise about their own affairs.

(*b*) Extraordinary (or great) diligence is that diligence which very prudent men observe in relation to similar matters of their own.

(*c*) Slight diligence marks the degree of care which persons who are of less than common prudence exercise in relation to their own concerns.

(*d*) Ordinary negligence is the want of that diligence which ordinary men commonly observe in their own business.

(*e*) Gross negligence is the omission of that care which even thoughtless men take of their own goods.

(*f*) Slight negligence is the omission of that degree of diligence which very prudent men are accustomed to take in their own affairs.

1050 It might well be considered, however, whether the comparison would not be better made if the degree of diligence or negligence should be measured by the care which an imprudent man, or a man of ordinary prudence, or an extremely prudent man, would take of the goods bailed, having regard to the nature of the bailment.

1051 For example, in the case of a gratuitous loan the bailee is required to use extraordinary care—that is, the care which a very prudent man would exercise about his own similar goods. But since greater care should be taken of articles borrowed than of articles of one's own, it would seem a more satisfactory test of the bailee's liability to say that he should exercise the care a very prudent man would exercise over a borrowed article of the kind in question.

1052 Extent of Liability.—A bailee, in the absence of a special agreement, is not an insurer of the chattel and is, therefore, not liable for any loss or injury not attributable to the negligence of himself or his agents. Thus in the absence of negligence a bailee would not be responsible because of fire, storm, perils of the sea, robbery, burglary, and similar matters. But theft by the bailee's servants would render him liable.

1053 The liability of a bailee may, of course, be measured by any agreement between the bailor and bailee, by the terms of which the bailee is to be responsible for the consequences of such matters as would not otherwise create any liability, and may be limited by any agreement, so long as such agreement does not create immunity from the consequences of the wrongful action of the bailee.

1054 If the goods, which are the subject of the bailment, are lost or injured, it is, as a general rule, sufficient for the bailor to show the loss or injury to throw upon the bailee the onus of proving that the loss or injury did not occur in consequence of the negligence or wrongdoing of the bailee or his agents, or, rather, to put this in the affirmative form, that he and his servants exercised the degree of care required under all the circumstances of the bailment.

1055 Conversion.—The use or disposition of the bailment by the bailee in a manner not authorized by or inconsistent with the terms of the bailment is called a conversion.

1056 If the bailee pledge to a third person a horse borrowed for the personal use of the bailee, or if the bailee refused to return the

bailment when rightfully demanded by the bailor, or if the bailee sold the chattel, there would be in each case a conversion.

1057 In all cases of conversion the bailor is entitled to recover from the bailee either the goods or (if the rights of innocent third parties have intervened) the value of the goods or damages, or both, as the nature of the case and the form of action taken may require.

1058 Generally speaking the return of a chattel which has been misused and its acceptance by the bailor may be urged in mitigation of damages.

1059 Re-delivery.—When a bailment is determined either by the accomplishment of its purpose, by effluxion of time, or by the demand of the bailor, the bailee must re-deliver the chattel to the bailor or his assigns or agents. This duty is absolute, and if not performed the unauthorized detention will be evidence of a conversion.

1060 The bailee cannot justify his detention by setting up want of title in the bailor unless the bailee has given up the goods to the true owner. But the bailee must take the risk of the title of the third party. If a third party claims goods in the hands of the bailee the bailee may call upon the bailor and the third party to settle their respective rights by interpleader proceedings.

1061 Compensation.—The bailee who preforms services in relation to the subject of the bailment is (unless the services were to be rendered without remuneration) entitled to compensation. If this compensation is not settled as to amount or rate by the terms of the bailment, it will be rendered according to the reasonable value of the services.

1062 Lien.—If the bailee has an article delivered to him upon which he bestows his services he is entitled, if compensation was agreed to or contemplated by the parties, to detain the article until his pay is forthcoming, unless the work was done on credit.

1063 By R. S. O. 1897, Chap. 153, a statutory right of lien is given in respect of chattels upon which work has been done. See Appendix.

1064 Compensation to the Bailor.—The bailor is entitled to compensation for the use of the article bailed. The compensation is usually fixed by the terms of the bailment. If not, the bailor is entitled to reasonable compensation unless it is shown that the bailment was intended to be grattuitous.

1065 Liability For Expenses.—A gratuitous bailee is entitled to be reimbursed in respect of expenses necessarily incurred. Ordinary incidental expenses are payable by the borrower. Extraordinary expenses are at the risk of the lender. A pledgee may collect expenses necessarily incurred in the preservation of the chattel.

1066 A bailee for hire where the use of the thing bailed is the essence of the contract impliedly undertakes to keep the chattel in repair and to bear incidental expenses, unless there exists some defect as to which there is an express or implied warranty by the bailor, in which case expenditures chargeable to such defect are payable by the bailor.

1067 Rights of Bailee Against Third Parties.—The bailee has a special property in the thing bailed and is entitled to protect or recover it from wrongful injury or taking by third parties.

1068 Termination of Bailment.—This may be

(*a*) By effluxion of time, as where the chattel is loaned or hired for a definite period.

(*b*) By the accomplishment of the object of the bailment, as where goods delivered to a carrier have been carried as agreed.

(*c*) By the act of the parties, as where the services which were to have been rendered have been waived and abandoned by mutual consent.

(*d*) By destruction of the thing bailed, as where a ship founders in a storm.

(*e*) By conversion, as where the bailee sells the goods hired by him.

(*f*) By operation of law, as where the chattel is seized under an execution against the bailor.

CHAPTER LXII.—BAILMENT.—(Continued.)—WAREHOUSEMEN.—CARRIERS.

1069 Having in the last chapter stated generally the leading principles relating to bailments, it may be of interest to consider more fully the law relating to warehousemen and carriers.

1070 Warehousemen.—A warehouseman is one who receives goods and stores them in his warehouse for a compensation.

1071 He is a bailee for hire, and is bound to exercise ordinary care over the goods in his possession. It has been held that a warehouseman was not liable for goods destroyed by rats, when he had exercised ordinary care in preserving the goods. He would be liable for theft only when it was caused by lack of proper care.

1072 Hire of Carriage.—The subject of carriage forms a large part of the law of bailment, and often involves the most serious and difficult questions.

1073 Kinds of Carriers.—Carriers without hire; carriers for hire, but not common carriers; and common carriers.

1074 Common Carriers.—A common carrier is a person who undertakes for hire to carry goods or persons for the public, and allows it to be known that he is ready and willing to serve anyone who may desire to employ him.

Draymen, expressmen, railroads, steamboat lines, stages and omnibusses are examples of common carriers.

1075 A carrier who is not a common carrier, is one who undertakes for hire, or without hire, to carry goods or persons upon some

particular occasion, but who does not make a business of such work. Anyone who undertakes for another to do some particular act in the way of transporting goods, becomes a private carrier, either with or without hire, and is liable as noted in bailments generally.

1076 Common Carrier Practically an Insurer.—It is a general rule that a common carrier is practically an insurer of the goods he undertakes to carry, and is responsible for any loss that occurs unless caused by an act of God or the public enemy; and even in these cases the carrier is liable if his previous negligence has exposed the goods to danger, as where goods were carelessly left where they were carried away by the overflow of a river.

1077 Loss by the act of God is any loss which results from natural causes, and which can in no way be attributed to, nor controlled by, human acts.

1078 If a carrier seeks to escape responsibility for loss by showing that the loss was the result of natural causes, he must show that he could not have guarded against, or avoided the result. Thus, a collision of two vehicles on the land, or two boats on a river, would not be regarded as the act of God, but the collision of two vessels on the sea during a tempest might be.

1079 Liability Limited.—The carrier may usually limit his liability by special contract, but such contracts must be reasonable.

As to what degree of limitation would be reasonable no general rule can be given, the question being one for the courts to decide upon the facts of each particular case.

1080 A carrier may stipulate with the shipper that in case of loss the claim should be presented within a reasonable time; but even then the question of reasonable time would be for the courts. A carrier cannot restrict his liability by public notice, nor would he be allowed to contract against his own negligence or the negligence of his servants.

1081 Carrier's Duties.—A common carrier must transport all goods, of the kind he is accustomed to carry, that are taken to him for the purpose of carriage, provided the amount offered is within his carrying capacity. The carrier must transport the goods in the order they are received, though a preference may be given to perishable goods. The carrier should not deviate from the ordinary route in the transportation of the goods; if he does deviate unnecessarily, and loss occurs, whatever may occasion the loss, he is responsible.

1082 The carrier must provide proper carriages, conveyances, or machinery for the transportation of the goods. If special directions are given by the shipper they should be followed wherever practicable. For example, care should be used where a package is marked "Glass, With Care."

When goods are to be carried over more than one line, and the first carrier contracts for the whole distance, he is responsible for the loss wherever it happens.

1083 Delivery of the Goods.—Delivery of the goods carried is one of the essential elements of a carrier's contract. The common carrier must make delivery of goods to the consignee, and failure to deliver will be a breach of his implied contract, though under any express contract, with a limited liability, notice that the goods have been received may be sufficient.

1084 Where a delivery is made impossible by the absence or death of the consignee, or because he cannot be found, or because he neglects or refuses to receive the goods, the carrier, if he has done all that could be reasonably demanded of him in his efforts to deliver the goods, is thenceforward only liable as a warehouseman.

The delivery must be to the consignee or his authorized agent.

In connection with this must be considered the law relating to stoppage in transit and the reservation of the *jus disponendi*.

1085 Rights of the Carrier.—These will be considered (1) As to his special interest in the goods; (2) Compensation, (3) Lien.

1086 Special Interest in the Goods.—The carrier has such an interest in the goods that he can maintain in his own name an action of trespass, trover or replevin for injury to them or to his possession of them, because these are injuries to a possessory right. Either the carrier or owner of the goods has the right of action against the wrongdoer, the owner being in possession through his agent the carrier, but action by one would bar the right of the other, in so far as their rights were identical.

1087 Compensation.—In the absence of any express agreement as to rates of carriage the carrier is entitled to a reasonable compensation for transporting the goods, whether they are carried upon an express or implied contract. But the rate is, of course, usually fixed by the contract.

1088 The carrier, in order to recover his charges, may bring an action against either the consignor or consignee; but he cannot sue for the freightage until he has carried and delivered the goods pursuant to the terms of the hiring.

1089 Lien.—The carrier is entitled to a lien on the goods for the price of the carriage. Besides the regular charges for freight, the carrier may have a lien for reasonable storage charges, when the consignee has been negligent in removing the goods.

1090 The carrier has only a special lien, that is, he cannot hold one bill of goods for charges upon another.

1091 Carriage of Passengers.—A common carrier of passengers is one who undertakes for a compensation to carry all persons who desire to be carried over the route travelled by his conveyances.

1092 (*a*) The common carrier of passengers is bound to provide safe and properly found carriages or conveyances.

(*b*) To carry anyone that applies for carriage and offers to pay for the same; he can in no case refuse a passenger if he has accommodation for him unless it be for good cause.

(*c*) To run his trains or conveyances according to the advertised time tables (if any) if with the use of reasonable diligence they can start to make the journey in the scheduled time.

(*d*) To carry passengers to the end of the journey to which the contract applies.

(*e*) To stop at the usual stopping places and to stay there the time advertised.

1093 Liabilities.—It is well settled that the liability of passenger carriers is much more limited than that of the carriers of goods.

They are not insurers of passengers as they are of goods, because they cannot have the same control over them. But they must exercise a reasonable degree of care and watchfulness over everything that pertains to their business. What constitutes a reasonable degree of care is not well settled and depends upon circumstances, and is a matter of fact to be determined by the court or jury. But common carriers of passengers are not liable to compensate their passengers for any loss or injury, unless the loss or injury of which the passenger complains is caused by the negligence of the carrier, without contributory negligence on the part of the passenger.

1094 Duties as to Baggage.—A common carrier of passengers is also a common carrier of the passengers' baggage, and is regarded

as an insurer of the baggage. He is liable for any injury to the baggage unless it is caused by inevitable accident. But it is not left with the passenger to determine what shall be classed as baggage. This, if not defined by the contract, must be decided by the court on the basis of a reasonable allowance.

The carrier is only responsible for such goods as might naturally be carried by a passenger as baggage.

CHAPTER LXIII.—CONTRACTS OF AFFREIGHTMENT.

1095 Contracts of Affreightment, being contracts for the carriage of goods in vessels, fall under the general denomination of contracts with carriers. On account, however, of the important place they occupy in the mercantile law, it has been thought proper to devote a separate chapter to their consideration.

Contracts of this description are either,—

1 Contracts of affreightment by charterparty; or

2 Contracts for the conveyance of goods in a general ship.

1096 By Charterparty.—A contract by charterparty is a contract by which a shipowner agrees to carry goods on a specified vessel, hired by the charterer, for a particular voyage or series of voyages.

1097 By Whom Executed.—The charterparty may be executed either by the owner of the ship, (or by his agent, or by the master of the ship, or by a broker,) and by the charterer.

1098 Form of Contract.—A form of charterparty, taken from Smith's Mercantile Law, will be found in the Appendix.

1099 Variation of Terms.—The terms of a charterparty cannot, of course, be varied by parol, though it may like other mercantile instruments be explained, though not contradicted, by evidence as to the usage of trade (for example, the well known usage of a port).

1100 (2) By Conveyance in a General Ship.—When the master and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for conveyance in a "general ship".

1101 Bill of Lading.—The contract is comprised in a "bill of lading" and is primarily a receipt for goods delivered on board ship.

1102 Goods not Shipped.—The master of a ship could not at common law make the owner responsible, even to an innocent indorsee for value, by signing bills of lading for goods which had never been shipped. But this has been changed by statute. (See Section 5 of the Mercantile Amendment Act, given in the Appendix).

1103 Not of Quality Stated.—Nor will the owner (apart from the statute) be liable to an indorsee for value, if the goods are not of the quality stated.

1104 Wrong Quantity.—Unless so agreed by the shipowner, the bill of lading will not (apart from the statute) be conclusive as to the quantity received.

1105 Bills in a Set.—It is usual to execute bills of lading in sets of three.

1106 Form of Bill of Lading.—A form of bill of lading, taken from Smith's Mercantile Law, will be found in the Appendix.

1107 Most shipowners, especially steamship and railway companies, have their own forms of bills of lading, in which are introduced provisions limiting the liability of the owners.

1108 Other clauses than those above mentioned may be, and often are, introduced into the bill of lading, according to the nature of the contract between the parties to it. It is impossible to state, here, all or even many of them. The following are examples:—A clause to provide for the payment of demurrage by the consignee, the effect of which will be to raise an implied undertaking on his part to pay it, if he receives the goods under such bill of lading, and that too, though he have no valuable interest in them, for the "acceptance of the goods in pursuance of a bill of lading, whereby the shipper has expressly made the payment of freight, or demurrage, a condition precedent to their delivery, is evidence of a contract by the consignee to pay such demand." So, too, there may be a clause "with liberty to call at any port," which permits of calling at any port for any purpose connected with, and in furtherance of, the scope of the adventure.

1109 The Mercantile Amendment Act, R. S. O. 1897, Chapter 145, contains provisions dealing with bills of lading, which will be found in the Appendix.

1110 In the form given in the Appendix, a consignee of the goods is mentioned, to whom, or to whose assigns, they are to be delivered. But the bill is sometimes made out for delivery. "To. . . . order or. . . . . assigns," which imports an engagement to deliver to the person whom the consignor shall nominate, or his assigns, or sometimes to the shipper himself, his order, or his assigns. If no such words appear in the bill of lading, it would be in no sense negotiable.

1111 Bill to Order of Vendor.—*Prima facie* a delivery of goods on board a vessel under a bill of lading, in the latter form, or to the order of the vendor, though it be the vessel of the intended consignee, imports an intention on the part of the consignor, especially if he be an unpaid vendor, to reserve to himself the property in the goods, and that that shall pass by the indorsement of the bill of lading. In such case, until it has been indorsed and accepted by the indorsee, the goods remain the vendor's, so as to preserve his rights, whether as an unpaid vendor or otherwise, and he has a perfect right to vary their destination, and, if payment of the price be refused, to sell them.

1112 But such a bill of lading is not conclusive—it merely creates a presumption, and it will be a question of fact, looking at the whole of the circumstances under which the shipment took place,

what was the intention of the parties; whether the delivery was really for and on account of the vendee, and the bill of lading was made out to the vendor on behalf of, and as agent for, the vendee, in which event the property will have passed and vested in the intended consignee; or whether it was intended to preserve the rights of the unpaid vendor, until some further act was done, as by transferring the bill of lading.

1113 In the decision of this question, the circumstances, that the shipment was on board the vessel of the intended consignee, and that the bill of lading was expressed to be freight free, or that an invoice was sent by the consignor, stating the shipment to have been made for and at the risk of the intended consignee, will be material for the consideration of the jury.

1114 Bill of Exchange Sent Concurrently.—If a bill of exchange be sent with the bill of lading, the consignee is bound to accept the bill drawn against the cargo, if he retain the bill of lading, and until such acceptance, the property in the goods will not pass to the consignee.

1115 Negotiability of Bills.—The provisions of the law merchant and the statute law dealing with the negotiability of bills of lading have done much to facilitate commerce.

1116 It has been seen that the bill of lading is usually made out for the delivery of the goods to the order of some person, for example E. F., or his assigns. E. F. can, therefore, by naming an assign, transfer his right to the goods to some other person. The mode of appointing an assign is by indorsing to him, and handing over, the negotiable instrument. It is a common practice with merchants to so negotiate bills. By such assignment, the property in the goods is held to pass to the indorsee of the bill of lading if such was the intention of the parties.

1117 But if the assignee of the bill of lading has not given valuable consideration or acted in good faith, as 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 the same situation as the consignee, and the consignor retains his right to stop *in transitu*. And, if there be any condition, either in the bill of lading, or in the indorsement thereof, for example, if the goods are to be delivered provided E. F. pay a certain draft, all subsequent indorsees take subject to that condition, and have no title until it is complied with.

1118 But, although the bill of lading is so far negotiable, it is not negotiable in the sense in which a bill of exchange or promissory note is so; except under the Mercantile Amendment Act (see Appendix) property does not pass by mere delivery to a holder in good faith for valuable consideration; it is negotiable only as a symbol of the goods. Therefore, save in cases within the Factors Act (see Appendix) delivery, by a person who has improperly obtained it, or without authority from a true owner, of a bill of lading indorsed in blank, to a *bona fide* transferee for value, confers no title to the goods which it represents. Its indorsement, too, formerly transferred no more than the property in the goods, it did not transfer the contract between the original parties to it. Therefore, the assignee of such an instrument could not maintain an action founded upon that contract, nor could an action founded upon it be brought against him.

