Digest of Canadian Mercantile Laws

WILLIAM HENRY ANGER

DIGEST

OF THE

MERCANTILE LAWS OF CANADA AND NEWFOUNDLAND

THE TECHNICAL POINTS AND MAIN FEATURES OF BOTH THE COMMON AND STATUTE LAWS

TOGETHER WITH THE VARIOUS

LEGAL AND BUSINESS DOCUMENTS IN GENERAL USE

FORMING A WORK OF

READY-REFERENCE FOR MAGISTRATES, CONVEYANCERS, PROFESSIONAL AND BUSINESS MEN, LANDOWNERS, CONTRACTORS, ETC.

BY

W. H. ANGER, B.A.

AND

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BARRISTER-AT-LAW

Lawyers will also find it convenient as a condensed and well-classified collection of most vital legal points for the various Provinces.

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PREFACE.

THE subject treated in this volume is one to which no class of persons in Canada can be indifferent, for no man can properly discharge the duties he owes to the public, or to himself, or to his family, without in some degree possessing a definite knowledge of the laws by which all are bound and the obligations resting upon each as an individual.

There is no good reason why every intelligent business and professional man should not understand particularly the laws of contract, agreement, guaranty, negotiable paper, chattel mortgages, mortgages, landlord and tenant, Statute of Limitations, wills, etc., as fully and clearly as any judge or lawyer in the land, for they belong to business life just as much as does the knowledge of the qualities and values of goods and commodities.

This "Digest of Business Laws" is not intended to make lawyers out of laymen, nor even to take the place of a lawyer in cases where a lawyer is needed, but it is intended to furnish its readers with such a detailed, systematic compilation of those business laws with which every person in the community comes in daily contact that will enable them to act intelligently and promptly in the conduct of their business and avoid making those needless mistakes which so often involve loss and lead to ruinous litigation. It is the only purely law book published in Canada on this branch of the law that applies equally to all the Provinces, giving the information that laymen need, detailed and direct, free from technical language and the mediæval phraseology employed in the Statutes.

The success that has attended the publication and sale of the eight previous editions of this work, amounting to sixty-two thousand, is sufficient evidence that it is meeting the general and increasing demand on the part of business and professional men for a more accurate and critical knowledge of those laws that confront them in everyday life.

The present edition has been carefully revised, and a considerable amount of new matter has been added to several of the chapters.

Toronto, January, 1915. W. H. A.

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DIGEST OF MERCANTILE LAWS

OF

CANADA AND NEWFOUNDLAND.

CHAPTER I.

INTRODUCTORY.

In this volume constitutional and international law will not be dealt with, neither will municipal nor school laws be touched; but the single aim has been to present in condensed form a reliable digest of the mercantile laws of Canada and Newfoundland.

2 Legislative Bodies.

In Great Britain, the Imperial Parliament, including the House of Commons and the House of Lords. In Canada, the Dominion Parliament, including the House of Commons and Senate, and a Legislative Assembly for each of the Provinces. In the United States, Congress, including the House of Representatives and Senate, and the various State Legislatures.

But besides these great legislative bodies in each country there are various other minor corporations possessing extensive legislative powers. Every city, town, county, township and incorporated village has power conferred upon it by Parliament to pass by-laws which have the full force of Statute Law within their jurisdiction.

In Canada all authority is divided between the Dominion Parliament and the Legislative Assemblies of the different Provinces. The Legislative Assemblies have delegated to county, township, city, town and school corporations certain legislative powers for the purposes of local self-government.

Incorporated companies, lodges, and various associations working under Government charter, also have power to pass by-laws and adopt constitutions or measures that bind their members in all things pertaining to the association or company as firmly as they would be by the national laws.

Therefore, members of such associations must not forget that they are required in all matters pertaining to them to comply with their regulations, and in case of any supposed wrong they must first exhaust the machinery which those regulations provide for the redress of grievances before taking the case to court for suit.

3 Divisions of Law.

The two great divisions of law are: (1) Common Law; (2) Statute Law.

Besides these two grand divisions of the law there are various other divisions used because of the different objects to which the law applies, as

Civil, Criminal, Mercantile, Marine, Constitutional, International, Military, Canon or Ecclesiastical Law, etc.

4 The Common Law.

The Common Law is what is called the unwritten law. It had its origin in the early days of Britain. The various races from which have sprung the British people, brought with them, when they invaded and settled in the country, their respective customs and rules of action, which, after the various Provinces became united under one government, caused considerable confusion for a time, until a general body of law was established for the whole kingdom, and thus called the *common law*. Owing to the fact that but few of the early inhabitants were able to read or write, the laws were for a long time simply preserved in memory, hence also called the *unwritten law*. The term *unwritten* does not now apply in the same sense that it did then, because every principle of the *common law* has long since found its way into print through the thousands of volumes of reports giving the rulings and decisions of the various courts, thus furnishing precedents for guidance in all future cases equal to any written law as to uniformity and definiteness, constituting what is known as Case Law.

In its broadest definition "Law is any rule which will be enforced by the courts."

5 Statute Law.

Statute Law is sometimes called the written law, in contradistinction to the *unwritten* or Common Law. It is a law that has been formally written out and introduced into Parliament as a Bill, which being passed becomes a law of the land under the name of Statute Law. Our Statute Laws contain many contradictions and inconsistencies, hence the conflicting interpretations by the various judges and courts.

Probably not one-quarter of our commercial laws are found in the Statutes; but they have grown up through long years of custom and usage, and from time to time receiving the sanction of the courts, have become a well-defined body of laws as stated in Section 4, sometimes called the Law Merchant, and form a part of what is called Case Law.

8 Uniformity of Laws.

The laws in Great Britain, Canada, the United States and Newfoundland are very similar, owing to the fact that Newfoundland and all the States of the Union, except Louisiana, and all the Provinces in the Dominion, except Quebec, adopted the common law of England, thus making it the fundamental law of the English-speaking world; and it prevails in all cases where it has not been abrogated or modified by Statute Law.

Louisiana and Quebec adopted the old French law, which is an embodiment of the Roman law; therefore, people having dealings in Quebec must keep that fact in view. For instance, a promissory note outlaws in Quebec in five years from maturity or last payment, whereas in all the other Provinces and Newfoundland it is six years.

CHAPTER II.

CONTRACTS.

10 Contracts.

Agreement, bargain, contract mean the same thing. There are legal and illegal contracts, void and voidable contracts, valid and invalid. Contracts may be either express or implied, or merely gathered from circumstances. Some are binding when made by spoken words, others require to be in writing, while some must be under seal in order to be binding. A clear knowledge of these distinctions is essential to those who would avoid needless business irritations and losses.

As contracts are the basis of every business transaction, whether great or small, this chapter will cover those which the business and professional man will be most likely to come in contact with.

11 Verbal, or Oral Contracts.

Oral contracts are those made by spoken words, and are usually called verbal, and sometimes parol. They are binding for the sale of *personal property* (but not for real estate), up to a certain amount fixed by Statute in each Province. In Ontario the oral agreement for the sale of personal property would be valid for any amount *under* $40. (For other Provinces, and for technical details, see "Statute of Frauds," also "When a Verbal Agreement Binds.")

They are also binding for a lease of property for one year and under, and under certain conditions for three years and under (see "Terms of Lease").

Oral agreements for one year or under between master and servant are binding; and in regard to other things they are also limited as to time to one year.

12 Written Contracts.

Written contracts may be either printed or written, or partly printed and partly written. They may be *formal*, using the legal phraseology, containing the details of the whole contract; or they may be *informal*, merely contained in letters that have passed between the parties.

13 Contemporary Written and Verbal Contracts.

As a usual thing a written contract cannot be affected by a contemporaneous oral agreement. If the written instrument purports to embody the whole contract, the court would not be inclined to receive other evidence to show that the intention of the parties was different. But if the writing does not give evidence of containing the whole agreement, or shows evident omissions, then in that case evidence would be received to prove a contemporaneous explanatory verbal agreement.

In the case of negotiable paper a contemporaneous written agreement would have no effect upon the position of a "holder in due course."

14 Contracts Under Seal.

Contracts under seal are called Specialty Contracts, and must, of course, be in writing. They do not require a *consideration* to make them valid. The seal indicates greater deliberation and solemnity in executing such contracts, and a person is presumed to enter into them with a full knowledge of their contents, and is hence debarred from afterwards pleading "insufficient consideration."

Anything affixed to the document after the name will answer for a seal as well as a regular seal made for the purpose.

All corporate bodies and joint stock companies are required by law to have a corporate seal, which the officers must impress on all contracts signed by them, on which seals are essential.

Promissory notes and bills should not be under seal, as a seal would destroy their *negotiability* by placing them among "Specialty Contracts."

Seals are required on deeds, mortgages, bonds and on leases that are required to be in writing.

For seals on leases, see "Terms of Lease."

For seals on wills, see "Requisites of a Valid Will."

15 Implied Contracts.

Implied contracts are those where the terms are not definitely stated, but are *presumed* to be understood. They are as binding as express contracts, but sometimes are difficult to prove, or are misunderstood. *Example*: A customer leaves his order with a grocer to have delivered at his residence five dozen eggs and $2 worth of sugar. Nothing is said about the price of eggs or the number of pounds of sugar sold for a dollar, or anything about payment; but the law *presumes* the existence of a tacit understanding between the parties as to the prices and the time of payment.

16 Voidable Contracts.

Voidable contracts are those which take their full and proper legal effect unless they are set aside by some one entitled to do so. They bind both parties until set aside. The party defrauded may void the contract if he chooses or he may affirm it and compel the other party to perform it.

Contracts, not for necessaries, made with minors, or with persons of unsound mind, or with Indians on their reservations, are voidable, not void, as it is optional with such persons whether they will honor their contracts or repudiate them. Also fraudulent contracts are voidable, not void. (See Section 22.)

17 Illegal Contracts.

Illegal contracts are utterly void from the beginning and cannot be enforced. They have no legal effect except in so far as a party to them may incur a penalty. An illegal contract is where the thing to be performed, or not to be performed, is forbidden by law. In all such cases, if either party has performed his part of the contract he cannot compel the other to perform his, and if either party has paid money he cannot recover it back, as the contract is regarded as wholly vicious, and no court would attempt to enforce it. But if an innocent party has paid money it may be recovered back.

In a contract containing two or more promises that are entirely distinct, so that one could be performed without the others, and it turned out that one was illegal, the illegal part would fall, but the others can be enforced.

But illegality does not always appear "on the face" of a contract, and in such a case it must be established by *evidence*.

The following are examples of illegal contracts:

1. Contracts in restraint of trade. 2. Contracts in restraint of marriage. 3. To obstruct the course of public justice. 4. Contracts with alien enemies

in time of war. 5. Contracts to lead an immoral life. 6. Sabbath desecration. 7. Bets or wagers.

18 Contracts Against Public Policy.

The policy of every community or State is to advance the public good, hence whatever contracts are opposed to the general good are said to injuriously affect public policy, and are, therefore, void. Among such the following three sections are included:

19 Contracts in Restraint of Trade.

All contracts in *general restraint* of trade are void. For instance, a merchant sells his business, including stock and good will, and agrees not to engage in business again of any kind. Such contract would be void because lawful trade is considered to be in the public interest. He could, therefore, commence business again and the purchaser would have no redress. He could, however, legally bind himself not to engage in business in a particular locality, or in a certain line of business, or for a certain length of time as that would be only a *partial restraint* of trade, hence not within the meaning of the law.

All combines, as among manufacturers, dealers, etc., which attempt by coercive measures to control the trade, or the market, for the purpose of inflating prices, are illegal, and render the individuals or firms composing them liable to penalties. This does not penalize concerted action to secure fair and reasonable prices. It is the coercive feature that refuses to sell to or bars out such dealers or workmen as do not enter the "combine," or who refuse to co-operate with it, or sell at a lower price, that is illegal and punishable.

20 Contracts in Restraint of Marriage.

Marriage is held to be in the public good, hence any contract which wholly restrains marriage is void. The *condition* that he or she must not marry if attached to a bequest to any person (except a wife or husband) in a will is void. The person would take the property. A partial restraint of marriage, where it is reasonable, may be valid, as where a bequest is left to a child on condition that marriage should not be effected until the age of twenty-one, or, say, twenty-five years. It would be valid, because it would merely fix a date when there would be less danger of contracting an ill-advised marriage. But if the time fixed should be, say, fifty years of age, it would be void, because that would be unreasonable.

A husband's bequest to his wife on condition that she does not marry again, though selfish, is valid, because she has once been married, hence it is not in restraint of marriage. It would be the same with a wife's bequest to her husband, or any bequest to any person who has been married. (See "Valid and Invalid Bequests.")

21 Contracts to Obstruct the Course of Justice.

An agreement of a public official to do something contrary to his duty cannot be enforced; and money promised him to use extra exertions in the discharge of his duty in a particular course cannot be recovered.

22 Fraudulent Contracts.

Fraudulent contracts are voidable—not void. A definition cannot be given that would cover all the forms of fraud, but the following will make sufficiently clear what would constitute fraud:

1. A false statement as to the facts knowingly or recklessly made by a party, or

2. A concealment of facts that are known to the one and not readily discernible by the other, and yet such as should be revealed. The misrepresentation must *actually deceive* in order to make a case of fraud. To sustain an action of deceit there must be *proof of fraud*—fraud that actually deceives—and nothing short of that will suffice.

The party who has been defrauded may void the contract if he wishes, or he may affirm it and compel the other party to perform it. If he wishes to void it, two things are necessary:

(1) He must not accept any benefit derived from it, or to continue to act under it after he has discovered the fraud;

(2) He must give prompt notice of the fraud after he has discovered it.

The dishonest party cannot disaffirm the contract, but in all cases is bound to carry it out, if the other party demands it. If both parties practise fraud, neither one can enforce the contract against the other.

25 Selling Property Obtained by Fraud.

As a usual thing a person obtaining goods or any kind of property through fraud, and transferring them to an innocent third party for value, gives a good title.

A promissory note obtained through fraud cannot be collected by the party who obtained it; but upon coming into hands of a third party, before maturity, for value, and who did not know of the fraud, would be valid and good against the maker; so would a stolen note. But a forged note cannot be collected; it is void from the beginning.

26 Statute of Frauds and Perjuries.

This famous Statute was passed in the 29th year of the reign of Charles II. of England, 1678, and still exists there, in this country (except Quebec), in Newfoundland, and in the United States (except Louisiana), with but slight change. It was designed to prevent the frequent commission of frauds and perjuries in regard to the enforcing of old claims, and various kinds of promises to answer for the debts of others, and provided that certain contracts had to be in writing to be binding. The following are the requirements of the Statute which come within the scope of this work as they have been varied by our Statutes:

1. That leases of land for more than three years must be in writing and under seal.

2. Contracts for the sale of lands, or for any interest in lands, must be in writing.

3. Every agreement that by its terms is not to be performed within one year must be in writing.

4. Every special promise to answer for the debt, default or miscarriage of another must be in writing.

5. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry (engagement), must be in writing.

6. Contracts made for the sale of personal property of $40 and upwards must be in writing, unless part or all of the goods have been delivered, or a part of the purchase price paid. In Quebec, British Columbia, Manitoba, Alberta, Saskatchewan, North-West Territories and Newfoundland the sum is $50, and in Prince Edward Island, $30. In the Yukon, $50.

27 False Pretence.

False pretence is a representation by words, or otherwise (a shake or nod of the head) of a matter of fact either present or past, which representation is known by the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation; hence, there are four essentials to constitute *false pretence:*

1. There must be a false statement or act.

2. The offender must know at the time of making the statement that it is false.

3. The goods or money in question must be parted with in consequence of such false statement.

4. The false statement must be made with the *intent to deceive.*

The penalty for obtaining goods or money by false pretence is three years' imprisonment.

The Dominion Parliament, by Chapter 24 of 1914, adds the following to the Criminal Code: "Every person who knowingly publishes or causes to be published any advertisement for the purpose of promoting the sale or disposal of any real or personal property, or any interest therein, containing any false statement which is likely, or is intended to, enhance the price or value of such property, shall be liable, upon summary conviction, to a fine not exceeding $200, or six months' imprisonment, or both."

28 Theft and False Pretence.

In theft the owner of the property has no intention of parting with it to the person taking it; but in the case of false pretence the owner of the goods does intend to part with them, but his consent to part with them is secured by the false representations made to him. In general, it is not stealing to take something growing out of the earth of less value than 25 cents.

29 Embezzlement.

Embezzlement is the taking of money that has not yet come into possession of the employer. For instance, a debtor pays the employee money for the employer and he keeps it himself; therefore, whenever money is received by the employee, and is not accounted for, or its receipt denied, it is embezzlement. By the law of Canada this is now classed as theft.

30 Breach of Trust.

Breach of trust is a term used in connection with a person who is appointed a trustee of any property for the use and benefit of some other person, or a public or charitable purpose, and who fraudulently appropriates it to some other use. Persons guilty of this offence are liable to seven years' imprisonment.

33 A Proposition and Its Acceptance.

A contract is composed of two elements—a proposition and an acceptance. A proposition in some form is the beginning of every contract. One person makes an offer of some kind to another, and if the other person accepts the offer in the *same sense* as made, then there is a contract. But if in accepting he makes any change in the terms, there is no contract. Example: One man offers to sell a horse to another for $100 cash. The other party says he will buy the horse, but will only give $85. This is not assenting to the proposition, but is in effect a *new proposition.* Any other change in the terms would have the same effect, as for instance, the second

party would say to the first that he would accept the offer but could not pay for three months. There is no *assent* here, no mutual agreement, hence no contract.

34 Time for Acceptance of Proposition.

An oral proposition which does not include any provision as to time ceases when the parties separate. A written proposition with no time limit named is good until accepted (if done within a reasonable time), or until withdrawn.

If a time is fixed for acceptance, it must be given within that time, otherwise the acceptance would be a nullity. An acceptance may be given by an act as well as by words, as in case of all implied contracts. Example: The wife or children purchasing necessaries at a store, the assent of the father is *implied,* and binds him, unless notice to the contrary has been given.

35 Assent Obtained Through Fraud.

Assent obtained through fraud is not binding on the party who was defrauded. Such a contract may be rescinded by the innocent party, but he must do so immediately after he discovers the fraud. He must also refuse to exercise ownership over the subject-matter of the contract or accept any profits arising from it.

36 Assent Obtained Through Force.

If assent is obtained through threat of bodily harm, imprisonment, or any similar illegal pressure, it is void, because under *duress.* But a threat to dismiss from employment unless a certain proposition were agreed to by an employee would not be *duress,* and a contract signed under that kind of pressure would be legal.

39 Proposition by Mail or Telegram.

When a proposition is made by letter the contract is closed when the letter of acceptance is placed in the post-office.

An acceptance given by telegram to a proposition made either by letter or telegram closes the contract when the message is delivered to the telegraph company. In all cases the acceptance by telegram should be confirmed by letter so as to guard against error in transmission or failure of delivery.

A proposition that does not prescribe any time for acceptance continues valid until revoked, or until a reasonable time has elapsed before acceptance.

42 Withdrawal of Proposition.

A proposition may be withdrawn any time before the acceptance has been given.

In case a proposition made by letter is to be withdrawn, the letter of withdrawal must be *received* by the other party before the letter of acceptance is placed in the post-office, otherwise it is too late.

If withdrawn, by telegram or by telephone, the message of withdrawal must be delivered to *the other party* before his *letter* of acceptance is placed in the *post-office,* or his acceptance by *telegraph* is delivered to the *telegraph company,* otherwise it is too late.

43 Consideration in Contracts.

This law term refers to the *reason or inducement* upon which the parties to a contract give their assent and agree to be bound. In every binding contract there must of necessity be a *legal consideration,* and what the law denominates a "sufficient consideration."

There are various kinds of *consideration,* and as this is one of the most important features of a contract, several will here be enumerated:

(*a*) *Good consideration* is one based upon *natural love and affection.* Example: A father may deed to his child a portion of his land, and it would be valid. He could not recover it afterwards even if he desired to do so. A mere *promise,* however, to give a deed some time in the future would not be binding.

(*b*) *Valuable consideration* is usually, but need not necessarily be, a monetary consideration. It may be something given or done, or something promised to be given or done by or for the person making the promise. Any of these would constitute a "sufficient consideration."

A promise to marry is held a valuable consideration.

(*c*) *Illegal consideration* is where the act to be performed is wholly or in part immoral or contrary to public policy, or forbidden by Statute; as smuggling goods into the country, selling lottery tickets, publishing or selling immoral literature. Notes given in satisfaction of a wager on an election or a horse race, or in settlement of a "bucket shop" transaction, or to a hotel-keeper in payment for liquor, or a note towards election expenses are void in the hands of the party to whom it was given, or of a subsequent holder with notice, or when no consideration was given.

A note given for a gambling debt has been declared null and void even in the hands of an innocent endorsee for value before maturity. Biroleau v. Derorum, 7 L. C. Jur., 128 (1863).

(*d*) *Consideration in contracts under seal.*—Contracts under seal are valid without a consideration. The placing of a seal on a contract makes it final. The seal itself is said to impute a consideration.

(*e*) *Consideration in regard to negotiable paper is presumed.* Promissory notes, acceptances and cheques in the hands of an innocent holder for value are valid, even if they were issued without a consideration. With such paper consideration is *presumed,* and an innocent third party buying them before maturity may collect them. The party to whom they were given without value could not enforce payment; neither could third parties if they purchased them after maturity. Accommodation notes and acceptances are common examples of this kind.

Anson's four general rules as to consideration are as follows:

1. It is necessary to the validity of every promise not under seal.
2. It need not be adequate to the promise, but must be of some value in the eye of the law.
3. It must be legal.
4. It must either be present or future; it must not be past.

But there are important exceptions to the 4th rule, as for instance:

A debt barred by the Statute of Limitations is *consideration* for a subsequent written promise to pay it. There are other exceptions that could be given, but, as a rule, it is correct to say that the consideration must not be past.

48 Failure of Consideration.

A failure of the consideration voids the contract. Example: A person agrees to give $500 for a certain interest in a patent to manufacture gas, and afterwards the patent is found to be void. The contract cannot be enforced, and if a note were given it could not be collected except in the hands of "an innocent holder for value."

(*a*) *Partial failure* of consideration does not void the contract, and the other party may obtain damages for the part that failed.

49 Gratuitous Promises, and Gifts.

Gratuitous promises, that is, promises without a *consideration,* are not binding, because there is no equivalent given. If there is no *consideration* there is no reason for the contract; hence a mere promise to give or do something cannot be enforced.

(*a*) An oral promise to one creditor to pay another's debt that has already been incurred, is gratuitous, and cannot be enforced.

(*b*) Mutual promises, however, if made at the same time, are binding, as the one promise is a "consideration" for the other promise.

(*c*) A gift of goods or any kind of chattels is good, if accompanied by delivery, and the donor could not recover them back. But where one person obtains property from another the *presumption* is that he *purchased* the property; hence, if the giver should sue for the value of the articles, the other party in setting up his defence would have to *prove* they were a gift, and this he could not do by the plaintiff if he denies the gift. Other evidence would have to be given to *prove the gift.*

51 Legal Incapacity to Contract.

The classes of persons whose rights and interests the law protects by placing them more or less under legal incapacity to contract are: 1. Persons under 21 years of age. 2. Idiots and lunatics. 3. Persons wholly intoxicated. 4. Indians living on their reservations. 5. Those under sentence of death.

53 Minors, or Infants.

Minors, in Common Law called Infants, are, in Canada, all persons, male or female, under twenty-one years of age. In a few of the States of the United States females are of age at eighteen years, but not so in Canada.

A minor cannot waive his rights of infancy by any possible agreement, either oral or written, that will bind him.

A wife, however, under age, may bar her right to dower, but she cannot make a valid will.

A minor may sign as witness to any document, if old enough to understand what he is doing, and to give evidence in court.

A minor may also act as *agent* and bind others in contracts.

(*a*) Where a minor represents himself to a purchaser to be of full age he is not allowed afterwards to set up his infancy as a defence. Bennetto v. Holden, 21 Gr. 222.

(*b*) In Quebec minors cannot sign as witnesses to Wills made in "Authentic Form."

54 Minors Contracting for Necessaries.

Whatever things are necessary for the minor in his station and condition in life he may contract for, if he is not living with his parents or guardians, who are able and willing to support him. If he should not pay for such necessary articles, the dealer from whom he purchased them may sue and recover from him just the same as though he were of full age.

The things usually reckoned as necessities for minors are board, clothing, education and medical attendance, according to their station in life. A suit of tweed clothing for a son of a mechanic, or any person in a similar

station in life, would be regarded as a necessary, but a sealskin overcoat or a gold watch would not be. A fur coat or a gold watch would be held a necessary for a millionaire under age.

Minors not at home and supporting themselves may sue and recover for wages earned by them. They are also liable for any damage done or wrong committed by them; also for any criminal offence. Wages of minors may be garnisheed in payment for necessaries only.

They may also contract for life insurance within certain limitations, and be held liable for the premiums. But if he gives a note for the premium the note cannot be collected by suit. (See section "Minor's Note.")

(*a*) *In Quebec* minors are emancipated from some of the disabilities of minority: 1. By marriage. 2. Judicially by a court. 3. By engaging in trade, as a banker, merchant, or mechanic, he is reputed of age for all acts relating to such trade or business. (C. C. Article 323.)

But in all cases a curator or guardian must be appointed to such emancipated minor.

An emancipated minor may grant leases for terms not exceeding nine years, receive his revenues and give receipts for same and perform all other acts of mere administration, and be held liable on his contracts in connection with his business or trade.

But he cannot bring an action or defend an action, nor borrow money without the aid of his curator, and cannot give a mortgage or deed without authority of a court or judge or prothonotary.

In all other respects the same as minors in the other Provinces.

55 Minors Buying Luxuries.

Things classed as luxuries for minors would be anything beyond what the law classes as *necessaries*. For any such articles bought on credit the merchant cannot compel the minor to pay. If, however, the original goods are in his possession, the merchant has the right to *replevy* and take them back, but he cannot take them himself by force.

56 A Minor's Note.

A minor's note, given even for necessaries, cannot be collected. If a merchant should chance to take such a note for *necessaries*, he could not sue on the note, but he could hold the note until maturity and then sue on the open account, and present the note as evidence of the debt. He could not sue until the note matured, as that would be the date of payment.

The note is not void, so that if there were an endorser, or a joint maker, or a surety, they would be liable on it, even if given for luxuries.

A minor may also transfer, or sue on a note which he holds, for although he is not bound, others competent to contract who are indebted to him are liable on contracts made with him.

57 A Minor's Deed.

The deed of a minor is voidable, not void, for when he attains full age he may affirm, or retract it, just as he decides. An infant entitled to repudiate a deed can only get relief upon making restoration of the benefit he has received. Whalls v. Learn, 15 Ont. R. 481.

Also if a minor sues or defends during infancy in an action in which the deed is called in question he may affirm or disaffirm the deed, and the record will bind him. Gilchrist v. Ramsay, 27 U. C. R. 500; Gallagher v. Gallagher, 3 U. C. R. 422.

In selling real estate to a minor, if he pays cash that of course settles it. If he buys under a written agreement, paying down part, the contract cannot be enforced against him. He can repudiate the agreement and recover back the amount he had paid. If, however, he should transfer the agreement or option to another party of full age, the contract can be enforced against such third party. In this way a minor may buy and sell, but the original owner to protect himself should make the conveyance direct to such purchaser and never through the minor.

58 Minor Attaining Full Age.

When a minor comes of age he may ratify a contract made before age, which is yet to be performed. The ratification must be in writing to bind him, or unreasonable delay in repudiating it will bind him.

He may also rescind a contract that has been executed; but in such a case he must restore to the other party the *consideration,* if it be within his power to do, else he may not rescind.

60 Parents' Liability for Minor's Debts.

While the minor is living at home and supported by his parents or guardians, they are liable for *necessaries* purchased by the minor, unless notice has been given to the contrary. They cannot be held liable for *luxuries.*

Parents are also liable in case the minor is not living at home, but is supporting himself and collecting his own wages, if they should pay part of his bills or accounts. They then render themselves liable for all of them. They may aid him if they wish by giving money direct to him, but must not pay any of the debts he contracts if they do not wish to become liable for all of them.

61 Parents and Wrongful Acts of Minor.

As a general rule a father is not liable for the wrongful acts of his children. To make a father liable for the wrongful act of his child it must be shown either (1) that he authorized it, or (2) that he ratified it, or (3) that it was done in the course and scope of the child's employment. The same rules which govern the liability of a master for the acts of his servant apply to the liability of a parent for the acts of his child.