1119 As several parts of a bill of lading, signed by the master, are generally delivered to the shipper (see Section 1105), and as in some instances, these parts may have been indorsed to different persons, the ship-master may in such a case deliver the goods to the first person, whether the original consignee or an indorsee, presenting one part of the bill of lading, provided of course, the master has no notice of a prior assignment.

1120 The power of thus transferring the property in the goods by an assignment of the bill of lading remains to the shipper as long as the goods are in the hands of any agent of his, and he may alter their destination while they are on board, provided the bill of lading has not been transferred; thus, if the captain sign a bill of lading for the delivery of the goods to A. or his assigns, and the shipper afterwards obtained and transmitted to B. the bill of lading, making them deliverable to him, B. will be entitled to them, if nothing further has been done to vest the property in A. The power of thus transferring the property in goods by means of the bill of lading continues until there has been a complete delivery under it, even though the goods may have been landed.

1121 The above observations regarding the negotiation of bills of lading by a consignee, apply to the case of consignment of the goods to a purchaser; for where they were consigned to a factor, this power of altering the property in them by indorsement of the bill of lading, was less extensive, since it was thought that, though he might bind his principal by a sale of the bill of lading, because a factor's usual

employment is to sell, yet he could not by a pledge thereof, for that is not within the scope of his authority. (But see now The Factors Act in the Appendix.)

1122 Voyage Must Proceed Without Delay.—Unless by express stipulation, the ship must when loaded start on her voyage without delay, and must not deviate.

1123 Delivery of Goods in Completion of Voyage.—On the completion of the voyage, the master must deliver up the cargo to the consignee or other person named in the bill of lading or his indorsee on payment of the freight (if unpaid) and other charges.

1124 The Freight is the charge made for carrying the goods.

1125 Primage was originally a small customary payment to the master for his care and trouble. In practice it is generally treated as a part of the freight.

1126 Average denotes several petty charges, such as towage, beaconage, etc.

1127 Demurrage.—The charterer usually agrees to load and unload within a specified time, called "lay days." If the ship is detained beyond the time allotted, whether by custom or by special agreement, to the loading or unloading, the charterer is liable to pay, for each subsequent day, a sum which is called "demurrage. The same term is used for the delay itself. Demurrage is counted either by working days or running days. If the contract is silent as to this, running days are counted, unless there is a custom of the particular port to the contrary

1128 General Average.—Whenever damage or loss is incurred by any particular part of the ship or cargo, for the preservation of the rest, it is compensated for by an arrangement called, general average, and each party interested in the ship, freight, and cargo, shall contribute their respective proportions to indemnify the owner of the particular part against the damage which has been incurred for the good of all. But the loss or damage must be unusual, and there must have been imminent peril and the whole adventure, that is, ship and cargo, must have been in jeopardy.

1129 Salvage is defined to be a compensation to be made by the shipowner or merchant to persons by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss.

CHAPTER LXIV.—ARBITRATION.

1130 Definition.—Arbitration is the investigation and determination of a matter or matters in difference between the contending parties by one or more official, or unofficial, chosen, named or indicated parties called arbitrators.

1131 Submission is the contract by virtue of which matters in difference between the parties are submitted to the arbitrament and award of the arbitrator or arbitrators.

1132 Form.—As at Common Law, arbitrations were voluntary, it was not necessary that the submission should be in any particular form. But if the submission is under any statute the provisions of the statute must be observed as well in the form of the submission as in other matters.

1133 Compulsory Arbitration.—There are a number of statutes under which arbitration proceedings are compulsory. (See Appendix for statutory provisions respecting arbitrations.)

1134 What May Be Submitted.—All matters of civil right as to which any differences or disputes exist may, by the parties to such differences, be submitted to arbitration.

1135 How Entered Upon.—Submissions are either to

(*a*) One arbitrator;

(*b*) A plurality of named arbitrators; or

(*c*) Two or more named arbitrators, with power to those named to name an umpire or an additional arbitrator.

1136 The arbitrators must be indifferent between the parties, and hence any business or other relationship which would render an arbitrator partial will be a cause for setting aside the award.

1137 In voluntary submissions, the rights of the parties as to appointing or objecting to arbitrators, must be subject to the terms (if any) to that effect contained in the submission.

1138 Hearing and Award.—When the arbitrators have been chosen and have consented to act, they hear the parties and such witnesses as may be presented, and then decide upon their finding, which is called an award, and which when completed is said to be published by them.

1139 The time for making the award may be extended by the parties if the submission does not provide for any extension.

1140 Revocation of Submission.—At common Law a submission might be revoked at any time before award, unless the submission was made a rule of court. The death of a party revoked the submission, and the death or refusal of an arbitrator would also operate as a revocation unless the submission contained an automatic provision for substitution in such a case. The statutory rule is different.

1141 Duties of the Arbitrators.—The arbitrators must, as stated, be indifferent between the parties, and must act uprightly and for both parties and not as partisans for either one or the other. They must act judicially and must all join in the award unless the submission provides for an award by the majority.

1142 The arbitrators must hear the parties in the presence of each other. They must examine the witnesses on each side in the presence of both parties, and should neither receive nor ask evidence (material or immaterial) from the witnesses after the hearing is closed. No communications or arguments should be received from the parties or their solicitors *ex parte*. If both parties are not fairly and impartially dealt with the award will be set aside. Circumstances (such as the refusal of one party to attend after due notice and after an intimation that a hearing would take place in his absence) may of course arise in which the arbitrator may proceed in the absence of one of the parties, but the general rule is as stated.

1143 It follows from what has been just said that the arbitrators must give due notice to each party of the time and place of holding the sittings at which the parties and their witnesses are to be examined

and arguments heard. It is not necessary to give notice of the sittings of the arbitrators to consider their award, the parties not being entitled to be present or represented at such latter meetings.

1144 While it is true that the arbitrators are to determine the "admissibility" of evidence according to legal rules and not in pursuance of their own opinions, yet in considering the "number" of witnesses to be adduced in regard to any particular fact, the arbitrators have some discretion, and may refuse to hear further evidence of a fact already sufficiently proved, although the evidence may be strictly admissible. (The distinction is between the quantity of the evidence and its admissible quality.)

1145 The reception of new evidence is within the powers of the arbitrators. But as soon as all the evidence which has been offered or which they require has been produced, they should declare to the parties their intention to consider the case closed.

1146 Powers of Arbitrators.—On voluntary submissions the powers of the arbitrators as to the scope of the enquiry must be limited by the terms of the submission. They cannot enquire into and deal with matters which have not been referred to them, however much they may deem it desirable to do so in the interests of the parties concerned.

1147 The powers of an arbitrator on a submission by an order of court, or upon a voluntary submission which has been made a rule of court, are dealt with by R. S. O., 1897, Chap. 62. (See Appendix.)

1148 The arbitrators may call witnesses for their own information (of course in the presence of the parties), and may adjourn the hearing of the case from time to time (if such adjournments are not unreasonable).

1149 The duties of the arbitrator being judical, he is not allowed to delegate his authority.

1150 The Award.—The finding of the arbitrators, when expressed in its final terms as the results of their arbitrament, is called their award.

1151 The award must follow the directions of the submission, and must be published to the parties within the time limited.

1152 As the arbitrators have no power to deal with matters outside the scope of the reference, the award must not contain any findings on matters not within the terms of the submission.

1153 The award must contain findings on all the matters submitted, and the arbitrators will be presumed to have dealt with all matters in dispute, if they do not expressly state that they have not done so, or unless it plainly appears from the face of the award.

1154 The award within the scope of its authority must be final.

1155 It is necessary also that the award should be certain and should show what questions were decided and what the decisions on these questions.

1156 Umpire.—The duty of an umpire, properly so called, is only to decide questions between two disagreeing arbitrators. If the third person appointed is merely a third arbitrator he will, of course, participate in the findings and award just as any other arbitrator, but if he is really only an umpire his duties as to findings only commence when the arbitrators disagree.

1157 Award by a Majority.—Unless so provided by the submission or statute or rule of court, under which the arbitration is held, the award of a majority of the arbitrators is ineffective.

1158 Costs.—See as to this the Act (R. S. O. 1897, Chap. 62, in the Appendix).

1159 Appeal.—If the award is not satisfactory to either party he may appeal, or move against the award, and the award may be set aside or the matter recommitted to the arbitrators.

1160 The Award Final.—If not appealed from or moved against within the time limited, the award becomes final between the parties. The original cause of action becomes merged and the remedy for the non-performance of the award is an action on the award.

CHAPTER LXV.—BILLS OF SALE AND CHATTEL MORTGAGES.

1161 Sales and Mortgages at Common Law.—At Common Law every conveyance of chattels, whether absolutely or by way of mortgage, was good without writing, and that whether the possession of the chattels did or did not pass.

1162 Registration Required By Statute.—But as it was deemed undesirable that sales or mortgages of chattels, where the property did not pass to the purchaser or mortgagee, should be left as oral contracts, since this must naturally prove prejudicial in the extreme to the claims of creditors or subsequent purchasers or mortgagees, it has been provided by statute that all such conveyances and mortgages must be recorded for the information of the public.

1163 Registration Only Required Where Possession Unchanged.—This, however, leaves untouched the provisions of the Common Law as to conveyances and mortgages where the goods are transferred to the purchaser or mortgagee, that is where there has been (in the language of the statute) an actual and continued change of possession.

1164 Consequently transactions are of everyday occurrence in which chattels are bought or pledged by verbal contracts only, the chattels passing by virtue of the contract directly from the vendor or mortgagor to the purchaser or mortgagee. Cases also occur in which similar sales or mortgages, accompanied by a change of possession, are evidenced by deeds or other written contracts, not because the law so requires but because the parties have deemed it wise to preserve a record of their dealings which shall be more lasting and certain than the fallible recollections of the persons by whom the contract was made.

1165 Tendency of Statutory Provisions.—It may well be doubted whether the decisions of the courts upon the Chattel Mortgage Acts have not carried the statutory provisions further than was intended, with the result that innocent purchasers and mortagees have often been deprived of their rights by technical and arbitrary distinctions at the instance of creditors and others who have set up adverse claims not perhaps more, and frequently far less, meritorious than the claim which, by a forced reading of the law, they have displaced and defeated. This, however, is not the place to enter into a discussion of the policy or scope of the statute. We must be content to take the law as it stands.

1166 Unregistered Documents Void.—Generally speaking the Chattel Mortgage Act (an Act respecting Mortgages and Sales of Personal Property, R. S. O. 1897, Chap. 148, and which is hereafter in this chapter referred to as the Act), renders absolutely void as against subsequent creditors, purchasers or mortgagees, all sales and mortgages within the Act unless the provisions of the Act have been strictly and literally complied with.

1167 Requirements as to Registration of Mortgages.—The second section of the Act provides in effect that every mortgage, of chattels which are allowed after the mortgage to remain in the possession of the mortgagor, shall be registered (within five days from its execution) together with two affidavits (1) an affidavit by the attesting witness, which is called the affidavit of execution, and which verifies the fact *and the date* of the due execution of the mortgage, and (2) an affidavit called the affidavit of *bona fides*, which shall be made by the mortgagee

(or his agent, provided the agent is aware of all the circumstances and is properly authorized, in writing, to make such affidavit).

1168 Contents of Affidavit of Bona Fides.—This affidavit (whether by the mortgagee or his agent) must state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, and that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the chattels against the creditors of the mortgagor, or of preventing the creditors of the mortgagor from obtaining payment of any claim against him.

1169 Importance of the Affidavit.—This affidavit of *bona fides* is regarded as the most important element in the registered mortgage. The slightest omission in respect of any of the statutory requirements will be absolutely fatal to the validity of the mortgage.

1170 When Mortgage to Take Effect.—Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time of the execution thereof.

1171 Effect of Non-Registration.—If the mortgage and affidavits are not registered, the mortgage is absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

1172 Requirements as to Registration of Conveyances.—Every sale of chattels, not accompanied by change of possession of the chattels sold, must be evidenced in writing, and such writing shall be a conveyance (or bill of sale) under the provisions of the Act, and shall be accompanied by an affidavit of an attesting witness of the due execution thereof, and an affidavit of the purchaser or his agent (if such agent is aware of all the circumstances connected therewith) duly authorized in writing to take the conveyance that the sale is *bona fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding the goods mentioned therein against the creditors of the bargainor, and the conveyance and affidavit shall be registered within five days, otherwise the bill of sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

1173 Mortgage to Secure Future Advances.—A mortgage of chattels to secure the repayment of future advances will be invalid unless the Act is complied with in the following particulars: (1) The

agreement for future advances must be in writing; (2) the advances must be for the purpose of enabling the borrower to enter into and carry on business; (3) the time of repayment must not be longer than one year; (4) the mortgage must be executed in good faith; (5) it must set forth fully by recital or otherwise the agreement; (6) it must be accompanied by an affidavit of the attesting witness; (7) and by an affidavit of the mortgagee that the mortgage sets forth the true agreement between the parties and is executed in good faith; and (8) it must be duly registered under the provisions of the Act.

1174 Mortgages to Secure Indorsers and Sureties.—Mortgages of this description must (1) be made in good faith; (2) and for a period not exceeding one year; (3) and must contain a true statement of the nature and extent of the liability intended to be provided against. They must (4) be duly registered under the provisions of the Act, accompanied by (5) an affidavit by an attesting witness as to the due execution of the mortgage, and by (6) an affidavit of *bona fides*.

1175 Contract to Give a Mortgage.— In order to evade the provisions of the earlier Acts relating to registration, it was sometimes arranged that the debtor should enter into a contract to give a mortgage. Such a contract is now, however, (by Section 11 of the Act) to be deemed to be a mortgage.

1176 Registration.—The chattel mortgage or bill of sale must be registered in the office of the Clerk of the County Court. The Clerk numbers every such instrument and enters the names of the parties in an alphabetical index. This index may be searched by any person on payment of a small fee.

1177 Where Goods Removed.—If goods which are subject to a chattel mortgage are removed from the county in which the chattel mortgage is registered, a copy of the chattel mortgage may within two months be filed in the office of the Clerk of the County Court of the county to which the goods have been removed.

1178 Renewal of Mortgages.—Annual Statement.—When a bill of sale has been registered, it does not require any further attention on the part of the purchaser, but a mortgage or a bill of sale intended to operate as a mortgage must be renewed yearly or it will cease to be valid against creditors, or subsequent purchasers or mortgagees, though it still remains, of course, valid as between the parties to it just as it would if it had never been registered at all.

1179 Form and Contents of Renewal.—The statement must (1) be in the form given in the Act or to the like effect, and (2) may be filed (in the office in which the mortgage is registered) at any time within the thirty days next preceding the expiration of the term of one year from the day of the date of the registration of the chattel mortgage, or the filing of the last renewal. This statement (3) must show the interest of the mortgagee in the chattels, (4) state the sums which have been paid on account of principal and interest, and (5) show the amount still due for principal and interest under the mortgage. It must (6) be accompanied by an affidavit of the mortgagee, that the statement is true and that the mortgage has not been kept on foot for any fraudulent purpose.

1180 Remedies of Mortgagee.—A chattel mortgage will, as a matter of course, contain a covenant by the mortgagor to pay the mortgage money and interest. If this covenant is broken the mortgagee may bring an action against the mortgagor to recover the amount due. Or (if the mortgage contains the usual clauses) the mortgagee may seize the mortgaged chattels and may either hold them until redeemed or sell them.

1181 Rent and Taxes.—The right of the landlord to distrain for rent is superior to the right of the chattel mortgagee, and the landlord therefore is entitled to seize and sell for rent overdue, even though the result may be to leave the mortgagee nothing. If, however, the mortgagee gets possession of the goods and removes them from the premises before the landlord distrains, the landlord has lost his right of distress. Taxes, of course, are a superior charge.

1182 Discharge of Chattel Mortgages.—A registered chattel mortgage may be discharged by filing in the office in which the mortgage is registered, a certificate (in the form provided by the Act) signed by the mortgagee stating that the moneys due under the mortgage have been duly paid and satisfied.

1183 Bills of Sale and Chattel Mortgage Act.—An abstract of the provisions of the Act as to registration is given in the Appendix.

CHAPTER LXVI.—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1184 Origin in Common Law.—"An assignment for the general benefit of creditors has long been known to the jurisprudence of England, and also of Canada, and has its force and effect at Common Law quite independently of any system of bankruptcy, or insolvency or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy, on which an adjudication might be founded." "The operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not, in fact, insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend upon the insolvency of the assignor." (Ontario v. Canada, 6 Reports 6.)

1185 Consent of Creditors.—A Common Law assignment being of the nature indicated above, it is evident that its effect could not depend upon the consent of creditors, since a voluntary tranfer to a trustee in trust to pay debts rateably could not bind the creditors either to accept the payments offered or to release the unpaid balance of their claims, or to refrain from proceedings in respect of the debts due them.

1186 If the creditors consented to the assignment and executed it, there was then a contract, the effect of which would be determined by the conventions and agreements contained in it.

1187 Passing Property.—A Common Law assignment will only pass the interests the assignor has in the goods and property transferred.

1188 Preferential Assignments.—At Common Law a debtor was entitled to prefer certain creditors, even though he thereby diminished or absorbed the property applicable to the payment of his other creditors, provided such preference was not fraudulent.

1189 Fraudulent Preferences are void under 13 Eliz., Chap. 5, as their object is to delay, defeat, or hinder creditors. They are also void if contrary to the provisions of the Assignment Act next referred to.

1190 Statutory Provisions.—Assignments for the benefit of creditors are regulated in Ontario by R. S. O., 1897, Chap. 147. An abstract of this statute is given in the Appendix.

1191 Effect of Assignments on Balance of Debt.—One point must be particularly noticed in connection with these voluntary assignments, as much misconception is current with regard thereto.