63 Contracts by Lunatics.

Such persons having lost their reason are manifestly incompetent to contract. But unless the insanity is of such a nature as to be patent to everybody, it must be established by legal proceedings to relieve the lunatic from a contract he may have entered into. To void a contract on the ground of insanity, it is not sufficient to prove merely mental incapacity, but also that the other party had knowledge of that fact, and unless these two facts are established the plaintiff cannot succeed. Robertson v. Kelly, 2 O.R. 163.

A person who makes a contract with a lunatic is bound by it as though he were dealing with a person competent to contract. No person but the lunatic or his legal representatives can void a contract that he has made. Contracts for necessaries for him the law holds binding.

In some cases of insanity, persons have intervals during which they are perfectly sane. These are called "lucid intervals," and contracts made during such periods are binding.

64 Drunken Persons' Contracts.

A person merely strongly under the influence of liquor is not legally, although he may be mentally, incompetent to contract. To be relieved from liability on a contract he may have entered into, he must be wholly intoxicated, so as to be unable to use his reason, unless the other party furnished the liquor. Drunkenness will not relieve from criminal prosecution.

65 Indians' Contracts.

Our Indians living on their reservations are wards of the Crown, and thus protected from fraud and deception by being placed in a similar position to minors, and rendered incapable of binding themselves in a contract. A person who makes a contract with them is bound, but the Indian is not bound, not even for necessaries.

The words of the Statute covering these points are as follows: "No person shall take any security or otherwise obtain any liens or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian, or non-treaty Indian. Provided that any person selling any article to any Indian, or non-treaty Indian, may take security on such article for any part of the price thereof which is unpaid." R.S.C., chap. 81, sec. 102.

Sec. 105 says: "No presents given to Indians or non-treaty Indians, and no property purchased or acquired with or by moneys or any annuities granted to Indians, or any part thereof, shall be liable to be taken, seized or distrained for any debt, matter or cause whatsoever. All animals, farming implements, tools and other articles shall be held by them free from seizure for debt." R.S.C., chap. 81, sec. 105.

67 Alien Enemies, and Contracts.

According to International Law all commerce between nations at war is suppressed, and contracts entered into (even bills of exchange), after the declaration of war are illegal and void, unless the Crown gives a special license. Contracts made before the war commenced are suspended during its continuance, but may be enforced after peace is declared.

Aliens in Canada in times of peace may own property and contract as freely as natural-born subjects or those who have taken the oath of allegiance, but they cannot vote at any municipal or parliamentary election.

69 Parts of a Formal Contract.

A formal contract will include: 1. Date. 2. Names of all parties in full. 3. Recitals or explanations, and reasons, if any. 4. The consideration. 5. The subject-matter. 6. All the several agreements between the parties. 7. Signatures of all parties, as they usually sign their names. 8. Seals, if any are required. 9. Signature of witness, when required.

In drawing contracts be specific in naming all the terms and conditions of the agreement. State accurately the names in full, residence and occupations of the parties to the contract, and the different promises each one is to perform. If a person has several Christian names, include them all. A person who has no trade or profession is usually called a "gentleman." In giving the residence of the parties the smallest municipality must be mentioned first, as a township, or village, or town, or city, then the county, and lastly the Province.

The person agreeing to do work or to sell an article is usually called "the party of the first part," and the party paying the money "the party of the second part"; but there is really no difference which comes first.

70 Signing of Contracts.

The instrument, if to be registered, should be signed in the presence of a disinterested witness. If the instrument has already been signed, it will be sufficient for a person to *acknowledge* his signature in the presence of the witness, when words like the following may be used: "I acknowledge this to be my hand and seal," if a seal is required to be used.

In case of a corporation it is sufficient if the instrument in writing is duly sealed with the corporate seal. (B. of Ex. Act sec. 5.)

71 Signature by Mark.

A person who cannot sign his own name must *request* some other party to do it for him. The following will illustrate the usual form:

Witness: J. C. SUMMERS. WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ WINTERS.

A person signing his name this way may take hold of the pen while his name is being written, or he may not; he may make his own cross or he may direct some other person to make it for him. There must, however, be a witness to the signature.

72 Signature by One Who Cannot Read.

When a person who cannot read is executing an instrument, it is required that it be read over and explained to him in the presence of the witness, so that he may fully understand what he is doing. The witness, in signing such an instrument, should mention the fact in some such words as the following:

Signed, sealed and delivered after first having been read over and explained in the presence of J. C. SUMMERS. WILLIAM $\overset{\text{his}}{\underset{\text{mark}}{\times}}$ WINTERS.

Of course for a promissory note the word "sealed" should be omitted, as a seal would destroy the negotiability of the note.

75 Witnesses to Documents.

It is not essential to the validity of any document or agreement that its execution be *witnessed,* except in the case of Wills and where a person signs "by mark," as in the two preceding sections. The only object in having one or more witnesses to a lease, a deed, or bond is to prove the contract in case the parties should thereafter dispute their signatures; and also to comply with the requirements of the Registration Act for documents that have to be recorded.

In all documents to be registered, as deeds, mortgages and bills of sale, it is necessary for the witness to verify his witnessing and signature by an affidavit, which is written on or attached to the document.

76 Erasures and Corrections in Documents.

If any such should become necessary to make it should be done before the document is signed. In making the corrections do not use a knife or rubber, but simply draw a line through the words with pen and ink so that the original words may be clearly seen. Then write the correct words between the lines, using a caret to show where they should be read in. The witness should put his initials on the margin opposite every such correction or interlineation as evidence that it was made before the execution of the document.

77 Documents Requiring Several Sheets.

When a document is written on more than one sheet they should be fastened together and paged before being signed. The witness sometimes places his initials on each sheet and mentions the number of sheets with his signature.

78 Agreement Comprising Separate Documents.

When an agreement is composed of two or more separate documents they are usually marked with the letters of the alphabet, as A, B, C, etc., and referred to as "Schedule A," "Schedule B," etc. Example: Contracts for the erection of large structures are usually accompanied by plans and specifications marked A, B, etc., which are attached to and form part of the agreement.

79 Requisites of a Valid Contract.

From the preceding sections the requisites of a valid contract may be summarized as follows: (1) It must be possible. (2) It must be lawful. (3) It must be made by persons who are competent to contract. (4) It must be assented to by each and all the parties. (5) It requires a consideration, except for those under seal and for negotiable instruments. (6) It must be without fraud. (7) Some may be verbal, others must be in writing, and some under seal, according to the nature of the contract.

80 Interpretation of Contracts.

Although it is supposed that parties entering into a contract fully understand its terms, and will use language in expressing them that will explicitly give their meaning, yet it often happens that such is not the case; hence certain rules have been adopted to interpret them when ambiguity occurs. The following are those of chief importance:

1. THE INTENTION of the parties at the time the contract was made is considered, rather than the literal meaning of the words, but the intention will be drawn from the words, if possible.

2. CUSTOM AND USAGE of that particular business and place will be regarded when the wording of the contract is doubtful.

3. THE TECHNICAL WORDS AND PHRASES used will be given the meaning in which they are employed in that particular business.

4. VARIATIONS BETWEEN WRITING AND PRINTING.—When one part of a contract is written and another printed, if they disagree the written portion will be accepted. The same is true with a note or cheque.

5. LIBERAL CONSTRUCTION.—Where the wording of a contract is ambiguous it is the rule of the courts to construe it liberally, so as to give effect to the common sense of the agreement, even sometimes rejecting objectionable clauses and supplying omissions. But where the Statutes fix a definite meaning to words, they will invariably be construed in that sense.

6. CONSTRUCTION AS TO TIME.—When no time is mentioned in the contract for its execution, the presumption is that it must be done at once, or in a reasonable time, and the courts will so construe it, according to the nature of the work to be done.

7. CONSTRUCTION AS TO PLACE.—It is a settled rule that:

(*a*) All matters bearing upon the interpretation, the validity and the execution of contracts, as well as capacity of the respective parties thereto to contract in such case, are determined by the *law of the place* where the contract is made, unless the law of the place where the contract is to be carried out forbids it.

(*b*) All matters relating to its *performance* are governed by the law of the Province or country where the contract, by its terms, is to be performed.

(*c*) All matters respecting the *remedies* to be pursued, the bringing of suits, service of process, etc., are governed by the law of the place where action is brought.

81 Time for Completion of Contracts.

The element of time is an important feature of all contracts. A contractor not completing his contract within the time specified is liable for whatever damages actually occur, if no stated sum is agreed upon.

In cases where no time is fixed for the completion of a contract it must be performed within a "reasonable time," according to the circumstances, which, if not mutually agreed upon, would be for the court or judge to determine.

82 The Penalty Clause in Contracts.

Where a definite time is fixed for the completion of the contract and a stated sum agreed upon by way of damages if not completed by such date, say "$20 per day for each and every day thereafter, until completion," such agreement is enforceable, providing it is not nullified by some act of the owner himself. For instance, the contract is for the construction of a particular building, according to certain plans and specifications, using certain kinds of material; but during the course of erection some change is made, either by the request or consent of the owner of the building, in the substitution of some other kind of material in place of that agreed upon; or some change is made in the plan of some room, or hall, or stairs or chimney, no matter what: this makes a new contract. It is not the building the contractor bound himself under a penalty to complete by such date, and therefore he is released from the stipulated damages.

To prevent such changes from nullifying the penalty clause they must be embodied in an additional written agreement, signed by the contracting parties, in which it is definitely stated that the other parts of the original agreement, including the penalty clause, are to remain in force.

83 Cancelling Contracts.

In cases where a person has been induced through *fraud*, or *falsehood*, or *misrepresentation* of any kind, to enter into a contract to purchase land or any kind of personal property, he can repudiate the contract or bargain; and if he has paid money he can recover it. But he must act as soon as he discovers the fraud, and restore, or offer to restore, the property in the same condition it was in when he received it. The fraud or misrepresentation must be of a material nature and actually deceive.

A purchaser who would rescind a contract must be in a position to restore the property. If he treats the property as his own (more than to care for it), after discovering the fraud, he cannot afterwards return it and recover his money. If a portion of the goods were used before the discovery of the fraud, it would be for the court to determine the value of the portion used. There is no chance for a person to rescind a contract merely because he changes his mind.

84 Breach of Contract.

Breach of contract is a failure to do what was required or covenanted to do; or the doing of what was forbidden. The party willing to carry out the contract must tender the money, or goods, or service, as the case may be, and then if refused may sue for "specific performance," or for damages for breach of contract.

85 Remedies for Breach of Contract.

The law provides two classes of *remedies* for the enforcement of the rights created by contract—civil and criminal. The criminal are for the punishment of crime, and in a general sense are dealt with by the Crown; the civil belong to the individual, and enable him to enforce his personal rights. His remedy is by suit for damages. There are different classes of damages: (1) Compensation for the actual loss sustained. (2) Nominal, where the failure to perform the contract is not regarded as intentional, but merely through inability to do so. (3) Liquidated, where the amount is previously agreed upon in case damages should be awarded. (4) Speculative. Where the profits that would have resulted from the performance of the contract are known, they may be recovered. (5) Exemplary, where for a malicious violation of a contract a sum in excess of the actual loss is awarded as a punishment—"smart money."

90 Injunction and Mandamus.

Where a person or company or corporation is doing something that was contracted not to be done, or is infringing upon the rights of another, a writ may be issued and an order obtained from the court restraining him from further action until the case has been legally adjudged. This order is called an injunction and can be obtained from the judges of the higher courts only.

The cost varies. If the party desiring an injunction will go to the judge direct and make application for himself, becoming personally responsible under a bond for whatever damages may arise out of it and the matter stops with the service of the injunction, it need not cost over $5.00. But if he employs a solicitor or barrister to make application for an order of injunction and who thus becomes responsible for damages that may arise, it will cost from $20 to $50, and possibly $75 if the injunction is resisted and the case has to be fought out.

The same judges may grant a *mandamus*, ordering one to do his duty in a particular case. This is usually used against a public official, as for instance, against a township official or the whole council for the repair of a certain roadway or a bridge.

CHAPTER III.

GUARDING AGAINST FRAUD.

100 Guarding Against Fraud.

Although this is purely a law book and not a book on business, still this chapter is so essential to the business community that it can scarcely be omitted.

The itinerant swindler is always operating somewhere, in some line. Every class in the community have this enemy to watch against. The following suggestions may be of service:

1. Never give money or a note, except it be to a well-known firm, until the article purchased is in your possession and found to be according to agreement.

2. An article or a machine having been ordered, which, upon arrival at the freight or express office, is found to be not according to agreement, should not be received. Of course, if the article is according to contract it must be received if delivered at the place and time agreed upon; but if not according to contract the article should be refused, and payment therefor cannot be enforced.

3. Always *take a copy of every agreement* that is made in writing, or any order given for machinery, goods, etc. The agent should sign the company's name, together with his own, to the copy you retain, which should also be marked "copy" by him. Never neglect to do this, if you would avoid the risk of having your order changed by an unscrupulous agent into a promissory note, or for a much larger quantity of goods than you agreed to take. **If you have no copy, it might be difficult to prove the forgery.**

4. In dealing with an agent, or any other person, where a written contract, agreement or note is made, be assured of this, that nothing but the *written document* will be considered in court. No matter what else the other party promises in addition by word of mouth, or even in writing, if on a separate paper or not referred to specially in the written contract as a part of the agreement, it is utterly worthless where innocent third parties are interested.

5. Never cash a private cheque for a stranger, no matter what his "Letters of Introduction" may be. The banks and brokers will look after a man who actually has money in any bank in the world.

101 Sample of Swindling Note.

The form of swindling note shown on this page—which is made by merely cutting off the righthand end of what was supposed to be simply an agreement to sell six harrows, to be paid for after they were sold—is an old one. After the end is removed, it is a regular promissory note, which could be sold to any person who knew nothing of the swindle, and by being thus transferred to an innocent holder for value it would be collected. The swindle does not always take this form, but sometimes the note would be in the middle of a sheet, and by cutting away the top, bottom and sides a regular form of note would be left. This illustration, however, is enough to put thoughtful persons on their guard against all similar forms of trickery.

It is seldom that such documents are necessary in legitimate business, and the attempt to use them should be received as a strong suspicion of fraud of some kind, so strong that they should not be signed.

$175.00 TORONTO, *February 28th, 1910*

Six months after date I promise to pay Jas. Brown, or bearer, the sum of ONE HUNDRED AND SEVENTY-FIVE DOLLARS payable at Toronto, with interest at eight per cent. per annum

Wm. J. Simmons

Witness: S. S. Smith

when I sell six harrows when collected, to be if not paid when due.

Agent for Jas. Brown.

102 Note that Prevents Fraud by Agents.

The non-negotiable note given in section 180 is the best protection that can be devised against the frauds and swindles that have caught even the shrewdest of men. In purchasing a machine or any line of goods through an agent from a strange firm without opportunity for a sufficient test, if a note is to be given, write out such a note as that. That kind of note is valid and can be collected as well as any other form, *provided* there is no fraud; but if there is fraud in connection with the transaction, it could not be collected. It is positively non-negotiable, so that the payee cannot transfer it to an "innocent holder for value" to be collected. It can be transferred by assignment; but in that case the purchaser does not get any better title to it than had the original holder, hence the maker is safe.

CHAPTER IV.

GUARANTY AND SURETYSHIP.

107 Guaranty and Suretyship.

The kind of promise given by one person to another to answer for the debt, default or miscarriage of a third party that the courts will enforce was settled by that famous Statute of Frauds and Perjuries over three hundred years ago.

108 Verbal Recommendations.

The representation or assurance made by one person concerning the character, conduct, or credit of another by which such person obtains goods or credit does not bind such person as a surety, *unless it is in writing.* R.S.O., Chap. 146, Sec. 7. It is the same in all the Provinces.

109 A Verbal Promise that Binds.

There are oral or verbal promises to make good the debt of another which are binding in law. For instance:

A person goes with his hired man to a store and says to the merchant, "Give this man goods (naming the amount), and I will see it paid," or, "I will be responsible." This is binding when given merely by word of

mouth. if the sum does not exceed the amount for which an oral agreement is binding in that Province, because it is a promise to pay the debt himself, and not answering for the debt of another. It is his own order, and he virtually tells the merchant to charge the goods to him direct, which the merchant should do in such case, although the goods are for the benefit of the other party. It is a "valuable consideration," and makes the contract binding if the goods are taken.

Again, if A were to go to B and say, "If you do not press C for your claim for one month, at the end of that time I will see that you are paid." This would also be a direct promise by A to pay the debt, and would therefore be binding without being put in writing.

The extension of time given is a "sufficient consideration" to constitute a binding contract.

110 A Verbal Promise that Does Not Bind.

But if instead of using the form of expression employed in the preceding section, suppose he were to say to the merchant, "Give this man goods up to (naming the amount), and if he does not pay you by such a time (naming date), I will myself," or "send the bill to me." This would be worthless spoken by word of mouth, because it is "answering for the debt or default of another," and therefore utterly void unless put in writing. Even if there were witnesses it would still be void, according to that famous "Statute of Frauds and Perjuries," which has been good law since 1678. It leaves the debt on the other party, the guarantor only agreeing to pay in case the debtor fails to do so. Every form of wording that may be used where this is the effect, is utterly worthless, unless put in writing.

114 Letters of Recommendation.

Great care should be taken in the wording of a letter of recommendation where financial obligations are to be created or business relations formed, if nothing but a simple recommendation is intended. All such phrases as "He is good for them," or naming a certain amount and saying, "He would be safe to that extent," etc., if in writing, would constitute a guarantee. The liability may be evaded by modifying such expression by, "I would regard him as safe" for such an amount, or "I think you would be entirely safe in giving him credit" for such an amount, or, "I would trust him," or, "I think you could trust him," or, "He has always paid me," etc. With any such modifying phrase, much may be said to the credit of a worthy person without being held as a surety.

115 Guaranteeing Debt already Incurred.

In guaranteeing the payment of a debt already incurred, the guaranty must not only be in writing, but there must be a *consideration*, for *gratuitous promises* are not enforceable in law.

> *In consideration of One Dollar, the receipt of which is hereby acknowledged, I guarantee that the debt of One Hundred and Twenty-five Dollars now owing to James Forsyth by Henry Johnston shall be paid at maturity.*
>
> LONDON, Aug. 29th, 1910. WILLIAM JENNINGS.

This *guarantee* might be addressed to James Forsyth merely in the form of a letter, and closed with "Yours respectfully," etc., and be just as binding.

Another Form.—If there be a *consideration involved* it is not necessary to *express* it in the guaranty, as (R. S. O. Chap. 123, Sec. 8):

To C D, of.....

In consideration of your staying proceedings in the action you have commenced against ..... in the (name of court), of the county of ..... to recover the sum of ..... dollars (or if you will grant an extension of time to B to pay his account, as the case may be), I hereby guarantee to you that the amount, by weekly instalments of ..... dollars (or otherwise), shall be paid until the indebtedness is cancelled, and in default of payment of any one instalment I further agree that the balance then due shall be recoverable against me upon this guaranty.

Dated this ..... day of .....19 . (Signature.)

The staying of proceedings, or an extension of time, would be a *sufficient consideration.*

116 Guaranteeing Future Purchases.

This is what would be called a "continuing guarantee":

BRANTFORD, July 30th, 1910.

In consideration of One Dollar, the receipt of which is hereby acknowledged, I hereby guarantee the payment of all goods purchased by John Dillon from Alfred Freeman during the remainder of the year 1910, total amount of said purchase not to exceed One Hundred and Fifty Dollars.

WALTER JONES.

A guaranty of payment for goods purchased "*from* this date" would not cover goods purchased "*on* that date."

A guaranty of payment for goods sold by a firm to a person would not hold good for *future purchase* if such firm changed its *personnel* without a renewal of the guaranty.

117 Guaranteeing Performance of Agreement.

Guaranty of Performance to be indorsed on Lease, Bond, or other written agreement:

For value received I hereby guarantee to the bona fide owner of the within contract, his heirs or assigns, the full performance thereof on the part of "A B," together with all legal costs and expenses in enforcing such performance from "A B" and myself, or either of us.

Dated this ..... day of ..... 19 .

Signed. (Seal.)

120 Guaranty of Payment of Money.

For value received I hereby guarantee the payment on the part of (A B) of the sum of money contracted to be paid by him in the within contract and at the times and the manner therein mentioned, together with all costs and expenses incurred in collecting the same from (A B) and myself, or either of us.

Dated ..... the ..... day of ..... 19 .

Signature. (Seal.)

121 Guaranty for a Commission Merchant.

GLADSTONE, MAN., Jan. 2, 1913.

GEO. A. DOAN & Co., Winnipeg.

I hereby guarantee that Henry Jones, commission merchant, will pay for or return all such goods, wares, merchandise or fruit that you may consign, ship and deliver to him to the amount of one thousand dollars, during the next twelve months, for sale.

JAMES HILTZ.

Such a guaranty would not hold good for any goods that might be *sold* to Jones, but only for goods to be sold by him on commission.

122 Wife as Surety for her Husband.

In Quebec, a contract of suretyship entered into by a married woman either for or with her husband is not binding upon her separate property, even though she fully understand the facts and receive competent advice. Art. 1301 C.C.

In all the other provinces and Newfoundland she may become bound as surety, either with or for her husband if she had independent legal advice, and it is not shown she was acting under undue influence, but not otherwise. Undue influence may be affection, fear or some deception practised upon her to the knowledge of the creditor, or which he had reason to suspect would be practised.

Cox v. Adams 35 S.C.R. 393, settles this point definitely. In this case C.'s wife and daughter each gave promissory notes in a considerable sum to enable him to free himself from a pressing debt. Both notes were by him endorsed to the creditor. The Court found that both women gave the notes through sympathy and affection, holding this to be undue influence; that neither woman had independent legal advice to inform her as to the facts involved in the transaction; and that upon these grounds the notes were unenforceable as against them. Also see Bank of Montreal, v. Stuart, 1911 A.C. 120.

124 Creditor's Obligations to Guarantor.

If the employee betrays his trust, or the debtor makes default in payment, the creditor is required to:

1. Give the guarantor notice of default within reasonable time after it is known, unless the guaranty waives the right of notice.

2. Give the guarantor, as soon as he has made good the default, all his rights against the debtor, and if any property of the debtor, or other collateral security is in his hands, turn it over to the guarantor.

The guarantor, after making good the default, takes the place of the creditor, and may recover from the debtor not only the original debt, but also all expenses and costs incurred.

125 Discharge of Guarantor.

Guaranties have been divided into two classes:

One when the "consideration" is *entire*, as guaranteeing payment of a promissory note or the performance of the covenants in a lease. When

such lease is granted the guaranty runs on through the duration of the lease, and would not be revoked by the death of the guarantor.

The other is when the "consideration" passes at different times, and is therefore *divisible*, as the guaranty of running account at a banking house, or store. Such guaranty may be revoked by notice to that effect, and would also be determined by the death of the guarantor and notice of that event.

Keeping in view the above distinction it will readily be seen that any one of the following events or acts discharges the guarantor:

1. The expiration of the time, or the completion of the contract.

2. Notice by the guarantor to the creditor if the "consideration" is *divisible* as stated above.

3. Death of the guarantor and notice of that event, if the consideration is *divisible*. As stated above, this could not apply to a negotiable instrument not yet due, or to any contract the time for which to be executed had not yet arrived.

4. Any alteration of the agreement without the knowledge and consent of the guarantor operates as a discharge, even though the alteration may be for his benefit.

5. In guaranteeing the fidelity of a clerk any change of employment from that for which his fidelity was guaranteed, would release the guarantor.

6. An extension of time by *valid agreement* given by the creditor to the debtor on a negotiable instrument or other contract releases a surety or guarantor unless he gives his consent.

A mere voluntary extension of time would not release the surety, neither would a mere *promise* to extend the time, because the promise would not be legally binding.

In order to be a discharge to the surety, the agreement with the debtor must be one that *binds* the creditors to an extension of time for payment, so that they are prevented from proceeding against the debtor themselves during that time, and which consequently prevents the surety from exercising his right of paying the creditors and suing the debtor upon the claim.

7. Fraud, either in respect to the contract itself; or some fraud or deception practised by the creditor himself, or by the debtor with the creditor's consent, by which the surety was induced to guarantee the debt, releases the surety from his obligation.

126 Revoking a Guaranty.

Notice of Revocation of Guaranty where such power exists:

Whereas, by a written agreement of guaranty dated the ..... day of ..... 19 , I became surety to you for (name) of (address). I, the undersigned (surety) in pursuance of a power for that purpose reserved and contained in the said agreement (if that were done), now give you notice that I hereby revoke and determine the said agreement from the day of ..... next ensuing: and that my liability thereunder shall from and after that, the said last date, wholly cease and be determined.

Dated ..... the ..... day of ..... 19 .

To (person to whom the guaranty was made). (*Signature.*)

When several persons unite in a guaranty each one is required to contribute equally to the satisfaction of the claim should the debtor make default. If one were found to be insolvent the others would be bound to bear the burden equally. In case one paid the whole amount he could recover from his co-sureties their equitable share of the loss.

This proportional distribution of the liability holds unless there is an agreement among the sureties that changes it. If the last surety (as with indorsers on a note) were to add to his signature, "surety for the above names," or words of similar import, he would not be a *co-surety,* but would merely be liable in case the others fail.

130 Merging Securities.

The higher security merges the lower. Where one person would be owing another on a book account or note, and then gives a mortgage for the same debt, the mortgage, being under seal, is a higher security, and thus the book account or note is merged into the mortgage, hence would be no longer binding. If there were an indorser on the note he would be relieved. If it is desired that the mortgage should not merge the note, it must be stated in the mortgage that it is given as *collateral security;* then the note would still be binding, and the payment of either one discharges both.

CHAPTER V.

PAYMENTS.

135 Payments in Money.

Unless otherwise stated, every debt is payable in money. If in gold, it must be in gold; if at a certain place, it must be there; if to be sent by letter or by express, it must be that way. If the directions are complied with fully, even if the other party should fail to receive the money, the debt is paid nevertheless. Of course, the party must be able to prove that he actually sent the money, and sent it according to agreement.

136 Payments in Property.

When the agreement is such, any debt or contract may be paid in goods, or other property, or in service. If such articles are not tendered at the time and place agreed upon, the debt becomes payable in money. Or if any property other than the kind agreed upon is tendered, it may be refused, and the debt collected in money. (See "Chattel Notes.")

137 Payments by Negotiable Paper.

A promissory note or acceptance being merely a *promise* to pay, is not an absolute payment; and if it is not paid at maturity the debt stands the same as before. The case is different, however, if the note of a third party is given in payment for goods or on a debt. For instance, Jones gives Smith a note he held against Brown in payment for goods or on a debt. This note pays the debt. Of course, if Jones indorsed the note, so as to make himself liable when he transferred it, then Smith can proceed against him as surety on the note, but not for the original debt.

138 Counterfeit Money, or Forged Paper.

Counterfeit money, a forged note or cheque given and received in good faith does not discharge a debt. The person receiving either must return it to the party who paid it to him within reasonable time. The debt still remains, and may be collected as though no such payment had been made.

139 Whom to Pay.

Payments should always be made to the person mentioned in the contract, unless it be a negotiable instrument, then to the *holder only*. Never pay a note unless you get the note back or the party can prove its loss. If no other person is mentioned, then payment must be to the creditor himself, or his legal representative, such as an agent, executor, attorney, etc. Care must be exercised when making payment to his representative that said party is authorized to receive the money.

140 Presumption of Payment.

A note, acceptance, due bill, or receipt in the hands of a debtor is presumptive evidence that the debt has been paid and will so be held unless there is positive evidence to the contrary. If there has been a great lapse of time without any demand being made the presumption is that the debt has been paid, hence the Statute of Limitations (which see).

141 Application of Payments.

The person making the payment has the right to make the application. Where a debtor owes more than one debt to the same creditor, and they are all due, the debtor has the right to say on which debt the payment shall be applied. If the debtor does not say on which debt it should be placed, then the creditor may apply it as he may desire. When neither debtor nor creditor makes the application, but credit is merely given for the receipt of so much money, in case the business matters were settled in court, the court would apply the payment on the debt that is considered the most burdensome to the debtor. If the debts were a book account, an indorsed note, a chattel mortgage and a judgment, the court would apply it on the judgment. If the debt were a book account only, the court in applying the payment would begin with the items longest standing.