The indebtedness of a debtor to his creditor is the result of a contract either express or implied. It is the result of a promise by the debtor, made upon some consideration, to pay to the creditor a certain sum of money. The debtor is bound to carry out that contract, and the mere fact that he does not or cannot pay does not release him from that obligation. Still less does the fact that he has put into other hands all his available assets. Nothing can release him from his obligation to pay but *(a)* the payment of the amount agreed, or *(b)* the positive direction of some statute, or *(c)* the agreement of the creditor.

If a voluntary assignment is made by a debtor in insolvent circumstances, the creditor may or may not send in his claim to the assignee and may refuse to receive any dividend. In either event the contract between the debtor and creditor is not touched. Suppose A. owes B. $100. A. becomes insolvent and assigns. The assignment is a contract between A. and his assignee, to which B. is not a party, and which, therefore, cannot bind him or affect the contract A. made with him. If B. receives from the assignee $50 he applies it towards the indebtedness of A. But since the debt was $100 A. will still owe B. $50, and this remaining indebtedness will not be affected by the assignment, since B. was not a party to it, and will not be released by the statute, because the statute contains no provision releasing debtors. B. may, therefore, collect (if he can) the balance from A., or obtain judgment against A. for the amount, subject, of course, to the provisions of the Statute of Limitations.

CHAPTER LXVII.—STATUTES OF LIMITATION.

1192 Stale Claims Discountenanced.—The law has always required that those who seek its aid should come promptly and not sleep upon their rights. The Courts of Equity never countenanced stale demands and the courts of law found in the provisions of the Statute of Limitations, that remedy against the tardy creditor, of which it has been aptly said, "Time, whose scythe removes the witnesses by whose aid we could have repelled an ancient claim, with the same stroke cuts short the period within which the claim can be litigated." It is eminently fair that this should be the case.

1193 Statutory Provisions.—Limitations of the right of action are to be found in all branches of the law. The statute referring to actions in respect of Real Property is not given here.

1194 The Ontario Statutes with regard to limitations and acknowledgments will be found in the Appendix. (See R. S. O., 1897, Chap. 72, and R. S. O., 1897, Chap. 146.)

1195 The English Statute is 21 Jac. I., Chap. 16, which refers to actions

(a) Of account and upon the case (other than such actions as concern the trade of merchandise between merchant and merchant, their factors or servants.—These are governed by the Ontario Act).

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

(c) Of debt for arrears of rent.

1196 Actions on Specialties.—It is provided by these statutes that the period within which an action can be brought on a specialty (that is, on a contract under seal, such as a bond, or any other agreement, in which the parties have evidenced their contract in a sealed document) is the period of twenty years after the cause of action arose. (If the action is on the covenant in a mortgage executed after 1st July 1895, the period is only ten years.)

1197 Actions on Simple Contracts.—If the cause of action is on an ordinary contract, such as a note, or a book account, or for goods sold on a verbal contract or a contract by writing only without seal, the action must be brought within six years from the time the cause of action arose.

1198 Remedy of Creditor Barred.—It will be noticed that in all the provisions of the statute it is the remedy of the creditor which is barred, and the contract is still existing. True, it is not available for purposes of action, but it may be and often is, available for other purposes, and it becomes what has been called a Contract of Imperfect Obligation. It may be revived by an acknowledgment, and it may form a consideration in the case of an agreement to pay it, though the consideration in this case is rather moral than legal.

1199 When Time Begins to Run.—As the creditor is entitled to commence an action as soon as the cause of action arises, that is, as soon as the debtor has broken his promise to pay, the time begins to run from the first day on which he would have been entitled to enter an action.

1200 Thus, if the debtor promised to pay $100 on the 1st of May, 1891, and did not do so, the creditor could commence an action on the 2nd of May, 1891. Then the statute would commence to run as against the creditor on the 2nd day of May, 1891. The six years would expire on the 1st day of May, 1897, so that an action commenced on the 2nd day of May, 1897, would be too late.

1201 Allowance in Case of Disabilities.—If the creditor is an infant or insane when the cause of action arises, the Statute will not commence to run until the disability is removed. If the debtor is out of Ontario when the cause of action arises the statute does not begin to run until his return.

1202 But these exceptions only apply when they are applicable at the time the cause of action arose. If once the statute starts running no disability or absence will make it stop.

1203 Thus, if the debtor promised to pay $100 on the 1st day of May, 1891, and when that date arrived was in England, the statute would not start to run until he returned from England to Ontario.

1204 But if the debtor (in the case supposed) was in Ontario on the 2nd day of May, 1891, the statute will commence to run and will go on running notwithstanding that the debtor may have immediately thereafter removed to England, and the statute, having once started, will go on running during the whole of the six years, even though the debtor may not have returned to Ontario in all that time.

1205 Defence of Statute, How Raised.—If an action is brought on a claim the remedy in respect of which is barred by the statute, then the defendant must state in his pleading (or dispute note, or notice of defence, as the case may be) that the cause of action did not arise within the six (or ten, or twenty years) prior to the commencement of the action. If this is found to be the case, the action cannot be maintained.

1206 Effect of Acknowledgment.—If during the currency of the statute in respect of any cause of action the debtor or his duly authorized agent makes a written acknowledgment of the debt, or a partial payment either of principal or interest, a new statutory period will commence.

1207 What Acknowledgment Sufficient.—The written acknowledgment which will stop the running of the statute must contain some admission that the indebtedness is current. A writing which denies the indebtedness of the writer, or admits that the debt once existed but has been paid, or which in any other way repudiates any liability is not sufficient.

1208 If the writing does not contain an express promise to pay to, the acknowledgment of the debt must be in such terms that a promise to pay may be inferred in fact. A simple acknowledgment of the debt will be sufficient, because from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, there may be inferred a promise to pay on request.

1209 If the promise to pay is conditional, it must be shown that the condition has been performed, so that the promise has thus become absolute.

1210 Effect of Payment on Account.—The running of the statute is also stopped by a payment on account of either interest or

principal if the payment is so made that a promise to pay the principal or the balance may be inferred in fact.

1211 This being the effect of a partial payment, there must necessarily be a temptation to the creditor to save the whole debt from being "outlawed" (a debt is popularly said to be "outlawed" when it cannot be collected by an action at law) by entering up a small payment on account. For this reason an alleged payment must if disputed be clearly proved. If the contract is a note or bill of exchange or other writing, a memorandum of payment endorsed thereon will not of itself be sufficient proof of payment if it is signed only by the person to whom the payment is made. For this reason, when a payment is made on a contract of this kind and indorsed, it is advisable to have the indorsement signed by the person by whom or on whose behalf the payment is made.

1212 The creditor is entitled to refuse a partial payment of the amount due to him. This, of course, is not usual, but it is sometimes desirable, and may be resorted to when necessary.

1213 If the remedy in respect of a debt has already become barred by reason of the statute, it may be revived by a payment made by the debtor on the old debt. If between the debtor and the creditor there are several items of debt, as to some of which the statute had barred any action, a payment on account, if unappropriated by the debtor, may be applied by the creditor to an item due for over six years.

1214 Any sufficient acknowledgment or part payment will make a new starting point and the remedy will become finally barred at the expiration of six years from the date of the last acknowledgment or payment, as the case may be.

CHAPTER LXVIII.—MASTER AND SERVANT.

1215 The Contract at Common Law.—The law of master and servant is founded upon Common Law, but has been regulated by statute in various particulars. And in so far as the relationship of master and servant depends upon the Common Law, it may be created like any other Common Law contract, by word of mouth, or by writing, or by implication.

1216 The Contract as Affected by the Statute of Frauds.—The contract must be in writing, when the term of service extends over one year, and when, being for one year only, it commences at a period subsequent to the making of the contract. This is by virtue of the 4th Section of the Statute of Frauds, whereby it is provided that any agreement not to be performed within the space of one year from the making thereof, must be in writing, and be signed by the parties to be charged.

1217 The Contract as Affected by Statute Law in Ontario.—By the Revised Statute of Ontario, 1897, Chapter 157, an Act respecting Master and Servant, it is provided (1) In continuation of the ancient law of this country, that there shall be no slavery in any part of the Province of Ontario.

1218 Contract Not to Exceed Nine Years.—The 2nd Section of this Act provides that no voluntary contract of service or indentures are to be binding upon the parties, or either of them, for a longer term than nine years.

1219 Agreements to Share Profits.—It is sometimes difficult to tell whether a Common Law contract of hiring was for service only, or created a partnership. It being a general proposition that partnership is the outcome of an agreement to share profits, it might seem to follow that when the compensation of the person hired was to depend upon, and vary with, the rate of the profits earned in the business or undertaking in which he was employed, the contract would be rather a partnership than an agreement for service, notwithstanding that the intention of the parties might have been the other way. And in many cases this unintended result actually did follow.

1220 It will be seen, however, that this point has been so far settled by the Act now in force in Ontario, that the difficulty which existed at Common Law does not now exist as to any contracts which are within the provisions of the Act.

1221 Thus, by the 3rd Section it is provided that it shall be lawful in any trade, business or employment, to make agreements between master and servant, by which the servant is to share in the profits of the business in lieu of, or in addition to his wages or salary, and that such agreement shall not of itself create a partnership, nor shall it of itself give the servant any right to investigate the accounts of his employer for the purpose of finding out whether the statement of profits has been correct or not.

1222 Agreements of this kind, that is, agreements to share in the profit of a business, or to have remuneration depending upon the ratio of profit are deemed to be within the Act, unless they are expressly excepted therefrom by the terms of the instrument.

1223 Verbal Contracts.—By the 5th Section of the Statute, verbal as well as written, agreements between master and servant shall be binding, if the agreement is for less than one year; if for more than one year it will be remembered that they are within the 4th Section of the Statute of Frauds.

1224 Lien of Boarding-house Keepers, etc.—The Act further provides that tavern keepers and boarding-house keepers shall not keep the wearing apparel of any servant or laborer in pledge for

expenses to a greater amount than $6. But it is only as to the wearing apparel, not as to other property.

1225 Summary Trial of Disputes.—If after the termination of an engagement between the master and servant, any dispute arises, the matter may be dealt with by a Justice or Justices of the Peace, just as if the relationship still existed, but in this case the proceedings must be taken within a montn of the close of the contract of hiring.

1226 These summary proceedings may be taken before one or more Justices of the Peace, and the procedure to be adopted in these cases is provided in the Act, and provision is also made for appeals from the order or decision of any Justice or Justices, which appeals shall be to the Division Court held in the Division in which the cause of action arose, or in which the party or parties complained against, or one of them, resided at the time of the making of the complaint.

1227 Contracts as to Imported Labor.—By the 8th Section of the statute agreements made with residents out of Canada for service in Ontario are to be void as against a person so coming into the Province, except in the case of an agreement made with skilled workmen, nor does the provision apply to teachers and members of some other professions.

1228 Contracts Waiving the Statute Are Void.—Contracts of hiring which waive the application of the Act are to be void; that is, no workman, servant, laborer or mechanic or other person employed in any kind of manual labor is to be allowed to contract himself, or herself, out of the protection afforded by the statute.

1229 Compensation to Workmen.—The Legislature of Ontario has made elaborate provision for compensation to workmen if they are injured under certain circumstances.

1230 Where personal injury is caused to a workman:

(1) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for, or used in the business of the employer, or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence, or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of

the injury was bound to conform and did conform, where such injury resulted from his having so conformed, or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer, or by any person delegated with the authority of the employer in that behalf, or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any locomotive, engine, machine or train, upon a railway, tramway or street railway,

the workman, or in case the injury results in death, the legal representatives of the workman or any person entitled in case of death, shall have the same right to compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work.

1231 The limit of the amount of compensation which may be obtained under the statute is fixed at the estimated earnings during the three years preceding the injury of a person in the same grade of employment during these years, or the sum of $1500, whichever is larger.

1232 The Act makes provision in detail for the conduct of actions respecting injuries of this kind.

1233 Agency of Servant.—As the servant, within the usual scope of his employment, is the agent of his master, there are many parts of the duties and liabilities of master and servant in which the Law of Agency plays a material part.

1234 Within Scope of Duties.—For example, when the servant is carrying on the business of his master, he becomes the agent of the master with respect to third persons, and anything which he does and which is within the scope of his duties will bind the master, even though the servant had instructions not to do what he did.

1235 But Not Otherwise.—If, however, the act done by the servant for the master is not done under instructions, and is not in the usual course of the business which the servant is hired to perform, the master will not be liable.

1236 Thus, in a recent case where the motorman of an electric car pushed a newsboy off the step of the car, it was held that the railway company which employed the man was not liable for the

consequences of his act, because, although the motorman did it in what he conceived to be the interests of his employer, yet he had no instructions to do it, and it was not within the scope of the duties for which he was hired.

1237 Contracts in Restraint of Trade.—Contracts made with servants or apprentices by which, in return for having imparted to them the secrets of the business which they are desirous of learning, they have agreed not to practice or carry on the same business, trade or profession, are termed contracts in restraint of trade. These contracts are narrowly scanned by the court as tending to create monopolies. They have been dealt with, however, in the chapter on Illegal Contracts, and need not be further enlarged upon here.

1238 Determination of Contract.—If the contract between master and servant is specific as to the term during which the service is to continue, then the discharge of the relationship will, of course, depend upon the terms of the contract which created it. Any discharge which is not warranted by the terms of the contract will be improper unless the employer can justify it, as, for example, by showing a wilful disobedience of orders.

1239 If, however, the agreement is silent as to the date at which the relationship is to cease, the time of its duration, and the notice required to dissolve it, will depend upon the various circumstances connected with the service rather than on one universal rule.

1240 However, many occupations have their own customs with regard to hiring and discharge, and where it has been shown that there is a custom in any particular trade or occupation, dealing with the length of notice required to sever the relationship of master and servant, the decision in any case would be governed by the custom which has, by lapse of time, become a custom entitled to recognition as part of the unwritten law, or, as it is otherwise put, the parties will have been deemed to have made their contract with the knowledge of the custom, and with the intention to abide by the terms of the custom, so that the custom becomes part of their contract by implication.

1241 It will be impossible, therefore, to lay down any particular rule with regard to the time at which notice should be given to terminate the employment, the length of the notice required in each case depending upon its own special circumstances.

1242 In any event any notice terminating the contract must either be provided for by the terms of the contract, or must be such a notice as the Court may find to be reasonable.

1243 In cases of wrongful dismissal, the discharged employe is entitled to recover from the employer such damages as the nature of the case may warrant.

CHAPTER LXIX.—THE LAW OF REAL PROPERTY.

1244 Relation of Real Property Law to Commercial Law.—While the law of real property does not, strictly speaking, fall under the heading of Commercial Law, yet as it frequently happens that commercial undertakings have to be supplemented by or are made in connection with purchases or sales or mortgages of real estate, it seems desirable that some general statements relative to these matters should be given.

1245 It is impossible, of course, to here fully treat so extensive a subject and nothing can be given but the merest outlines. Fuller information must be obtained either from professional sources or from those works upon the subject which deal with it in its completeness.

1246 Antiquity of Real Property Law.—The law relating to the transfer of personal property differs materially from the law relating to the transfer of real property, and although an attempt has been made in the direction of assimilating these laws the attempt has not been entirely successful, and in any event is only local in its character. In the great majority of instances the law which governs transactions in real estate is the law that has governed them for hundreds of years, and much learning has necessarily accumulated on the subject. Of course there are many statutes of a modern date which have materially aided in simplifying titles and in rendering the transactions between buyer and seller and mortgagor and mortgagee easier and less costly. Notwithstanding all this, it is impossible to gain a thorough knowledge of real estate law without having recourse to the ancient common law doctrines and the statutes of early law history.

1247 The Statute of Frauds.—For example, in the purchase of real property, the sale must be by some written document or it is not in the absence of part performance enforcible. This effect is due to the operation of the Statute of Frauds which provides in the 4th Sec. that no action shall be brought upon any agreement for the sale of lands, or any interest in lands, unless the agreement is in writing and signed by the party to be charged. Thus the necessity for, and the effect of the initiatory step in the purchase of property (that is, the agreement of purchase) is derived from, and is settled by reference to, a statute passed in the reign of Charles II. as confirmed by the many decisions which have been given upon its terms.

1248 Signature to Contract.—It will be noticed that by the statute the agreement in writing is to be signed by the party to be charged. If, therefore, the agreement is not signed by both parties, it is enforcible or not, at the option of the party who has not signed it. A verbal agreement for the sale of lands is not enforcible by either party. A written agreement for the sale of lands is only enforcible against the parties who have signed it.

1249 Part Performance.—But this rule is subject to an exception. Courts of Equity have decided that where there has been a part per-

formance of the verbal contract it would be inequitable to allow the other party to deny the contract, and he will therefore be held bound by it though it may be oral or by writing not signed by him.

1250 For example, if on a verbal contract for the sale of land the purchaser enters into possession, this will be considered such a part performance as to take the case out of the statute, since the person taking possession could only have taken possession *(a)* as a trespasser or *(b)* under some contract, and as the law will not presume that he is a trespasser, it follows that the possession indicates a contract, and the terms of the contract may be shown by evidence, the fact of the existence of a contract having been established by the act of the parties. Such indefinite acts however as the payment of the whole or part of the purchase money will not amount to a part performance, and therefore the payment of money to bind the bargain is inoperative so far as sales of real property are concerned, though useful in respect of sales of personal property falling within the 17th Sec. of the Statute of Frauds.

1251 Part Payment.—It is a matter of common supposition that part payment of the price paid on the purchase of land will bind the bargain. This supposition is wholly erroneous and nothing will render such a bargain binding but a written agreement or part performance of a verbal agreement. Of course, many verbal contracts are carried out by the parties without any objection, but if objection is made to the completion of a verbal contract or, what is the same thing, a written contract not signed by the party who objects, the law will not enforce the contract which undoubtedly may exist, because such allowance is forbidden by the 4th Sec. of the Statute of Frauds.

1252 Examination of Title.—There is no presumption in favor of a purchaser that his vendor had a good title to the lands conveyed, and it is therefore necessary that a search should be made in order to ascertain what title the vendor has to the land he proposes to convey.

1253 Under the Land Titles Act.—If the land has been brought under the provisions of the Land Titles Act, which is similar to what is popularly known as the Torrens system of transfer, the search will be confined to entries made since the vendor purchased. That is to say, under the Land Titles Act a certificate of title given to the owner of the land is conclusive as to his title at that time. No search is necessary as to the state of the title before the certificate, the certificate of the Master, or Local Master, of Titles under the Act being con-

clusive as to the facts alleged in it. It is then only necessary to search for incumbrances or other matters registered against the land since the certificate was given.

1254 In Other Cases.—But in titles to land not affected by this Act it is necessary to make a search either from the time of the grant from the Crown or from some later period, according to the circumstances of the case and the degree of caution exercised in the matter, in order to see (1) that the vendor is the owner of the land, and (2) that there are no incumbrances existing against the property.

1255 It would be impossible here to indicate the nature of the search which has to be made, the difficulties which have to be contended with, or the method of making the necessary requisitions as between vendor and purchaser. These matters must be left to technical works upon the subject. It may be sufficient here to point out that when land is purchased a careful solicitor will have to make the following searches:

1. In the Abstract Index in the Registry office, for entries affecting the lot in question.
2. In the General Register, to see that there are no general registrations affecting the lands of the vendor or his predecessors (for at least ten years) in title.
3. A search in the Sheriff's office in order to see that there have been no sales of land under execution within the last six months, and that there are no executions in the Sheriff's hands affecting the lands of the vendor or of his predecessors (within the last ten years) in title.

   The searches in the General Registry and in the Sheriff's office are only required as to previous owners who have held the land within the last ten years (Neil v. Almond, 29 O. R. 63).
4. A search will be made in the office of the Treasurer of the city or county in which the lands are situated to ascertain

   (a) That there has been no sale for taxes within the past two years, and

   (b) That there are no arrears of taxes against the property.
5. A search in the office of the Clerk of the Municipality as to local improvements, drainage tax, or other burdens upon the land outside the regular taxes.

1256 Conveyance.—If the title has been examined and found satisfactory the purchase money can be paid over in return for a conveyance of the property. (It might be well to note here that at the time the conveyance is made and the purchase money paid the insurance policy, if any, should be also transferred and the consent of the insurance company obtained to the transfer.) The conveyance is a document under seal by which the land is transferred from the vendor to the purchaser.

1257 Form of Conveyance.—This conveyance may be in any form of words so long as the intention of the parties is clear as to the passing of the property to the purchaser, but as the legislature has appointed a form of words to be used for the purpose of conveyance, and as the form provided has an extended statutory meaning, it is the usual custom to follow the statutory form, not only in order that the conveyances of different parties may be more easily read and perused, but also because the form which the Legislature has adopted and authorized conveys with the greatest certainty the land and all the incidental matters which go to make up the property purchased by the vendee, such as houses and outbuildings and rights of way and water and other easements. These statutory forms will be found set out in R. S. O., 1897, Chap. 124.

1258 First will be found the date and the statement that the conveyance is made under the Act, and then will follow the names and descriptions of the parties. The conveyance, of course, is made by the vendor to the purchaser, and if the vendor is married it is necessary that his wife should be made a party to the conveyance and should execute it for the purpose of barring her dower in the land. If the property is owned by a married woman it is customary to make her husband a joint grantor with herself because, although by the various statutes relating to the property of married women, it is not in all cases necessary that the husband should join, yet because there may be some cases in which the wife alone could not convey it is usually a matter of prudence to join the husband in all cases. If there are any parties having any interest in the land they should be joined in order that they may grant their interest to the purchaser.

1259 After the description of the parties, and after the recitals (if any) are made, comes the statement of the consideration, (that is, the amount of the purchase money,) and then the operative words, as they are called, which denote the purpose of the document with regard

to the estate conveyed. These words indicate that the vendor (or grantor as he is otherwise called) grants to the purchaser the following lands "in fee simple." Formerly the grant was of the following lands to the purchaser "and his heirs and assigns forever," these words being the words technically used to describe the quality of the estate in fee simple, the highest estate known to the law, but the statutory form now is "grant to the purchaser in fee simple." Next follows a description of the land. This description not only states the number of the lot, whether farm or town or sublot, as it would appear in the books of the Registry office, but if the land described is a portion only of the lot, it should set out some further description as "the north half of the lot," or "the south-west quarter of the lot." If the piece described does not constitute an aliquot part of the lot it is then customary to describe it by metes and bounds, that is by starting at a certain point, usually the corner of the lot or some point otherwise easily identified, and then describe the direction and length of the boundaries of the piece conveyed.

1260 After the description of the parcels conveyed, it was customary to introduce a clause called the "habendum," which read as follows: "to have and to hold unto and to the use of the said party of the second part and his heirs and assigns, to and for his and their sole and only use forever, but subject nevertheless to the provisoes, conditions and stipulations contained in the original grant thereof from the Crown." This habendum clause, however, has been omitted from the statutory form and it is not necessary now to use it, (except in special cases).

1261 After the description on the statutory form, (or after the habendum, if that is used) follow covenants setting forth the right of the vendor to convey the land described, and for the estate limited, notwithstanding anything done by the vendor; and that the land is conveyed free from incumbrances; and that the vendor will execute any further assurances that may be necessary; and the grantor also releases all his claims in the land to the purchaser. These covenants as at present used only refer to the acts of the vendor and those claiming under him; they do not refer to the acts of previous owners.

1262 So far as the acts of the vendor are concerned, and to the extent to which the vendor is financially responsible, these covenants contain a ready answer to any claims which may be set up by those who claim the land (as against the purchaser) by virtue of some act

of the vendor, but it is not desirable to rely upon these covenants since the remedy under these is personal only and the vendor may not be financially responsible. At all events, they are not to be taken as substitutes for a careful search (as above set out) in the Registry Office, and of the various conveyances and mortgages and other documents produced.

1263 The bar of dower follows the covenants and release.

1264 Effect of Conveyance.—When the conveyance has been executed and delivered by the vendor, it vests in the purchaser the property described for the estate conveyed.

1265 Registration is not necessary to the validity of the conveyance, which as between the parties to it is good though it is never registered. It is also good without registration as against an execution creditor of the vendor, but it is not good without registration as against subsequent purchasers or mortgagees of the land for value without notice. If the subsequent mortgagee or purchaser has notice of the prior conveyance, then of course he will take subject to it. It is not, of course, wise to allow a conveyance to remain unregistered, since it is liable to be defeated by subsequent documents, as shewn above.

1266 Mortgage.—A mortgage has been defined as a defeasible conveyance of land. It is an instrument which is made use of for the purpose of transferring land, as a pledge or security for the repayment of money. The same remarks as to forms which were made in respect of the conveyance will apply here. Apart from the statutory provisions the form is immaterial, but in this case also there is a Statute, R. S. O., 1897, Chap. 126, passed for providing a uniform document having an extended or statutory meaning, and the effect of which has been settled by judicial decision.

1267 Under a mortgage the land is conveyed to the person to whom the money is owing, though the conveyance is not absolute, but is subject to a defeasance clause which is known as the proviso for redemption. The date, description of the parties, consideration and description of the land, will need no further remark than was given to them in the case of conveyances.

1268 Bar of Dower.—In mortgages the bar of dower comes immediately after the description of the land, whereas in conveyances it comes after the release by the vendor which follows the covenants.

1269 Proviso for Redemption.—In the mortgage after the release of dower comes the proviso for redemption "provided this mortgage be void on payment of $....." If the moneys set out in the proviso for redemption are paid, then the property returns once more to the mortgagor. This return is not effected without the execution of a document which is either a re-conveyance properly so called, or else a statutory certificate of discharge, which has, however, (when registered) the same effect as a re-conveyance.

1270 The Covenants contained in a mortgage are not limited to acts of the mortgagor, but since the responsibility of the mortgagor is measured by the amount of the money which is payable under the proviso for redemption, the covenants cannot have any greater effect, and therefore their form or strictness or severity may be in practice disregarded, since the liability cannot be greater than the liability of the mortgagor under his covenant to pay the mortgage moneys.

1271 Re-Conveyance.—If the moneys payable under a mortgage are paid whether at or after maturity, the re-conveyance of the land is effected either as has been said by conveyance properly so called or by a statutory discharge which when registered (but not otherwise) has the effect of a re-conveyance.

1272 Remedies of Mortgagee.—But if the mortgage moneys are not paid according to the tenor of the proviso for redemption then there accrue to the mortgagee several forms of remedy, either one of which he is entitled to pursue; though under present statutory regulations he is not entitled to pursue all of them concurrently, unless by leave.

1273 Action on Covenant. – (1) The mortgagee is entitled to bring a personal action against the mortgagor to recover the amount of money payable under the mortgage in pursuance of the contract to that effect in the mortgage contained. The procedure in this case will be the same as in other personal actions, and if judgment is recovered against the mortgagor and execution issued, this execution will bind the goods and lands of the mortgagor, and in this way the claim of the mortgagee may be satisfied out of other lands (if any) belonging to the mortgagor and not included in the mortgage.

1274 (2) **Exercise of Power of Sale.**—The mortgagee, after default in payment according to the stipulations contained in the mortgage, is entitled to serve upon the mortgagor and his assigns a written demand for payment, and a notice to the effect that if payment

is not made according to the demand the lands will be sold pursuant to the power in that behalf reserved in the mortgage.

1275 After the expiration of the term limited by the notice, and which of course must be the term provided for in the mortgage, the mortgagee may offer the land for sale, usually at public auction, but if the power of the mortgage provides for a private sale then the land may be sold in that way. It is customary, however, and always safer, to offer the land, at first at all events, for sale at public auction.

1276 If the land is sold the mortgagee may make a conveyance to the purchaser and, in the absence of anything to invalidate the sale, the conveyance to the purchaser will pass all the estate of the mortgagee and mortgagor in the land. And if the wife of the mortgagor has joined in the mortgage to bar her dower, the conveyance to the purchaser will pass the land free of any claim of hers.

1277 The mortgagor is entitled to take out of the purchase money received for the land (1) the costs incurred in selling, and (2) the amount of principal and interest due to him on his mortgage. If there is any balance left it will be applicable (1) to the payment of the claim (if any) of the morgagor's wife in respect of her dower in the land, and (2) to the mortgagor or his assigns.

1278 Dower Allowance on Sale.—The wife of the mortgagor is entitled to claim out of the surplus purchase money the value of her dower in the whole land and if there is any difficulty or dispute as to this amount the mortgagee may pay the surplus into court. (See R. S. O., 1897, Chap. 164.)

1279 Distress for Interest.—(3) The mortgage usually contains a proviso allowing the mortgagee to distrain for interest in arrear. Under this clause the mortgagee is entitled to enter upon the lands and seize the goods and chattels of the mortgagor to satisfy the arrears of interest.

1280 Taking Possession of Mortgaged Lands.—(4) The mortgagee, if the premises are in the possession of a tenant, may give notice to the tenant, requiring the rent to be paid to the mortgagee, or if the premises are in possession of the mortgagor, he may bring an action of ejectment and turn the mortgagor out and himself take possession. Whether he takes possession in this way under ejectment proceedings or by notice to the tenant, he is then said to be a mortgagee in possession. He is responsible for all rents collected by him or which he might have collected save for his own default.

1281 A mortgagee in possession who assigns his mortgage still remains liable to account to the mortgagor for the defaults of his assignee. It is for this reason that the Act which compels the mortgagee to assign a mortgage which has been paid off, creates and enacts an exception where the mortgagee has been in possession.

1282 Foreclosure.—(5) A further remedy, and which in some respects is a combination of the others, is found in the Statutes and Rules of Court relating to foreclosure proceedings. In a writ commencing a foreclosure action, the plaintiff is entitled to ask not only that the defendant may be foreclosed of his equity of redemption, but that there be an order for immediate payment of the amount due under the mortgage, and an order for immediate possession of the land by the mortgagee, and there may be also under the same proceedings a sale of the property if desired by the mortgagee, or if desired and paid for by the mortgagor.

1283 The remedy in foreclosure therefore embraces all the other remedies to which a mortgagee is entitled, and the only reason the proceeding by foreclosure is not more common is because of the length of time which is required to complete the proceedings, the law allowing a mortgagor six months after the amount due under the mortgage has been computed to finally redeem. It is not that this period is longer than the mortgagor requires but it is certainly longer than the mortgagee desires to wait, and therefore foreclosure affords a remedy which is inferior in that respect to the proceeding under the power of sale.

1284 After the expiration of the period of time allowed in foreclosure proceedings for the payment of the mortgage money the mortgagor, if in default, is by a final order of foreclosure barred and foreclosed of all his equity of redemption in the land, and upon the making of this final order the mortgagee becomes the owner of the property. If, after foreclosure is completed, he sells the property he is entitled to keep the whole of the purchase money, notwithstanding that it is much larger in amount than the total of the mortgage claim.

1285 It will be noticed that there is a difference in this respect between the sale under the power of sale, and the sale which the mortgagee may make after foreclosure proceedings. In the first instance, any surplus over the amount of the mortgage debt must be accounted for by the mortgagee, and will belong to the mortgagor, or his assigns, or his wife, as the case may be; whereas, after there has been a final order in foreclosure the surplus, if any, resulting from

a sale will belong to the mortgagee, or rather there will be no such thing as a surplus because the mortgage debt will not be considered in relation to the matter at all, the mortgagee now being owner not mortgagee.

1286 Discharge of Mortgage.—Upon the payment of the amount due under the mortgage the mortgagor is entitled to receive from the mortgagee, at the expense of the mortgagor, either a reconveyance of the property in question, or what is more common, a statutory discharge. This statutory discharge is in the form of a certificate by the mortgagee that all moneys due, or to grow due, under the mortgage, have been paid and satisfied, and upon the execution of the statutory discharge, and upon its registration, the land comprised in the mortgage will be re-conveyed from the mortgagee to the persons who may be entitled to the equity of redemption. The statutory discharge is not in itself a re-conveyance, but it operates as a re-conveyance by force of the direction in the statute. If the mortgagee has not been in possession of the mortgaged premises the mortgagor, on paying the mortgage money, is entitled to ask for an assignment of the mortgage to himself or to a nominee. This assignment, of course, like the discharge or re-conveyance, will be at the expense of the mortgagor.

1287 Other Forms of Transfer.—There are other forms of contracts by which land may pass from one person to another, and land may also pass from a person dying intestate, by virtue of the right of inheritance. But the scope of this work will not allow of the going into matters of this kind with the detail which alone would render them serviceable to the general reader.

1288 Property may also pass from one person to another by will. While the subject of wills cannot of necessity be gone into here, being out of place in a work on commercial law, yet for the information of the reader some useful directions as to the making of a will, which has often to be done in a hurry, and done without the assistance of professional services, will be found in the Appendix.

CHAPTER LXX.—LANDLORD AND TENANT.

1289 Contract of Tenancy.—The relationship of landlord and tenant may be created like any other contract, either expressly or by implication, and if expressly, either by document under seal, or by writing without seal, or verbally.

1290 Various Kinds of Tenancy.—There are three kinds of tenancy, that is, tenancy at will, tenancy for a fixed period or term, and tenancy from year to year, or quarter to quarter, or month to month, or week to week.

1291 Form of Contract.—While no particular form of agreement is necessary to create the tenancy, yet if that tenancy is for a period exceeding three years, it must be by a lease under seal.

1292.—A tenancy from year to year, or a tenancy for a period less than three years, may be created by parol.

1293 The Incidents of the Contract.—The incidents implied by the relationship of landlord and tenant are the liability of the tenant to pay rent to the landlord in respect to the premises occupied, and the right of the landlord to distrain in respect of arrears of rent.

1294 The Right to Make Distress is one which is not given to any other private creditor in respect of indebtedness due to him, unless in cases of positive agreement between the parties providing for such a remedy, but the landlord has this right as inherent to his position irrespective of the agreement made between the parties.

1295 Right of Tenant to Exclusive Possession.—After the creation of a tenancy for whatever period, the tenant is entitled to the exclusive possession of the premises, subject only to such rights, if any, as may have been reserved to the landlord by the lease, and subject to the right of the landlord to enter upon the premises during reasonable hours for the purpose of reparation, and for the purpose of demanding the rent.

1296 Usual Contents of a Lease.—The most convenient form of representing the salient points of this branch of the law will be by going through the form of an ordinary statutory lease, and discussing the contents in order.

1297 The Short Forms of Leases Act.—The statute which provides for short forms of lease is found in the Revised Statutes of Ontario, 1897, Chap. 125. Under this Act the forms given in the second schedule to the Act are equivalent, the short form conveying the effect and meaning of the long form.

1298 The lease commences with the date and the description of the parties, and the statement that in consideration of the rent agreed to be paid, the lessor demises to the lessee a certain parcel of land. With regard to the description of the land, it must be specific if the lease is to be registered, and leases for a term of seven years and upwards must be registered, (under R. S. O., 1897, Chap. 136, Sec. 39). The description of the property, that is, of the land, will include the houses or buildings erected upon it, and it will not be necessary, if the lease is by deed, to describe the buildings, but merely to describe the land upon which the buildings are erected.

1299 The next proviso in the lease states the length of the term during which the lease is to exist. This term is, of course, within the agreement of the parties and may be of any length.

1300 When the lease is made for any particular term, both parties will be bound to carry on or allow the tenancy during that term, unless it is terminated by mutual consent, or in pursuance of some power reserved to that end in the lease.

1301 Notice of an intention to leave the premises at the end of the term created by the lease is not necessary, unless so provided expressly in the lease itself, since the lease provides for the end of the term, and it ends then without notice.

1302 Notice is required to terminate a yearly, quarterly, monthly, or weekly tenancy, but it is not required to terminate the tenancy under a lease, which expires by virtue of the provision of the lease.

1303 The commencement of the term must be definitely stated. (The distinction between freehold and leasehold estates lies in this that in freeholds, even for an interest less than a fee simple, the estate continues for a period, however long or short, until an event which may or must happen, but the date of the happening of which is not known or fixed or determined; while in leaseholds, the interest of the tenant ceases after a definite and pre-determined period.)

1304 Then will follow the statement of the amount of rent payable, and the dates and times upon which the payments are to be made. Payments of rent must be made promptly as they fall due. They are payable upon the demised premises or to the landlord, and if not paid may be recovered either by distress or by action, or the tenancy may be determined, and the landlord may re-enter.

1305 Then follow the covenants, which in the short form are as follows:

(1) The lessee covenants with the lessor to pay rent.

We have already spoken of the necessity for prompt payment of the rent reserved by the lease, and of the remedies which exist with regard thereto. So far as the remedy under the covenant is concerned, it is by an action taken against the lessee in the proper court, that is the court having jurisdiction over actions of the particular amount, and is pursued in the ordinary way to judgment and execution.