142 Compromise Settlement.

A disputed claim may be paid by any sum where there is an agreement to accept such sum in satisfaction for the claim. The agreement should be in writing, or have a witness. "Accord" and "satisfaction" are terms used in settlement of disputed claims by compromise.

143 Tender of Payment.

A *legal tender* is the attempted performance of a contract, whether it is to *do something* or to *pay something*. If payable in goods, then goods of that kind and quality must be offered at the exact place and time called for in the contract. If payment in money, it must be in the lawful money of the country, if that is demanded. A creditor cannot be forced to accept a cheque as payment.

The refusal to accept part payment on a note or debt does not affect the debt in any way. The refusal to accept payment tendered in full does not cancel the debt, but is usually a bar to all interest and expense thereafter.

A tender of payment if coupled with a condition as for a receipt in full or for the cancellation of a certain document is not good.

145 "Without Prejudice"—Its Legal Force.

The two words, "without prejudice," have great importance when used in a legal sense. This use can be best shown by an illustration, *e.g.*: Two persons are at variance and likely to be drawn into court, but the one desires amicable settlement, and is willing to make any reasonable concession to effect it. He, therefore, takes these two words, *without prejudice*, and writes them across the upper left-hand corner of his letter, or in the body of the letter, and then makes his proposition, whatever it might be. The effect of those words is, that if the other party should not accept the proposition and terms thus offered, but the case goes to suit, this letter cannot be used in court as evidence against the writer. Hence, by using these words in that way a person who wishes to avoid litigation may safely make advances to secure a peaceful settlement, and if not successful his case is not jeopardized. A convenient form at the beginning of the letter would be similar to the following:

> *Dear Sir: "Without prejudice" I hereby make you the following proposition, etc.*

Also, a debtor who may be taking the benefit of the Statute of Limitations may, by using these words, frankly acknowledge the justice of the claim against him, and assure his creditor that he will still pay him or may even pay money to him, without reviving the *legal liability*. Also in offering to make payment on a disputed account or claim by way of a compromise, these words prevent the offer being held to be an acknowledgment of the claim. Every man should be familiar with their use, and make use of them whenever occasion requires, instead of trusting to the other party's honor.

CHAPTER VI.

NEGOTIABLE PAPER—PROMISSORY NOTES.

150 Negotiable Paper.

Negotiable paper includes those instruments in use in community which pass freely from one person to another by simple delivery or by indorsement, and are payable in money only. Those which are transferable by simple delivery are written payable to a certain person, firm or corporation, or *bearer;* and those which are transferable by indorsement are written payable to a certain person, firm or corporation, or *order,* and require to have the payee's name written across the back to be transferred.

The paper must be properly *signed* and *delivered* in order to be valid. A promissory note, draft or cheque signed and complete in form is not a contract until it is *delivered,* and if stolen at that stage and sold, even an innocent purchaser for value would not get a good title, so as to collect it. It is like forged paper.

The instruments classed under Negotiable Paper are promissory notes, acceptances, bank notes and cheques, but besides these are also the following, which are negotiable by indorsement: Warehouse Receipts, Bills of Lading and Coupon Bonds. Dominion notes are not classed among negotiable instruments, because the Dominion of Canada cannot be held to be a person as a chartered bank would be. Bonds, mortgages, agreements for the sale of real estate, leases, chattel notes, etc., are negotiable by *assignment,* and the purchaser can enforce the contract to the same extent that the original owner could if he had not transferred them, but they are not called "negotiable instruments."

151 Promissory Notes.

A promissory note is an *unconditional* written promise to pay a certain sum of *money* at a *specified time* or on the happening of a *certain event.* Three essentials—Unconditional, money only, time certain, as follows:

1. There must be no *condition* expressed. If there be a condition expressed in the note, its character as a promissory note is destroyed and it becomes nothing but a written agreement, binding on both parties, but not negotiable, except by assignment.

Any condition added, as "this note is held as collateral security," destroys it as a negotiable instrument.

2. It must be payable in *money.* If it is made payable in anything except money its negotiability is destroyed and it is called a Chattel Note (which see).

3. It must be made payable at some *specified time* or on the happening of a certain event. If made payable so many days or months after the death of a certain person it would be as valid as if made payable after date, as they are usually drawn, because it is an event certain to occur, although the time of happening is uncertain.

152 Parties to a Note.

At the inception of a contract by promissory note the parties to the note are *maker* and *payee*, and occasionally an indorser. After its transfer other parties become interested, and the *holder* takes the place of the *payee*. If the original payee in transferring indorses it in the usual way, he becomes surety for subsequent holders.

153 Defective Title by Holder.

In particular the title of a person who negotiates a bill or note is defective within the meaning of the Act, when he obtained the note ...ceptance, or the acceptance of the bill 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 *fraud*.

155 The Place of Payment.

It is not necessary to the *validity* of a note to mention in it any place of payment; but it is *desirable*, for various reasons, that it should be done. The maker would then know where to find it at maturity. Also, if there is an indorser on the note, it is better for the holder if it is made payable at a certain place, as he would have less difficulty in making the *legal presentment* required in order to hold the indorser.

If no place of payment is mentioned in the note it is payable where made and the holder is under no legal obligation to present it for payment at maturity; it is the maker's duty to find his note and pay it, and if he does not do so, the note may be sued the next day, or be allowed to run on and draw interest.

156 Signatures to Notes.

A person need not sign his own name to a note with his own hand, but it is sufficient if his signature is written thereon by some other person, by or under his authority.

A trade name, or assumed name, even *initials* or a *stamp* would answer where it is clear that the parties intended to adopt them as their signature.

A note or acceptance drawn or signed with lead pencil would be valid; prudence would use a pencil, as it can be too easily erased person of ordinary so would an indorsement in pencil be binding; but no and changes made.

157 Signature by Agent, or Company Official.

In all cases where a person is signing documents in a representative capacity he must use the name of his principal. Merely signing his own name and then writing agent, or secretary, or president, under it is worth no more than if he wrote alderman, captain, or liberal or conservative after his name.

Signature to note by agent that binds the principal and not the agent:

James Fitzgerald,
by J. W. Smith,
Agent.

The following signature would bind the agent and not the principal:

J. W. Smith,
Agent for James Fitzgerald,

A corporation signature that binds the company and not the officer signing the note:

The Standard Fuel Company, Limited,
By J. W. Smith,
Treasurer.

The common error is:

J. W. Smith,
Treasurer Standard Fuel Co., Ltd.

The last signature would bind Smith personally and not the company.

In case of a corporation it is not necessary to attach the seal to a note or bill if the corporate name is used. But if the corporate seal is attached it does not affect the negotiability of the instrument, thus constituting an exception to the Law Merchant that an instrument under seal is not negotiable.

In case of a corporation it is sufficient if the instrument is sealed with the corporate seal.

160 Value Received.

These words are usually inserted in a promissory note, but they are not necessary to its validity. In regard to negotiable paper, value (consideration) is *presumed.*

When any note or bill or acceptance is *materially* altered without the consent of all the parties liable on it, the instrument is void, except as against the person who made, or who assented to the alterations, and also against *subsequent* indorsers.

161 Alterations of Notes and Bills.

The alterations that are held to be material, and that destroy the bill, are:

1. The change of date.
2. Change in the sum payable, making it either greater or less.
3. The time of payment, no matter whether it is hastened or delayed.
4. Change of place of payment, or striking out one, or the addition of a place of payment when no place is specified and no instruction given to write in a place of payment.
5. By adding a new maker after issue, or erasing the signature of one of the joint makers.
6. Adding "with interest." Jones v. Reid, O.W.R. 131 (1906).
7. Adding the word "Limited" after the name of the payee. Bank of Montreal v. Exhibit and Trading Co. 22 T.L.R. 722 (1906). This note was payable in London, Eng., and was not "stamped," hence void under the English Stamp Act, as well as by adding "Limited."

Both the Bills of Exchange Act and Companies Acts require strictness in regard to the use of the registered name of the company, not only in respect to the use of the word "Limited," but in all other respects.

8. Changing "order" to "bearer."

162 Defects Which Do Not Invalidate.

A bill is not invalid by reason that it is not dated, or that it is dated by mistake on Sunday; that it does not specify that value has been given, or name the place where it was drawn or where it is payable. It might be dated either forward or backward. If through oversight no date were placed on a note or draft, the holder would have the right to insert the proper date, according to the intention of the parties at the time the instrument was made. (Sec. 27, B. of E. Act.)

164 Days of Grace.

Three days of grace are allowed on all notes and acceptances, except those drawn payable *on demand,* which have no days of grace allowed, neither have cheques. A note or acceptance payable a certain time after demand would have three days of grace.

In Newfoundland and England sight drafts have no days of grace allowed.

165 Maturity of Notes and Acceptances.

A note or acceptance is legally due on the third day of grace for those on which days of grace are allowed, and may be paid at any time during the business hours of that day. If payable at a bank, it must be paid during banking hours.

When the time is expressed in days, the actual number of days must be counted. In computing the time, the day upon which the note is dated is not included, but commences on the following day. If the time is expressed in months, it means calendar months and not merely thirty days. For instance, a note dated April 10th, at three months, falls due July 10th, and the three days of grace added makes July 13th as its legal date of maturity.

A note or acceptance falling due on Sunday, or any legal holiday, is payable on the following day, unless that again were a holiday, in which case it would be the first business day thereafter.

In England where a note or acceptance falls due on Sunday, Good Friday or Christmas Day, it is payable the preceding business day, and maturing on any other Bank Holiday, the day after.

In New York, when the instrument falls due on Sunday, or Saturday, or other holiday, it is payable on the next succeeding business day. Paper payable on demand falling due on Saturday may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday.

166 Accommodation Paper.

An accommodation note or acceptance is one where the person signing the note or accepting the draft does so without receiving any value therefor, but merely for the purpose of lending his name to some other person. The accommodation party is liable on the instrument to any holder for value whether such holder, when he took the note or acceptance, knew such party to be an accommodation party or not. (B. of Ex. Act, Sec. 55.)

The person for whom the accommodation party signed the paper could not collect it. A note, however, given a firm in consideration that they do not sue a brother has been held to be valid. (Crers v. Hunter, 19 Q.B. D. 341.)

168 Payment of Notes.

Payment of negotiable paper of any kind should never be made except to the actual holder of the paper who has it in his possession to deliver over, and who does deliver it over upon receipt of the payment. Payment even to the supposed holder who has not the note to deliver over is not *redeeming* the note, but is simply placing that much money in his hands and trusting to his honor to apply it to the note. The note, however, may have been transferred and the holder could collect it over again, or it may be in a bank under discount, and would have to be paid to the bank.

Paying money to an *agent* of a firm who has not the note to hand over is simply trusting to the honesty of the agent. His receipt would be worthless as a set-off if the agent kept the money and the firm sued on the note.

170 Cancelling Signatures.

When a note is paid the name should never be torn off, as is sometimes done, but simply draw one or two lines through the signature of both maker and indorser, or better still, have a stencil stamp and punch out the letters *paid,* and file the note away as a voucher. There is the same necessity for preserving a *redeemed* note as there is for a receipt.

171 Surety vs. Indorser.

The obligations of a person who signs a note on its face as a *surety* are the same to the public as that of the maker, and he has the same defences that the maker has.

When a person signs his name on the face of a note, *as surety,* he should put the word *surety* after his name, so that if any complications should arise in the future between the maker and the surety, or between either one and the estate or heirs of the other, the paper itself would declare whose debt it was.

If he puts his name on the back of the note he is an *indorser* only, and the holder of the note must meet the requirements of the law in regard to presenting the note for payment, otherwise his liability ceases. But if he writes his name on the face with that of the maker, he is not a surety only, but becomes one of the makers, and is, therefore, held for payment, whether the holder presents the note for payment or not.

172 Note Obtained by Fraud.

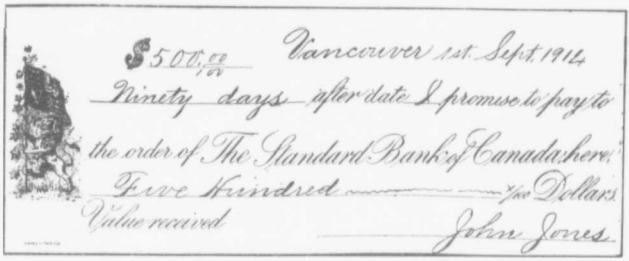
A note obtained by fraud is *void* in the hands of the original holder, if the maker can prove the fact of fraud or misrepresentation, but if it has been transferred to another person before maturity, who gives full value for it and does not know of the fraud, then this third party will collect it. No difference what the fraud may have been, or deception, this innocent holder for value has a good title and will collect it.

173 Forged Negotiable Paper.

A forged note, acceptance or cheque is void and cannot be collected under any circumstances from the parties whose names are forged. But a forged note or cheque in the hands of a "holder in due course" could be collected from any *bona fide endorser* on the paper; likewise the *bona fide acceptor* of a forged draft would be liable to a "holder in due course."

175 Individual Promissory Note.

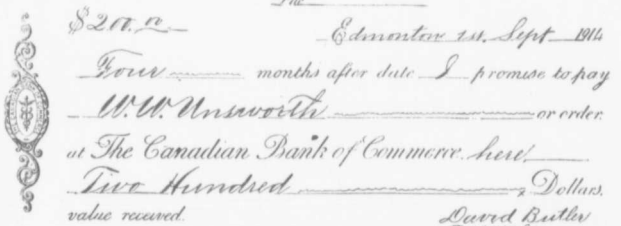
An individual note is one signed by only one person as maker, and that not a company, or a firm name.



The above note is presumed to be given by John Jones to The Provincial Stove Co., Ltd., in settlement of account, but instead of writing it payable to the Company it is made payable to the Company's bank, and subsequently indorsed by the Company. This is a common practice with manufacturers, and is the same in effect as drawing a draft on the debtor and making it payable to the bank; but the paper must not be endorsed *before* its delivery to the bank and receives the *endorsement of the bank* as payee. In this case if the *Company* were to endorse the note before it had received the endorsement of the *bank* the Company would not be liable for payment. This was definitely settled by the Divisional Court in the case of the Canadian Bank of Commerce v. Perram (1898) 31, O. R. 116.

177 Joint and Several Note.

A joint and several note is one signed by two or more persons, who thus promise to pay either jointly or individually, if necessary. There are several forms for the wording in general use, as: "We, or either of us, promise to pay," or "We jointly and severally promise to pay," and signed by two or more persons, or simply "I promise to pay," and let as many sign it as are interested, it being an "I promise" for each one. The latter form is preferable, because shorter.



In the above joint and several note each is liable for the whole amount, and if the holder found it necessary to sue in order to recover payment, he could proceed against both at once, or against either one, just as he thought best. If he sued one and collected the whole amount from him, then that

one, if they were equally interested, could sue and collect half from the other, including half of the costs of the previous suit. But if the party who paid the note happened to be a mere surety for the other, he would collect the whole amount from the other party who received the value.

178 Joint Promissory Note.

A joint note is written "we promise to pay," or "we jointly promise to pay," and signed by two or more persons, who are not *partners*.

$140 50/100 Quebec Jan 7, 1913

Ninety days after date We promise to pay to

J W Lamoreaux or Order

at THE STERLING BANK OF CANADA here the sum of

One Hundred and forty 50/100 Dollars

Value received A N Angers

W R St John

In the above form both parties are supposed to have received value and agree to pay it *jointly*. If it should become necessary to sue in order to collect it, the parties must be sued together and judgment recovered against both at the same time, as a judgment against one only is a bar to action against the other. Hence judgment could not be signed against one in default of appearance, that is in not filing a defence. If one were out of the country, and his address could not be ascertained so as to serve him, he may be served *substitutionally*. That is done by procuring an order from the Judge to serve some other member of the family or otherwise as he may direct. Suit may then proceed against both.

In the Province of Quebec, where the French law governs contracts, each one of the joint makers of this note is liable for half the amount only.

But in all the other Canadian provinces where the English law governs contracts the preponderance of legal opinion seems to be that the liability is "joint and several," and that the whole amount may be collected from either party. Although the Bills of Exchange Act, Section 179, reads, "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," yet according to McLaren, page 441 of 1909 edition, and in Cook v. Dodds, L. R. 608, either party is liable for the whole amount, except in the Province of Quebec.

179 Partnership Promissory Note.

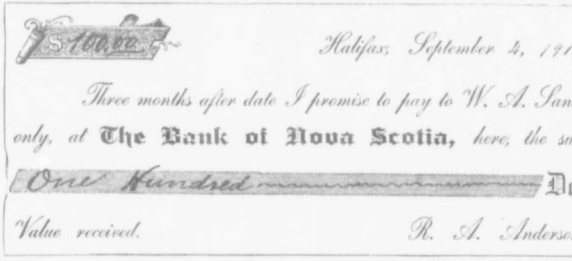
A partnership note is usually written *"we"* promise to pay, but in that case it is not in fact a joint note, although it has that form, but is a joint and several note. Although three or four may sign, each member of the partnership is individually liable for payment of the whole note on account of the partnership laws. In suing a partnership note or account the *firm name* must be used.

180 Non-Negotiable Notes.

Non-negotiable notes are given for a specific purpose and must conform in wording to the Bills of Exchange Act in order not to be held as negoti-

able instruments. They are made payable to a certain person, firm or corporation without using either of the words *bearer* or *order*, and furthermore by writing the word *only* after the name of the payee.

Simply marking out the word *order* or *bearer* from the printed blanks is not sufficient to make the bill non-negotiable. Before 1890 such a note was absolutely non-negotiable, but not since that date. A bill or note now made payable to a particular person, but which does not contain additional word *prohibiting* transfer is still negotiable, notwithstanding the words *bearer* or *order* are omitted. It is regarded by the Statute as simply an omission, the same as forgetting to date the bill, which any holder could subsequently insert. Hence to make the bill non-negotiable it is absolutely necessary to put the word "*only*" after the name of the payee.


$100.00 Halifax, September 4, 1914

Three months after date I promise to pay to W. A. Sanderson only, at The Bank of Nova Scotia, here, the sum of One Hundred Dollars

Value received. R. A. Anderson.

A non-negotiable note or bill may be transferred by assignment the same as a book account or due bill. The party who purchases such a note takes it subject to all the defects and equities that may burden it, and in no respect obtains any better title than the original owner possessed. If not payable on demand, they have three days of grace.

The material distinctions between a negotiable instrument and a non-negotiable instrument are:

1. The maker of a non-negotiable instrument who has agreed to pay *money* or *property* under it has a right when the money or property is demanded, either by the original payee or a purchaser of the instrument, to a *set-off* against it for any claims that he has against the *original owner*. But in a negotiable instrument the *bona fide* purchaser for value before maturity can enforce payment for the full amount against the maker without regard to any counter-claims or defence that the maker might have against the original owner.

2. An indorser of a non-negotiable instrument is not liable for payment.

181 Patent Right Notes.

Any note or acceptance given for a patent right, or for any interest in a patent right, must have legibly written or printed across the face of it, before the instrument is issued, the words: "Given for a Patent Right." And without such words thereon, the instrument, or any renewal of it, is void, unless in the hands of a holder in due course. (Sec. 14 B. of Ex. Act.)

Any person who intentionally transfers a note or acceptance which he knows is given for a patent right, or for an interest in a patent right, and

is not thus marked, is liable to a fine not exceeding $200, or one year's imprisonment. (Sec. 16 B. of Ex. Act.)

The purchaser of a patent right, note or acceptance that is *thus marked* receives no better title than the original owner possessed. Hence, if the instrument is affected with fraud or any illegality, the mere transference does not relieve it in the hands of an innocent holder for value. (Sec. 15 B. of Ex. Act.)

182 Notes by Married Women.

In each Province married women may now control their own separate estate, and enter into contracts independently of their husbands; hence in signing a note or other contract they should use their own Christian name, as "Sara A. Jones," instead of "Mrs. J. W. Jones," as in following form:

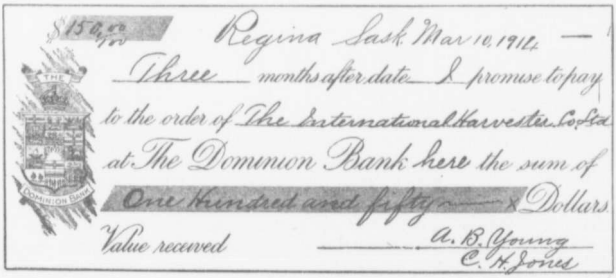
$50.00. OSHAWA, March 3rd, 1910.

Thirty days after date I promise to pay Henry Alexander, or order, Fifty Dollars, at the Dominion Bank here, for value received. SARA A. JONES.

Where a money order or a bill is payable to the order of a married woman, thus: "Mrs. J. W. Jones," the proper mode of indorsement is to indorse the bill as she is described, "Mrs. J. W. Jones," then add her own proper signature, "Sara A. Jones," under it. The same form of signature would be used in accepting a draft drawn on a married woman, as "Mrs. W. H. Stevens."

183 Notes Restricting Place of Payment.

The form shown here is a joint and several note restricting the place of payment, so that if it is not presented at the place stipulated, on the date of maturity, no cost or expense will be incurred until after it has been



presented. The makers contract to pay this note on June 10, 1914, and the three days of grace being added, June 13th becomes the due date. If the note is not presented at the bank on June 13th, the indorsers are free, if there are indorsers on it.

But if there is no indorser on the paper that the payee desires to hold liable for payment, he need not present it on the due date, for the omission to present the note for payment on such date does not discharge the makers.

It is the duty of the makers to have the money at such place to meet it and if it is not presented the money should be left there until it is presented, and if any suit were instituted thereon before its presentation no costs would be added. Bank of Canada v. Henderson, 28 Ont., R. 360 (1897).

If the note were payable at any other place, a tender of the money at such place would also be a bar to any subsequent costs, and probably to interest after maturity.

The Statute says that in such cases the question of costs and subsequent interest is left to the discretion of the court, but no judge, except under peculiar circumstances, would allow costs in a case of that nature, and but very few would allow interest after maturity.

184 Lost Bills and Notes.

Where a note or acceptance has been lost the debt is not thereby cancelled. If it was lost before maturity the person who was the holder may apply to the maker or acceptor to give him another of the same tenor, giving him security to indemnify him against all persons in case the lost bill should be found again, and if not paid when due a copy may be protested. Bills of Exchange Act, Sections 156 and 157.

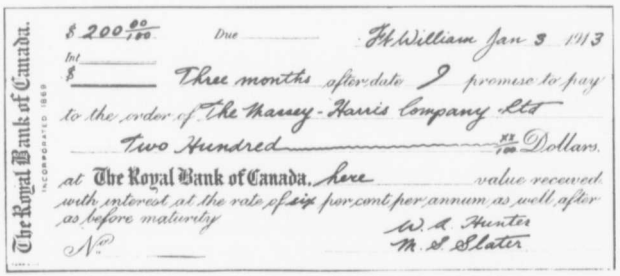
If no tender of indemnity were offered before action would be taken to collect it, the plaintiff would very seldom be allowed his costs, and would probably be ordered to pay the costs of the defendant.

The lost instrument is usually advertised as a warning to the public not to purchase it, but such advertisement would not prevent an innocent holder for value from collecting it, that is, a person who purchased it without knowing of the loss or advertisement, providing the note had been *issued*, that is delivered over to the payee before it was lost. But if lost before its *issue*, the finder or an innocent purchaser for value acquires no title. See section 150, second paragraph, also section 286.

Any person finding such an instrument and attempting to conceal it, or negotiate it instead of trying to find the owner, is liable on a charge for larceny or theft.

185 Retaining Same Interest After Maturity.

The form shown here retains the same rate of interest after maturity


The Royal Bank of Canada. INCORPORATED 1869

$ 200 00/100 Due Ft William Jan 3 1913

Int

$ Three months after date I promise to pay

to the order of The Massey-Harris Company Ltd

Two Hundred xx/100 Dollars.

at The Royal Bank of Canada. here value received

with interest at the rate of six per cent per annum as well after as before maturity

No. W A Hunter

M S Slater

that it bore before. The legal rate of interest in Canada at present is five per cent., but any rate can be collected that a person *legally* agrees to

pay. A note drawn for a higher rate than five per cent., if not paid at maturity will then drop to five, and if drawing less than five it will rise to five unless it expressly stipulates the contrary, in either case.

The usual way in which this is attempted to be done, by writing immediately after the rate of interest the words "until paid," is not sufficient. The courts rule that that simply means at maturity, for that is the time when the instrument is contracted to be paid. Powell *v.* Peck, 15 Ont. A. R. 138 (1888).

To make the rate named in the note binding after maturity, words like the following must be used, "with interest at (the rate desired) until maturity, and thereafter at the same rate until paid," or "both before and after maturity until paid."

Interest before maturity is called interest, but after maturity it is called *damages* for breach of the contract. Therefore unless the amount of the damages is fixed in the instrument, the rate of damages would naturally be held to be the statutory rate of interest. But the court or jury has power to fix any other rate as legitimate *damages* according to the circumstances in the individual case, making it either the same, or higher or lower than the rate charged before maturity.

A note drawn "with interest at, say, one per cent. per month" would legally draw only five per cent. unless the rate per annum was also stated. St. John *v.* Rykert, 10 S.C.R. 278; chap. 120, sec. 4, R.S.C. 1906.

Clause 5 of the Interest Act provides that if any sum is paid on account of such agreement it may be recovered back.

Another mistake sometimes made is in naming a higher rate of interest after maturity if the note is not paid when due, as, for instance, " at seven per cent. until maturity and ten per cent. thereafter, if not paid at maturity." In this case only five, or at most seven, per cent. could be collected. Increasing the rate thus after maturity is of the nature of a fine, and there is no authority except a court that can legally inflict a penalty. This interpretation has been questioned by certain firms quoting in opposition cases cited by Falconbridge as to the " measure of damages " after maturity the courts will allow on bills of exchange. But the cases do not touch this question. Falconbridge quotes from a judgment: " The agreement between the parties for the payment of interest after maturity at a certain fixed rate fixes the rate of interest recoverable as damages, however exorbitant it may be." Young *v.* Fluke, 15 C. P. 360 (1865). In this case the interest clause read " with interest at five per cent. each month after due till paid." The reader will at once see that this is a different case entirely. There was no interest at all before maturity, so that the rate agreed upon to be paid after maturity was clearly *damages* and not in the nature of a fine. Not one of the cases cited by Falconbridge or McLaren provided for a higher rate of interest after maturity than before.

Now, if it is vicious under a mortgage to contract for a higher rate of interest after maturity than before, is it not equally so in a promissory note?

Some manufacturing firms write the interest clause in a way that avoids its penalty aspect, as in the following: " With interest at ten per cent. per annum until due, and twelve per cent. per annum after due till paid." This assumes that the money is not *expected* to be paid when the note by its

wording falls due, but at a future time, and the rate of interest is agreed upon in advance for both periods. In such case the interest payable after the due date is not a *penalty* as it would be if the clause read "twelve per cent. if not paid at *maturity.*"

Russell, on Bills, page 369, concludes: "The whole question of interest is one on which the authorities are obscure, and the cases have been conflicting."

The Dominion Parliament by including negotiable paper with mortgages in Chap. 120, R.S.C. 1906, would end, in Canada, this unreasonable conflict of judicial opinion in a case so vitally affecting public interest.

187 Chattel Notes.

Notes payable in merchandise instead of money are called chattel notes. They are not negotiable, even if the word *bearer* or *order* should be inserted, but they may be transferred by *assignment* the same as a due bill or book account. Following is one form:

BRANTFORD, July 29th, 1912.

Five months after date I promise to pay James Smith, at his store, One Hundred Barrels of good Baldwin Apples at market prices J. W. WINTERS.

The price per barrel might be named, as at $2.00 per barrel if the price had been agreed upon.

If the party giving such a note does not tender the articles at the *time* and *place* mentioned in the note, the holder may sue; and if payment in the chattel is not made, the amount becomes payable in money. If the articles are cumbersome and he *offers* to deliver them, it will be sufficient. If the payee refuses to receive them the debt is discharged by the tender of the articles, according to the directions in the note, but the *property* in the articles tendered passes to the *payee.* If, therefore, the debtor should be compelled to take the goods home again, he becomes the bailee for the payee, and must give them ordinary care, but at the risk and expense of the payee. If at any time afterwards the creditor requests their delivery, they must be delivered up if the expenses that may have been incurred as cartage, storage, insurance, etc., are paid. If perishable goods, like strawberries, they should be sold and money retained.