1306 (2) And to pay taxes, except for local improvements.

This, of course, is a matter of agreement between the parties, and while the statutory form is as given, it is often reversed by the agreement made between the landlord and the tenant, the landlord frequently paying the taxes, the tenant paying the rent only.

If the landlord agrees to pay the taxes and does not pay them, and the tenant is compelled to pay them, he may deduct the amount out of the rent.

1307 (3) And to repair; reasonable wear and tear, damage by fire, lightning and tempest only excepted.

The provisions of this covenant are somewhat extensive.

Leaving out the dilapidation caused by fire, lightning or tempest, the tenant, if he agrees to this covenant, will have to sufficiently repair, maintain, and keep the premises in good and substantial repair.

This includes all repairs, no matter how extensive or expensive, or how caused, with the exceptions noticed.

1308 (4) And to keep up fences.

This is to keep in repair and make anew any parts which require to be renewed in a good and husbandlike manner.

1309 (5) And not to cut down timber.

This, of course, is with the exception of timber for necessary repairs or fire-wood, or except with regard to any cutting or clearing which may be arranged for between the parties.

1310 (6) And that the lessor may enter and view state of repairs, and that the lessee will repair according to notice in writing, reasonable wear and tear, and damage by fire, lightning and tempest only excepted.

As to this the remarks made upon covenant No. 3 will apply.

1311 (7) And will not assign or sub-let without leave.

This, of course, in order that the landlord may know the class of tenant by whom the building is to be occupied.

The first tenant might be a desirable one; if he was allowed to assign his lease without leave, the assignee might possibly be one whom the landlord would not desire to see upon the premises.

1312 (8) And that he will leave the premises in good repair, reasonable wear and tear, and damage by fire, lightning and tempest only excepted.

This is also to be construed with the remarks under No. 3.

With these three covenants, that is, 3, 6 and 8 in the lease, the tenant is bound to keep up the repair of the premises during his tenancy, and is bound also to leave it in repair.

1313 If the landlord agrees to make the repairs, that is, if these covenants are not inserted, but in their place is put a covenant by the landlord to make all necessary repairs, then it will be the duty of the landlord to make such repairs as are required by the state of the premises. If he does not do so the tenant is not allowed to aggravate the damages by sitting still; he must make the repairs himself and charge the amount to the landlord. For example, if a landlord agreed to keep the premises in repair, and the roof leaked and the landlord refused to repair it, the tenant would not be justified in allowing the roof to continue leaking, whereby his carpets and furniture were ruined, and then charge the landlord with the loss. It would be the duty of the tenant to himself have the repairs made and charge the amount against the landlord. The landlord, however, is not bound to repair them unless in pursuance of an express agreement by him to do so.

1314 If neither party agrees to repair the premises, neither party is bound to repair them, no matter how dilapidated the premises may be.

1315 (9) Provided the lessee may remove his fixtures.

It will be instructive to notice the extended form of this covenant. The removal must take place at, or prior to, the expiration of the term, and the tenant may remove fixtures, plant, machinery, shelving, counters or other articles upon the said premises in the nature of trade, or tenant fixtures, but the lessee shall do no damage to the premises or shall make good any damage he may occasion.

1316 (10) In the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt.

This, of course, is if the premises are rendered unfit for the purposes of the said lessee.

1317 (11) Proviso for re-entry by the lessor on non-payment of rent or non-performance of the covenants.

This covenant, being in derogation of the rights obtained by the tenant, is one which must be strictly pursued, and as to which relief is given in respect of certain breaches of contract under which the landlord would be entitled to re-enter at Common Law under the provisions of the covenant.

The remedy being a severe one, a provision for relief is made under the Landlord and Tenant Act, which will be dealt with subsequently.

1318 (12) The lessor covenants with the lessee for quiet enjoyment.

That is, that the tenant shall not be disturbed in his occupation of the premises, either by the landlord or by anyone claiming under him.

1319 Other Covenants.—The foregoing are all the covenants provided by the statute. It will be noticed that there are a number of matters as to which provision is often made in a lease which are not included. As to these matters, the parties are left to their own convention, and whatever they may agree upon and incorporate in the lease will of course be binding upon them.

1320 Verbal Letting.—If a lease is made verbally it cannot be for a period longer than three years; it is good for any period up to that. Verbal leases, however, are not desirable inasmuch as the intention of the parties is left to depend upon memory only, and disputes are apt to arise between them as to what was really agreed upon at the time the tenancy was created.

1321 Distress for Rent.—If the rent is not paid and the landlord does not re-enter and does not bring an action upon the covenant, he has, as stated, a remedy by distress. This remedy is used by means of a warrant issued under the hand of the landlord, and directed to a bailiff, commanding him to seize and take the goods of the tenant, and out of the proceeds thereof to make the rent which is due.

1322 Upon the receipt of this warrant the bailiff (or landlord in person if he so desires) comes to the demised premises and seizes the goods and chattels which are there and places someone in possession of the goods, taking an inventory and making a valuation. The goods are afterwards sold either with or without removal as the circumstances of the case may render necessary, and out of the proceeds of the goods sold the landlord is entitled to recover his claim and costs. As to the amount of the costs which are chargeable in respect to the distress, they will be found regulated by R. S. O., 1897, Chapter 75. (See also Sections 1333—1337).

1323 The Landlord and Tenant Act.—Another statute relating to the subject under discussion is the Act respecting the Law of Landlord and Tenant, R.S.O., 1897, Chap. 170.

1324 This Act deals with the relation of landlord and tenant, and declares by Section 3 that a reversion or remainder would not be necessary to create the relation of landlord and tenant, and provides

also in Sections 4 to 8 as to the apportionment of rent and other periodical payments, and by Section 9 for the apportionment of a condition of re-entry. Section 10 provides for the merger of reversions.

1325 By Section 12, consent to the assignment of a lease may be given by the guardian of an infant or the committee of a lunatic with the approbation of the Judge of a Surrogate Court.

1326 Provision as to Re-entry.—Section 11 provides that every demise after the twenty-fifth day of March, 1886, whether by parol or in writing, unless otherwise agreed, shall be deemed to include an agreement that if rent is in default for fifteen days the landlord may re-enter.

1327 Notice Before Re-entry.—By Section 13, the lessor must serve upon his tenant written notice specifying in what particular the tenant has committed a breach of the covenant or condition before the lessor has a right to re-enter. The lessee may within a reasonable time after the notice make compensation, and then the right to re-enter shall not be exercised.

1328 Relief Against Re-entry.—The court is to have power to grant relief against any re-entry if in the circumstances of the case relief should be granted; but the relief shall not be granted in respect to a mining lease, or in respect to a covenant or condition against assigning or underletting of the land leased, or the condition for forfeiture at bankruptcy, or on the taking in execution of the lessee's interest.

1329 By Section 14, a license to do any act can only apply to the particular or specific breach in respect to which it was given, and shall not be a continuing license. And by Section 16 a waiver is not construed as a general waiver unless the intention to that effect appears.

1330 Length of Notices to Quit.—Section 18. A tenancy from week to week shall require one week's notice to quit ending with the week. In tenancies from month to month, one month's notice to quit ending with the month. (In yearly tenancies the notice must be half a year's notice, though this is not provided by the Act.)

1331 Recovery of Possession by Landlord.—If one half year's rent is in arrear, the landlord may recover possession of the premises, if he has a right to re-enter for non-payment of rent. But with regard to this right of the landlord, there are several provisions of a technical kind to which regard must be had if proceedings are to be taken.

1332 Security by Tenant.—By Section 26, under certain circumstances the landlord may give notice to the tenant to find security.

1333 Exemptions From Seizure.—By Section 30, the goods and chattels exempt from seizure under execution, are also to be exempt from seizure under distress, but a person claiming the exemption shall point out the goods and chattels as to which he claims exemption, and in any event in the case of a monthly tenancy the exemption shall only apply to two month's arrears of rent.

1334 What Goods May Be Seized.—(31) The landlord is not entitled to distrain upon the goods of any person except the tenant or other person liable for rent although the same are found on the premises; but this restriction shall not apply to an execution creditor, or a mortgagee, or to the holder of a lien note, (to the extent of the lessor's interest in the goods covered by the lien note), or in the case of a relative of a tenant living on the premises.

1335 (32) If a tenant claims the benefit of the exemptions from distress, he must give up possession of the premises, or must be ready and offer to do so.

1336 When a landlord desires the seizure of exempted goods he shall after default, and before or at the time of seizure serve a notice to that effect. The notice may be served either upon the tenant or upon some grown up person residing on the premises, or if this cannot be done, service is effected by posting up the paper on some conspicuous part of the premises.

1337 Sale of Crops.—Growing or standing crops seized for rent may at the option of the landlord or on the request of the tenant, be sold like other goods, and it will not be necessary for the landlord to harvest the same, the purchaser of such goods being liable for the rent of the lands on which the same are growing, until the crop is removed.

1338 Set Off Against Rent.—If the tenant has a claim against the landlord, he may set it off against the rent, and give notice thereof to the landlord.

1339 Assignment by Tenant for Benefit of Creditors.—If the tenant makes a general assignment for the benefit of creditors, the lien of the landlord for rent shall be restricted to the arrears of rent for one year previous to the assignment and the amount for three months following the assignment, and from this so long as the assignee retains possession, which he may do by giving the landlord notice in writing of his election to remain tenant.

1340 Demand of Rent Before Re-entry.—Where the landlord has by law a right to re-enter for non-payment of rent, the strictness required by the Common Law is dispensed with, provided the demand (unless the premises are vacant) be made fifteen days, at least, before entry, such demand being made on the tenant personally anywhere, or on his wife, or some other grown-up member of his family, on the premises.

1341 Protection of Goods of Lodgers From Distress.—By Section 39, the goods of lodgers are exempt from distress for rent due from the tenant of the house in which they lodge or board. Claim must be made by the lodger, and he must be willing to pay the landlord, or his bailiff, the amount due to the tenant from the boarder or lodger.

1342 Over-holding Tenants.—If a tenant remains in possession of the property of the landlord after his tenancy has been determined either by effluxion of time or by notice properly given, the landlord may proceed against him, under Chapter 171, of R. S. O., 1897, and obtain a warrant directing the sheriff to eject the over-holding tenant.

1343 The course of procedure is provided by the Act, and forms of writ of possession are given.

APPENDIX.

A number of statutes, or parts of statutes, of frequent occurrence or special importance from a mercantile point of view have been placed together in an Appendix in order not to unduly extend the text. This Appendix will also contain other matters referred to in the text, and placed here for the information of the student.

INTERPRETATION.

In contracts, unless otherwise provided, the word "month" shall mean a calendar month; and the word "year" a calendar year. (See R. S. O., 1897, Chap. 1, Sec. 8, Sub.-Sec. 15.)

R. S. O., 1897, CHAPTER 146.

An Act respecting Written Promises and Acknowledgments of Liability.

1 No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of the Act passed in England, in the twenty-first year of the Reign of King James the First, any case falling within the provisions of the said Act respecting actions

(*a*) Of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;

(*b*) On simple contract or of debt grounded upon any lending or contract without specialty, and

(*c*) Of debt for arrears of rent;

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

2 Where there are two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said Act 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.

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

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

5 The said Act of King James and this Act shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off on the part of any defendant.

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

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

8 No special promise made by any person to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized shall be deemed invalid to support an action, or other proceeding to charge the person by whom the promise has been made by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document.

9 Section 17 of the Act passed in England in the 29th year of the Reign of King Charles the Second, entitled "An Act for the Prevention of Frauds and Perjuries," shall extend to all contracts for the sale of goods of the value of $40 and upwards, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery, or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

ACT TO AMEND THE MERCANTILE LAW, R. S. O., 1897, CHAP. 145.

1 This Act may be cited as "The Mercantile Amendment Act."

2 Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty shall be entitled to have assigned to him, or a trustee for him. every judgment, specialty, or other security which is held by the creditor in respect of such debt, or duty, whether such judgment specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty.

3 Such person shall 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 order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has paid such debt or performed such duty; and such payment or performance so made by such surety shall not be a defence to such action or other proceeding by him.

4 No co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor by the means aforesaid, more than the just proportion to which as between those parties themselves, such last mentioned person is justly liable.

BILLS OF LADING.

5 Whereas, by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading, continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods, in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonq fide* holder for value should

not be questioned by the master or other person signing the same, on the ground of the goods not having been laden, as aforesaid;

Therefore, it is enacted as follows·

(1) Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned passes upon, or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities in respect of the goods as if the contract contained in a bill of lading had been made to himself.

(2) Nothing in this section contained shall prejudice or affect any right of stoppage in transitu or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

(3) Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel or train shall be conclusive evidence of the shipment as against the master or other person signing the same, notwithstanding that the goods or some part thereof may not have been so shipped, unless the holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary; but the master or other person so signing may exonerate himself in respect to such misrepresentation, by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or of some person under whom the holder claims.

ABSTRACT OF REMAINING SECTIONS.

6 Goods, wares, and merchandise include for the purposes of this Act timber, boards, deals, staves, and other lumber.

7 Cove receipts and bills of lading,
given by cove-keeper, etc.,
For grain or goods, wares, etc.,
Deposited, etc.,
Or shipped, etc.,
May be transferred to any private person by indorsement,
As collateral security,
(But not for antecedent debt, see Section 9.)
And such indorsee may sell the goods
(But not without notice to owner, see Section 9,)
If the debt is not paid.

8 Cove-keeper, miller, wharfinger, or master of vessel may give a cove receipt, etc., though he himself is the owner of the goods.

9 The goods tranferred under Sec. 7 shall not be held in pledge for more than six months. The debt must be contemporaneous with transfer. The goods must not be sold without notice.

10 Timber shall not be held in pledge over twelve months. The debt must not be antecedent to transfer, and the goods must not be sold by pledge without notice.

(2) Such sale shall be by public auction after notice.

11 Advance on cove receipts, etc.,
Shall give
To the person making the advance
A lien on the grain, lumber, etc.,
Which shall be prior to the claims of
Any unpaid vendor
Or other creditor,
Except claims for wages of labor.

12 Provisions as to transfer of warehouse receipts for crude petroleum issued by incorporated companies.

ABSTRACT

Of Act Respecting Assignments by Insolvents. R. S. O., 1897, Chap. 147.

1 Confessions or warrants to confess judgments given by an insolvent
- (*a*) Voluntarily, or
- (*b*) By collusion with a creditor with intent to
  - (*a*) Defeat, or
  - (*b*) Delay, or
  - (*c*) Give a preference to

  Creditors, or a creditor,

Shall be null and void as against creditors,
And ineffectual to support judgment or execution.

2 (1) (Subject to Sec. 3.) Gifts, conveyance, assignment or transfer delivery over of goods, etc., made by an insolvent with intent to defeat, hinder, delay or prejudice his creditors shall be void.

(2) (Subject to Sec. 3.) Similar gifts to give a creditor an unjust preference shall be void.

(3) (Subject to Sec. 3.) Such preferences shall, if impeached by action within 60 days, be presumed to have been made with intent to prefer, whether made voluntarily or under pressure.

(4) (Subject to Sec. 3.) Such preferences shall, if the debtor assigns for benefit of creditors within 60 days, be presumed made to prefer, whether made voluntarily or under pressure.

(5) Creditor includes surety and indorser, who would upon payment to principal creditor, become creditor of principal debtor.

3 Section 2 not to apply to
- (*a*) Assignment to the sheriff, or
- (*b*) (With the consent of a majority of creditors for not less than $100) to an assignee (resident in Ontario),

  For the purpose of paying creditors rateably,
- (*c*) *Bona fide* sales or payment in ordinary course to innocent purchasers or parties,
- (*d*) Payment of money to a creditor,
- (*e*) *Bona fide* conveyance or transfer of goods, etc.,

  For money, or
  As security for present money advance, or
  In consideration of present sale,

  If money paid or goods, etc., sold bear fair relative value to the consideration therefor.

(2) Transfer to creditor of consideration for sale invalid.

(3) General assignment not valid under (*a*) or (*b*), valid only unless and until an assignment made under (*a*) or (*b*).

(4) A security given up in consideration for a void payment shall be returned or its value made good.

(5) (*a*) Provisions of Wages Act (R.S.O., Chap. 156) not affected.
(*b*) Payments for which valid securities given up not affected, unless value of security restored.
(*c*) Substitution of securities of equal value not affected.
(*d*) Securities protected if given for past indebtedness and a present advance to save the debtor.

4 Assignee must reside in Province.

5 Form of assignment.

6 All assignments for general benefit of creditors are subject to this Act.

7 Where debtors owe individual and partnership debts, claims shall rank
1st. Upon the estate contracting the debt,
2nd. Upon the others, but only after the creditors of the others have been paid in full.

8 Appointment of substituted assignee.

9 (1) Assignee to have exclusive right to sue for rescission of fraudulent conveyances.

(2) But if he refuses a creditor may proceed,
Upon a judge's order,
Upon terms of indemnity, etc.,
And take the benefit of his proceedings to the full amount of his claim and costs.

10 Provision for following proceeds of property fraudulently transferred.

11 Assignments under this Act to take precedence of
(*a*) Judgments, and
(*b*) Executions not completely executed by payment subject to lien of first or only execution creditor for costs.

12 Assignment may be amended by order of a judge.

13 (1) Notice of assignment must be published
(*a*) In *Ontario Gazette* once, and
(*b*) In one newspaper, in the county, twice.
Assignments under this Act are not within R.S.O., 1897, Chap. 148.

(2) Assignment must be registered within five days from execution (with affidavit of witness) in office of Clerk of County Court of county
(*a*) Where assignor (if in Ontario) lives, or
(*b*) Where goods (or principal part) are if assignor out of Ontario.

(3) In Muskoka, Parry Sound, Nipissing, Algoma, Manitoulin, Thunder Bay and Rainy River, and in Haliburton, assignment to be filed as chattel mortgages are filed.

14 Penalty provided for neglect of publication or registration.

15 Mode of compelling publication or registration.

16 Assignment not invalidated by omission to publish or register.

The remainder of the Act, Sections 17 to 39, refer to the duties and powers of the assignee; the meetings of creditors, their voting power; the proof and contestation of claims, and other matters.

CHATTEL MORTGAGES.

The principal provisions of the Bills of Sale and Chattel Mortgage Act (R. S. O., 1897, Chap. 148) are as follows:

2 Mortgages of chattels not accompanied by
(*a*) An immediate delivery, and
(*b*) A continued change of possession
shall within five days from their execution be registered, together with the affidavit of an attesting witness,
(*a*) Of the due execution, and
(*b*) Of the date of execution,
and an affidavit
Of the mortgagee,
Or one of several mortgagees,
Or of the agent of the mortgagee, if such agent
(*a*) Has knowledge of all the circumstances (which knowledge must be alleged in the affidavit), and
(*b*) Is properly authorized in writing (which authority or a copy must be registered),

3 Which shall state
  (*a*) That the mortgagor is indebted to the mortgagee in the sum stated in the mortgage,
  (*b*) That the mortgage was executed in good faith, and
  (*c*) For the express purpose of securing the payment of money justly due or accruing due,
  (*d*) And not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing his creditors from obtaining payment of any claim against him.

4 The mortgage shall take effect upon, from, and after the execution thereof.

5 Unregistered mortgages to be void against creditors and subsequent innocent purchasers or mortgagees for value.

6 Every sale of goods
  (*a*) Not accompanied by an immediate delivery, and
  (*b*) Followed by actual and continued change of possession,
must be in writing and accompanied by
  (*a*) The affidavit of a witness, and
  (*b*) The affidavit of *bona fides* substantially as in the 2nd and 3rd Sections,
or be void as in Section 5.

7 Mortgages to secure future advances must also be registered,
  And are subject to special provisions as to their contents, etc.

8 Mortgages to secure indorsers and sureties must also be registered,
  And are subject to special provisions as to their contents, etc.

11 A contract to give a mortgage shall be deemed a mortgage.

12 A contract to make a sale shall be deemed a sale.

14 Verbal agreements to mortgage or sell void as in Section 5.

The remainder of the Act deals with the place of registration; procedure when goods removed; renewals; mortgages to secure debentures; discharges; fees; and miscellaneous provisions.

ABSTRACT

Of the Statute relating to Conditional Sales of Chattels

(R. S. O., 1897, Chap. 149.)

1 Receipt notes,
  Hire receipts, and
  Orders for chattels,
    Given by bailees of chattels,
      Where the condition of the bailment is such that possession passes without ownership until payment,
    Shall only be valid,
      As against innocent purchasers or mortgagees for value,
    In the case of manufactured goods which at the time possession is given to the bailee have the name and address of
      The manufacturer,
      Bailor, or
      Vendor of the same,
    Painted, etc., thereon or thereto,
    And when evidenced in writing signed by the bailee or his agent.

2 Section 1 shall not apply
    To household furniture,
      Other than pianos, organs, or other musical instruments,
  Nor shall it apply
    To any chattels,
      Mentioned in such receipt note, etc.,

Where the manufacturer, bailor, or vendor,
Within ten days from the execution of the receipt, etc.,
Shall file
With the Clerk, etc.,
A copy of the said receipt note, etc.

5 A copy of the receipt note, etc., must be left with the vendee.

6 A statement of the amount due must be given on request.

8 If goods retaken for breach of condition, vendee is allowed 20 days to redeem.

9 Provides as to resale, notice of sale, etc.

10 Chattels affixed to realty without consent of lien holder remain subject to lien. (This section retroactive.)

THE FACTORS ACT.

Abstract of the Statute relating to Contracts in relation to Goods Entrusted to Agents. R. S. O., 1897, Chap. 150.

1 Interpretation. Goods = All personal property.
Shipped = Carriage of goods by land or water.
Document of title :—
(*a*) Bill of lading.
(*b*) Receipt or order for delivery of goods by warehousekeeper or wharfinger.
(*c*) Bill of inspection of pot or pearl ashes.
(*d*) Every other document used in the ordinary course of business as :
(1) Proof of the possession or control of goods ; or
(2) Authorizing (or purporting to authorize) the possessor of such document to either by indorsement or by delivery to transfer or receive goods thereby represented.

2 Any agent entrusted with the possession of goods or the documents of title thereto shall be deemed the owner thereof for the following purposes :
(1) To make a sale or contract as in Sec. 5.
(2) To entitle the consignee of goods consigned by such agent to a lien thereon for any money or negotiable security.
(*a*) Advanced or given by him to or for the use of such agent, or
(*b*) Received by the agent for the use of the consignee in like manner as if such agent were the true owner of the goods.
(3) To give validity to and make binding upon the owner of the goods any contract or agreement by way of pledge, lien or security *bona fide* made with such agent for an original loan, advance or payment.
(3) and (4) To give validity to
Any contract or agreement
By way of pledge, lien, or security *bona fide* made with such agent (even though with notice that he was only an agent) for an original loan or payment, or for an original further or continuing advance made upon the security of,
1 The goods, or
2 The documents
Shall be valid, and shall be binding upon the owner of the goods and on all others interested therein.

3 Agent in possession of goods and documents deemed entrusted therewith by the owner unless contrary shown in evidence.

4 Agent possessed of document of title shall be deemed entrusted with goods represented by it.

5 The sale of goods by an agent entrusted with the same, either for
(*a*) Cash, or
(*b*) The delivery or transfer of other goods, or
(*c*) Part cash and part goods
Shall be binding on the owner
Even though purchaser knew he was dealing with an agent.

6 Goods or documents held under a valid lien for an advance on contract with agent, may be given back to agent
In exchange
For lien on other goods or documents, and
The new lien (if in good faith) shall be good
But must not exceed the value of the goods or document given back.

7 Pledge of documents to be pledge of goods represented by documents.

8 Antecedent debt does not authorize pledge.

9 Good faith, and absence of notice of want of authority are required.

10 Contracts in good faith, without notice of want of authority, valid, even with notice of agency.

11 Loans to agent on contract to transfer goods,
(*a*) In good faith,
(*b*) Without notice of want of authority,
(*c*) If goods etc., then or subsequently transferred shall be within the Act.

12 Contract with clerk etc., of agent = contract with agent.

13 Payment by money or negotiable security = an advance.

14 Agent's other liability civilly not affected.

15 Conviction of agent for theft not admissible in evidence.

16 The owner of the goods may redeem.

17 If agent becomes insolvent after pledge.
If owner redeems he may prove for amount paid as for money paid to use of agent before insolvency.
If owner does not redeem he shall be deemed creditor of agent for value of goods at time of pledge.
And in either case may prove or set off, as the case may be.

LIMITED PARTNERSHIPS.

The law with regard to limited partnerships is regulated by Revised Statutes, 1897, Chap. 151. As will be remembered the liability of partners at Common Law was unlimited, but as cases frequently arose in which persons were willing to risk a certain amount of capital in the carrying on of a business but did not desire to saddle themselves with an unlimited liability, rather desiring to place themselves in a position analogous to the position of a shareholder in an incorporated company. These cases are provided for in the statute above mentioned, which enacts that limited partnerships may be formed by two or more persons for mercantile, manufacturing, mechanical or other business, one or more of the partners to be called general partners, and one or more who should contribute in actual cash a specified sum as capital, and who should be called special partners. General partners under the Act continue to be liable as at Common Law for the debts of the firm but special partners are not to be liable for the debts of the firm beyond the amounts they contribute to the capital.

Provided, however, that the general partners only shall be allowed to transact the partnership business, and if the special partner takes any part in the management of the business or lets his name be used in the name of the firm he will be liable as a general partner.

Limited partnerships must be registered upon a certificate signed by the members of the firm, and stating the name or firm under which the partnership is to be

conducted, the general nature of the business to be transacted, the names of the partners (distinguishing between general and special), the amount of the capital stock, and the period at which the partnership was to commence and the period at which it is to be terminated. The special partner is not allowed to withdraw any part of the capital stock paid in by him, but may receive interest and profits, provided the capital is not thereby reduced.

If the special partner keeps back any part of his capital in the way of profits, that is, if the capital which he has put in is reduced by payments to him, ostensibly of profits, he will have to restore the moneys so paid to him. The special partner is not entitled to claim as a creditor of the firm until after the claims of all other creditors of the partnership have been satisfied.

Limited partnerships are not allowed to dissolve themselves before the period named in their certificate until a notice of dissolution has been filed and published under the provisions of the Act.

REGISTRATION OF PARTNERSHIPS. R. S. O., 1897, CHAP. 152.

The formation of a partnership for trading, manufacturing or mining purposes must be certified and registered under the provisions of the Act respecting the registration of co-partnerships, R.S.O., 1897, Chap. 152. This declaration shall state the name, etc., of each and every partner and the name under which they intend to carry on business and the duration of the partnership, and that the persons joining in the declaration are the only partners, and a similar declaration shall be filed as often as there is any change in the membership of the partnership. This declaration of the formation of the partnership must be filed within six months after the partnership has been formed, and the persons signing the declaration are to be deemed partners until a new declaration is filed, or until a dissolution of the partnership has taken place.

Dissolutions of partnerships may be certified, and a certificate registered in the form provided by the Act.

If one person engages in business for trading, manufacturing or mining purposes and uses a firm name, or his own name with the addition of "and Co.," or some other word or phrase indicating a plurality of members of the firm, he shall file a declaration that he is the only person carrying on that business, and this declaration like the former one must be registered within six months. If declarations under the Act are not filed, then every member of the partnership shall forfeit the sum of one hundred dollars as a penalty.

This Act does not apply to cheese manufacturing companies.

MECHANICS LIENS. R.S.O., 1897, CHAP. 153.

The Legislature has provided a means by which persons who have bestowed labor or provided material for the erection of a building are to have a lien upon the premises for unpaid wages or for the price of the material in order that they may not by their work or material enrich the owner of the property, and be themselves unable to collect the money which is rightfully due to them. This has, and must often have happened, especially where the property which is benefited has been mortgaged or sold. The personal remedy against the owner for whom the building is erected would be in such cases utterly inadequate, and it was to alter this state of affairs that Acts were passed providing for the lien of mechanics on buildings. These Acts have been from time to time extended and made more complete and satisfactory until at the present time they probably cover all the matters that might reasonably be expected to fall under the scope of their provisions. The statute which provides for liens is Chap. 153, R. S. O., 1897. The principal provisions of this statute are as follows :

The making of any contract by which the application of the Act is waived is expressly forbidden, that is, no workman (unless his wages are more than three dollars a day) is allowed to contract himself out of the Act.

Mechânics and wage-earners, and those who have furnished material, are entitled to a lien for the price of such work or materials upon the work itself, and the land occupied thereby, limited to the sum due to the persons entitled to the lien and to the sum owing by the owner (except where the owner has overpaid the contractor, that is, where the owner has not kept back the percentage which under the Act he is allowed and indeed obliged to retain).

If the land in respect of which any work is done or materials placed is encumbered by a prior mortgage, the lien shall rank upon the land in priority to the mortgagee's claim to the amount only by which the land may be increased in selling value by the work done or the materials provided.

When a lien is claimed by any person other than the contractor the amount of the lien shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work is done or materials provided. The owner of property upon which a building is being erected is not allowed under the provisions of the Act to pay over the whole of the contract price, but he must retain for a period of thirty days after the completion of the work 20% of the value of the work done or materials furnished, and such value shall be calculated on the basis of the price to be paid for the whole contract. Where the contract exceeds $15,000 the amount to be retained should be 15%. The liens created by the Act are a charge upon the percentage of 20% (or 15%) to be kept back by the owner and upon any moneys which are at the time of the filing of the lien due to the contractor or sub-contractor. The owner is entitled before notice in writing of a lien to pay to the contractor payments up to but not exceeding 80% (or 85% as the case may be) of the value of the work done. After the expiration of 30 days the percentage held back may be paid over to the contractor if no liens have been filed, or to the lien holders if liens have been filed, and such payment shall operate to discharge all liens or charges under the Act unless proceedings have been taken to enforce the liens. Payments may be made direct by the owner to the persons entitled to the liens, but notice in such cases must be given in writing to the contractor or his agent. Liens created by the Act have priority over judgments and executions and assignments and over all payments or advances made on account of any conveyance or mortgage after registration or notice of the liens, and the lien holders shall divide the proceeds rateably among themselves in satisfaction or in part satisfaction of their claims, no lien holder having any priority over any other lien holder except in regard to wages.

A wage-earner, as to the extent of thirty days' wages, is given priority over other liens derivable through the same contractor.

The lien must in the first instance be registered; that is, it must be set out in a form which contains the particulars required by the Act, and the claim must be verified by an affidavit, and the affidavit and the claim filed in the Registry Office in the county or division in which the lands are situated. The claim may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein. Each lien must, however, be verified by affidavit. Informalities in the form will not invalidate the liens, but this only refers to defect of form, and will not cover the omission of any material point, and will not cover the non-registration of the lien.

The lien, when registered, is to be deemed an incumbrance upon the property, and the registration must be before or during the performance of the contract, or within thirty days after the completion thereof, if by a contractor; and if by a material man, it may be registered before or during the furnishing of the materials, or within thirty days after furnishing of the last materials. For services the lien may be registered at any time during the performance of the service, or within thirty days after the completion of service, and the claim for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed.

Liens not registered are invalidated, unless within the time during which they might be registered an action is commenced and a certificate of such action is registered. If a lien has been registered, proceedings may be taken upon it under the provisions of the Act within the ninety days after the work has been completed or

the materials furnished, or after the expiration of ninety days from the expiry of the period of credit, and if no action is commenced the lien will cease to exist.

The registration of the lien only holds good for six months, and if required to be preserved must be registered within that period if no action has been taken. The lien holder may discharge his lien, and the discharge may be registered or the money claimed may be paid into court and a discharge taken. The taking of any security, or the taking of a note, or the taking of any acknowledgment, or the giving of time, or commencing suit, will not waive the lien unless the lien holder agrees in writing that it shall do so. If the time has been extended, the lien holder, in order to preserve his rights, must, nevertheless, commence an action, but is not to take further proceedings in the action until the expiration of the extension of time. Lien holders are entitled to an inspection of the contract and to information from the owner as to the terms of the contract and of the amount paid or unpaid.

The Act then provides for the mode of realizing the amounts claimed by liens, this realization being through proceedings in the courts.

1 Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing, in the alteration and improvements in its properties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell by auction the chattel or thing in respect of which the lien exists, on giving one week's notice by advertisement in a newspaper, published in the municipality in which the work was done, or in case there is no newspaper published in such municipality, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he be a resident of such municipality.

2 Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him, and the costs of advertising and sale, and shall upon application, pay over any surplus to the person entitled thereto.

PRIORITY OF CLAIMS FOR WAGES. R. S. O., 1897, CHAP. 156.

The Legislature has been mindful of the claims of the workingman, and has not only provided for liens as hereinbefore set out, but has also provided that wages are to have priority over other claims in the following instances:

1 They are to have priority to the extent of three month's wages of any person in the employ of the insolvent at the time of making an assignment, or within one month before the making of the assignment, over the claims of creditors.

2 They have the same priority in the distribution of the assets of a company under the Winding-up Acts.

3 They have the same priority in the distribution of money levied out of the property of a debtor under the Creditors Relief Act.

4 And the same priority as against the proceeds of the property owned by an absconding debtor.

5 And the same rights in the administration of the estate of any person dying on and after the 13th day of April, 1897.

If the wages claimed exceed wages for three months, then the wage-earner is entitled to prove upon the estate, whatever may be its nature, for the balance, just as an ordinary creditor.

No debt for wages to a mechanic, workman, servant, clerk, or employee, shall be liable to seizure or attachment, unless such a debt exceeds the sum of $25, and then only to the extent of such excess.

ARBITRATION AND REFERENCES.

As Provided by R.S.O., 1897, Chap. 62.

1 This Act is called "The Arbitration Act."

2 "Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. "Court" means the High Court of Justice. "Judge" means a Judge of such Court, and "Rules of Court" are the Rules of the Supreme Court, made under authority of The Judicature Act.

References by consent out of Court.

3 A voluntary submission,
Unless a contrary intention is expressed therein,
Shall be irrevocable,
Except by leave of the Court or a Judge,
And shall have the same effect in all respects, as if it had been made a Rule of Court.

4 Unless a contrary intention is expressed therein,
A submission shall include (so far as they are applicable) the provisions set out on Schedule "A" to the Act.

5 If the submission is to an official referee, any official referee shall act when applied to.

6 The Court may stay legal proceedings commenced after submission.

7 (1) Where the submission is to one arbitrator to be named, and the parties cannot agree on an arbitrator,

(2) Where parties or two arbitrators may appoint an umpire or third arbitrator, and do not,

(3) On the death, or refusal to act, or incapacity of
(*a*) An arbitrator, or
(*b*) An umpire, or third arbitrator,
And it is inferred from the submission that the vacancy should be filled, and the parties, or two arbitrators, do not fill the vacancy,
Any party
May serve,
(*a*) The other parties, or (*b*) The arbitrators.
A written notice to appoint an arbitrator, an umpire, or a third arbitrator.
If the appointment is not made within seven clear days, the Court may appoint.

8 (Subject to the power of the Court or a Judge to set aside the appointment), if the reference is to two arbitrators, one named by each party.
Then (unless the submission expresses a contrary intention),
(*a*) If an appointed arbitrator dies, or refuses to act, or becomes incapable, the party appointing him may appoint another,
(*b*) If one party fails to appoint an arbitrator, either original or substituted, for seven clear days after the other party, having appointed his arbitrator, has served the defaulting party with notice to make an appointment, the party not in default, may appoint his arbitrator as sole arbitrator.

9 Unless the submission expresses a contrary intention, the arbitrators or umpire may
(*a*) Administer oaths or take affirmations,
(*b*) State an award in the form of a special case,
(*c*) Correct clerical or accidental errors in their award.

10 The Court or a Judge may enlarge the time for making an award.

11 The Court or a Judge may remit to the arbitrators for reconsideration.

12 The Court may remove an umpire or an arbitrator who has misconducted himself, or may set the award aside.

13 By leave of the Court or a Judge, an award may be enforced as a judgment or order.

14 Where the submission provides for an appeal, the appeal shall be as if the reference was under an Order of the Court.

15 Witnesses may be subpœaned.

16 The evidence shall be taken down in writing.

17 Provision is made for a commission, to examine witnesses.

Sections 18 to 27 make provision for the costs of arbitrations.

Sections 28 to 51 refer to references under Order of Court.

The fees to be charged by the arbitrators are also provided for in the Act.