188 Notes as Collateral Security.

It often occurs that a person wishes to borrow money on his own note where security would be necessary, and yet may not wish to give an indorser, but he has shares in some stock company or bank, or has a mortgage which he could place with the creditor as collateral and thus secure him. In such case the following note would be in order:

$200.00. DUNNVILLE, May 10th, 1912.

Three months after date, for value received, I promise to pay Wm. Braund, or order, at the Bank of Commerce, here, Two Hundred Dollars, with interest at six per cent.

Having deposited with the said Wm. Braund six shares in the Ontario Navigation Co., Limited, I authorize him upon the non-performance of this promise at maturity to sell them, either at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply the proceeds, or as much as may be necessary, to the payment of this note and all necessary expenses and charges, holding myself responsible for any deficiency. A. J. PALMER.

N.B.—A life insurance policy could not be used as above unless the *beneficiaries* signed the note, and the assignment was recorded on the company's books.

In all cases where collateral security is given with a note, the right to such security goes with the note, and may still be held even after the note might be outlawed.

A promissory note in proper form, but containing the words "this note to be held as collateral security," would not be a good promissory note, as it gives notice on the face of it that it is only a conditional promise to pay. Hall *v.* Merrick, 40 U.C.Q.B. 566 (1877).

189 Instalment Notes.

It does not affect the negotiability of a note to make it payable in instalments. Action may be taken as soon as the first instalment is due, allowing the three days of grace, but only for the amount of instalment, as each instalment is considered a separate note. An instalment note with a proviso that:

"In the event of default in making any of the above payments at the time mentioned, the whole amount of this note shall become due and payable forthwith" is valid.

The following instalment note will illustrate the form:

$60.00. HUMBERSTONE, June 1st, 1914.

On the first day of each month hereafter for four months consecutively, I promise to pay E. Augustine the sum of Fifteen Dollars, the whole amounting to Sixty Dollars, the first of such payments to be made on the first day of July next. Interest both before and after maturity until paid at the rate of six per cent. per annum.

In event of default in making any of the above payments at the time mentioned, the whole amount of this note shall thereupon become due and payable forthwith. JAMES HARDY.

Notes payable by instalment have three days of grace allowed on each instalment.

As to presentment and notice of dishonor each instalment is treated as a separate note, and in order to bind the indorser for any instalment of interest, note must be presented when instalment falls due, and notice of dishonor given such indorser. Jennings *v.* Napanee Brush Co., 41 C.L., T. 595. Also if an instalment note is transferred after any instalment is overdue and unpaid the purchaser takes it subject to all equities between the original parties.

191 Lien Notes.

A lien note is an ordinary promissory note with a clause added, which prevents the *ownership* of the article sold from passing to the purchaser until the note has been paid in full.

Such a note may be taken for an article being sold, but not for a debt that has already been contracted. The purchaser takes possession of the article, and has the full use of it, but he does not acquire its *ownership* until the full amount of the note, or any renewal of it, is paid. As the sale is to that extent conditional, the requirements of the Conditional Sales Act must be complied with, which see. Lien notes, whether negotiable or non-negotiable have days of grace.

(a) *The Lien clause* should be worded with care. There are two essentials to be observed:

1. It must be merely the right and title to the *ownership* that is reserved in the vendor, and not the right of *possession* of the article, if the note is desired to be negotiable.

2. The goods must be sufficiently described to make identification certain.

In a suit before Judge Senkler at Perth, Sept. 8, 1909, the following lien clause in a note was *held* to be "very meagre": "The right and title to the possession of the property—the household furniture, for which this note is given to remain in the said Geo. E. Leslie until this note or any renewal thereof is fully paid."

It would be impossible for an officer to identify the furniture from the above lien clause. The vendor also reserved the right to the *possession* of the property, which is a serious defect.

This was an Ontario transaction, and the Ontario Statutes then required a lien note taken for household furniture to be registered, which was not done in this case, hence the Court held that the furniture claimed in the summons "is not the property of the claimant." By amendment of 1911 such note now would not require registration. See sec. 527.

192 When Lien Notes Are Negotiable.

There is a conflict of authority as to whether lien notes are negotiable instruments or not, but the weight of authority is in favor of treating them as such when properly worded. And as such instruments are in general use a brief summary of the cases that have been cited *for* and *against* their negotiability will here be given:

In Chicago Railway Equipment Co. *v.* Merchants Bank, 136 U.S. 269 (1890), the lien clause read, "And it is agreed by the maker hereof that the title of said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars." The judge *held*:

"1. That this was a negotiable promissory note, according to the Statute of Illinois, where it was made, as well as by the general mercantile law.

"2. That its negotiability was not affected by the fact that the title to the cars for which it was given remained in the vendor until all the notes of the series were fully paid, the title being so retained only by way of security for the payment of the notes, and the agreement for the retention for that purpose being a short form of Chattel Mortgage."

In Merchants Bank *v.* Dunlop, 9 Man., 623 (1894), the lien clause read, "The title, ownership and right of possession of the property for which this note is given shall remain in Watson Manufacturing Co., Ltd., until this note or any renewal thereof is fully paid. The Watson Manufacturing Co. shall provide all repairs required for this binder, also any improvements that may be added to their binders before the date of the accompanying notes are payable." Judge Killam held that "these instruments were negotiable promissory notes notwithstanding the special provision at the end, which should be construed as a memorandum to show that the payees had promised to provide the things mentioned as part of the consideration of the defendants' promise to pay the note, *and not a condition, attached to the absolute promise to pay.*"

In Choate v. Stephens, 116 Mich., 28 (1898), the lien clause read, "Nevertheless it is understood and agreed by and between the undersigned and the said Low's Art Tile Soda-Fountain Co. that the title to the abovementioned property does not pass to the undersigned, and that until all said notes are paid the title to the aforesaid property shall remain in the said Low's Art Tile Soda-Fountain Co., who shall have the right in case of nonpayment at maturity of either of said notes, without process of law to enter, and retain immediate possession of said property wherever it may be, and remove the same. Payable at the Preston National Bank." It was "held that the clause retaining the title does not impair the negotiability of the note." The instrument "imports an absolute, not a conditional, sale, with reservation of title by way of security."

The finding of the courts in the three preceding *cases* cited has not been controverted by any different or later decisions.

The three following *cases* have been cited as against the negotiability of lien notes, but do not afford such proof, because the lien clause is radically different in these *cases.*

In Dominion Bank v. Wiggins, 21 Ont., A.R. 275 (1894), the lien clause read, "The title and right to the possession of the property for which this note is given shall remain in Wiggins Bros. Manufacturing Co. until this note is paid." Judgment in this case was first given the Bank as indorsee, but the Court of Appeal in reversing the judgment of the lower court, held that "the lien clause was fatal to the negotiability of the note," and further, that "the money was the consideration for the sale of the property as neither the title nor the right of possession was to pass until payment. If that is so it follows the purchaser is not compellable to pay when the day of payment arrives unless at the same time he gets the property with a good title," and as the property in this case had been taken back by the vendor before the maturity of the note and sold to a third party the endorsee bank failed in its suit to recover on the note.

Banks and others who may purchase lien notes must remember that the right to the securities goes with the paper (see following section), and it is incumbent upon them to see that the vendor does not nullify the contract by repossessing himself of the property which constituted the *consideration* for which the note is given.

In Imperial Bank *v.* Bromish, 16 C.L., T. 21 (1895), the instrument was held to be non-negotiable, but the lien clause had the wording—"the

title, ownership and *right of possession* of said cattle for which this note is given, shall be and remain in —— until this note is fully paid."

Of course with the *right of possession* reserved, as in the previous case, the sale was conditional, so the case does not prove the non-negotiability of a properly drawn lien note.

In Prescott v. Garland, 34 N.B. 291 (1899), besides several other drastic agreements, the lien clause read, "And that the said harness is meantime only on hire until paid for," and "on any default all payments to go as rent."

Of course this could only be a written agreement, and not a promissory note, as the court justly held.

From these six cases cited it certainly becomes manifest:

1. That where the lien clause reserves in the vendor the *title* or *ownership* until the article is paid for, the instrument is a negotiable promissory note, for there is no *condition* that attaches to the promise to pay.

They are promissory notes according to general mercantile law, and so many States and Provinces have declared in their favor that there should no longer be any question remaining as to their negotiability.

2. But in all cases where the lien clause reserves in the vendor the *right of possession* of the article for which the note is given, the sale is only conditional, and therefore the promise to pay cannot be held to be non-conditional, for if the legal owner should repossess himself of the property before the maturity of the note there would result a "failure of consideration."

If the preceding conclusions are legitimate deductions from the essential distinctions in the character of the instruments, and from the judicial finding of the courts in the six cases herein cited, it ought not to be a matter of doubt when a lien note is a negotiable instrument, and when it is not, except by *assignment*.

193 Form of Negotiable Lien Note.

The following form, according to the first three cases cited, is unquestionably a *Negotiable Lien Note*, for it has every element of negotiability:

$100.00. LYNN VALLEY, March 6th, 1914.

Three months after date I promise to pay Oliver Austin, or order, One Hundred Dollars, for value received.

The title of the property in the Bell Organ, No. 4326, for which this note is given, is not to pass, but to remain in the said Oliver Austin until this note or any renewal thereof is fully paid.

W. A. SANDERSON.

In the above note both parties to the contract understand that a sale has taken place. It is an *executory* sale and not a *conditional* one. Mr. Sanderson has the actual possession and the exclusive use of the organ, but by the terms of the contract he is precluded from disposing of it until it is paid for, the same as he would be if it were covered by a chattel mortgage.

Mr. Austin has reserved the *ownership*, but under no circumstances can he take back the organ except for non-payment of the note at maturity.

If the vendor desires to do so he may treat the note as any other without regard to the lien clause. If it is not paid at maturity he may sue for the amount, and sell under execution not only the organ, but other personal property as well, to recover the amount of debt and costs. The advantage of the lien in such case is the creditor knows there will be that much at least with which to satisfy his claim. If part of the debt had been paid so that the organ would resell for enough to cover the unpaid portion, the court expenses could be saved to the advantage of the debtor by simply retaking possession of the organ under the lien and selling it by public auction.

By the wording of the lien clause in the above note, if the vendor or a transferee of the note should take possession of the organ for non-payment, it would have the effect of cancelling the balance of the debt because there would result a "failure of consideration." If articles sold under a lien agreement should be of such a nature as to materially depreciate in selling value by even temporary use, a lien clause similar to the following should be used, so that in the event of retaking possession of the article, if it should not sell for enough to cover the remainder of the debt and costs, the maker of the note would still be liable for the balance.

> *"The title of the property in the Pease furnace, No. 40, for which this note is given is not to pass, but remain in the payee of this note until the same is paid in full, and in case of default in payment shall be at liberty without process of law to take possession of and hold until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price, and shall have the right to sue and recover the balance owing, if any.*

(*b*) If the above, or any other properly drawn lien note were transferred by *indorsement* only, the holder would have the right, if not paid at maturity, to sue either the maker or the indorser. But to have the benefit of the lien clause so as to have the right to take *possession of the article* or to follow it and claim it if it has been disposed of, the transfer must be completed by *assignment* in addition to the indorsement of the paper.

When such paper is discounted at a bank or transferred to other parties the *right* to the securities goes with the paper, whether the assignment is made at the time or not. The transfer of the note is held to transfer the securities. Central Bank *v.* Garland, 20 O.R. 142 (1891).

A person who sells an article covered by a lien note or a chattel mortgage is guilty of a "wrongful conversion," and the person who purchases such article only acquires whatever title or equity such vendor has in it. If such purchaser is led to believe that he is acquiring the actual and complete ownership of such article he is *defrauded*, and has the same remedy that he would have in any other case of fraud.

195 Assignment of Lien Note.

The following concise form for the assignment of a lien note written across the back is sufficient:

> *For value received, I hereby transfer the within note, and all my rights, title, and interest in the goods and chattels for which the said note was given, unto (name).*
>
> (Date,) (Signature)

196 Non-Negotiable Lien Agreements.

There are many forms of lien agreements called also "hire receipts," which, although embodying a form of promissory note, are so burdened with conditions and requirements that they cannot rank in any sense as negotiable instruments. In many instances some of the clauses constitute illegal contracts. For instance, "the right to break open locks and doors" to retake the goods is frequently one of the clauses in such agreements, to exercise which would be a criminal offence, punishable by imprisonment—no one can make a contract to allow another to commit a crime. See "Illegal Contract."

The following form (with some illegal clauses omitted) is a copy of a "lien agreement" used by an Ontario firm, and is about as strong as need be:

$150.00. CHATHAM, ONT., Sept. 1st, 1912.

On or before the first day of March, 1913, for value received I promise to pay the Canadian Furniture Co., Limited, or order, at their office, One Hundred and Fifty Dollars, with interest at 7 per cent. per annum till due, and thereafter until paid. I also promise and agree to furnish security, satisfactory to you, at any time if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose or attempt to dispose of my land, you may then declare the whole price due and payable, even before the maturity of the same, and suit therefor may be immediately entered, tried, and finally disposed of in any Court having jurisdiction where your Chatham Office is located, and I waive my rights to exemption from seizure given by statute, and you may retake possession of the vehicle or property so sold to me, without process of law, and at any time thereafter, may sell the same at public auction or private sale, the proceeds thereof, less proper charges of retaking possession and sale, to be applied on account of the amount of the purchase price and interest, then unpaid; such sale or right to sell shall in no way affect or limit my liability for the full purchase price, or your right to sue for and recover from me said full purchase price and interest, except that in the event of such sale I shall receive credit on account, as before provided, and shall therefore be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment, and all my other rights and claims thereto shall forever cease. Subject to these provisions I am to have possession and use of the vehicle or property at my own risk of damage or destruction from any cause whatsoever; but the property therein and the title thereto is not in any event to pass to me; on the contrary, shall remain in you until full payment of the purchase price and interest or any obligations or renewals thereof given therefor, and I agree not to remove the article or articles out of the Province of Ontario.

I am the owner of ....., Lot ....., Tp....., containing .....acres, worth $4,000, *mortgaged for* $600 *only, which lot I pledge as security for the payment hereof, and I fully understand that this note may be registered against my land, all my chattels being free from encumbrance except* $100, *and I understand that it is upon this representation that the goods are delivered to me.*

Witness: W. WISE. J. SAUNDERS.

In the above document the last clause at least could profitably be copied by other firms, for if the statements concerning the land and chattels are not true the party signing it would be guilty of obtaining goods under "false pretence." The document may also be registered against the land, except for land under the Land Titles Act.

To protect the owner against subsequent purchasers and mortgagees for value the provisions of the "Conditional Sales" Act must be complied with, which see.

For place of suit, see "Change of Venue."

(*a*) The provision that should the purchaser sell or attempt to sell his land property the vendors could declare the whole price due and payable, has been declared to be enforceable in the case of "The Ontario Wind Engine & Pump Co. v. A. G.," which came up in the Division Court before Judge Morson, December 10, 1907. The clause in the lien note read "if not paid at maturity, and if default in payment is made, or should I sell or dispose of my land property, or if for any good reason said Ontario Wind Engine & Pump Co., Ltd., should consider this note insecure, they have full power to declare it due and payable at any time."

It was shown at the trial that the maker of the note was endeavoring to sell his farm. The payees not being able to secure further security declared two notes, one due October, 1907, and the other October, 1908, both due and payable, and entered suit to enforce payment. The court held, in granting judgment in favor of the plaintiffs, that the clause was valid, and therefore, the "good reason" was a question for the payees only to determine.

In Manitoba and Saskatchewan the last paragraph in the above lien agreement would be largely worthless, as both Provinces have, by statute, prohibited the filing of any lien note or hire receipt in the Land Titles Office against land.

CHAPTER VII.

ACCEPTANCES.

200 Acceptances.

Acceptance, in commercial language, is the name given to a draft after it has been accepted. A draft is an unconditional written order from one person, called the *drawer,* to another called the *drawee,* to pay a certain specified sum of *money,* at a specified time, to a third party, called the *payee.* Drafts are denominated bills of exchange, but correctly speaking a draft that has neither been discounted nor accepted should not be called a bill of exchange. It is merely an order which the drawee may, or may not honor.

If a bill is payable in anything but *money,* or if it orders something to be done in addition to the payment of money, it is not a bill. But to name a particular account to be debited with the amount, or to include a statement of what gives rise to the bill, would not affect the bill.

Bills of Exchange are divided into two classes, viz., Inland and Foreign.

201 Inland Bills of Exchange.

Those payable in the same country in which they are drawn are called Inland or Domestic Bills of Exchange. For instance, a bill drawn by a Montreal merchant on one in Toronto, or Winnipeg, or Vancouver, would be an Inland Bill.

In Canada, Inland or Domestic Bills have three days' grace allowed on all except those payable "on demand."

In Newfoundland and England Inland Bills have three days' grace allowed on all except those payable "on demand," or "at sight."

202 Foreign Bills of Exchange.

Foreign Bills of Exchange are those payable in a country foreign to that in which they are drawn. For instance, a bill drawn by a Toronto manufacturing firm on a merchant in New York or St. John's, Nfld., or London, Eng., would be a Foreign Bill of Exchange. Also a bill drawn in any other country on a person in Canada would be a foreign bill, as in case of the following Chicago bill:

$500.00. CHICAGO, June 4th, 1912.

Thirty days after date pay to the order of The First National Bank, with exchange on New York, Five Hundred Dollars, value received, and charge to account of

To E. F. & Co., Toronto. THE A. B. & Co. Per C. D., Manager.

Adding "with exchange" to a bill does not destroy its negotiability, as the sum is certain; but to make it payable in "sterling exchange" or "New York exchange" would destroy the negotiability, as such exchange is not *money.*

All foreign bills payable in Canada must be protested for non-acceptance, and also for non-payment in order to hold the drawers and indorsers liable.

The Newfoundland Bills of Exchange Act contains the same requirements for foreign bills.

Bills drawn on foreign countries must conform to the requirements of such foreign countries in order to be valid there.

In Great Britain the Stamp Act of 1891 requires that bills of exchange must bear the proper revenue stamp when issued. The penalty for either issuing, or presenting for payment, an unstamped bill is a fine of ten pounds; neither can the bill be collected by suit. Canadian notes and bills payable in Britain must conform to the Stamp Act before they are presented for payment. Of course voiding the instrument would not cancel the debt, but it causes confusion and delay and would release any indorser that might be on the paper.

The following summary of essential requirements, in addition to the Canadian Law, taken from "Lovell's Legal Compendium," as prepared by John W. Blair, advocate of Montreal, will be of interest to importers and exporters:

A bill must be dated to comply with the laws of France, Germany, the Netherlands and Italy.

The nature of the consideration must be stated according to the laws of France and the Netherlands.

A bill must be drawn payable to *order* and would be invalid if payable to *bearer* according to the laws of France, Spain and Russia.

The *payee* must be named to accord with the law of Germany.

The place of payment must be stated for France, Germany and Italy.

All foreign bills payable either in Canada or Newfoundland must be protested for either non-acceptance or for non-payment.

203 Set of Exchange.

In the days of sailing vessels, delays and losses were frequent in ocean mails, hence the Foreign Bills of Exchange were usually sent in sets of three, called a "set of exchange," and each sent by a different route, or on a different day, so as to guard against delays or accident, one of the three being almost certain to reach its destination. But the great ocean liners now are as reliable as the mail train, therefore it is no longer necessary to transmit more than one bill of a set of exchange, as per following forms:

£100. LONDON, 25th August, 1912.

At ninety days after date pay this First of Exchange (Second unpaid) to our order the sum of One Hundred Pounds, for value received, payable at current rate of exchange for demand bills.

To MESSRS. A. & S.,
Toronto.

FOR A. M. & S., LIMITED.
J. R. A.
B. W. A.
Directors.

In case of a bill drawn in a foreign country and made payable in Canada, but not in the currency of Canada, the amount, in the absence of express stipulations, is to be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (Section 163 B. of E. Act). Therefore the drawees of the above exchange will not know the exact amount they will have to pay until the date of maturity. It may be more or it may be less than $4.86 2-3.

Exchange for £200 Stg. TORONTO, 4th Sept., 1912.

At sight of this First of Exchange (Second and Third unpaid) pay to the order of E. F. & Co. Two Hundred Pounds Sterling, value received.

TO THE BANK OF MONTREAL, London, Eng.

A. & B. Co., Limited.
Per A. E., Secretary.

Quite an anomaly exists in our market quotations on foreign exchange. When sterling exchange is quoted at 9½ it is at par, and not at a premium.

In the early years of the old Province of Canada the par value of the British pound sterling and the sovereign was fixed at $4.44 4-9; but when the United States adopted their gold standard and fixed the par value of the pound sterling at $4.86 2-3, the gold coming into Canada rapidly gravitated to the United States. Then in 1853 the Parliament of Canada passed a new Currency Act and made the par value of the pound sterling and the British sovereign in the two provinces $4.86 2-3 each.

Again in 1871 the Dominion Parliament in the new Currency Act for the whole Dominion made the par value of the pound sterling and the sovereign $4.86 2-3, just 9½ per cent. more than the old standard of $4.44 4-9.

Instead of the commercial institutions adopting the new standard, they have continued to use the old, and when sterling exchange is at par, $4.86 2-3, it is quoted on our markets at 9½ premium. Therefore, when our morning papers quote sterling 60 days sight, or demand, at 9½, it means at par, and when less than 9½ it is selling below par, and when over 9½ it is at a premium.

204 Parties to a Draft.

There are three parties to a draft at its inception—drawer, drawee and payee. The *drawer* is the one who makes or draws the draft. His name always stands in the lower right-hand corner.

The *drawee* is the one on whom the draft is drawn, that is the one who has to pay it. His name is always written in the lower left-hand corner.

The *payee* is the one in whose favor the draft is drawn—the one who is to receive the money. The *payee* is the same in both notes and drafts, and in each case his name is placed in the body of the instrument.

A note or draft may be made payable to one, or to two or more persons jointly, or alternately to one of two or of several payees, or to the holder of an office for the time being. B. of E. Act, Sec. 19.

205 Negotiation of Bills and Notes.

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 paper.

A bill or note payable to *bearer* is negotiated by delivery, without endorsement.

In transferring a bill or note, even by delivery, if the transferor knows it to be worthless at the time he transfers it, and the transferee can prove that fact, he will be obliged to refund the money. (Russell on Bills, page 378.)

A bill or note payable to *order* is negotiated by the endorsement of the holder, completed by delivery.

It is better to use the word *order* instead of *bearer*, because in that case if the note were lost or stolen it could not be disposed of to, and collected by, an "innocent purchaser for value," as it would lack the endorsement of the payee.

A bill or note is sufficiently endorsed by the payee, or the holder, writing his name across the back of the instrument, without any additional words.

Where a bill is payable to two or more payees who are not partners all must endorse. B. of E. Act, Sec. 63.

A draft drawn on a special fund is not negotiable. The drawee in accepting such a bill does not incur personal liability if such fund should be exhausted when the acceptance matures.

206 Negotiation of Overdue Paper.

A person becoming the holder of an *overdue* note or acceptance (or a non-negotiable note before maturity, or a note marked "given for patent right"), takes it subject to all the equities and defects of title which affected it at its maturity, and henceforward no person who takes it acquires any better title than it had at that time, and is liable also to whatever counter-claim or defences that may exist between the maker and the original payee. B. of Ex. Act, Sec. 69.

A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation an unreasonable length of time. Sec. 70, B. of Ex. Act.

A promissory note payable on demand is intended to be a continuing security, hence cannot be treated as overdue on the ground that an unreasonable time for presenting it for payment has elapsed since its date of issue. (Glasscock v. Balls, 1889, 24 Q.B.D., 13, 4 R.C., 40.) It differs in this respect from a demand bill or a cheque.

207 A Holder in Due Course.

A holder in due course is nearly the same as what is usually termed an "innocent holder for value," and means one (not the payee), who took a negotiable instrument under the following conditions:

1. That the instrument is complete and regular, on its face.

2. That he became the holder of it before it was overdue, and that if it had been previously dishonored he had no notice of such fact.

3. That he took it in good faith and for value, and that at the time it was negotiated to him he had no notice of any defect in the title of the person who negotiated it to him. Section 56 B. of Ex. Act.

Any person thus becoming the holder of a negotiable instrument will collect it no matter how great the fraud by which it may at first have been obtained, except in case of those marked *Given for patent right*, or in case of forged paper.

After the paper has thus passed through the hands of a "holder in due course," and been purged from its infirmity, it becomes immaterial whether any subsequent holder has notice or not of any prior defects or illegality. This is a case where a man may give a better title than he himself has.

"Notice" of infirmity, or defect in the title, would include any information that a prudent person would gather from looking at the instrument, as well as information that might have come through other sources. The purchaser cannot shut his eyes and ears and then say he had no notice. For instance, one or more notes offered at an unusually large discount is sufficient *notice* to the "purchaser to beware," and if cashed without inquiry, say at even 25 per cent. discount, the purchaser could not claim to be "an innocent holder for value."

208 Acceptance of Drafts.

A draft is not binding until it has been accepted, any more than an ordinary order on a merchant would be binding on him before he has accepted it.

The drawee of a draft, in the absence of an agreement, is not bound to accept, or in case of a demand bill to pay, a bill drawn upon him. Goodwin v. Roberts, 1875; L.R. 10 Ex., page 351.

In accepting a draft the mere signature of the drawee written across the face is sufficient, without the usual words being added. A draft is usually accepted by writing across the face of it, pretty well towards the upper end, which is the left-hand side, the word "Accepted," giving the date, where to be payable, and then signing the name immediately under, as:

"Accepted August 28th, 1910.
"Payable at Imperial Bank here.
"D. A. McLaren."

The word "accepted," followed by the signature of the drawee placed on the back of the bill instead of the face, has been held to be a good acceptance.

Drafts drawn payable "at sight," or a certain time "after sight," or a "demand" draft that is not paid when presented, should give the *date* of "acceptance," in order to fix the maturity of the instrument; but a draft drawn payable a certain time after "date" need not have the date of acceptance given; but even with these it is as well to give the date of acceptance, too. Where a draft is *accepted*, it is said to be "honored," and where acceptance is refused it is said to be "dishonored."

A *promise* to accept a bill is not an acceptance, and would not protect a bank if it relied on such promise.

An acceptor may revoke his acceptance at any time before he *delivers* the paper, or has *given notice* that he has accepted it; but after either act the acceptance becomes irrevocable.

When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder, and subsequent presentment for payment is not necessary. B. of Ex. Act, Sec. 82.

But action must not be commenced against an *indorser* until the notice of dishonor has had time to reach such indorser.

209 Statutory Time Allowed for Acceptance.

When a draft is presented for acceptance the drawee may, if he deems it desirable to do so, demand two days' further time in which to decide whether he will accept or not, and in such case it cannot be legally protested for non-acceptance until the expiration of that time.

But if the time is not asked it may be protested the day it is first presented, if acceptance is refused or cannot be obtained. The exact wording of the Act, Section 80, is:

"The drawee may accept a bill on the day of its due presentment to him for acceptance, or at any time within two days thereafter."

When a bill is thus duly presented for acceptance and is not accepted within the time above mentioned, 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 endorser.

The object of this section of the Statute is plain. A debtor is under no legal obligation to accept a draft drawn on him by a creditor, and as protest fees for non-acceptance could not be collected from *him,* it is in the interest of the *drawer* that reasonable time be allowed the drawee to decide whether he will accept or not before treating the paper as dishonored. The time allowed by the Act is three days, including the day of first presentment.

If the bill is returned accepted, but the acceptance is not dated within this time, the holder may refuse to take the acceptance, and may treat the bill as dishonored by non-acceptance. (2 Edw. VII., Chap. 2, Sec. 1.)

In case of time drafts drawn on well-known firms, when not attached to Bills of Lading, it is the custom with banks to leave them for acceptance. A draft thus left, if it is not returned accepted within the two days after presentment, must be treated as *dishonored.* If it is wrongly or accidentally detained in the hands of the drawee, protest may be made on a copy or written particulars of the bill gathered from the bill book.

Newfoundland has followed the English Statute, which states that the draft must be accepted "within the customary time," or the holder must treat it as dishonored.

210 General Acceptance.

General acceptance is the term used when a draft is accepted in the ordinary way, by writing the name, date, and usually a place of payment, across the face.

211 Qualified Acceptance.

When the *acceptance* in express terms varies the effect of the draft from what it was originally, it is called a *qualified* acceptance. The drawee has that privilege within certain limits; for instance, he may designate a particular place for payment, and it would not be a "qualified acceptance." But if he made the bill payable at a particular place *only* it would constitute a "qualified" acceptance.