52 No submission or reference to arbitration, heretofore or hereafter made, shall be deemed to have been, or be revoked by the death of any party thereto, whether occurring before or after the passing of this Act. (62 Vict. [2], Chap. 11, Sec. 12; Ont., 1899.)

BOARD OF TRADE ARBITRATORS.

R. S. O., 1897, Chap. 673, provides that Boards of Trade in any city, having at least 30,000 inhabitants, may form chambers of arbitration with the powers, and for the purposes set out in the Act.

ARBITRATION FOR SETTLING INDUSTRIAL DISPUTES.

R. S. O., 1897, Chap. 158, provides for arbitration for the friendly settlement of disputes between employers and employees, as conducive to the cultivation and maintenance of better relations and more active sympathies between them, and as being productive of benefit to the public generally, by preventing strikes and lockouts.

BOUNDARY LINES.

R. S. O., 1897, Chap. 64, which does not refer to lands in a city, town, or incorporated village, provides that

(*a*) In actions involving determination of boundaries, the Court may of its own motion, or at the request of any party, refer the question of boundary to a surveyor.

(*b*) By consent (before action) of all parties to a boundary line dispute, a County Court Judge may direct a reference.

See also the following other statutory provisions as to arbitrations:

Section 7 of an Act respecting Mines. (R. S. O., 1897, Chap. 36.)

Sections 58–72 of an Act respecting the Public Works of Ontario. (R. S. O., 1897, Chap. 37.)

Section 121 of the Judicature Act. (R. S. O., 1897, Chap. 51.)

Sections 206–210 of the Division Courts Act. (R. S. O., 1897, Chap. 60.)

The Boards of Trade General Arbitration Act. (R. S. O., 1897, Chap. 63.)

An Act respecting Damage to Lands by Flooding, in the new Districts. (R. S. O., 1897, Chap. 85.)

Sections 16–26 of The Saw Logs Driving Act. (R. S. O., 1897, Chap. 143.)

The Trades Disputes Act. (R. S. O., 1897, Chap. 158.)

The Trades Arbitration Act. (R. S. O., 1897, Chap. 159.)

Sections 55–58 of an Act respecting Gas and Water Companies. (R. S. O., 1897, Chap. 199.)

Section 16 of an Act respecting Cheese and Butter Companies. (R. S. O., 1897, Chap. 201.)

Section 19 of an Act respecting Co-operative Associations. (R. S. O., 1897, Chap. 202.)

Section 168 (16) of The Ontario Insurance Act. (R. S. O., 1897, Chap. 203.)

Section 55 (11) of an Act respecting the Insurance of Live Stock. (R. S. O., 1897, Chap. 204.)

Section 20 of The Railway Act of Ontario. (R. S. O., 1897, Chap. 207.)
Section 38 of The Street Railway Act. (R. S. O., 1897, Chap. 208.)
Section 35 of The Electric Railway Act. (R. S. O., 1897, Chap. 209.)
Sections 437–467 of The Municipal Act. (R. S. O., 1897, Chap. 223.)
Sections 88–113 of The Municipal Drainage Act. (R. S. O., 1897, Chap. 226.)
The Municipal Arbitrations Act. (R. S. O., 1897, Chap. 227.)
Sections 31–33, 36, 39, 43–45 of The Public Schools Act. (R. S. O., 1897, Chap. 292.)

LIMITATION OF ACTIONS.

Abstract of Statute Relating to Limitation of Actions. R. S. O., 1897, Chap. 72.

Actions, as follows, must be brought within the times limited:

(*a*) Actions for rent;
(*b*) Actions on a bond or other specialty, except covenants in mortgages dated after 1st July, 1894;
(*c*) Actions upon a recognizance,
Within twenty years after cause of action arose;
(*d*) Actions upon awards, where submission not by specialty;
(*e*) Actions for an escape;
(*f*) Actions for money levied on execution,
Within six years;
(*g*) Actions for penalties, damages, etc., by statute,
Within two years;
(*h*) Actions on covenant in mortgage, made after 1st July, 1894,
Within ten years;
(*i*) Actions on account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants,
Within six years (and time is not extended by other items in same account being within six years);
(*j*) Actions to recover personal estate of intestate from personal representative,
Within twenty years.

The time of disability of a person, who is an infant or of unsound mind, is not counted.

Non-resident plaintiffs have no longer time than resident plaintiffs.

As against defendants who were non-resident, when the cause of action accrued, the action may be brought within the time above limited, after his return.

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

Written acknowledgment or payment on account will give a new starting point.

In statutory actions, the times of limitations mentioned in the respective statutes, will govern.

See also an Act respecting Written Promises and Acknowledgments of Liability. R. S. O., 1897, Chap. 146, *ante*.

EXECUTION.

The rights of Creditors under executions are dealt with by

The Execution Act, R. S. O., 1897, Chap. 77, and
The Creditors Relief Act R. S. O., 1897, Chap. 78.

The following are the exemptions (under R. S. O., 1897, Chap. 77) from seizure under execution:

The following chattels shall be exempt from seizure under any writ in respect of

which this Province has legislative authority, issued out of any Court whatever in this Province, namely:

1 The bed, bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family.

2 The necessary and ordinary wearing apparel of the debtor and his family.

3 One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea-cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash-board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated not exceeding in value the sum of $150.

4 All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of $40.

5 One cow, six sheep, four hogs and twelve hens, in all not exceeding the value of $75, and food therefor for thirty days, and one dog.

6 Tools and implements of or chattels ordinarily used in the debtor's occupation to the value of $100.

7 Bees reared and kept in hives to the extent of fifteen hives.

3 The debtor may, in lieu of tools and implements of, or chattels ordinarily used in his occupation, referred to in Clause 6 of Section 2 of this Act, elect to receive the proceeds of the sale therefor up to $100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same do not exceed $100, or, if the same exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

4 The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or if there is no widow, the family of the debtor shall be entitled to the exempted goods.

5 The debtor, his widow, or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure.

6 Nothing herein contained shall exempt any article enumerated in subdivisions 3, 4, 5, 6 and 7 of Section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article.

7 Notwithstanding anything contained in the preceeding sections, the various goods and chattels which were prior to the first day of October, 1887, liable to seizure in execution for debt, shall, as respects debts which were contracted prior to the said day, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized has endorsed upon it a certificate signed by the Judge of the Court out of which the writ issues, if a Court of Record, or where the execution issues out of a Division Court by the Clerk of the Court certifying that it is for the recovery of a debt contracted before the date hereinbefore mentioned.

COSTS OF DISTRESS, R. S. O., 1897, CHAP. 75.

Sums exceeding $80.

1 Levying distress.....$1.00
2 Man in possession, per diem..... 1.00
3 Removal of goods when necessary, actual expenses reasonably incurred.

4 Appraisement whether by one appraiser or more, two per cent.
5 Advertisement when necessarily published in newspaper, $2, but not exceeding $5.
6 Any printed advertisement otherwise than in a newspaper, $1, but not to exceed $3.
7 Catalogues, sale and commission and delivery of goods—five cents on the dollar, on the net proceeds of the sale.
8 Where the amount due shall be satisfied in whole or in part, after seizure and before sale, three per cent. on the amount realized instead of five per cent.

SCHEDULE "A."

Costs of Distress for small rents and penalties.

1 Levying distress under $80 ..... $1.00
2 Man keeping possession, per diem 75
3 Appraisement, whether by one appraiser or more, two cents in the dollar on the value of the goods.
4 If any printed advertisement not to exceed in all $1.00.
5 Catalogues, sale and commission and delivery of goods—five cents in the dollar on the net produce of the sale.

SCHEDULE "B."

Costs on seizure under chattel mortgages or bills of sale.

1 For making seizure where amount of debt does not exceed $100 ..... $1.00
2 For making seizure where amount of debt exceeds $100 ..... 1.50
3 One man keeping possession, per diem 1.00
4 If any printed advertisement, the same not to exceed in all 1.50
5 For catalogues, sale and commission and delivery of goods, five cents in the dollar, on the net proceeds of the sale, up to $100, and where the proceeds of the sale exceed $100, two and one half per cent on the excess over $100.
6 Where debt is paid before sale, a commission of two cents in the dollar and the amount actually disbursed in cartage, not to exceed 2.00

ABSCONDING DEBTORS.

WHEN ATTACHMENT MAY ISSUE.—If a debtor leaves Ontario, his creditor has a remedy which is more stringent and rapid than the ordinary processes of judgment and execution. This remedy is by attachment of the debtor's property.

In order to obtain attachment, there must be

(*a*) The absconder,
(*b*) Who must have resided in Ontario, and who,
(*c*) Being indebted,
(*d*) And being the owner of real or personal property in Ontario, not exempt from seizure,
(*e*) Has departed from Ontario
(*f*) With intent to defraud his creditors.

IN HIGH COURT AND COUNTY COURT.—If the amount of the debt exceeds the jurisdiction of the Division Court, the creditor may obtain from the High Court (or from the County Court if the sum involved is within the jurisdiction of a County Court) an order, attaching the property, credits and effects of the debtor.

This order is obtained on the filing of three affidavits.

1 The affidavit of the creditor, shewing
(*a*) The facts (as set out above) of the departure, etc., of the defendant ;
(*b*) The place, out of Ontario, to which the debtor has gone (or, that this cannot be ascertained),
(*c*) That the debtor has so fled, with intent to defraud the creditor,
(*d*) And stating the cause of action.

2 and 3 The affidavits of two other persons,
(*a*) That they are well acquainted with the debtor, and
(*b*) Believe he has departed from Ontario with intent to defraud the plaintiff.

The order is issued in duplicate, and handed to the Sheriff, who proceeds thereon in the manner indicated in the Act, (R. S. O., 1897, Chap. 79).

IN DIVISION COURTS.—In the case of debts exceeding $4, but not exceeding $100 (or $200 in certain cases), for any debt or damages arising upon a contract, express or implied, or upon a judgment, a Division Court Clerk may issue an attachment upon the filing of an affidavit by the creditor,

(*a*) Verifying the indebtedness,
(*b*) And the cause of action,
(*c*) And that defendant,
(1) With intent to defraud the plaintiff, has absconded from Ontario, leaving personal property liable to seizure, in the County of ——— ; or
(2) Is attempting to remove his personal property, liable to seizure, out of Ontario (or from the County of ——— to the County of ———), with intent and design to defraud the plaintiff ; or
(3) Keeps concealed in the County of ——— , in Ontario, to avoid service, with intent and design to defraud the plaintiff,
(*d*) And that the affidavit is not made, nor the process thereon, to be issued from any vexatious or malicious motive.

The proceedings in attachment, in whatever Court, must conform to the various statutory requirements.

ABSTRACT

Of the Statute providing for Succession Duty. R. S. O., 1897, Chap. 24.

This Act provides that, except

(*a*) As to estates, which net $10,000 or less ; and
(*b*) Property for religious, charitable, or educational purposes ; and
(*c*) Property (where the aggregate value of the estate is $100,000 or less), passing to the father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law of the deceased.

The property of a deceased person (whether testate or intestate), shall be liable to a succession duty of,

(*d*) Where the property exceeds $100,000 in value, and passes, as in (*c*), 2½ per cent,
(*e*) Where the property exceeds $200,000, the whole property passing, as in (*c*), 5 per cent ;
(*f*) On property exceeding $10,000, on so much thereof as passes to grandfather or grandmother, or any other lineal ancestor (except father or mother), or to (or to any descendant of), any brother or sister of the deceased, or to (or to any descendant of), any uncle or aunt of the deceased), 5 per cent ;
(*g*) On property exceeding $10,000, and not passing as above provided, 10 per cent.

Legacies or shares of less than $200 are exempt.

Executors must file an inventory and give bonds (equal in amount to 10 per cent of estate), for payment of duty.

Duty to be paid within 18 months.

ABSTRACT OF THE MARRIED WOMEN'S PROPERTY ACT., R. S. O., 1897, CHAP. 163.

1 Title.

2 Interpretation.

3 (1) A married woman shall be capable of holding property as if she were a *feme sole*.

(2) And may make contracts to the extent of her separate property

(3) Contracts after 13th April, 1897, to be deemed made in respect of and as binding separate property.

(4) Contracts before that date
if with respect to and to bind separate property shall
bind also after acquired separate property.

4 (1) Every contract by a married woman after 13th April, 1897, (except as agent).

(*a*) Shall be deemed made in respect of and to bind her separate property
(1) Whether she has or has not any when making the contract,
(2) Proof of separate property not necessary,

(*b*) Shall bind all separate property then and afterwards held or acquired.

(*c*) Shall be enforcible against all her property,
(2) Except where there there is a restraint against anticipation.

5 (1) A woman married on or before 4th May, 1859, may hold property not then reduced to possession of husband.

(2) A woman married between 4th May, 1859, and 2nd March, 1872, may hold her real property (not received from her husband) free from the debts or control of her husband.

(3) A woman married after 2nd March, 1872, may hold her real property free from any estate or claim of her husband during her life.

(4) A woman married since 4th May, 1859, may hold her personal property (not received from her husband) free from the debts or control of her husband.

6 (1) The earnings of a married woman shall be her separate property.

(2) A woman married on or after 1st July, 1884, may hold as separate property All other real and personal property

(*a*) Belonging to her at the time of marriage,

(*b*) Acquired by her after marriage, or

(*c*) Devolving upon her after marriage.

7 A woman married before 1st July, 1884, may hold as her separate property Real and personal estate (including wages) acquired on or after 1st July, 1884.

8 Execution of general power makes the property liable as separate property.

9 The Court may override restraint on anticipation.

10 Stocks, deposits, shares, debentures, etc.. on 1st July, 1884, standing in sole name of a married woman are deemed her separate property.

11 And the same as to stocks, etc., transferred after 1st July, 1884.

12 And the provisions of Secs. 10 and 11 apply as to the estate of the married woman in any such stocks, etc., which on 25th March, 1884, were held by a married woman jointly with another (other than her husband).

13 And her husband need not join in transfer.

14 Power of Court over investments made by wife with husband's money.

(*a*) Without his consent

(*b*) In fraud of his creditors.

15 Married woman entitled to all remedies for the protection of her separate estate.

Against all persons (including her husband),

Except for purposes of this section husband and wife cannot sue each other for tort.

In proceedings under this section husband and wife may give evidence against each other.

16 Marriage forms no release of ante-nuptial debts of a woman.

17 and 18 Extent to which a husband is liable for his wife's debts.

19 Procedure on summary application as to questions between husband and wife.

20 Husband of married woman who is executrix administratrix or trustee need not join in suits, transfers, etc.

21 Saving as to settlements.

22 Procedure on application by married woman for protection order for earnings of her minor children.

AN ACT RESPECTING DOWER. R. S. O., 1897, CHAP. 164.

2 A widow shall be entitled to dower out of equitable estates.

3 And out of rights of entry.

4 Dower shall not be recoverable out of land which was in a state of nature when aliened.

5 Or out of mining land unless the husband dies seized.

7 (1) Bar of dower in a mortgage shall only operate so far as is necessary to give full effect to the rights of the mortgagee.

(2) If a sale is made by mortgagee, the wife is entitled out of any surplus to full value of her dower.

8 Analogous provision as to mortgages since 16th April, 1895.
Except when mortgage given for balance of unpaid purchase money.

9 The surplus may be paid into Court.

10 Widow must elect between dower out of surplus and share of surplus as personal estate.

11 The husband of a lunatic wife may buy land and convey and mortgage the same free from her dower, if such buying, selling and mortgaging is done while the wife is in a public asylum.

12 to 16 The Court may order conveyance, etc., free from dower, where wife is living apart from her husband;
Or where a wife is a lunatic in asylum;
Or not in asylum.

17 to 21 Relief from dower at the instance of a purchaser or mortgagee.

22 Widow not entitled, because of some informality, to claim dower, where she has joined in a deed to purchaser for value. (As to bar of dower by wife under 21, see Sections 4 and 5 of The Married Women's Real Estate Act, R.S.O., 1897, Chap. 165.)

DOMINION STATUTES RELATING TO THE FORMATION OF COMPANIES.

Immigration Aid Societies, R. S. C., Chap. 66.

Joint-Stock Companies, R. S. C., Chap. 119.
(Amended by 50-51 Vic., Chap. 20; 58-59 Vic., Chap. 21; and 60-61 Vic., Chap. 27.)

Boards of Trade, R. S. C., Chap. 130.
(Amended by 57-58 Vic., Chap. 23; and 58-59 Vic., Chap. 17.)

Building Societies,
C. S. U. C., Chap, 53.
(Amended by 29 Vic., Chap. 38; 37 Vic., Chap. 50; 40 Vic., Chap. 48; 40 Vic., Chap. 49; 41 Vic., Chap. 22; 42 Vic., Chap. 49; 43 Vic., Chap. 43; 45 Vic., Chap. 24; 47 Vic., Chap. 40; and 60-61 Vic., Chap. 31.)

Timber Slide Companies, C. S. C., Chap. 68.
(Amended by 36 Vic., Chap. 64; and 43 Vic., Chap. 9.)
Companies for Construction of Piers, Wharves, Day Docks and Harbors, C. S. U. C., Chap. 50.
(See also Interpretation Act., R. S. C.)
Cheese and Butter Echanges, 62 Vic. (2), Chap. 20 (Ont., 1899).

PROVINCIAL STATUTES RELATING TO THE FORMATION OF COMPANIES.

Ontario Companies' Act. R. S. O., 1897, Chap. 191.
General Road Companies' Act. R. S. O., 1897, Chap. 193.
Timber Slide Companies' Act. R. S. O., 1897, Chap. 194.
Pier, Etc., Construction Companies' Act. R. S. O., 1897, Chap. 195.
Exhibition Buildings Companies' Act. R. S. O., 1897, Chap. 196.
Ontario Mining Companies' Incorporation Act. R. S. O., 1897, Chap. 197.
Gas and Water Companies' Act. R. S. O., 1897, Chap. 199.
Act Respecting Companies for Supplying Heat, etc. R. S. O., 1897, Chap. 200.
(In all the foregoing cases the letters patent must be issued under Chap. 191.)
Act Respecting Cheese and Butter Companies. R. S. O., 1897, Chap. 201.
Co-operative Associations Act. R. S. O., 1897, Chap. 202.
The Ontario Insurance Act. R. S. O., 1897, Chap. 203.
Act Respecting Insurance of Live Stock. R. S. O., 1897, Chap. 204.
Loan Corporations' Act. R. S. O., 1897, Chap. 205.
Ontario Trusts Corporations' Act. R. S. O., 1897, Chap. 206.
(Letters patent to Trust Companies to be issued under Chap. 191.)
Street Railway Companies' Act. R. S. O., 1897, Chap. 208.
(Letters patent to Street Railway Companies to be issued under Chap. 191.)
Benevolent Societies' Act. R. S. O., 1897, Chap 211.
Immigration Aid Societies' Act. R. S. O., 1897, Chap. 212.
Cemetery Companies' Act. R. S. O., 1897, Chap. 213.
(Letters patent to Cemetery Companies to be issued under Chap. 191.)

ABSTRACT

Of that part of the Companies Act relating to Use of the Word "Limited."

22 Every company shall keep painted, or affixed its name with the unabbreviated word "Limited" as the last word thereof, on the outside of every office, or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible; and shall have its name with the said unabbreviated word in legible characters on its seal, and shall have its name with the said unabbreviated word mentioned in legible characters in all notices, advertisements and other official publications of the company, and in all bills of exchange, promissory notes, indorsements, cheques and orders for money or goods, purporting to be signed by, or on behalf of such company, and in all bills of parcels, invoices and receipts of the company. 52 Vic., Chap. 26, Sec. 3.

(1) Directors liable on written contracts, which do not show limited liability. See now on Vics. (2), Vic. 11, Chap. 19, (Ont., 1899].

(2) Provides a penalty for violation of preceding section.

(3) Provides a penalty for permitting violation.

(4) Provides a penalty for using or authorizing use of seal without word "limited" on it. [Certain companies excepted by proviso to this section].

(To be executed in duplicate ; one duplicate to be deposited in the Office of the Provincial Secretary.)

SCHEDULE A.

The .....Company of..... ... Limited.

Memorandum of Agreement and Stock-Book

We the undersigned do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of The Ontario Companies' Act under the name of The.....Company of.....(Limited), or such other name as the Lieutenant-Governor-in-Council may give to the Company, with a capital of .....dollars, divided into .....,shares of.....dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said Company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such Company to the said amounts.....

In witness whereof we have signed.....
Name of subscriber.....
Amount of subscriptions.....
Date.....
Place.....
Residence of subscriber.....
Name of witness.....

To His Honour The Lieutenant-Governor of the Province of Ontario in Council:

The Petition of..... .....humbly sheweth:—

1 That your petitioners are desirous of obtaining by Letters Patent, under the Great Seal, a Charter under the provisions of the Act respecting the Incorporation and Regulation of Joint Stock Companies..... .. . constituting your petitioners and such others as may become shareholders in the Company thereby created, a body corporate and politic under the name of the.....(Limited), or such other name as shall appear to Your Honour to be proper in the premises.

2 That your petitioners have satisfied themselves and are assured that the corporate name under which incorporation is sought is not on any public grounds objectionable, and that it is not that of any known Company, incorporated or unincorporated, or of any partnership, or individual, or any name under which any known business is being carried on, or so nearly resembling the same as to deceive .....

3 That your petitioners have satisfied themselves and are assured that no public or private interest will be prejudicially affected by the incorporation of your petitioners as aforesaid .....

4 That your petitioners are of the full age of twenty-one years.

5 That the object for which incorporation as aforesaid is sought by your petitioners is to.....

6 That the undertaking of the Company will be carried at (or from)..... which is (or are) within the Province of Ontario.

7 That the head office of the Company will be at.....

8 That the amount of the capital stock of the Company is to be ..... dollars.

9 That the said stock is to be divided into ....shares of ....dollars each.

10 That the number of the Board of Directors of the Company is to be.....

11 That the said .... are to be the provisional directors of the Company.

12 That by subscribing therefor in a Memorandum of Agreement and Stock Book duly executed, in duplicate, with a view to the incorporation of the Company, your petitioners have taken the amounts of stock set opposite their respective names, as follows:—

Your petitioners therefore pray that Your Honour may be pleased by Letters Patent under the Great Seal to grant a Charter to your petitioners constituting your petitioners and such others as may become shareholders in the Company thereby created, a body corporate and politic for the due carrying out of the undertaking aforesaid.

And your petitioners, as in duty bound will ever pray.

Dated at ..... .this.....day of.....189

CHARTERPARTY.

London, 5th Nov., 1886.

A. B. & Co.,.....E. C.

Outward.

This charterparty is mutually entered into between C. D. & Co., as agents for owners, and Messrs. A. B. & Co., as charterers of the good ship, or vessel, Ajax, Captain Anderson, now in Hull.

The voyage to be Liverpool to Yokohama and Hiogo, or so near thereto as the vessel can safely get, where cargo is to be delivered as per bills of lading, in the customary manner, so ending the voyage. The vessel to proceed with all safe speed direct to the port of discharge.

Vessel's hold and cargo capacity are given to charterers for cargo, except only what is customary and necessary for the ship's stores for the above voyage; and owners hereby guarantee the vessel to carry 1,850 tons (of 20 cwt.) weight of cargo (without being overladen) or if this be refused by owners or captain, then charterers have power to deduct the *pro rata* equivalent for such short carrying from owners' account. The weight of cargo to be computed from invoices, and from carriers' notes and from bills of lading. Either these original documents or shippers' certificates of such weights, to be accepted as absolute proof by the owners.

The cargo to be taken on board as customary, and to be of lawful merchandise, including gunpowder (in the river) charterers erecting the necessary magazine, specie, kerosine or similar oils, acids on deck at shippers' risk; also machinery which can be shipped without cutting hatches. The vessel to proceed to any crane as required in loading dock, but any extra expense in loading or discharging packages over three tons weight to be borne by charterers.

Charter money to be paid owners is 2,058 pounds, say two thousand and fifty eight pounds sterling, in full of all port charges, primages, etc. 1,000 pounds to be payable abroad, at current rate of exchange, by bills of lading or charterers' order (at their option), to captain on final and true delivery of cargo; balance to be paid here in cash on sailing, less 5 per cent. for interest and insurance. Captain to have an absolute lien and charge for freight on cargo, but to have no recourse on charterers for any freight due abroad, per bill of lading, if not paid; charterers' responsibility to cease as soon as cargo is signed for, except for advance due here, and the order (if any) for balance due abroad.

Loading dock to be ordered by charterers, and to load in the river if required. Vessel to be made ready and proceed to her loading berth as soon as possible on

signing of this charter. Provided there is not sufficient water to allow of her leaving the dock fully laden, the loading to be completed in the river.

Loading days allowed charterers are thirty, with two clear days for clearing; for any used for loading beyond these, 14 pounds per day demurrage to be paid to owner by charterers. Sundays, customs or bank holidays, or detention by frost, are always excluded throughout the charterparty. Any day or days during which ballast is discharged not to count against charterers. Captain to notify, in writing, when vessel is in a proper loading berth as above, with the hold clear and cleaned, vessel painted, rigged and ready for cargo. When such are complied with, loading days to commence twenty-four hours after such notice has been received by charterers. Lay days not to commence to count before 20th Nov., unless vessel and cargo are both ready sooner; and charterers to have the option of cancelling this charterparty if vessel not arrived and ready to commence loading by 5th Dec.

Mate's receipts to be signed for the cargo as taken on board. On production of these, bills of lading are to be signed by the captain at charterers' request at any rate of freight, such bills of lading to be without prejudice to this charter. Captain shall also sign for weight of coal, pig iron, or other cargo, when weighed alongside or on board, or delivered on official weighing machine notes. The captain to attend at least once daily at charterers' office to sign bills of lading.

Stevedore to be appointed by the charterer. These men are to take on board and to stow the cargo under the direction of the master. The master and owners alone to be responsible for stowage of cargo and trim of vessel. Charterers to charge owners for stowage of cargo at the rate of one shilling four pence per ton in account. Owners to pay the usual advertising, printing, and measurers' charges not exceeding eight guineas. Underwriters' surveyors to settle all disputes as to stowage or draught, and their recommendation or decision to be carried out by captain and owners.

Dunnage or mats, if required, to be provided by owners.

Consignment of vessel to be placed in the hands of the agents appointed by the charterers, whom the owners also accept as agents of the vessel at her ports of discharge inwards, the owners paying 5½% inwards on amount of this charter, and charterers' agents to have the preference outwards. Should the vessel put into any port or ports on the way while under this charter, she is to be consigned to charterers' agents there.

A brokerage of five per cent. on this charter is due by owners to B. J. & Co., on signing of same.

If any disputes arise, the same to be settled by two London commercial men, each party naming one as arbitrator, and, if necessary, the arbitrators to appoint a third. The decision of the majority shall be final, and any party attempting to revoke the submission for arbitration without the leave of a court shall be liable to pay to the other, or others, as liquidated damages the estimated amount of chartered freight. It is further agreed that these presents may be made a rule of Her Majesty's High Court of Justice.

It is also further agreed that the said vessel shall, by the owners thereof, during the whole of the said voyage, be kept tight, staunch and strong, and well found, and provided with men and mariners sufficient and able to navigate the said vessel and with all manner of rigging, boats, tackle, provisions and appurtenances whatsoever (restraints of princes and rulers, the dangers and accidents of the seas, rivers and navigation, fire pirates and enemy throughout this charterparty shall be excepted). In the event of war being declared between the nation to which this vessel belongs and any other, the charterers have the option or cancelling the charter before the vessel proceeds to sea, upon indemnifying the owners from all consequences of re-delivering the cargo; and, in case the charter be so cancelled, the charterers shall pay to the owners the sum of thirteen pence for each and every day which shall elapse between the time of the vessel being in a loading berth and cancelling of such charter, or the final discharge of the cargo, if any, which may have been received on board, whichever last shall happen. For the due performance of the agreements and matters herein contained, each of the said parties bindeth himself and

themselves each of the other in the sum of estimated amount of freight. Vessel to call at a wharf in the Tees on her way to dock to load some iron provided same can be done with safety to vessel and no extra expense be incurred; if the latter, then the same to be paid by charterers.

By authority of X. Y., New York;
C. D., as agent.
A. B.

Signed by C. D., in the presence of E. F.

Signed by A. B., in the presence of G. H.

BILL OF LADING.

J. W. No. 1 a. 20

"Shipped in good order by A B., merchant, in and upon the good ship called the ——— —, whereof C. D. is master, now riding at anchor in the River Thames and bound for Barcelona, in Spain, twenty bales, containing one hundred pieces of broadcloth marked and numbered as per margin, and are to be delivered in the like good order and condition at Barcelona aforesaid (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto E. F., merchant there, or his assigns, he or they paying freight for the said goods ——— per piece freight, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading of this tenor and date; one of which bills being accomplished, the other two to stand void.

"Dated at London, the.....day of....."

DRAWING CONTRACTS

While it is true that many contracts are and can be made verbally yet as human memory is not perfect, it is never wise to trust matters of business to the uncertain recollections of the parties. It is always desirable that the agreement of the parties should be reduced into writing, and, as it is not always possible to obtain the assistance of a professional man when this has to be done, a few general directions may be given as to the preparation of an agreement.

The outline of the form will be something like this:

Date.
Parties.
The subject matter and consideration or the mutual promises of the parties.
Collateral stipulations.

The date of the contract should be inserted, usually at the commencement, sometimes at the end. The insertion of the date is convenient, but is not (except in one or two special cases) essential to the validity of the document.

The parties by whom the contract is made should be clearly specified. So far as the validity of the document itself is concerned it would be sufficient to say: This agreement made between John Smith and William Brown. But, as there are a great many individuals bearing similar names, it is desirable to identify the individual intended by inserting his address and occupation. Thus:

Between William Charles Francis Smith, of the Township of B., in the County of A., in that part of the Dominion of Canada called Ontario, Farmer, of the first part; and

James Jacobs, of the same place, Blacksmith, of the second part.

Then proceed to set out the agreement which these two parties have made.

In the first place it may be noticed that except with regard to Statutory forms, no precise arrangement or set form is required, but it is absolutely necessary that

the intention of the parties should clearly appear from what they have set down on the paper.

If the Court can make out the meaning of the parties it will not be concerned with regard to any informal expression of it.

The first thing, therefore, to be done is to clearly ascertain the intention of the parties, and then to set that intention down in plain, simple words, as clearly and distinctly as possible, dividing the contract into numbered sections, and referring to them by their numbers when it is required to refer from one to the other.

If the agreement is lengthy and covers more than one sheet of paper, see that the sheets are carefully attached.

Unless required by statute or in the case of instruments executing powers the presence of a witness is not necessary to the validity of the execution of an agreement, but it is highly important that all documents should be executed in the presence of a witness who should be intelligent enough to understand what he is doing. Preferably this witness should be disinterested, though his interest does not disqualify him but only affects his credit.

If any changes or corrections are required in the document it is essential that these should be made *before* the document has been executed.

In making changes do not scrape or cut the word out, or entirely obliterate it, but just draw the pen through the words to be taken out. If words are to be inserted, write them carefully and distinctly between the lines and insert a caret to show where they should be read in.

Any change which has been made should be initialled by the witness so that if a question arises as to the time at which it was inserted the presence of his initials will enable him to swear positively that the change was made before the document was executed.

If the parties to the document can write it is always advisable that they should themselves sign their names. An illiterate person is usually called a marksman because instead of signing his name he makes his mark. This is usually done thus: The name of the illiterate is written John $\overset{\text{HIS}}{\underset{\text{MARK}}{\ }}$ Smith and the marksman either by himself or with assistance makes a mark in the space thus John $\overset{\text{HIS}}{\underset{\text{MARK}}{\text{X}}}$ Smith

When an agreement or contract has been executed by a marksman it is always desirable that the witness should certify on the document itself that the completed document was in his presence read over and explained to the illiterate, and was apparently understood by him before he executed it.

If a document has been signed it may be acknowledged in the presence of a witness and this so far as proof of the execution is concerned will be equivalent to signing in his presence. The parties will each say "I acknowledge this to be my hand (or, my hand and seal, if the document is under seal) for the purposes therein contained," or some such words, at the same time making it clear to the witness, as for instance by touching the signature, what precise document was intended.

It is further necessary that a document, when signed, should be delivered to the person for whose benefit it was made or to someone on his behalf. While it remains in the possession of the person making the promise it is usually inoperative unless it has been agreed that he shall hold it. Thus, if A. should sign a promissory note payable to B. and should keep it in his own possession B. could not enforce it unless he could prove that it was agreed that A. should hold it for B. Though the mere fact that a deed has been retained by the grantor is not of itself sufficient evidence that it was never in a legal sense delivered so as to complete the execution. (Zwicker v. Zwicker, 19 C. L. T., O. N. 262.)

It is because delivery is necessary that the ordinary form runs, "Signed, sealed and delivered in presence of," and it is customary in England for the party signing to say "I deliver this as my act and deed." This declaration of delivery is, of course, not necessary where there has been a delivery in fact.

The following is a simple form of contract:

THIS AGREEMENT, made this 14th day of November, A. D., 1899,

Between A. B., of the City of London, in the County of Middlesex, in that part of the Dominion of Canada called Ontario, Blacksmith, of the first part; and

C. D., of the Township of Westminster, in the said County of Middlesex, Farmer, of the second part;

Witnesseth, that the parties hereto agree together as follows, that is to say:

1 That the party of the first part agrees to make and construct, and find material for, one farm wagon, to be made and delivered complete to the party of the second part on or before the first day of May, A. D. 1900.

2 The said wagon is to be made after the pattern and of the size, shape, dimensions and quality of the farm wagon now owned by the party of the second part, and manufactured by the E. F. Company.

3 The price of the said wagon shall be $40, and this shall be paid by the delivery to the party of the first part of the wood hereinafter mentioned.

4 The party of the second part agrees to deliver to the party of the first part, or his assigns, on or before the first day of March, A. D., 1900, ten cords of best split and cut body maple This wood is to be delivered where desired by the party of the first part, and is to be accepted by him in full payment for the said wagon.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in presence of }

ABSTRACT

Of Act Relating to Voluntary Conveyances. R.S.O., 1897, Chap. 115.

1 Voluntary conveyances or incumbrances, if

(*a*) Made in good faith, and

(*b*) Duly registered (before the execution of a conveyance to a subsequent purchaser), shall not be void merely because voluntary.

2 Instruments otherwise void not valid under Sec. 1.

3 Recital of 13 Eliz., Chap. 5, Secs. 1, 2 and 6, as to conveyances to hinder, delay or defraud creditors.

Valuable consideration and intent to pass interest will not prevent operation of first and second clauses,

Unless to a purchaser in good faith and without notice.

EXECUTION OF WILLS, R. S. O., 1897, CHAP. 128, SEC. 12.

No will shall be valid unless it is in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

20 Every will shall be revoked by the marriage of the testator, except in the following cases, namely:—

(*a*) Where it is declared in the will that the same is made in contemplation of such marriage;

(*b*) Where the wife of the husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband, and filed within one year after the testator's death in the office of the Surrogate Clerk at Toronto;

(*c*) Where the will is made in the exercise of a power of appointment and the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distributions.

SOME DIRECTIONS AS TO THE PREPARATION OF A WILL.

The general directions formerly given as to the preparation of a contract will guide the reader in the preparation of a will. But there are one or two things which will have to be observed in addition to those already set out. And the most important matter is as to the execution of a will. As shown in the extract from the statute above given the will must be signed in the presence of two witnesses. Although no form of attestation is necessary, it is customary to use one in order that the recollection of the witnesses may be fortified by the statement in writing upon the will, of the facts attending the execution. If the witnesses have altogether forgotten what occurred when the will was executed, the Court will take the statements of the attestation clause as evidence of what occurred. The witnesses should always be persons not mentioned in the will, since a legacy or devise to a witness is void. The witness himself is not incapacitated because of his interest; the law operates the other way, it takes away his interest from him. It will be found useful to place the following clause for the witnesses to sign: "Signed, executed, published and declared as and for his last will and testament by the said testator, A. B., in the presence of us witnesses present at the same time, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." The witnesses should then sign their names and state their residence and occupation. It might be well that the witnesses should be able to speak as to the apparent ability of the testator to make a will, and as to his understanding of the contents of the will, if he is illiterate, though these matters, of course, can be shown by other witnesses if they should be at any time questioned. After a will has been executed it may, if desired, be placed for safe keeping in the office of the Clerk of the Surrogate Court of the County.

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