The holder may refuse a *qualified* acceptance and treat the paper as dishonored by having it protested for non-acceptance. Any one of the following would be a *qualified* acceptance:

(1) A CONDITIONAL ACCEPTANCE, one in which the acceptor makes the payment conditional upon something contained in it, as: "Accepted, payable out of the funds of Amity Lodge, No. 32, A.F. & A.M., A. MATTISON, Treasurer."

In such a case A. Mattison would not make himself personally liable, but the holder may refuse such acceptance and treat the paper as dishonored, as the Lodge might not have any funds in the treasury.

(2) PARTIAL ACCEPTANCE, where the acceptor only agrees to pay part of the amount stated in the draft, as: "Accepted September 4th, 1910, for fifty dollars. W. JOHNSON."

In this case, say the draft was for $75, the drawer and indorser would have to be notified that it was only accepted for part, which they could refuse if they wished to do so.

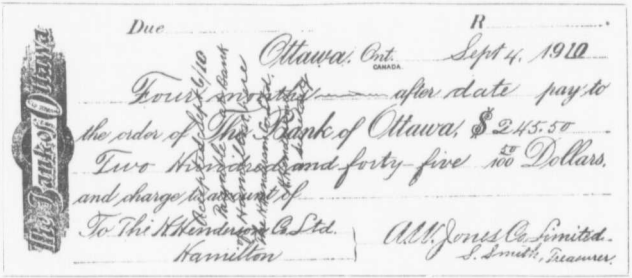
(3) ACCEPTANCE CHANGING TIME where the acceptor changes the time, as, for instance, from sixty to ninety days. The holder may refuse it.

(4) THE ACCEPTANCE of some one or more of the drawees, but not all would bind those that accepted, but the holder may still refuse it unless all accept.

In all such cases where the original conditions of the draft are changed, the *drawer* and all *indorsers* are relieved unless they are notified. If, after receiving such notice, they do not within a reasonable time express their dissent, they are held to have given their assent to the change, and thus remain bound.

213. Acceptance by Officer of a Company.

A bill drawn on an incorporated company should be drawn on the company and not on any officer or director. A secretary or managing director of a stock company in accepting a draft drawn on the company should sign the company's name only.



It is the same with a partnership firm. A partner in accepting a draft or signing a firm note should sign the partnership name only. But if he signs his own under that of the firm name it is still the acceptance of the firm.

But if he accepts simply in his own name it binds him personally and not the firm. (Owens *v.* Von Oster, 10 C.B. 318).

One of the rules of the Canadian Bankers' Association requires that

in indorsements of negotiable paper by incorporated companies, not only the name of the company should be used, but also the official position of the person signing the name should be given. The custom has become general, not only in indorsing, but also in drawing and accepting bills, for the person signing the name to indicate his official position as in above form.

215 Time Draft After Date.

A draft drawn so many days or months after *date* differs from a time draft *after sight* as to the date of maturity only.

$175.00. SAULT STE. MARIE, Jan. 31st, 1914.

Ninety days after date pay to the order of L. A. Green, at The Canadian Bank of Commerce here, One Hundred and Seventy-five Dollars, value received, and charge to the account of
To. W. W. ANDERSON,

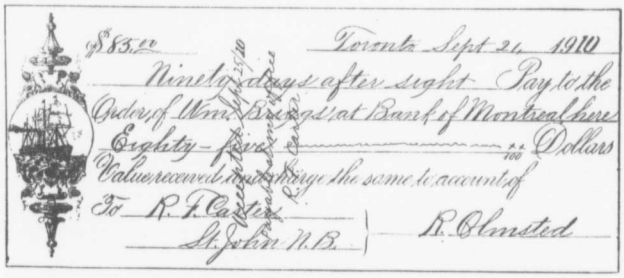
Charlottetown, P. E. Island. D. A. MCLAREN.

In accepting the above draft, which is payable "after date," W. W. Anderson need not write the date of acceptance, as the time when it will mature is fixed in the draft, being made payable ninety days after its date, which would be May 1st, with three days' grace, making it May 4th.

216 Time Draft After Sight.

The following form is a "time draft," drawn 21st of Sept., 1910, and payable ninety days *after sight*. It was accepted Sept. 25th, 1910, and would, therefore, fall due ninety days after that date, Dec. 24th, and the three days' grace being added make it legally mature Dec. 27th, 1910.

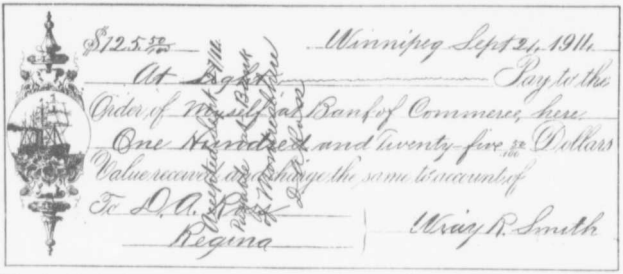
It was made payable at the Bank of Montreal at Toronto, but Mr. Carter in accepting it, it will be noticed, made it payable at his own office, and therefore the bank that presented it to him for acceptance will now have to present it at Mr. Carter's own office for payment when it falls due. Of course, Mr. Carter could have made it payable at some other bank at St. John, if he had wished to do so.



After payment the money will be forwarded to the Bank of Montreal at Toronto, as Mr. Olmstead directed when he drew the draft.

217 A Sight Draft.

The form shown in this section is a *sight* draft. It is drawn by Wray R. Smith, of Winnipeg, on D. A. Ross, of Regina. It will be noticed that



Mr. Smith made it payable to himself, and therefore the *drawer* and *payee* are the same person in this case

This form of draft is supposed to be paid when it is presented, but if the *drawee* wishes to do so he may accept it in the usual way and take the three days' grace, except in Newfoundland and England. It will be seen by the form shown here that Mr. Ross took advantage of the three days' grace and "accepted" it in the usual way.

It was drawn September 21st, payable at the Bank of Commerce, Winnipeg, but in accepting it Mr. Ross made it payable at the Bank of Montreal, Regina, which is allowable.

It was accepted September 27th, and will therefore be payable September 30th.

Sight Drafts and Time Drafts are both governed by the same laws for presentment and payment, except that in Newfoundland and England sight drafts have no days of grace.

218 Demand Drafts.

A demand draft has no days of grace allowed, but is payable when demanded; that is, within the time allowed by Statute for the acceptance of drafts, and if not then paid it must be treated as dishonored. The Bills of Exchange Act makes no distinction between drafts when it reserves to the drawee the reasonable time of "two clear days after presentment" in which to determine whether he will honor the drawee's draft or not. The creditor has no legal authority given him to force the debtor to pay his demand bill on him on presentment and refuse the two clear days the Act allows for the acceptance of drafts. (See Russell on Bills, page 273.)

$220.00. COBALT, ONT., Feb. 6th, 1914.

On demand pay to the order of A. De Cew, at the Sovereign Bank here, Two Hundred and Twenty Dollars, for value received, and charge to account of

TO THE R. SMITH CO., H. P. MOORE.
Orillia.

With a demand draft *acceptance* and *payment* are expected to take place at the same time. The drawer, of course, has the right to give time for payment. In that case it would be "accepted" as other drafts, placing the date of acceptance upon it. It would not commence to draw interest until it was presented, but would commence at that date to draw five per cent. The Statute of Limitations would also commence to run from the date of acceptance in favor of the acceptor.

"In case of urgency, say, for instance, where a demand draft is attached to a bill of lading of perishable goods, a more speedy acceptance is required, special instruction should be given, as otherwise the drawee would be justified in claiming, and the party presenting the bill in granting the delay mentioned in Section 80 of the Act." (McLaren, page 238.)

If the *drawee demands* the statutory time allowed for acceptance, and the bank protests even a demand draft before the expiration of that time it is *premature*. If within the time allowed by the Act the drawee were to ask for the draft and tender the money for its face, and the bank were to refuse payment unless protest charges were also paid, it would do so at its own risk if the drawee were on the eve of insolvency.

220 Discounting Bills and Notes.

A bill may be discounted either before or after acceptance. If discounted before acceptance it is done solely on the credit of the drawer or indorser, and if it is dishonored by non-acceptance an immediate right of recourse against the drawer and indorser accrues to the holder, without waiting for the maturity of the paper.

The discounting of a draft before acceptance is not "Kiting," as in Merchants Bank *v.* Darveau, R. J. Q., 15, S. C. 326 (1898), it was held that the Banking Act does not prohibit a bank from taking as security for advances the transfer of a certain debt.

221 Presentment of Notes and Acceptances for Payment.

Absolute compliance with the provisions of the Bills of Exchange Act, both as to presentment for *acceptance*, and for *payment*, and *notice* of dishonor if not accepted or not paid, as the case may be, is compulsory to preserve the right of recourse against indorsers, and against the drawer, if the instrument has been negotiated.

An inland bill that is not payable in the Province of Quebec, and which has not been discounted or negotiated should not be protested for non-acceptance.

Notes and acceptances made payable at a certain place should be presented there for payment on the third day of grace, even if there is no indorser on them.

If the bill or note is payable at a bank, then it must be presented during banking hours; but if not at a bank, then the holder has the ordinary business day for presentment.

If there are indorsers on the paper, and it is not presented for payment on the third day of grace, if that is a business day, the indorsers are discharged.

If there are no indorsers, then it need not necessarily be presented on the date of maturity, but must be presented for payment before any action is taken, or the holder would likely be saddled with the costs, and possibly lose the interest after maturity as well.

If payment is not received the paper must be treated as *dishonored* in order to preserve recourse against drawers and indorsers. As to *when* protest is compulsory see "Protests when Required."

Of course private individuals who may be collecting bills and notes in their possession must observe all these requirements just the same as the banks do. A demand for payment must be made on the *third day of grace,* and they must have the paper ready for delivery if payment is offered, otherwise the indorsers are free. If payment is not received it is absolutely essential that *notice* of dishonor be given the indorsers, otherwise they are discharged.

122 Place of Presentment.

If there are no indorsers on the paper that the holder desires to hold liable for payment in case the maker or acceptor fails to pay at maturity, presentment for payment is not essential so long as presentment or demand for payment is made before entering action, and before it is barred by Statute of Limitations.

But if there are *indorsers* or the *drawer* that the holder wishes to hold liable for payment, then presentment becomes absolutely essential, and must be:

1. At the place specified in the paper, if any.

2. If at a certain bank the paper must be at such bank on the due date. If at the office of the maker or acceptor it must be presented there on the proper date.

3. If no place of payment is specified, then at the address of the maker or acceptor, if given.

4. If no address is mentioned in the bill, then at his place of business, if known; if not known, then at his ordinary place of residence, if known.

5. If neither is known, then at his last known place of business or residence, or wherever he may be found.

6. Where the place of payment specified in the acceptance is any city, town, or village, and no place therein specified, the bill will be presented to the drawee's or acceptor's known place of business or residence, and if there is no such place found, then at the post-office, or principal post-office is sufficient.

When circumstances beyond the control of the holder prevent presentation at proper time, it is excused; but it must be presented as soon as the hindrance ceases.

Many a holder has lost his security by not presenting the paper for payment as the law requires, and many an indorser has paid a note from which he was legally discharged by the holder failing to comply with the legal requirements.

CHAPTER VIII.

INDORSEMENTS AND PROTESTS.

230 Purposes of Indorsement.

Indorsements may be either (1) for the purpose of negotiation, (2) for additional security, (3) for the acknowledgment of a partial payment of the instrument, (4) or for identification.

In the absence of evidence to the contrary, a person writing his name on the back of a negotiable instrument is *presumed* to be an *indorser*, and writing his name on the face a *maker* or *drawer*, as the case may be.

"That a person indorsing a note before delivery to the payee is an indorser only is sustained by the courts of Quebec, Nova Scotia, Manitoba, and the Supreme Court of Canada." (McLaren.)

The drawer cannot sue an indorser, even if he makes himself the payee.

231 Forms of Indorsement.

There are several ways in general use of indorsing a note or draft, to conform to the requirements of the business community in safeguarding the complex and sometimes the opposing financial interests of the contracting parties. The following are chief, and parties who may not be familiar with them can readily understand their different uses by noticing the wording in each case:

232 Indorsement in Blank.

The name written across the back of the instrument as:

James Smith.

This indorsement holds the indorser liable for payment, and the note or draft may be transferred thereafter simply by delivery. It is the form in common use.

233 Indorsement in Full.

The following are usual forms of indorsement in full:

"Pay J. Murray or order."
James Smith.

This indorsement not only passes the title of the note to J. Murray and holds James Smith liable for payment if the maker fails, but it also makes it compulsory for J. Murray to indorse it if he wishes to transfer it to another person. It is the safest indorsement, because if the note were lost no one could collect it but the indorsee if he had not indorsed it again in blank. "Pay J. Murray" would also be an indorsement in full.

Another form is "Pay to the order of J. Murray," which would compel him to indorse it before receiving the money, thus securing proof of payment to him.

234 Restrictive Indorsement.

This indorsement not only transfers the title of the note, but it restricts payment to A. Sanderson. It does not absolutely prohibit the further transfer of the bill, but it is evidence to third parties that other transactions may be depending on it, and therefore subsequent holders take it subject to the equities that may burden it when it receives the "restrictive indorsement."

There are various forms for this kind of indorsement, as for example:

"Pay A. Sanderson only."
James Smith.

or "Pay D for the account of H," or "Pay D or order, for collection." If such bills are further transferred, the holders take them merely as agents of the first indorsee, and not as "holders in due course," and are subject to the same liabilities that the first indorsee had.

A note or bill payable to *bearer*, or to a certain person or bearer, cannot have its negotiability restricted by indorsement, but those using the word *order* may be so restricted, as shown above.

236 Indorsement Without Recourse.

This indorsement, called also "Qualified Indorsement," has special uses. If a note or bill drawn payable to the payee *or order* is transferred the indorsement of the payee is compulsory, but by indorsing it in this way he can negotiate it and yet not make himself liable to any future holder for payment. Its purpose is for negotiation only, and not surety for payment:

"Without recourse."
James Smith.

It is also written "without recourse to me." If a note or bill were indorsed by a third party before the payee received it, he may transfer it without becoming liable for payment by indorsing it in this way, placing his indorsement above the one already on the paper.

The banks, of course, would not ordinarily discount paper indorsed in this way, as they expect customers to be responsible for the paper they carry for them.

238 Guaranteeing Payment of Note.

"I hereby guarantee the payment of the within note."
James Smith.

The above guarantee is not an indorsement and in no sense operates as a negotiation of the paper. James Smith guarantees the payment of the paper, but the law respecting presentment and notice of dishonor must be complied with. An ordinary endorsement guarantees as much as this guarantee does.

The following form is preferable and has meaning:

"For value received, I hereby guarantee payment of the within note, and waive protest and notice thereof." *James Smith.*

It is said "a guarantor is a favorite of the law," and he is allowed to stand on the precise wording written above his name, and he waives no rights that his written contract does not waive.

The above guarantee does not waive due *presentment* for payment, which if not done would free him from liability.

239 Guaranty for Collection of Note.

"for value received, I hereby guarantee the collection of the within note"
James Smith.

In this case the guarantor is not liable until a legal attempt to collect by suit has failed, and for that reason in many cases it would be better for the guarantor than a simple indorsement.

240 Indorsement Waiving Protest.

"Presentation and protest waived."
James Smith.

This form is usually employed when done before maturity to *prevent* useless protest.

The following form is in general use when done at maturity to save *cost* of needless protest:

"I hereby accept notice of non-payment and waive protest."
James Smith.

241 Indorsement of Partial Payment.

It is usual in indorsing payments on a note to give the date and amount, and if different persons receive the money, the initials of the person should be given.

Received on within note Aug. 5. 1910, Ten dollars ($10.00).
Sept. 16, 1910, Forty Dollars ($40.00). H. A.

In cases where the question of outlawing is possible it is advisable to have the maker indorse his own payment, as

"Paid on within Oct. 10, 1910, $20.00."
J. Parks.

In case as above it would be impossible subsequently to deny making the payment.

242 Indorsement of Identification.

"W. Carter is hereby identified."
James Smith.

This indorsement identifies the holder of the paper at the Bank without making the indorser liable for payment.

243 Specific Indorsements.

"For collection only on account of
James Smith."

This is a precautionary measure used to guard against loss in sending the paper by post, or through other hands. Other wording of *specific indorsement* would be:

For discount only to credit of
James Smith.

For deposit only to credit of
James Smith.

For deposit only to credit of James Smith
David Jones.

The last of the above forms would answer for a clerk who had not authority to indorse his employer's name.

If a bank were to pay cash in any of the above or similar cases, it would do so at its peril.

244 Indorsement Consenting to Extension of Time.

"Presentment, demand, protest and notice waived, and consent given that time of payment of this instrument may be extended without prejudice to my liability as indorser." *J. W. Smith.*

248 Indorser's Implied Contract.

When the payee or the holder of a negotiable instrument transfers it by indorsement, he, in effect, agrees in good faith with all the subsequent holders: (1) That the instrument itself is genuine, and all the names on it previous to his own are competent to contract. (2) That he has a good title to the bill. (3) That he is competent to contract. (4) That the maker will pay the bill at maturity. (5) That in case the maker fails to pay the bill he will pay it himself, providing he does not give notice to the contrary in the form of indorsement he employs, and providing the holder complies with the law relating to negotiable instruments.

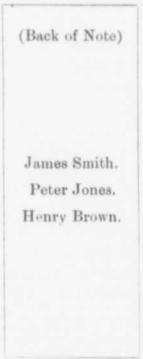
The indorser on even a forged note is liable to "a holder in due course," although the maker whose name was forged would not be liable. (Choquette *v.* Leclaire, Q. R. 19, S.C. 521, 1900.)

249 Relation Between Indorsers.

Where two or more persons indorse the paper at *the same time* as security, and the maker fails to pay, the holder may sue all; or he may sue and recover from either one he thinks best. In case he collects the note from one, then that one may collect a proportionate share from each of the others. If there were three of them, he could collect one-third from each of the other two; and if only two, then he would collect half from the other party.

But if the indorsements were at different dates, as they naturally would be where paper is indorsed as it is transferred, the liabilities are altogether different. In fact, where two or more indorsers are on a bill or note, each

indorsement is deemed to have been made in the order in which it appears on the paper, until the contrary is proved. Therefore, where the indorsements are at different dates the first indorser is security for all after him, the second is security for the third, the following, etc.



If the maker of such a note failed to pay, the holder could sue all the indorsers, or any one of them he might choose. Say there were three, as in the form shown on this page, and the holder sued and collected from all, one-third from each, then, in that case, Jones and Brown could collect what they paid from Smith, thus making him pay all, because he was surety for both. If Smith, however, proved to be insolvent, and Jones and Brown had to pay the whole debt, then Brown would collect what he paid from Jones, because Jones indorsed before him, and was, therefore, his surety. Jones would have to pay the whole debt, and look to Smith and the maker, who are both liable for it to him; and one or the other might sometime be in a position to pay. If Smith were sued either by the holder or one of the subsequent indorsers, and paid the amount, he could only look to the maker of the note.

250 To Hold Indorsers Liable.

Indorsers on negotiable paper are not debtors to the holder of the paper, but merely sureties under certain conditions. To hold them liable for payment on a note or bill that is not paid at maturity, it is necessary:

1. To present the note or bill for payment on the third day of grace, at the proper place, and during business hours. If this is not done the indorsers are free.

2. If it is not paid, the paper must be treated as *dishonored*. If it is a foreign bill, or one payable in the Province of Quebec, it must be protested. See "Collection of Notes and Bills."

3. Notice of the dishonor must be forwarded to the drawer and indorsers on that day or not later than the following business day. See 97, B. of Ex. Act.

This notice must contain the following three facts:

(1) That the note or bill (giving its date, amount, name of maker, indorsers, etc.) had been presented for payment;

(2) That payment was refused;

(3) That the holder looks to him (the indorser) for payment.

251 Notice of Dishonor.

When a bill is dishonored by non-acceptance or non-payment, or a promissory note is dishonored by non-payment, notice of dishonor may be given immediately, but action cannot be brought until the following day.

The notice of dishonor may be sent by a notary, or the holder himself may send it.

An oral notice is also legal, but it is better that it be in writing.

It may be sent merely as a letter, but stating clearly the three facts above mentioned. The postage must be prepaid.

If the letter is not registered, it would be advisable to have a witness to

its contents, and delivery to the post-office, or have some person deliver the letter to the post-office so as to be able to prove its delivery. A notary usually delivers his notices at the post-office himself so there would be no possibility of neglect.

If an indorser has added an address to his signature the notice of dishonor must be sent to that address, but if he has not given such address, then the notice must be given as follows:

1. Either to the indorser personally; or,

2. To his post-office, if known, but, if not known, then to the post-office nearest to his place of residence.

3. If he lives in one place and does business in another, notice may be sent to either place.

The indorser might not receive the notice for several days or weeks after, but that would not make any difference so long as the paper had been duly *presented* for payment and the *notice* of dishonor mailed to his supposed address. A similar notice is also sent to the maker or drawer; in fact, to every name appearing on the paper. Notice is excused:

1. When after reasonable diligence notice cannot be given to, or does not reach the drawer or indorser sought to be charged.

2. By waiver of notice, either express or implied.

254 Protest, When Required.

As some traders are not familiar with the provisions of our Bills of Exchange Act in respect to protesting negotiable paper for non-acceptance, and for non-payment, a *verbatim* copy of the Act is here given:

In order to render the acceptor of a bill liable it is not necessary to protest it. Sec. 109.

"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.

"Where a foreign bill which has not been previously dishonored by non-acceptance is dishonored by non payment, it must be duly protested for non-payment.

"Where a foreign bill has been accepted only as to part it must be protested as to the balance.

"If a foreign bill is not protested as by this section required the drawer and indorsers are discharged." Section 112.

"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 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 indorsers." (Section 113.) But the *notice* of dishonor must be given if it is not protested. See section 250 of this Digest.

"In the case of an inland 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." Section 114.

"Except as in this section provided, 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." Section 114.

"Where the acceptor of a bill suspends payment before it matures the holder may cause the bill to be protested for better security against the drawers and endorsers." Section 115.

When a bill is protested, the protest must be made or noted on the day of its dishonor. If for non acceptance it may be any time after acceptance was refused, but if for non-payment it must not be until after three o'clock in the afternoon.

A bill must be protested where it is dishonored, or at some other place in Canada, within five miles of the place of presentment and dishonor, except in such case where the bill is presented through the post-office and returned by post dishonored, it may then be protested at the place to which it is returned not later than the day of its return, or the next juridical day. Section 121.

In Newfoundland an inland bill does not need to be protested either for non-acceptance or non-payment. But foreign bills must be protested for dishonor the same as in Canada.

255 Contents of Protest.

A protest must contain a copy of the bill, 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 date and place of protest;
(c) The cause or reason for protesting the bill;
(d) The demand made, and the answer given, if any; or,
(e) The fact that the drawee or acceptor could not be found.

256 Notice to Indorsers.

Toronto, January 10, 1910.

To J. W. Jones, Brampton, Ont.

Sir,—

Mr. John Smith's Promissory Note for $65.50, dated at Brampton the 7th day of October, 1909, payable three months after date to Henry Brown, or order, and indorsed by you, was this day, at the request of Henry Brown, duly protested by me for non-payment.

M. A. Brown.
Notary Public.

When an indorser receives a notice of protest, if there is a previous indorser on the paper, he should immediately forward the protest notice to such indorser, in order to hold him liable in case the holder neglected to notify him.

257 Noting for Protest.

Where a bill or note cannot be paid on date of maturity, it may be "noted" for protest, when it will be held over for a day. This is done by the notary public. If not then paid the paper must be protested the next business day.

258 Fees Allowed for Protesting.

(This section is taken from Maclaren).

In Ontario the fees for protesting a note or draft or cheque is 50 cents, and 25 cents for each notice sent to maker and indorsers, and amount of postage actually expended.

Quebec.
Presenting, noting, and protest, $1.00.
Each notice, 50c.
Postage additional.
Nova Scotia and Prince Edward Island, R.S.C., Chap. 123, Sec. 7, 8.
Protest for local bills, 50c.
Each notice, 25c.
Protest charges for bills not local, $2.50.
New Brunswick, R.S.N.B., Chap. 188.
Presentment and noting, 50c.
Presentment, protest and notices, $1.00.
Manitoba, charges regulated by usage.
Protest, $1.00.
Each notice, 50c.
Postage extra.
Alberta, Saskatchewan and N. W. Territories, charges governed by usage.
Protest, $2.00.
Each notice, 50c.
Postage actually paid.
British Columbia, charges governed by usage.
Presentment, protest and notices, $2.50.
Postage in addition.

259 **Protest by Magistrate.**

When there is no notary public, or none whose services can be obtained at the place where the paper is dishonored, any Justice of the Peace resident at the place may present and protest the paper and give the necessary notices. Section 123 B. of Ex. Act.

260 **Form of Protest by Magistrate.**

(A copy of the bill or note and indorsements.)

On this.....day of....., in the year of 19.., I, A. B., one of His Majesty's Justices of the Peace for the district (or county) of....., in the Province of ....., dwelling at (or near) the village of....., in the said district, there being no practising notary public at or near the said village (or other cause) did at the request of....., and in the presence of....., well known unto me, exhibit the original bill (or note), whereof a true copy is above written, unto C. D., the acceptor (or drawer or promisor) thereof, personally (or at his residence, office, or usual place of business), in....., and speaking to himself (or his wife, his clerk, or his servant, etc.) did demand acceptance (or payment) thereof, unto which demand he (or she) answered, ...wherefore, I the said Justice of the Peace, at the request aforesaid, have protested, and by these presents do protest against the drawer and indorsers (or promisor and indorsers or acceptor, drawer and indorsers) of the said bill (or note) and all other parties thereto and therein concerned, for all exchange, re-exchange and all costs, damages and interest, present and to come for want of acceptance (or payment) of the said bill (or note), all of which is by these presents attested by the signature of the said (witness) and by my hand and seal.

(Protested in duplicate.)

Signature of witness.

(Chap. 119, R.S.C.) Signature and seal of the J. P.

In Newfoundland, where the services of a notary cannot be obtained to protest a bill, any householder or substantial resident of the place, in the presence of two witnesses, may give a certificate which shall in all respects operate as a protest. The following is the statutory form:

"Know all men that I, A. B. (householder), of ....., in....., at the request of C. D., there being no notary public available, did, on the..... day of....., 19.., at.....demand payment (or acceptance) of the bill of exchange hereunder written from G. F., to which demand he made answer (state answer, if any). Wherefore, I now, in the presence of G. H. and J. K., do protest the said bill of exchange.

J. K.
G. H.

Witnesses. (Signed) A. B.

262 Bank and General Holidays.

The following are legal holidays, or non-juridical days, in all the Provinces of Canada: Sundays, New Year's Day, Good Friday, Easter Monday, Victoria Day (May 24), Dominion Day (July 1st), Labor Day (first Monday in September), Christmas Day. The birthday of the reigning Sovereign (or the day fixed by proclamation for the celebration of the birthday), Thanksgiving Day (any day appointed by proclamation).

When New Year's, Christmas, King's Birthday, Victoria Day, or Dominion Day falls upon Sunday, then the day following is a public holiday.

Alberta, Saskatchewan, N.-W. Territories and Yukon also have the above days, with Ash Wednesday and Arbor Day (second Friday in May) added.

And in the Province of Quebec all the above days (except Arbor Day and Ash Wednesday) and also the following: The Epiphany, the Ascension, All Saints' Day, Conception Day.

In any of the Provinces any day appointed by proclamation of the Lieutenant-Governor for a public holiday or Thanksgiving would be bank holidays in such Province.

Civic Holidays, being merely local, are not bank or general holidays, hence negotiable paper and all outside contracts must be attended to.

Easter Monday is a bank holiday, but not a general holiday.

Promissory notes falling due upon Sunday or a holiday will legally mature on the day next following which is not a holiday.

The time limit also of any contract expiring or falling upon a holiday, the time so limited shall extend to, and such thing may be done on, the day next following which is not a holiday.

263 Legal Holidays in Newfoundland.

Sunday, New Year's Day, Good Friday, Christmas Day, Victoria Day (May 24). Any day that may be proclaimed as a holiday by the Governor-in-Council by notice in the "Royal Gazette." Among these would be the King's Birthday, the date of the commemoration of which is generally prescribed by the British authorities.

CHAPTER IX.

BANKS AND BANKING.

270 Chartered Banks.

At Confederation, 1867, the business of banking in Canada came under the jurisdiction of the Federal Parliament, and our Canadian banking system, taken all in all, is undoubtedly the finest in the world.

This brief *resume* of the organization of banks, security of bill holders, and the practical work of banking as it touches traders, is given for the information of the public rather than for the banking fraternity.

All banks organized since Confederation have taken their charters from the Dominion Government, and the banks previously organized, either by Imperial or Provincial Parliaments as their charters expired, have been renewed by the Dominion Government.

Private persons or corporations may engage in the business of banking, but cannot issue paper currency, nor use the word "Bank," "Banking Company," "Banking House," "Banking Association," "Banking Institution," or any similar term on their sign, or in connection with their name in business in any way, but they may use the words "Private Banker," as that is notice to the public that the office is not under government inspection or control.

The penalty for violation of this Section of the Act is a fine not exceeding $1,000, or imprisonment for a term not exceeding five years, or both, in the discretion of the court.

272 Incorporation of New Banks.

Banks are organized and incorporated in much the same manner as are other Stock Companies by opening a Stock Book, soliciting subscribers, appointment of Provisional Directors, and then applying for charter.

At present the capital stock in a Chartered Bank must not be less than $500,000, divided into shares of $100 each.

At least $250,000 of the $500,000 must be paid in, which sum in actual money, must be temporarily deposited with the Minister of Finance and Receiver-General.

There must not be less than five Provisional Directors, nor more than ten.

The bank must not commence business or issue notes until it has received the certificate permitting it to do a banking business.

Upon the issue of the certificate the $250,000 deposited with the Treasury Department is returned to the bank except $5,000, which is retained until the time for the annual adjustment when this deposit must be made equal to five per cent. of the average amount of its note circulation from the time it commenced business to the time of such adjustment.

The charter carries with it the privilege of issuing a bank currency, and establishing branches, which are not required to deposit anything as security.

In Canada the charters of all the banks expire at the same time, no matter when the bank was started. The period is ten years and renewable for ten years more, and so on from one period to another.

If a bank suspends payment for ninety days it loses its charter, and its affairs are wound up.

273 The Business of Banking.

The business of banking is dealing in *money* and *debts*, and includes the issuing of notes for circulation, receiving deposits, discounting and collecting commercial paper, and in a general way dealing in money, and documents payable in money, domestic and foreign public securities, etc.

The means at its disposal are:

1. The capital paid in by the shareholders.
2. The deposits of its customers.
3. The amount of its own notes it can keep out in circulation.
4. The money in transmission through it.

The chartered banks are prohibited from engaging in trade, or dealing in goods or lands, or lending money upon their security; but they may take as *collateral* security for loans, mortgages on real estate, chattel mortgages, warehouse receipts, bills of lading, stocks, bonds, debentures, etc.

They cannot take a mortgage on real estate or on chattels as security for a loan, but after a loan has been made they may take a mortgage as collateral security. They must not lend money upon their own stock, or the capital stock of any other Canadian bank. They cannot hold real estate that comes into their hands for more than seven years except for use of the bank, unless the time is extended by the Treasury Board, which in any event must not exceed five years longer.

Banks may issue as much note currency as the requirements of trade demand, up to the full amount of their unimpaired paid up capital.

Notes smaller than $5.00 are issued by the Dominion Government, but the $5.00 notes, and over that in multiples of fives, by the banks.

The Government of Canada will pay gold for Dominion notes when presented at any branch office of the Receiver-General.

The various banks send back the notes of all other banks it receives each day for redemption and pushes out its own notes, hence redemption is going on every day.

When requested to do so, every chartered bank is required to make payment in Dominion notes to the extent of $100 in any denomination that may be desired.

Banks may charge any rate of discount without incurring any penalty, but cannot recover by suit more than 7 per cent.

Collection fees allowed banks are: Under thirty days, one-eighth of 1 per cent.; thirty days and over but under sixty days, one-fourth of 1 per cent.; sixty days and over but under ninety days, three-eights of 1 per cent.; ninety days and over, one-half of one per cent.

These fees, however, are now virtually obsolete, as the banks are not charging as much.

Agents' fees when collected by other banks in addition. For small sums a minimum fee of fifteen cents is charged.

274 Security for Note Holders.

Canadian bank notes are secured:

1. By being made a *first charge* on the assets of the bank.
2. By the *double liability* of the shareholders of all banks, except the Bank of British North America, which holds its charter from the Imperial Government.

3. Each bank is required to keep in the hands of the Dominion Government a deposit equal to 5 per cent. of its average note circulation, which fund is called the "Bank Circulation Redemption Fund," and should the liquidator be unable to redeem all the notes of any bank that may have failed, recourse is had to this fund. And if this fund should not be sufficient to redeem all the notes of the insolvent bank, then all the other chartered banks are required to contribute *pro rata* an additional sum sufficient to make good the deficiency.

With this *deposit* with the Government, the *double liability* of the shareholders, together with the *general assets* of the bank, *note-holders are always amply secured.*

As the bank notes draw five per cent. interest from the date of suspension until the liquidator announces that he is ready to redeem them, other banks will cash them at par, and are required by the Bank Act to do so; therefore, the bills of our chartered banks are as safe as are our Dominion notes, or gold or silver coins.

The chartered banks redeem their notes in gold when presented at the place where they are made payable.

If the holder of any bank bill loses it through fire, or it is otherwise destroyed, he is entitled to have it redeemed in full by giving indemnity, the same as in lost promissory notes. But identity is difficult unless the holder knows its number.

Torn, mutilated or soiled bills may also be exchanged for new ones.

275 Security for Depositors.

As banks are required to make a full return to the Government each month of their *circulation*, and *deposits*, and the *amount of their reserves*, any bank attempting to lessen its reserves below a reasonable percentage of its circulation would soon lose public confidence enough to put depositors on their guard.

The total amount of the note circulation must never exceed the amount of the unimpaired paid-up capital of the bank, and no dividends or bonus must be paid out that will impair its paid-up capital, so nothing short of a criminal misuse of the funds of the bank on the part of its officers, accompanied by undetected false Government returns, can bring any of our chartered banks in a position where depositors would suffer loss.

Note-holders are made a first charge on the assets of a bank that goes into liquidation.

Dominion Government claims are a second charge, the Provincial Governments third, then the depositors and general creditors.

280 Cheques.

A cheque is a bill of exchange drawn on a bank, payable on presentment. They have no days of grace.

A cheque is not legal tender, nor yet money, and a person cannot be *compelled* to accept it in payment for a debt.

The practice of making payment by cheque is becoming general. It saves time in counting change, prevents mistakes in counting, and liability of loss by theft. A returned cheque from the bank, bearing the payee's endorsement, is also the best evidence of payment a man can have, and should be filed away the same as a receipt.

Cheques sent to places other than the town or city of the payee Bank should be made payable at par, by writing " and exchange " after the amount. Otherwise the payee loses from fifteen to twenty-five cents for exchange, even on small cheques.

Cheques are negotiable the same as notes are, and are subject to the same laws that govern other bills of exchange as to validity, presentment for payment, and notice of dishonor in order to hold drawer and endorsers. And if the bank refuses payment the holder may sue either the maker or any prior endorser that may be on the paper.

A cheque may be made to answer for a receipt for payment of a particular debt by inserting after the amount what it was given for, as " in full of account," or " for invoice of 10th inst.," etc. But like a receipt it is merely documentary evidence of the payment of that much money, and if more should be owing it does not cancel the remainder. It does not bind the payee, but he may accept it and give credit for its face value, unless it makes such settlement the *condition* of its acceptance.

Cheques operate as payment until presentment has been made and payment refused.

281 Presentment of Cheques.

A cheque received should be presented for payment not later than the following day, or forwarded if the bank is in a different place or town. Even twenty-four hours, under certain circumstances, have been held to be an unreasonable time to hold it, and the holder in such cases must bear whatever loss may occur through failure to present it promptly.

Presentment and notice of dishonor, if not paid, are just as necessary with cheques as with other bills, to hold the drawer and prior endorsers liable, if they have been transferred.

A cheque refused to be paid by a bank upon which it is drawn should usually be immediately returned to the drawer, if it had not previously passed through other hands, unless it had been " certified " by the bank, in which case the bank is liable. If there is an endorser he, of course, would be surety to the holder.

If a cheque is not presented within a reasonable time, the endorsers are discharged, but the drawer only to the extent that he has suffered damage by the delay. In other respects a cheque is good until barred by the Statute of Limitations.

282 Cheques Payable to Bearer.

A cheque payable to *bearer* may be paid to bearer, notwithstanding the fact that some previous holder may have endorsed it " payable to the order of " some individual.

A cheque payable to " cash " is payable to bearer.

A cheque payable to John Smith with the words " bearer or order " struck out, would nevertheless be payable to John Smith *or order*. With cheques, as with promissory notes, " bearer or order " is not essential to their negotiability. If it is desired to be payable to a certain person or firm and to no other, prohibitive words must be used, as " pay John Smith *only*." See section 180.

Banks usually require the person presenting a cheque for payment to endorse it, no matter how it is written, but this is a custom of the banks,

and not a statutory requirement. The endorsement of the paper required by the bank is for the purpose of *identification* only. As the bank's liabilities are unavoidable if it pays a forged or a raised cheque, or pays the wrong party, that simple precaution to procure *proof* as to whom the money was actually paid is only reasonable, and an endorsement, *without recourse,* would serve the purpose.

283 Cheques Payable to Order.

The form shown below is the standard form now used in the United States and quite generally in Canada.

Toronto, September 4, 1911.

Imperial Bank of Canada

PAY TO THE ORDER OF

The D. A. Ross Co. *$150.00*

One Hundred and Fifty ~~~~~~~~~~~~~~~~~~~~ *Dollars.*

A. R. Somerville.

In the above form the cheque is not made payable to the *payee,* but to his *order,* hence he must endorse it before the bank would seem to have a right to cash it, or to receive it on deposit. But Section 22 of the B. of Ex. Act, Chap. 119 R.S.C., interprets it differently, and makes it *optional* with him, as: "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 to his order, it is nevertheless *payable to him, or to his order, at his option.*"

284 Post-Dated Cheques.

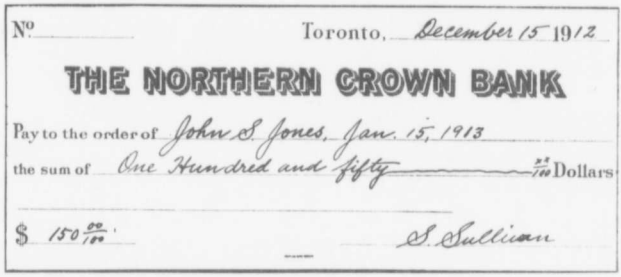
A cheque is not invalid by reason that it is not dated, or that it is dated on Sunday, or dated forward or backward. (See Section 162 for defects that do not invalidate.)

A cheque that is post-dated is held not to be a cheque, but a bill of exchange, payable at maturity, and entitled to three days of grace, as between maker and payee. This being the ruling of the courts, as particularly established in Forster v. Mackreth, L.R., 2 Ex. 163 (1867), it must be observed that a post-dated cheque is taken out of the provisions of the Act governing cheques and must be treated "as a bill of exchange at so many days date as intervene between the day of delivering the cheque and the date marked upon the cheque."

Of course, if the payee, or a transferee, merely held the cheque until the date it bore, and then presented it to the bank for payment, it would be payable on presentment, for the bank would have no evidence that it was post-dated. But if in the meantime the maker had countermanded payment or there were no funds on deposit at maturity, and the bank refused to honor it, it would be a bill of exchange in the hands of the holder. In such case

if the cheque had been issued by one member of a firm in the firm name who had authority to issue cheques, but not bills of exchange, the firm would not be bound by the post-dated cheque, only the partner who signed it. Forster *v.* Mackreth covers this point also.

A cheque dated on date of issue, say Dec. 15, 1912, but written in the body or across the face of it "payable Jan. 15, 1913," would not be a cheque but a bill of exchange payable Jan. 15th with three days of grace, and the bank could only cash it before maturity in the sense of discounting it, and could not charge the maker's account until the date of maturity. The following would be an illustration:



285 Cheques Without Funds at Bank.

For a person to obtain goods or money by giving a cheque when he had no *account* at the bank would be obtaining the goods or money under *false pretences,* the penalty for which is three years' imprisonment. But if the money were deposited in a bank to cover the cheque before its presentment, there would then be no fraud in it, although the transaction would be irregular.

But simply not having enough money in the bank to cover the cheque would not incur any such penalty, unless the amount of cheque would be so much greater than the usual amount on deposit that a fraudulent intent would be manifest, or in case where numerous cheques would be given greatly exceeding the usual amount on deposit or the amount to his credit at that time, it would be difficult to escape a penalty for fraud, or for obtaining goods or money under false pretences.

286 Certified Cheques.

The practice of "certifying" cheques for the drawer instead of cashing them is a favor on the part of the bank to its customers. In sending cheques to strangers or to distant cities, or for deposit with tender on a contract, or other cases where the equivalent of actual cash is necessary, the drawer may request the bank to "certify" or mark them "good." In that case it is immediately charged against the drawer's account in the bank, just the same as though he had drawn out the money himself. There are several ways in practice by the banks for "marking" or "certifying" cheques; sometimes the word "certified" or "good" is written on the face, giving the initials of the name of the ledger-keeper and the ledger folio, and

sometimes the word "accepted" with the name of the bank, date, etc., are stamped on the face, but the effect is the same in each case.

A "certified cheque" sent anywhere in the country will be accepted as cash, and will be cashed by other banks, because the bank's certification guarantees that it is issued in good faith, that the drawer has money on deposit with which to honor it, and that the bank will hold such funds for the payment of such cheque when presented by a holder entitled to receive the money; but it *does not guarantee payment to any holder.* Apart from this guarantee the holder of a "certified" cheque is in no different position from the holder of an unmarked cheque. If a drawer should countermand payment of a certified cheque before it is presented for payment, the bank is under the same obligation to its customer to withhold payment that it would be if the cheque were not certified. In such case the bank practically becomes the trustee of the money for the payee or endorsee, and can only safely pay the cheque after the court has settled the question of ownership.

There is unanimity among authorities that a cheque, being a demand draft on a bank, is "accepted" by *payment*, and that there is no such thing as "acceptance" for the drawer apart from payment. Likewise the payee or holder has no right to present a cheque to the drawee-bank except for payment. But if when presenting it, and being informed that there are funds ready with which to pay it, he does not take the money, but instead has the bank certify the cheque, that constitutes its payment and the drawer and indorsers are thereby discharged. In this case the bank becomes the debtor of the holder for the amount of the cheque. Boyd v. Nasmith, 17, O.R. 42. The cheque is in such case an acceptance of the bank, but not when "marked" for the *drawer*. As regards its subsequent negotiation a certified cheque before delivery is subject to all the rules applicable to uncertified cheques. Gaden v. Newfoundland Savings Bank, 1899, A.C. 281.

A bank in "certifying" a cheque for the drawer does not acquire any title to it; and such certified cheque does not cease to be the property of the *drawer* until it is paid by the drawee bank. Thompson v. Giles, 2 B. & C. 422. In Gaden v. Newfoundland (above), the *drawer* had the cheque certified before she delivered it over to the payee, but the certifying bank failed before the cheque in due course reached their office. The payee, although accepting the cheque as cash, sued the *drawer* for the amount and recovered it, the Court holding that the bank had never acquired any title to the cheque, but that it was the property of the drawer.

From the above it follows that such "certified cheque" also remained subject to countermand of payment.

A cheque, whether certified or not, that has been lost or stolen before *issue* is worthless in the hands of any holder. The cheque is still the property of the drawer, and if the finder, or thief, negotiates it, even an innocent holder for value obtains no title to it. And if the drawer of such cheque, whether certified or not, countermands payment before it has been honored by the drawee bank the bank is legally bound to refuse payment. If the name of the payee on such lost or stolen cheque, whether certified or not, should be forged by the finder, and the drawee bank should pay such cheque to the holder out of the funds of the *drawer* he may recover the amount from the bank if he gives notice in writing of such forgery within a reasonable time. The Bills of Exchange Act, section 49, allows one year.

A cheque marked "good for two days only," carries the guarantee of the bank for the two days, but if not presented for payment within that time the guarantee is lost, and the cheque becomes as though it had not been certified. Of course, any other number of days would be the same.

287 Crossed Cheques.

Where it is desired that a cheque should not be negotiable, except through a bank, it may be "crossed." The crossing may be either *general* or *special*.

1. A cheque is crossed *generally* when it has:

(*a*) Two parallel transverse lines drawn across the face, or

(*b*) Two parallel transverse lines drawn across its face with the word "Bank" written between them, with or without the words "not negotiable," or

(*c*) Two parallel transverse lines, either with or without the words "not negotiable" written between them.

2. A cheque is crossed *specially* when the name of a particular Bank is added, as "Bank of Toronto," in which case the cheque is crossed to that particular Bank.

3. Any person receiving an uncrossed cheque is at liberty to cross it either generally or specially, or if it is crossed generally when he receives it he may cross it specially.

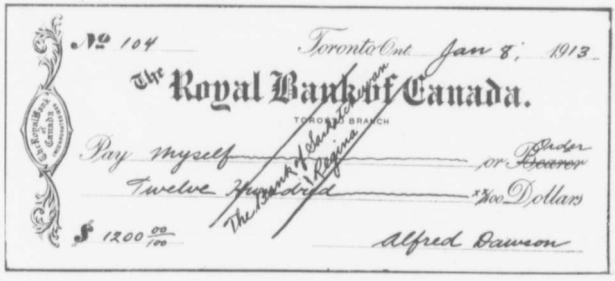
The *drawer* only can *uncross* a cheque that has once been crossed by writing between the lines "pay cash," and initialing it, after which it will be negotiable again.

Crossed cheques are extensively used in England, where the banks are not held responsible for the endorsation of cheques, hence business men to be on the safe side very commonly "cross" their cheques so they cannot be paid in cash over the counter, but must be paid through a customer's account, who being personally known at the bank, payment to the wrong person would be impossible. But in Canada the banks are held liable for the endorsation of cheques, hence no need of "crossing." Cheques are here so extensively used in payment of wages, etc., paid to thousands of persons who have no account at a bank, that "crossing" is scarcely ever resorted to.

A crossed cheque payable to a person not a customer of the bank may be cashed by the bank, but it assumes liability if it pays to the wrong party.

288 Form of Crossed Cheque.

The following form constitutes a genuine safety transfer cheque:



Drovers and other business men who receive large sums of money in the city would find safety in using these "crossed cheques." Instead of carrying the money home with them they could deposit it in one of the city banks, and take a "certified" cheque *crossed* to their home bank. In case of robbery no person could possibly make any use of such cheque, as it is absolutely non-negotiable, and only payable at their own town bank and through their own account.

290 Trust Funds Cheque.

In the following form the drawer does not restrict the negotiability of his cheque, neither does he place any responsibility on the payee to endorse the paper in the event that he does not negotiate it.

St. John's, Nfld.,
February 16, 1914

The Bank of Nova Scotia

Pay to N. M. Squire ..... *or Order*

One Hundred and Fifteen ..... *Dollars* $115.00

E. Augustine.
In trust.

But if it is negotiated the drawer makes it compulsory for the payee to endorse it, thus securing indisputable evidence of payment when the endorsed cheque is cashed by the bank.

In using a cheque as above, of course the drawer would have a "Trust Account" with the bank, and the cheque is payable out of such *trust funds* only, and cannot be charged against his private account. Funds in a *Trust Account* cannot be garnisheed nor taken under execution for any private debt of the depositor.

Executors, administrators, solicitors and officials in general holding estate, or church, or society funds in their hands are in equity bound to keep such *trust money* separate from their own, and provide that the cheque "In trust" shall be the voucher of every disbursement connected with such funds.

No responsibility is placed on the bank when such an account is opened. The bank is not required to enquire into either the nature of the *trust*, or to what purpose the cheque is being applied.

294 Relation Between Bank and Depositor.

The relationship between bank and depositor is in general that of debtor and creditor. The bank is not a *trustee*, nor *agent*, nor *bailee* to the depositor, and is not subject to those laws. The bank's relationship is very wide in its general course of business, but to the depositor it is limited.

As a debtor the bank is under an *implied* obligation to pay the depositor's cheques drawn on it to the extent that it is a debtor, but no further.

If a depositor draw a cheque on his bank for a greater sum than he has to his credit, three courses are open to the bank to choose from:

1. It may refuse to cash the cheque, or

2. It may, if it feels safe in assuming the obligation, cash the cheque and become the creditor to the depositor to that extent, or

3. It may make a partial payment, paying to the extent of the funds to the credit of the depositor, providing the holder of the cheque will receive it.

While there is no legal impediment to prevent such partial payment, it would lead to endless annoyances to the banks and to frequent complications in trade if such a procedure were allowed to become a bank custom.

295 When Banks Are to Refuse Payment of Cheques.

1. If payment has been countermanded by the drawer before the cheque has been accepted, or countermanded by an executor, assignee, or court. In countermanding payment of a cheque the notice must be given the *manager* and not to the ledger-keeper or teller. This was confirmed by Judge Madden in a Division Court suit at Kingston, March 27, 1908, in which a customer had sued his banker for negligence in paying a $50 cheque, payment of which he had countermanded by verbal notice to the ledger-keeper. The written judgment of the court was that as a question of law such notice to be effectual should be given to the *manager* of the bank, and in writing.

2. Notice of the drawer's death. Payment after the death, but *before notice*, would be valid.

Notice of the death of an attorney who issues a cheque under a power of attorney, before his death, does not require the bank to withhold payment, as the attorney is only an agent.

3. Where a garnishee order has been served on it.

4. If a cheque is not regular on the face of it, or is post-dated, the bank would pay it at its peril.

5. Official notice of the drawer's insolvency. Rogers *v.* Whiteley, 9, A. C. 118 (1892).

The holder of a cheque has no action for damages against a bank if it refuses payment, unless it is a "certified cheque." He may sue the *drawer* or a *prior endorser*, or he may garnishee the funds of the drawer in the bank, but has no action against the bank.

296 Banks' Liability in Paying Cheques.

If a bank pays a forged cheque the bank is the loser. It is the same with "raised cheques," where they have been raised from a smaller to a larger sum, the bank loses the difference unless it can be shown that the drawer's carelessness in writing the cheque facilitated the forgery. For instance: If you were to write a cheque for "five" dollars, and commenced so far from the end of the paper that the forger had sufficient room to write "fifty" before the five, thus making it "fifty-five"; or, if you were to leave blank space enough after the "five" for an expert to turn the "five" into "fifty," or to add "hundred," and the imitation in the writing was good, the bank would not be held responsible. Also, in cases where the drawer is careless in writing his signature, having no uniform style, so the bank could not positively identify his signature, then the bank would not be held responsible for payment of a forged cheque.

Paying a cheque drawn payable "to order" to the wrong person, even though of the same name, is the same thing in effect as paying it on a forged endorsement, and cannot be charged to the customer's account; hence the reasonableness of always requiring the person who receives payment to endorse the paper.

A cheque made payable to James Smith, guardian of Mary and William Brown, should be endorsed "James Smith," simply. The teller, however, must know that the endorser—James Smith—is the person described as guardian for Mary and William Brown; so in all cases where the payee is very minutely described, it is for the *protection* of the *bank* in identifying the payee and not as a direction for the *form of the endorsement.*

298 A Group of Reminders.

If a drawee writes his acceptance on a draft, it is still in his power to cancel it while the paper is in his possession, unless he has notified the bank that he had accepted it.

If a bank pays money to an "innocent holder for value" on a forged cheque it cannot recover the money from such third party.

A bank that certifies a cheque that is afterwards "raised" is liable to a collecting bank which may have cashed it for the original amount of the cheque only.

Presentment of a bill for payment may be made any time during the day of the due date, even after three o'clock, if the notary or holder can find any person authorized to pay or refuse payment.

Waiving "notice of dishonor" does not relieve the bank from the obligation of presentment for payment.

The holder of a note, whether a bank or a private individual, cannot part with the custody of collateral security without releasing the endorsers, unless they give their consent.

Promissory notes held by a bank as collateral security for advances to a customer cannot be garnisheed, as they are personal property and not *money due.*

If coupon bonds or a mortgage is left with a bank as collateral security the bank will be liable if the customer loses through neglect to collect the interest.

If a cheque is presented for payment which has the word "duplicate" written across its face, but is in other respects regular, the bank may safely cash it, and refuse to cash the original, should it be presented before receipt of the drawer's notice stopping payment of the original.

The holder of a dishonored cheque that has not been "certified," has no action against the drawee bank, but he may sue both the drawer and endorsers, if any.

A bank, in the interests of its customer, may take part payment on a bill or note, unless specially forbidden by the payee to do so, and by notice of dishonor reserve recourse against drawer or maker and endorsers for the remainder.

Where a bill is held over for a few days after maturity by arrangement with the drawer and endorsers, the arrangement must amount to a *waiver of notice* or an *admission of notice* of dishonor. If not paid at the end of the time the bill could not then be protested.

In an action against an endorser it is not necessary to prove that there were not sufficient funds at the place named in the instrument for pay-

ment; and for an inland bill, except a Quebec bill, it is not necessary to prove that the paper was protested, but merely prove *due presentment, non-payment,* and *notice of dishonor.* These last are essential; protest is superfluous.

The legal intention and effect of each of the signatures on a negotiable instrument was established generations ago, and the courts invariably construe the contract of each in accordance with the time honored customs. The scales of justice in this respect are held evenly, and men in business must not "wince" if they are pinched by a law one or two hundred years old, with which they have not taken the trouble to familiarize themselves.

299 Deposits by Minors.

Section 84 of the Banking Act provides for the deposit of funds in a chartered bank in the name of a minor without any distinction as to age. The minor may add to or draw from such deposit either principal or interest from time to time without the intervention of the parents or guardians.

The amount that may be kept on deposit is limited to $500, in those Provinces where the provincial laws would not permit such person to contract in this way if it were not for this Section in the Banking Act.

Money thus on deposit of a deceased minor can only be withdrawn from the bank by an *administrator.* If the bank wishes to allow the parent or guardian to withdraw the money, it may, of course, do so, but at its own risk. An indemnity bond in most cases would be sufficient protection.

The Newfoundland Bank Act also provides for children's deposit accounts allowing them to deposit and draw out funds the same as the Canadian Bank Act.

301 Bank Drafts.

A bank draft is a draft of one bank on another, payable on demand. The cost to the remitter is usually one-quarter of one per cent. more than the face, but it is cashed at par by the bank on which it is drawn and by other banks in the same town or city. It is a safe medium for the transmission of money to others, or in carrying sums of money when made payable to your own order. When drawn on a foreign country they are called Foreign Bills of Exchange. The following would be treated as a foreign bill both in Canada and Newfoundland.

Bank of Montreal

Toronto January 6th 1914

Pay to the Order of William H. Jones

Two Hundred and Eighty Dollars.

S. Vincent,
Manager.

E. Dickout,
Accountant.

To Bank of Montreal,
ST. JOHN'S, NFLD.

302 Deposit Receipt.

Deposit Receipt, commonly called "certificate of deposit," is a receipt given by a bank for money deposited. It bears interest, but is not negotiable in Canada. In a legal sense it does not differ much from any other form of receipt. In most of the States of the American Union, except Pennsylvania, it is classed as a negotiable instrument, and in Canada if the deposit receipt contains the word *order* it is held to be negotiable by endorsement as per 17 O.R. 574 (1889).

The following is one form of such receipt:

FORM OF BANK DEPOSIT RECEIPT.

(Name of Bank.....)

$..... *No.....*

Toronto.....19....

RECEIVED *from .....*

the sum of .....Dollars, which amount will be accounted for to.....by this Bank, and will bear interest at the rate of.....per cent. per annum until further notice. Fifteen days' notice of withdrawal to be given, and this receipt to be surrendered before repayment of either Principal or Interest is made.

No interest will be allowed unless the money remains in the Bank.....months.

This receipt is not negotiable.

For.....(Bank).

....

Accountant. *Manager.*

304 Bills of Lading.

A bill of lading is a receipt by a *carrier* that goods have been received for carriage and upon its transfer the *property* in the goods mentioned in it passes to the transferee.

Bills of lading are classed as negotiable instruments, but they are not like bills of exchange, for the transfer and endorsement of a bill of lading gives no better title to the goods than the endorsee himself had, so that if a bill of lading endorsed in blank were lost or stolen the finder or thief could not give a good title to an innocent third party. When the bill of lading for goods purchased has been received the owner may transfer it to a *bona fide* purchaser for value, or he may pledge it as security for advances from a bank and in both cases give a title that is good against the seller and shuts out the right of *stoppage in transitu.* Benjamin on Sales, page 919, 1906 edition.

The shipper may also attach the bill of lading to a demand draft payable to the order of a bank, thus compelling the purchaser to pay the draft before the delivery of the bill of lading and goods.

305 Letter of Credit.

It is a common custom for persons going to a foreign country on business, to deposit money in a bank at home and receive from such bank a letter of credit upon a bank in the country where the money will be needed, or

upon an agent of the bank in such country, authorizing such bank or agent to cash the drafts or cheques of the payee up to the limit stated in it. This letter of credit costs nothing except its face value, and enables the holder to obtain funds in the foreign country as readily as he could in his own town, without the risk of carrying it with him. It is not a negotiable instrument.

Persons of well-known financial standing, or one who has a satisfactory guarantor, may obtain a letter of credit from a banking house without depositing the money until he returns.

306 Circular Letters of Credit.

Circular letters of credit are commonly used by *travellers,* as by this means money may be obtained in various countries the same as by the ordinary letter of credit in a particular country.

The following is one form of a Letter of Credit:

CIRCULAR LETTER OF CREDIT.

Issued by

No...... £.....*Stg*

THE CANADIAN BANK OF COMMERCE,

Ottawa,.....*190*

To the Banks named in our Letter of Indication (Introduction).

This letter will be presented to you by..... *in whose favor we have opened a credit of*..... *sterling, to be availed of by his (her) demand drafts on the Bank of Scotland, Lothbury, London, which we request that you will negotiate at the current rate of the day, less your usual charges.*

The drafts should bear the following clause:

Drawn under.....*credit No*.....; *they should be drawn within one year from date hereof, and date and amount of each draft cashed are to be entered in the space provided on the back of this letter.*

Mr..... *is provided with a copy of our Letter of Indication, wherein*.....*signature may be found.*

For the Canadian Bank of Commerce,

.....

.....

This letter of credit is accompanied by a letter of introduction, bearing the signature of the payee, also a list of agents or correspondents where the money may be drawn.

307 Warehouse Receipts.

Warehouse Receipts are receipts given by the owners of warehouses, elevators, etc., acknowledging the receipt of goods and chattels stored or kept for the owners of such property. These receipts are negotiable by endorsement, and are used largely as collateral security by business men along with their notes for present advances by banks.

The transfer of a warehouse receipt to secure a past due debt is not illegal, but it does not transfer the goods. Fall *v.* Shortley, R.J.O. 1 S.C. 389 (1892).

A warehouse receipt to be valid as security must be for goods actually in possession and not for goods which are not all yet in storage. Milloy *v.* Kerr, 8 S.C.R. 474 (1880).

Receipts usually given by the ordinary storage warehouse for household goods and furniture are generally made non-negotiable. Such can only be transferred by assignment.

The following is one form of Warehouse Receipt:

WAREHOUSE RECEIPT.

Received *in Store from W. H. Hamilton, in Warehouse at 29 Wellington Street, Toronto, Goods as per schedule of the total value of $950.00, to be delivered pursuant to the order of W. H. Hamilton to be indorsed hereon, and on production of this receipt only.*

This is to be regarded as a receipt under the provisions of the Revised Statutes of Ontario Chap. 122, and of the Revised Statutes of Canada, Chap. 120, intituled "An Act respecting Bank and Banking," as the same may be amended by subsequent Acts. Clauses of the Criminal Law relating to Warehouse Receipts are printed on the back hereof.

EMPIRE WAREHOUSE CO., LIMITED.

TORONTO, OCT. 10TH, 1910.

CHAPTER X.

DUE BILLS, ORDERS AND RECEIPTS.

315 Due Bills.

A due bill is a written acknowledgment of a debt. They are not negotiable, either by delivery or by endorsement, no matter if the word *bearer* or *order* is used, because they are not a promise to pay.

They may be transferred by *assignment.* The following is a very good form, written across the back:

"For value received, I hereby assign to James Smith the within due bill."

HARRY POTTS.

Smith should notify the maker of the due bill that he has purchased it, and that the money is to be paid to him only.

316 Forms of Due Bills.

1. Payable in goods.

NELSON, B.C., Aug. 4th, 1910.

Due James Smith Ten Dollars in goods from our store.

$10.00. HIBBARD & SONS.

2. Payable in money.

FORT ERIE, Aug. 4th, 1910.

Due James Smith for value received Ten Dollars.

$10.00. W. LAUR.

317 **An I. O. U.**

An I.O.U. is payable in cash, and on demand if there is no agreement to the contrary The creditor's name is not usually inserted, but it is better to insert it. They are not a promise to pay, hence not negotiable.

HAMILTON, Aug. 4th, 1910.

I. O. U. Twenty-five Dollars.

J. J. HAUN.

But if a promise to pay were added to the I. O. U., it would be a promissory note and negotiable, as follows: (Brooks *v.* Elkins, 1836, 2 M. & W. 74.)

J. W. Smith, I. O. U. Twenty-five Dollars, to be paid Dec. 4th, 1910.

J. J. HAUN.

320 **Orders.**

An order is a written request to deliver goods or money on account of the person making the request. When such order is received and acceded to, the person signing the order should be charged for the amount. If the order is in favor of a third party, the name of the party receiving the goods or money should be mentioned in the entry, and the order preserved until settlement is made.

They differ from a draft in being more simple in form and generally for goods instead of for money. If the drawee owes the drawer the amount payment can be enforced by the payee.

1. COBALT, Ont., Aug. 12th, 1910.

Mr. James Smith:

Dear Sir,—Please pay to Henry Brooks or order Thirty-five Dollars and charge the same to the account of

$35.00. S. W. JONES.

MORDEN, Man., May 19th, 1910.

Mr. W. Winters:

Dear Sir,—Please let Mr. H. Brooks have from your store Fifteen Dollars in such goods as he may wish and charge to account of

ALEX. B. BARRON.

AYLMER, May 26th, 1910.

Mr. W. Winters:

Dear Sir,—Please pay to the bearer, Mr. H. Brooks, Thirty-five Dollars from the funds left with you yesterday.

W. A. PHILLIPS.

322 Receipts, Various Forms.

A receipt is a written acknowledgment of having received a certain sum of money or other value.

A receipt is not absolute evidence of payment, but it throws the burden of proof upon the party who impeaches it. It may have been obtained before payment was made, and then payment refused, or it may have been obtained through fraud, or for some other purpose; but the burden of proof rests upon the party who gave it to show wherein it is not valid.

A receipt given in full of all demands to date would not bar the creditor's claim for an additional item of account if an error had been made which he could satisfactorily prove. It is evidence only that so much value had been received or money paid.

A cheque received, and having marked on it "in full of all demands" or "in full of account," which does not cover the account in full, may still be endorsed and cashed at the bank in the usual way without losing the balance of account. If the debtor inserted those words in the cheque through mistake the court would correct it, if proven; and if done intentionally the court would also order the correction. If, however, it stated that the amount should be paid on the *condition* of its being received as *payment in full* of account, then its acceptance and endorsement by the creditor would cancel the balance of debt. It would then be a "compromise" settlement and binding.

It is a creditor's duty to give a receipt on the payment of a debt, but generally he cannot be compelled by law to do so. When he holds a debtor's note, or any other security, he is compelled to surrender it on payment, also a mortgage when paid.

When a receipt is taken from an agent or collector it should have the name of the principal on it, as well as that of the agent or collector, who should always designate himself as "agent" or "collector."

When a receipt is likely to be refused, payment should not be made except in the presence of witness.

When a receipt is given for money paid on a note or other contract, and an endorsement made, the latter should state the fact that a receipt was given, and the receipt should state that the amount had also been endorsed on the note, or other written instrument.

The following forms of receipt are in general use:

323 Receipt on Account.

BROCKVILLE, May 28th, 1910.

Received from James Smith One Hundred Dollars on account.

$100.00. H. SUMMERS.

324 Receipt in Full of Account.

THOROLD, Aug. 28th, 1910.

Received from Leslie McMaan One Hundred Dollars in full of account to date.

$100.00. J. BATTEN.

325 **Receipt for Rent.**

BRANDON, June 1st, 1910.

Received from James Smith One Hundred Dollars for three months' rent of store, No. 4 St. Paul Street, due May 1st.

$100.00. PETER MYERS.

326 **Money Received Through Third Party.**

OTTAWA, July 6th, 1910.

Received from Peter Smith, by the hands of A. Young, One Hundred Dollars, in full of all demands.

$100.00. H. BATTEN.

327 **Receipt for Payment of Legacy.**

KILLARNEY, Man., July 2nd, 1910.

Received from J. E. Anger, executor of the last will and testament of Henry Williams, of Winnipeg, deceased, the sum of Four Hundred Dollars, in full of a legacy bequeathed to me by said will. ALBERT HOWIE.

328 **Receipt by Clerk.**

WELLAND, May 12th, 1910.

Received of Peter Smith Forty Dollars in full of account.

$40.00. GEO. BURGAR (*per* JONES).

329 **Receipt for Note.**

BELMONT, Man., May 16th, 1910.

Received from Peter Smith note at four months from this date for One Hundred Dollars in full of account.

$100.00. C. E. WEEKS.

330 **Receipt for Property Held in Trust.**

SYDNEY, N.S., Aug. 16th, 1910.

Received from Peter Smith one Gold Watch to be held in trust for him, and delivered to his order without expense.

S. KERR.

332 **Receipt for Interest paid on Mortgage.**

TRURO, N.S., June 1st, 1910.

Received from Peter Smith One Hundred Dollars, being amount in full for six months' interest, due April 2nd, on his mortgage, in my favor, dated October 2nd, 1902, which amount is also endorsed on the mortgage.

$100.00. J. C. POPE.

333 **Receipt for Payment on a Note.**

TORONTO, May 4th, 1910.

Received of Peter Smith One Hundred Dollars, in part payment of his note in my favor, dated September 4th, 1904, which amount is also endorsed on the note.

$100.00. J. W. SYKES.

336 **Release.**

A release is a written discharge of a debt, claim, or demand held against one person by another. No special form of wording is necessary.

simply using words that convey the intention to release, acquit, and discharge the person from the debt or obligation. It is given under seal, and will discharge any debt whether acknowledged or not.

Releases may be individual, as when one person releases another from a debt or demand, or they may be mutual, as when two persons have been trading with one another, and have contra accounts running for a considerable time. When a settlement is made, they very frequently release each other from all demands. A release will bar out any chance of opening up the matter again by showing that a mistake had been made, whereas a mere receipt in full of the demands would not do so. And they should be used more frequently than they are. The following is full form:

337 General Form of Mutual Release.

This Indenture, made the 17th day of June, A.D. 1910, between Henry N. Hibbard, of the first part, and Benjamin M. Disher, of the second part, all of the Township of Bertie, County of Welland, Province of Ontario, merchants.

Whereas, there have been divers accounts, dealings, and transactions between the said parties hereto, respectively, all of which have now been finally adjusted, settled and disposed of, and the said parties hereto have, respectively, agreed to give each other the mutual releases and discharges hereinafter contained in manner hereinafter expressed:

Now, therefore, these Presents Witnesseth that in consideration of the premises and of the sum of one dollar of lawful money of Canada to each of them, the said parties hereto, respectively, paid by each of them at or before the sealing and delivery hereof (the receipt of which is hereby acknowledged), each of them, the said parties hereto, respectively, doth hereby for himself, his heirs, executors, administrators and assigns, remise and release and forever acquit and discharge the other of them, his heirs, executors, administrators and assigns, all his and their lands and tenements, goods, chattels, estate, and effects, respectively, whatever and wheresoever, of and from all debts, sum and sums of money, accounts, reckonings, actions, suits, cause and causes of action and suit, claims and demands whatsoever, either at law or in equity, or otherwise howsoever, which either of the said parties now have, or has or ever had, or might or could have against the other of them, on any account whatsoever of and concerning any matter, cause or thing whatsoever between them, the said parties hereto, respectively, from the beginning of the world down to the day of the date of these presents.

In witness whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of N. Brewster. } Henry N. Hibbard. Benjamin M. Disher.

CHAPTER XI.

INTEREST.

345 Legal Rate of Interest.

The legal rate of interest in Canada is now five per cent. per annum. The rate which had formerly been six per cent. was changed to five by Act of Dominion Parliament, Chapter 29 of 1900, and came in force the 7th of July of that year. Any rate, however, can be collected that a person binds himself in a legal contract to pay, but where the rate is not stated it will be five per cent. per annum (chap. 120 R.S.C., 1906). Certain interest contracts are voidable. (See below, also section 185.)

As to a promissory note where nothing is said about interest, it will not draw interest before maturity; but if not paid at maturity it will then commence to draw five per cent. A note drawing a higher rate than five per cent., if not paid at maturity will drop to five, and a note drawing a lower rate than five, if not paid at maturity will rise to five per cent.

(*a*) If the rate stipulated in any negotiable instrument or other contract is over, or under five per cent., and it is desired that it should remain at that rate after maturity also, there must be an express provision for it. The interest clause stated like the following would answer:

"With interest at (the rate desired) until maturity, and thereafter at the same rate until paid," or "both before and after maturity."

(*b*) Respecting interest for a shorter period than one year, Section 4 provides: "Except as to mortgages on real estate, whenever any interest is by the terms of any contract, whether under seal or not, made payable at a rate per day, week, month or for any period less than a year, no interest exceeding the rate of five per cent. per annum shall be recoverable unless the contract contains an express statement of the yearly rate of interest to which such other rate is equivalent." Section 4.

By this section if a note were drawn at twelve per cent. per annum it could be collected, but if it read, "one per cent. a month," only five per cent. per annum could be collected.

(*c*) Whenever any principal money or interest secured by mortgage of real estate is made payable on the "sinking fund plan," or on any plan under which the payments of principal and interest are blended, no interest whatever shall be recoverable, unless the mortgage contains a statement showing the amount of such principal and the rate of interest chargeable thereon, calculated yearly or half yearly, not in advance. Section 6.

If the rate of interest shown in such statement is less than the rate which would be chargeable by virtue of some other stipulation or provision in the mortgage, no greater rate shall be recoverable than the rate shown in the statement. Section 7.

(*d*) No fine, or penalty, or rate of interest shall be stipulated or exacted on any *arrears* of principal or interest secured by mortgage of real estate which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal not in arrears. Section 8.

(*e*) If any sum is paid on account of any interest, fine or penalty, not chargeable or recoverable under the three preceding paragraphs, or sec-

tions, such sum may be recovered back, or deducted from any other interest or principal payable under such contract. Section 9.

(*f*) Compound interest cannot be collected unless it is agreed in the contract to be paid.

(*g*) Book accounts differ from negotiable paper in the matter of interest. A book account overdue will not draw interest unless the merchant has it printed on his invoices and bills he gives with the goods that interest will be charged after a certain date. Then it can only be five per cent. unless the debtor consents to pay more. Simply having eight or ten per cent., as the case may be, printed on the invoices does not make the charge binding, and the debtor may refuse to pay anything over five.

(*h*) A dishonored cheque commences to draw interest at five per cent. from date of presentment. In Newfoundland six per cent.

(*i*) Judgments also draw five per cent. interest, except in Manitoba, where six per cent. is allowed.

(*j*) Chartered banks are allowed seven per cent. There is no penalty if they charge more, but they cannot collect more than seven per cent. by suit. If a person voluntarily pays more he cannot recover it back.

(*k*) In Newfoundland the legal rate is still six per cent. In other respects it is the same as the Dominion Act, except that the yearly rate is not required to be stated where the rate per day, week, or month would be in excess of the legal rate.

348 The Money-Lenders' Act.

The Money-Lenders Act of 1906, Chap. 32 S.C., applies to all persons in Canada (except registered pawnbrokers) who advertise or hold themselves out as carrying on the business of money-lending, and who make a practice of lending money at a higher rate than ten per cent. per annum. "No money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement concerning a loan of money, the principal of which is under $500, a rate of interest or discount greater than 12 per cent. per annum; and the said rate of interest shall be reduced to the rate of five per cent. per annum from the date of judgment in any suit for the recovery of the amount due." Section 6.

In any suit concerning a loan of money by a money-lender, for a sum under $500, wherein it is alleged that the rate of interest paid or claimed exceeds 12 per cent. per annum, including all fines, bonus, expenses, renewals, etc. (except taxable charges for conveyancing), the court may reopen any transaction therewith no matter how it has been closed up by statement or new agreement, and release the debtor from paying any more than 12 per cent. per annum, and if anything in excess of that rate has been paid or allowed by the debtor, the court may order the creditor to repay it, and may alter or set aside wholly or in part any security given in respect to the transaction. Section 7.

In case of a negotiable instrument negotiated to a *bona fide* holder before maturity, although the original holder may have discounted it at a higher rate than 12 per cent. per annum, the new holder will recover the whole amount; but the party paying the instrument may reclaim from the money-lender all that was paid in excess of 12 per cent. per annum. Sec. 8.

The Act applies to any negotiable instrument or other contract given to a money-lender for a sum under $500, due and payable before July 13, 1906. Where the interest or discount is more than 12 per cent. per annum, they must not bear after July 13th more than 12 per cent. before judgment would be obtained, and five per cent. after judgment. Section 9.

As to negotiable instruments or other contract for sums under $500 made before July 13th, but maturing after that date, they must not exceed 12 per cent. after maturity. Section 10.

The penalty—"Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding $1,000, who lends money at a greater rate than authorized by this Act." Section 11.

"The Act does not apply to any small loan or transaction in which the whole interest or discount charged or collected does not exceed 50 cents." Section 4.

The Act does not apply to the Yukon Territory. Section 3.

350 Ontario Money-Lenders Act.

In Ontario a Money-Lenders' Act, Chap. 30, 1912, came in force July 1st, which provides that:

(1) No person in Ontario shall carry on business as a money-lender without being registered:

(2) Must not carry on business except in the registered name and at the registered address;

(3) Must not enter into agreement in connection with his business as a money-lender or take any security for money lent except in his registered name.

Any person violating any of these provisions is liable to a penalty not exceeding $200, and for a second or subsequent offence shall be liable to imprisonment not exceeding six months, or in case of a company to a penalty not exceeding $1,000.

Any money-lender, manager or clerk or agent of a money-lender, or director or officer of a corporation in the business of money-lending, who by any false or misleading statement or promise fraudulently induces any person to borrow money or be responsible for the repayment thereof shall incur a penalty not exceeding $500. The registration may also be suspended or cancelled.

No corporation shall be registered unless the head office is in Ontario, and the directors or managers also reside in Ontario.

Registration continues in force one year from date of registration.

Prosecutions under the Act shall be before a Police Magistrate or two Justices of the Peace.

In cases where an excessive charge has been made for money lent, the Court is empowered to alter or wholly set aside the agreement; or re-open an account or former settlement, no matter what statement or agreements it may contain, and if the money has been paid, to order its refund, and if the money-lender has parted with any securities to order him to indemnify the debtor.

The Act does not apply to registered Pawnbrokers or to Incorporated Insurance or Loan Companies, or to Chartered Banks, or to business men lending incidentally in their business, or to solicitors lending the money of their clients having no financial interest except their fees, or to trustees or executors who have no share in the profits of the investments.

The fee for registration is not given in the Act.

The rate of interest or discount is not given in the Act.

The Dominion Money-lenders' Act must also be complied with when more than twelve per cent. per annum is charged. (See Section 348 of this Digest.)

The money-lender will have to register under the Ontario Act, and also comply with the provisions of the Dominion Act of 1906.

As the maximum cost of a loan allowable is not fixed by the Ontario Act the borrower will have to look to the Dominion Act for his protection if his loan costs him more than that Act allows.

CHAPTER XII.

STATUTE OF LIMITATIONS.

355 Statute of Limitations.

The time within which the various kinds of debts must be paid, or action commenced to recover payment, is fixed by Statute, and if action is not commenced within that time they are said to be outlawed. The debt is not cancelled, but the creditor loses his right to sue and recover payment by legal process. In Quebec the *debt is cancelled,* as well as the right of action barred.

Action is commenced by the issue of a summons or writ. It is not required to obtain judgment within the specified time, but merely that the writ be issued.

The Statute limiting the time within which an action at law must be commenced for the collection or enforcement of a claim is called the Statute of Limitations. The time-limit for the various kinds of debts and claims is given in following sections:

356 Promissory Notes and Acceptances.

Promissory notes and acceptances in all the Provinces of Canada, except Quebec, outlaw in six years after maturity or last payment made on either interest or principal. The date of maturity is the last day of the three days of grace, hence the time commences to count the day after the third day of grace, except for those payable on demand.

Any payment, or *written* acknowledgment of the debt, will keep the paper alive six years from that date as against the party making the payment or the acknowledgment, but not against any other person whose name is on the paper.

In Quebec the time is five years instead of six. The law is the same in other respects, except that the *debt* as well as the *right of action* is barred in Quebec.

In Newfoundland and England the time is also six years.

Demand notes are deemed to be due when they are made, and demand acceptances when they are accepted; therefore, six years from those dates they are outlawed as far as the maker or acceptor is concerned. But it is different with endorsers on such paper, as no right of action accrues against them until a demand for payment has been made and dishonored, and therefore action on the bill is not barred against them until six years from date of demand. But a demand note having an endorser must be presented for payment within a "reasonable time," otherwise the endorser is discharged.

In Quebec the time would be five years, but in other respects the same.

359 Merchants' Accounts.

Action for the recovery of merchants' accounts, and all other debts founded upon any lending or other contract, not under seal, must be commenced within six years after the cause of action arose, or the last payment, or a written acknowledgment of the debt or claim.

In Newfoundland and England the time is the same.

In the Province of Quebec it is five years for such accounts. Professional fees, as of doctors and advocates, justices, notaries, and rents, interest and commercial matters in general are barred after five years from maturity or last payment.

If the debtor is absent from the Province when the cause of action accrued, the action may be brought when he returns.

In case of joint debtors, if any are out of the Province when the cause of action accrues, a judgment procured against those who were in the Province does not bar the creditor from entering action against such absent debtor after his return.

Accounts are, with regard to outlawing, "itemized," that is, each item or purchase is treated as a separate account, and all moneys paid on it are, unless otherwise specified, applied to the oldest items. They commence to outlaw from the date of purchase unless there is a time fixed for payment, in which case that would be the *due date.*

A debtor has the right, when making a payment, to say on what particular account it shall be applied. In case he neglects to do this, the creditor has the privilege of applying it to any part he likes. In case neither one applies it to any particular debt, it is by law, in case of personal accounts, applied to the oldest items.

The various purchases on different days being put into one bill and rendered to the debtor does not merge them into one debt so as to change the time for outlawing of any particular purchase, but they all remain entirely separate, and six years from the date of purchase of each item it is outlawed, unless there has been a part payment made on that individual purchase, or a written acknowledgment. (Five years for Quebec.) A part payment on a running account does not therefore keep the whole bill alive.

The items of an account may, however, be merged into a single debt by what is called an "Account Stated." To form an "account stated," an agreement must be come to between the debtor and creditor by which the whole account is either verbally or tacitly *acknowledged.* Where this has not been done, if the merchant wants a part payment to keep all the items of the account alive, he must apply part on every individual purchase, even if it is not more than twenty-five cents on each. This can be done by a day-

book entry without saying anything to the debtor. The following or similar words would answer: "Received from James Smith, $4.50 on account, an equal amount to be applied on each purchase up to date." Give the customer the ordinary receipt on account without any reference to the special application you have made of the payments.

A definite formal settlement in writing between the parties, even though no money is paid, will serve to extend the time for another period of six or five years, as the case may be.

An I.O.U. is an "account stated," as well as acknowledged.

In Quebec wages due employees hired by the day or week, or for any period less than a year, outlaw in one year.

360 Judgments.

Judgments in Manitoba outlaw in ten years from date when entered, or last execution on them, or the last written acknowledgment; in Alberta, Saskatchewan, Yukon and North-West Territories, twelve years; in Ontario, Nova Scotia, Prince Edward Island and Newfoundland, twenty years.

In Quebec they remain in force for thirty years; Newfoundland, twenty.

In New Brunswick Judgments in the Justices, Parish Court, Commissioners' or Stipendiary Magistrates' Court outlaw in six years if no execution issues, but in County or Supreme Court twenty years.

Foreign judgments cannot be enforced in Ontario after six years from the entry in the foreign country.

361 Mortgages of Real Estate.

Mortgages on real estate in Ontario and Manitoba outlaw in ten years after maturity or last payment on either principal or interest; in British Columbia, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland they outlaw in twenty years; in Alberta, Saskatchewan, North-West Territories and the Yukon, twelve years, and in Quebec thirty years if the mortgage is duly registered.

In each Province and country a part payment of either principal or interest, or a written acknowledgment of the debt will extend the time for another period of ten, twelve, twenty or thirty years, as the case may be, respectively.

The mortgagor's right to redeem the mortgage also expires ten, or twelve, or twenty years in the respective Provinces after the mortgagee has taken possession of the land, or the last written acknowledgment of the title of the mortgagor by the mortgagee. If there are more mortgagors than one the acknowledgment given to one is effectual to all, and to all persons claiming through any mortgagor.

In case there are more mortgagees than one, or more persons than one claiming the estate of the mortgagee, the written acknowledgment of one or more is effectual only against the persons signing it and those claiming under them.

362 Bonds and Agreements Under Seal.

Action upon bonds, covenants or any instrument under seal, except mortgages on real estate, may be commenced any time within twenty years.

363 Chattel Mortgages.

As between debtor and creditor Chattel Mortgages in Newfoundland and all the Canadian Provinces, except Quebec, will hold the claim for twenty years, being an instrument under seal and not affecting interest in lands. As against other creditors, however, they only hold the *property as security* for a period varying in the different Provinces from one to five years. Chattel mortgages are not used in Quebec.

365 Ownership by Possession.

A person having continuous peaceable possession of land (except in trust), paying taxes on same and treating it as his own, acknowledging in no way the right or title of any other person for the same, becomes the owner of the property in Ontario and Manitoba after ten years; in Alberta, Saskatchewan, North-West Territories and the Yukon, twelve years; in New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland in twenty years. In Quebec ten years give a *possessory* title. It is sufficient if the possession is held by different persons holding in privity with each other.

A person, without the knowledge of the grantee, **"squatting" on land** yet in a state of nature, usually called "wild land," which has been granted by the Crown, but which the grantee has not taken actual possession of by fencing, or residing on, or cultivating some portion of it, must in all the Provinces, and Newfoundland, occupy it for 20 years to get title by possession. He would not acquire the ownership of any portion of the property which he did not actually occupy for the whole 20 years.

Land enclosed by a fence while the land is "in a state of nature," and subsequent survey showing the fence to include land belonging to an adjoining owner, the Statute of Limitations would not commence to operate until such survey and discovery.

In cases where a fence is fraudulently placed or removed, the Statute would not commence to run until the time the fraud is discovered.

The Statute not merely bars the *right of action*, but also *extinguishes the title* of the person who would have been the owner of the land. Lawrence *v.* Norreys, 15 A.C., 210.

366 Devise of Real Estate.

Devises are barred in the same length of time that mortgages on real estate are, from the time the right to receive accrued, unless devisee were a minor or under some other disability, in which case the Statute of Limitations does not commence to run until the removal of such disability.

In cases, however, where a devisee would remain on the property, as, for instance, with the mother, and a brother who worked the farm, the claim would be kept alive no matter how many years passed. (Divisional Court judgment of Chief Justice Mulock and Justices Clute and Magee, March, 1909, in case of the will of Archibald Spence.)

It is the same in cases of intestacy. The right of the heirs to a distributive share of the real estate of the deceased is barred in the same length of time they would be if there had been a will left.

367 Legacies, and Arrears of Interest.

Legacies which are left by the will a charge upon land are barred in the same length of time after a present right to receive them accrued, that mortgages of real estate are barred in the respective provinces.

Legacies made an *express trust*, payable out of land are barred in the same length of time as are others payable out of land.

Arrears of interest on legacies are barred in six years; five in Quebec.

Legacies which are not made a charge upon land, but are to be paid the legatees by the executors as directed in the will, will depend upon the wording of the will as to outlawing. For instance: If legacies are left with an executor or trustee as an *express trust*, the legacy would not be barred by lapse of time. But an executor is a trustee only in a *constructive sense* and that would not take the legacy or annuity out of the Statute, hence it must be an express trust to prevent outlawing. If not made an *express trust* they are barred in the same length of time as those made a charge upon land are barred.

368 Annuities.

Where an annuity is payable under a covenant or upon a bond and is not made a charge upon, or payable out of land, it is a strictly personal annuity and is recoverable for twenty years. But where a personal annuity is given by will it is simply a legacy and recoverable in the same time that mortgages would be. Arrears of interest on it only for six years, five in Quebec.

369 Dower, and Arrears of Dower.

The right to recover dower (where dower is allowed) by a widow out of her deceased husband's estate is barred in the same length of time a mortgage on real estate is barred. The right to dower accrues at the husband's death. Arrears of dower barred in same time that interest is.

There is no time allowed for disability on the part of the dowress.

Where the dowress remains in actual possession of the land of which she is dowable, either alone or with heirs or devises of her deceased husband, the period of ten or twelve or twenty years, as the case may be, is to be computed from the time she gives up such possession.

370 Interest and Rent.

In all the Provinces, except Quebec, the right to recover interest or arrears of rent is barred six years after it is due, or six years after an acknowledgment in writing has been duly given to the person entitled to receive the same. In Quebec it is five years.

This includes interest on all forms of debt—accounts, notes, mortgages, legacies, dowers, etc.

372 Personal Property, and Intestate Estates.

Personal property given into the possession of another for any purpose does not become the property of such person, no matter how long he may have them in possession, until six years from the time they were demanded back. Then if six years are allowed to lapse after a demand for their return has been made without entering action for their recovery, the right of action is barred. Gibbs *v.* Guild, 9 Q.B.D. 159.

In Quebec it would be five years.

Action to recover a distributive share of the personal estate of a person dying intestate must be commenced within twenty years from the time when

the right accrued, which would generally be at the death of the intestate, except in case of infancy or other disability.

373 Easements.

To acquire a prescriptive right to the use of a lane or way over another person's property the right must be actually enjoyed by the person claiming right thereof without interruption for the full period of twenty years

The same holds good for a *water pipe* or *drain* through a neighbor's property.

This applies to all the provinces and Newfoundland.

(a) No telephone or telegraph company shall be deemed to have acquired any easement by prescription or otherwise in respect to wires or cables attached to private property or buildings, or passing through or carried over such property unless where the company has obtained a grant from the owner of the property, 5 Edw. VII., Chap. 14, Sec. 74.

374 Crown Lands.

No action by the Crown (Provincial) to recover lands or any rents or interest in lands can be brought after sixty years from the time when the right to bring action first accrued.

An acknowledgment in writing extends the time sixty years from date of such acknowledgment.

No length of occupancy of the shores and margins of streams owned by the Dominion gives a right of possession.

375 Disabilities.

Where there is any legal disability on the part of either the debtor or creditor so that the action cannot be commenced, the time does not begin to run until the disability is removed.

The disability, however, of whatever nature it is, must be in existence at the time when the debt became due, if a debt, or in other cases "when the cause of action arose," or "the right first accrued," or "the fraud was discovered," for instance, in cases of infancy, idiocy, insanity or absence from the country.

If the debtor were living outside the province at the time the debt fell due, the time for outlawing would not commence until he returned. If, however, he left the country after the debt was due and before action was commenced, it would then not form an exception, because action could have been taken to collect before he went away.

The absence of one joint debtor from the country does not prevent the Statute from running against the other.

Disabilities, however, do not hold indefinitely, and each province and country has fixed a statutory limit in each case.

376 Reviving Outlawed Debts.

In promissory notes, acceptances and book accounts, a part payment or a written acknowledgment will revive them and keep them alive again from that date for a further period of six years. Mortgages, legacies, dower, rents, etc., are kept alive in same manner.

In Quebec a part payment or a written acknowledgment before the debt is barred by Statute will keep it alive, but would not revive the claim after it had been outlawed, as the debt itself is cancelled as well as the right of action barred.

Money also paid by the debtor to the creditor on account, without any instructions as to what debt it should apply to, may be applied by the creditor (except in Quebec), to any such debt that has been barred by Statute, and thus reduce it. This cannot be done by a third party to whom such debt may have been transferred, neither does it revive the balance.

Payments of money on a promissory note by one of the parties do not prevent it from outlawing in six years (five for Quebec) so far as the endorsers are concerned.

Written acknowledgments from one joint debtor will not affect the other.

A written acknowledgment of a debt that will take it out of the Statute requires to be:

1. An acknowledgment of the debt from which a promise to pay is inferred, or
2. There must be an unconditional promise to pay the debt, or
3. There must be a conditional promise to pay the debt, and evidence that the condition has been performed.

A promise to pay as a debt of honor is not sufficient, as it does not admit the legal liability.

An acknowledgment of the debt, coupled with a statement that he will never pay it, will not take the debt out of the Statute.

377 Exceptions to Outlawing.

Bank bills or bank notes, or other evidence of debt issued by a bank, never outlaw by lapse of time.

Statute of Limitations does not apply to express trusts. For instance, a farm deeded in trust to a person for heirs or other persons would never become the property of the trustee by possession, if he occupied it sixty years. Land owned by the wife, but worked and improved by the husband and even assessed in his name, does not become his by right of possession. To money left in bank in trust the Statute of Limitations does not apply, and no lapse of time will bar the right to recover it.

CHAPTER XIII.

CHATTEL MORTGAGES.

380 Chattel Mortgages.

A Chattel Mortgage, frequently incorrectly called Bill of Sale, is a *lien* on personal property—goods and chattels. It is in reality a deed or conveyance of the property as security for a debt, or for borrowed money, with a *proviso* that when the debt is paid the mortgage becomes null and void.

The debtor is called the mortgagor and the creditor the mortgagee. It is a conveyance of the *title*, but not of the *possession* of the property; but the mortgagee may take *possession* of the property also on a breach of any of the covenants.

The Statutes, except in Yukon, do not give a form for chattel mortgages with which they are compelled to comply, nor define what covenants they

shall contain; therefore, to know what the covenants, provisos and conditions are, the mortgage itself must be carefully read. The printed forms in general use are what have been settled by conveyancers as being appropriate and suitable to meet the usual requirements of borrower and lender, and therefore the mortgage should be carefully read before signing it, as the covenants and conditions may vary much. There is a definite statutory form for a Discharge and Renewal.

In Quebec chattel mortgages are not used. Bills of Sale will hold the property as between the debtor and creditor, but are not binding there against third parties unless the goods are taken possession of by the creditor.

381 Description of Property.

They must contain a full description of the goods and chattels, so they can be readily distinguished; also, where they are located and whose possession they are in at the time. In describing an animal, give age, color, sex, name, breed, and any particular spot or mark. In describing a machine, give the manufacturer's name and number of machine, color and condition.

382 Must Be a Bona-Fide Transaction.

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the goods mortgaged must be registered, or a true copy of it, as provided in each province, together with the affidavit of an attesting witness of the due execution of such mortgage, which affidavit shall contain the date of the execution of the mortgage; and also the affidavit of *bona fides* by the mortgagee, or his agent, stating that the mortgagor is justly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of the money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor.

Mortgages to secure future advances with which to carry on business are also valid, so are mortgages to secure endorsers and sureties if registered within the time required in each province.

If a mortgage extends to future advances it has been decided that the mortgagee cannot safely make such advances, if he have notice of an intervening second mortgage.

A chattel mortgage given by a person who is on the eve of insolvency may be set aside on the ground that it was given to defeat creditors, or to give one a preference over other creditors. See "Fraudulent Conveyances."

But a person who is able to pay his debts is not insolvent, although he may be considerably in debt, and a chattel mortgage given by him even after a judgment may have been secured against him would be good, providing a seizure of the goods had not been actually made.

An affidavit of *bona fides* by the mortgagee or his agent must in all cases be filed with the instrument for either an absolute or a conditional Bill of Sale in order to be binding against third parties, unless the time is extended by an order from court.

In British Columbia provision has been made for mortgages and sales of goods and chattels not yet in possession of the mortgagor or bargainor,

and for goods to be delivered at a future time, as also for goods which may yet require some act to complete or render such goods and chattels fit for delivery. Chapter 2, 1912.

383 Registration.

Mortgages take effect at the time of execution as between the mortgagor and mortgagee, but to hold the goods against judgment creditors, and subsequent purchasers and mortgagees in good faith for valuable consideration, the mortgage or Bill of Sale must be registered in the district where the goods are located within a specified number of days, together with two affidavits, one of a subscribing witness, and one of *bona fides* by the mortgagee, otherwise against such parties it becomes absolutely null and void. The time varies in the different provinces. It would, however, still be good against the debtor or mortgagor as evidence of debt and a lien on the goods for the amounts.

Registered Bills of Sale have priority over those unregistered, and where more than one registered Bill of Sale covers the same property, they have priority according to the date of registration.

A subsequent Bill of Sale given in substitution for a prior unregistered Bill of Sale, and covering the whole of or any part of the same property covered by the first, and given to secure the same debt or any part of such debt, it shall, so far as it is the same debt as the first, and also so far as it covers the same chattels as are covered by the first, be absolutely void unless it is established to the satisfaction of the Court that the second instrument was given to correct some material error in the first, and not for the purpose of evading the Bills of Sale Act.

In Manitoba the Judge of the County, and in all the other Western Provinces and N.-W. Territories, the Judge of the Supreme Court, has power to rectify omission to register a chattel mortgage within the prescribed time, or to correct any error or omission in such mortgage, subject to the rights of third parties that may have accrued by reason of such neglect or error. The same authority would reside in the High Court Judges of Ontario and the Eastern Provinces.

In Ontario, for counties they require to be recorded at the office of the Clerk of the County Court in which the property is situate within five days after their execution.

For the various Districts they are to be recorded in the office of the Clerk of the District Court within ten days after their execution.

For the Provisional county of Haliburton they must be filed within ten days from execution in the office of the Clerk of the First Division Court.

In all the above cases they remain in force one year without renewal. Fee for registering, 50c.

Chattel mortgages made by an incorporated company whose head office is not in Ontario, thirty days are allowed for filing.

By amendment of 1908, Section 31, any mortgage or other instrument made by an incorporated company securing bonds, debentures, notes, or other securities in any rolling stock which is subject to any lease, conditional sale or bailment to a railway company, the same, or a copy thereof, may be filed in the office of the Provincial Secretary within twenty-one

days from the execution thereof, and no further filing or registering shall be necessary to be binding against the creditors of such company, subsequent purchasers or mortgagees.

In Manitoba they must be filed at the office of the Clerk of the County Court in the registration district in which the goods are situate, within twenty days from date, and if not filed within that time they cannot be filed thereafter. They remain in force two years without renewing. Fee for filing, 50c.

A copy of any chattel mortgage, conditional sale or lease respecting the cars and rolling stock of railways, certified by a notary to be a true copy thereof, may be registered in the office of the Provincial Secretary, and will then need no renewal. Fee, $2.00.

The registration of a discharge of same is also $2.00.

By amendment of 1908, Chap. 1, it is provided that if a chattel mortgage is not registered within the statutory time, or a discharge or a renewal statement has not been duly registered, or if there is any omission or mis-statement of the name, residence or occupation of any person in connection therewith, the Judge of the County Court is empowered to order such mistake to be rectified, or to extend the time for registration on such terms and conditions as he may think fit to direct, subject to the rights of third parties that may have accrued by reason of such neglect or omission, or mis-statement.

Where a mortgage is made by an incorporated company whose head office is not in Manitoba, it may be registered within thirty days instead of twenty, as for other mortgages.

Where a mortgage is given by an incorporated company as security for debentures, and the by-law of the company authorizing the issue of such debentures is filed with the mortgage, the mortgage does not need to be renewed.

Growing crops cannot be mortgaged, except in payment for seed grain, and in such case they have priority over any mortgage then registered and also over any executions in the hands of a sheriff.

In Alberta, Saskatchewan and the North-West Territories they must be filed within thirty days from execution at the office of the Clerk of the Registration District in which the property is situate, and they only take effect from date of filing. They are good for two years without renewal. Fee for filing is 50c.

Mortgages against growing crops are not valid unless it is to secure the purchase price of seed grain, and then they have preference over all other mortgages or bills of sale previously given, or executions. The mortgage must contain the date of the purchase of the seed grain, the number of bushels and price per bushel, and the same information must be in the affidavit of *bona fides.*

In Alberta and Saskatchewan, amendments of 1909 provide that a bill of sale, chattel mortgage, conditional sale, lien or other agreement respecting rolling stock and other railway equipment may be registered in the office of the Registrar of Joint Stock Companies, and needs no renewal. Fee for registration and for a discharge is $5.00 respectively.

In British Columbia chattel mortgages are filed with the Registrar of the County Court in each county or Registration District in which the property is situate, and, if more than one Registrar of a County Court, they are to be filed with the nearest one within the county or district. They are good for five years without renewal.

When the goods covered by a Bill of Sale are within the corporate limits of a city or town in which is situate an office of the County Court, where such Bill of Sale may be registered, it must then be registered within five days, but in all other cases twenty-one days are allowed. Fee for filing is $2.00.

A mortgage given outside the Province affecting property inside the Province must be registered within thirty days from execution. Chap. 8, section 13, of 1911.

Mortgages given by incorporated companies to secure bonds or debentures covering real estate as well as personal chattels, if registered according to the requirements of the Lands Registry Act, need not be registered according to the provisions of the Bills of Sale Act.

By amendment of 1908, Chap. 6, a Bill of Sale made by a company must be accompanied by an affidavit made by the president, secretary, or a director, in the "Statutory Form B" provided by the Act.

Creditors of the mortgagor may from time to time demand in writing from the mortgagee a statement of the account between the mortgagor and mortgagee.

Such statement asked for must be furnished within fifteen days after the receipt of demand. He may charge the applicant a fee of 30 cents per folio for such statement and declaration.

On application to the Judge of the Supreme or the County Court the mortgagee may be relieved from giving such statement if the Judge deems it not necessary.

In Yukon Territory they must be registered within thirty days from execution in the Registration District in which the goods are situate. Fee for registering, $2.00, good for two years without renewal.

In New Brunswick they must be filed within thirty days in the office of the Registrar of Deeds. Fee for filing is 25 cents. Must be renewed yearly.

In Nova Scotia there is no time limit within which they must be filed, but they only hold good against laws of insolvency, *bona fide* purchasers, judgment creditors and subsequent mortgagees in good faith for valuable consideration after filing. They remain in force three years.

Either the original Bill of Sale or a certified copy may be filed, and if there is any schedule annexed or referred to it must also be included, and if the instrument is subject to any condition whatever it must be considered a part of it and be filed with the instrument, otherwise the Bill of Sale is null and void against all third parties.

In Prince Edward Island the original must be filed in the office of the Prothonotary of the Supreme Court, accompanied by the usual affidavits of witness and *bona fides*, otherwise is void against third parties.

In Newfoundland bills of sale and chattel mortgages must be registered in the office for the Registry of Deeds within five days after execution when executed in the town of St. John, and within thirty days when executed elsewhere. Fee for registering when value of the property does not exceed $500, is $2.00; when exceeding $500, it is twenty-five cents extra for each additional $100.

384 Removal of Mortgaged Goods.

Chattel mortgages only hold the property in the one county or registration district where they are filed or registered, and every chattel mortgage contains a covenant that the goods will not be removed from the county or registration district where they are situate.

If all or a portion of the goods covered by a chattel mortgage should be permanently removed to another county or registration district, a duly certified copy of the mortgage must be filed in the proper office of that county or district for chattel mortgages, otherwise the goods are liable to seizure and sale under an execution, neither would the mortgagee have recourse against subsequent purchasers or mortgagees for value. In case the goods are removed without consent they may be seized and sold to satisfy the mortgage on a breach of the covenant, if the mortgagee prefers it.

If the mortgagee gives consent to the mortgagor to dispose of any of the articles covered by the mortgage, it virtually destroys his lien, and other creditors may come in and share *pro rata*. Relieving part relieves all as far as *priority* is concerned. This, of course, does not apply to mortgages covering goods in a store, or other property of trade, in which case the amount of goods only is required to be maintained.

In Ontario a copy of the mortgage must be filed in the office of the County Court Clerk where the goods have been removed to within two months from such removal.

In Manitoba six months, and subsequent renewals must be filed in such Judicial District to which the goods are removed.

In Alberta, Saskatchewan, Yukon and N. W. Territories a certified copy must be filed with the Clerk of the Registration District to which they are removed within three weeks from such removal. If mortgagor wishes to remove the goods from the district, the Statutes require him to give the mortgagee notice twenty days prior to such removal.

385 Form of Chattel Mortgage.

The following Chattel Mortgage is an up-to-date form that is being used by conveyancers in general, filled out in full, as a guide for inexperienced persons to follow in the wording of the different parts. The following illegal *proviso* is omitted: "and for such persons to break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures and places."

It is a criminal offence to break open a man's house or barn and no mortgagor can give a mortgagee a legal right to commit a crime. Any mortgagee attempting to carry out this proviso would be liable to imprisonment.

This Indenture made (in duplicate) the tenth day of May, one thousand nine hundred and ten.

Between James Smith, of the Township of Stamford, in the County of Welland, Province of Ontario, merchant, hereinafter called the Mortgagor, of the first part; and Walter Winters, of the Township of Stamford, in the County of Welland, Province of Ontario, yeoman, hereinafter called the Mortgagee, of the second part.

WITNESSETH that the Mortgagor for and in consideration of Five Hundred Dollars of lawful money of Canada to him in hand well and truly paid by the Mortgagee at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged) hath granted, bargained, sold and assigned, and by these Presents DOTH GRANT, bargain, sell and assign unto the Mortgagee, his executors, administrators and assigns ALL AND SINGULAR the goods, chattels and store fixtures hereinafter particularly mentioned and described; that is to say:

One bay horse four years old, having black mane and tail and white star on forehead; three Jersey Cows; twenty-four Southdown Sheep; thirty-six Hives of Bees; one Gladstone Carriage, made by Augustine & Kilmer; one Democrat Wagon; two sets single Harness; one light Sleigh; one J. & J. Taylor Safe, No. 4326; all the counters, shelving, show cases, weighing scales and fixtures used in connection with the grocery business conducted by the Mortgagor in the village of Stamford.

All of which said goods and chattels are the property of the Mortgagor and are now upon the premises situate and known as Lot No. 19 in the seventh Concession in the Township aforesaid, in the County of Welland and Province of Ontario, together with all goods and chattels, that may be added to or substituted for the said goods and chattels, or any of them as herein mentioned.

TO HAVE AND TO HOLD all and singular the said goods, chattels and store fixtures hereby assigned or intended to be assigned unto the said Mortgagee of the second part, his executors, administrators and assigns, for ever, as his or their own proper goods and effects.

PROVIDED ALWAYS and these Presents are upon this express condition that if the Mortgagor, his executors or administrators do and shall well and truly pay or cause to be paid unto the Mortgagee, his executors, administrators or assigns the full sum of Five Hundred Dollars, with interest for the same at the rate of five per cent. per annum, on the tenth day of May, 1910, then these Presents shall be void and every matter and thing herein contained shall cease, determine and be utterly void to all intents and purposes anything herein contained to the contrary thereof in anywise notwithstanding:

AND the mortgagor for himself, his executors and administrators, shall and will warrant and forever defend by these Presents all and singular the said goods, chattels and property unto the Mortgagee, his executors, administrators and assigns against himself, the Mortgagor, his executors and administrators, and against all and every other person or persons whomsoever.

AND the Mortgagor doth hereby for himself, his executors and administrators, COVENANT, PROMISE AND AGREE to and with the Mortgagee, his executors, administrators and assigns, that the Mortgagor, his executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the Mortgagee, his executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, on the day and time and in the manner above limited for the payment thereof: AND ALSO IN CASE DEFAULT SHALL BE MADE IN THE PAYMENT of the said sum of money in the said proviso mentioned or of the interest thereon or any part thereof, or in case the Mortgagor shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them, or to remove the same or any part thereof out of the County of Welland, or suffer or permit the same to be seized or taken in execution without the consent of the Mortgagee, his executors, administrators or assigns to such sale, removal or disposal thereof first had and obtained in writing, THEN and in such case it shall and may be lawful for the Mortgagee, his executors, administrators or assigns with his or their servant or servants, and with such other assistant or assistants as he or they may require at any time during the day, to enter into and upon any lands, tenements, houses and premises wheresoever and whatsoever where the said goods and chattels or any part thereof may be, for the purpose of taking possession of and removing the said goods and chattels: AND upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful for the Mortgagee, his executors, administrators or assigns, and each or any of them, is and are hereby authorized and empowered to sell the said goods and chattels or any of them or any part thereof at public auction or private sale, as to them or any of them may seem meet: AND from and out of the proceeds of such sale in the first place to pay and reimburse himself or themselves all such sums and sum of money as may then be due by virtue of these Presents, and all such expenses as may have been incurred by the Mortgagee, his executors, administrators or assigns in consequence of the default, neglect or failure of the Mortgagor, his executors, administrators or assigns in payment of the said sum of money with interest thereon as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the Mortgagor, his executors, administrators and assigns, all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these Presents at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid:

PROVIDED ALWAYS, nevertheless, that it shall not be incumbent on the Mortgagee, his executors, administrators or assigns to sell and dispose of the said goods and chattels, but that in case of default of payment of the said sum of money with interest thereon as aforesaid, it shall and may be lawful for the Mortgagee, his executors, administrators or assigns peaceably and quietly to have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of the Mortgagor, his executors, administrators or assigns or any of them or any other person or persons whomsoever. AND the Mortgagor doth hereby further COVENANT, PROMISE AND AGREE to and with the Mortgagee, his executors, administrators and assigns, that in case the sum of money realized under any such sale as above mentioned shall not be sufficient to pay the whole amount due at the time of such sale, that the Mortgagor, his executors or administrators shall and will forthwith pay or cause to be paid unto the Mortgagee, his executors, administrators and assigns all such sum or sums of money with interest thereon as may then be remaining due:

AND the Mortgagor doth put the Mortgagee in the full possession of said goods and chattels by delivering to him this Indenture in the name of all the said goods and chattels at the sealing and delivery hereof:

AND the Mortgagor COVENANTS with the Mortgagee that he will, during the continuance of this mortgage and any and every renewal thereof, insure the chattels hereinbefore mentioned against loss or damage by fire in some insurance office (authorized to transact business in Canada) in the sum of not less than Five Hundred Dollars, and will pay all premiums and moneys necessary for that purpose as the same becomes due, and will on demand assign and deliver over to the said Mortgagee, his executors and administrators, the policy or policies of insurance and receipts thereto appertaining: PROVIDED that if on default of payment of said premium or sums of money by the Mortgagor, the Mortgagee, his executors or administrators may pay the same, and such sums of money shall be added to the debt hereby secured (and shall bear interest at the same rate from the day of such payment) and shall be repayable with the principal sum hereby secured.

IN WITNESS WHEREOF the parties to these Presents have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of CHARLES SUMMERS. — JAMES SMITH. (L.S.) — WALTER WINTERS. (L.S.)

RECEIVED *on the day of the date of this Indenture from the Mortgagee the sum of Five Hundred Dollars mentioned.*

Witness: CHARLES SUMMERS. — JAMES SMITH.

AFFIDAVIT OF MORTGAGEE.

ONTARIO: COUNTY OF WELLAND, TO WIT: I, Walter Winters, of the Township of Stamford, in the County of Welland, yeoman, the Mortgagee in the foregoing Bill of Sale by way of Mortgage named, make oath and say: That James Smith, the Mortgagor in the foregoing Bill of Sale by way of Mortgage named, is justly and truly indebted to me, the deponent, Walter Winters, the Mortgagee therein named, in the sum of Five Hundred Dollars mentioned therein. That the said Bill of Sale by way of Mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said Bill of Sale by way of Mortgage against the creditors of the said James Smith, the Mortgagor therein named, or preventing the creditors of such Mortgagor from obtaining payment of any claim against him.

Sworn before me at the Town of Welland, in the County of Welland, this tenth day of May, in the year of our Lord, 1910. — WALTER WINTERS.

E. R. HELLEMS, *J.P. in and for the County of Welland.*

AFFIDAVIT OF WITNESS.

ONTARIO:
COUNTY OF WELLAND, TO WIT: } I, Charles Summers, of the Village of Niagara Falls South, in the County of Welland, make oath and say:

That I was personally present and did see the within Bill of Sale by way of Mortgage duly signed, sealed and delivered by James Smith and Walter Winters, the parties thereto, and that the name Charles Summers set and subscribed as a witness to the execution thereof is of the proper handwriting of me this deponent, and that the same was executed at the Town of Welland, in the said County of Welland, on the tenth day of May, one thousand nine hundred and ten.

Sworn before me at Welland, in the County of Welland, this tenth day of May, in the year of our Lord, 1910. } CHARLES SUMMERS.

E. R. HELLEMS, J.P.

386 Form of Affidavit for Companies.

In *British Columbia* a new form of affidavit has been added to the Bills of Sale Act to be used by presidents, managing directors or other officers of incorporated companies, designated as "Form E."

I, A. B., of , President (secretary, director, or as the case may be), of the (name of the company or corporation) make oath and say as follows:—

1. That the paper writing hereunto annexed and marked "A," is a true copy of a bill of sale, and of (or, when an original bill of sale is filed, is a bill of sale together with) every schedule or inventory thereto annexed or therein referred to as made, given and executed by the said (name of company or corporation).

2. That I, as President (secretary, director, or as the case may be), of the said Company (or Corporation) being duly authorized so to do, did affix the seal of said Company (or Corporation) to the said bill of sale, did sign the said bill of sale as President (secretary, director or as the case may be) of the said Company (or Corporation), and did duly deliver the said bill of sale as the act and deed of the said Company (or Corporation) on the day of , 19 .

3. That the head office or chief place of business of the said Company (or Corporation) in British Columbia is situate at (here state fully the whereabouts of the head office or chief place of business, such as street and number (if any) in the said Province).

Subscribed and sworn before me this day of , 19 .

388 Mortgagee's Privileges at Maturity.

If a chattel mortgage having the usual covenants for payment of principal and interest is not paid at maturity the mortgagee is free to take any one of several courses:

1. He may go himself upon the premises and take possession of the goods and remove them, or he may send a bailiff.

If he takes possession of the goods he is expected to sell them either by public auction or by private sale, and if there is any surplus money after payment of principal, interest and costs, it must be turned over to the mortgagor or his legal representatives. But some mortgages are so written that he is not bound to sell, but may simply take possession of the goods and hold them as his own.

If the mortgagee simply takes possession of the goods and holds them as his own without selling them, the mortgagor has then an "equity of redemption" for a limited time, which the courts will recognize, and he may enter an action against the mortgagee for redemption or sale of the goods.

2. He may sue the mortgagor for the amount due on the mortgage, without a seizure of the mortgaged goods, or

3. He may leave the goods in the hands of the mortgagor and extend all the time for payment he desires up to twenty years. Any time during that time he deems it necessary he may take possession of the goods, if they can be found. Of course, if he desires to keep both his lien and preference over other creditors good, he must file a renewal statement within the time provided by statute in the Province where the goods are located. He can file this renewal statement without the mortgagor's consent or request.

A chattel mortgage drawn for a shorter period, in any of the Provinces, than time fixed by statute for renewal, that is not paid when due need not be closed or renewed until the expiration of the statutory time. An earlier renewal would be useless and a waste of money.

A chattel mortgage that has not been renewed at the proper time according to statute, if the mortgagee wishes to retain his priority over other creditors, he must take possession of the goods, after which any desired time may be extended. Of course, if during the time the mortgage stood void against third parties, any of the goods were purchased or mortgaged or seized under execution the mortgagee could not make his mortgage valid against such parties by taking possession, but it would be good against all others.

389 Causes for Taking Possession.

The mortgagee cannot take possession of the goods until the mortgage is due, unless some covenant is broken that gives the right of possession. (See previous section for proceedings at maturity.)

The things that usually give the right to take possession of the mortgaged goods are:

1. Default in payment.
2. Removal of the goods out of the Registration district without written consent of mortgagee.
3. Seizure of the goods for rent or taxes.
4. Execution levied against the goods under any judgment at law.
5. If mortgagor attempts to sell or dispose of any of the goods.

Furniture and goods not included in the mortgage cannot be seized unless there is a general clause covering them.

To take possession illegally gives the owner of the goods or his legal representatives a claim for damages which may be recovered by ordinary suit, and if successful the amount of the judgment would be applied on the mortgage debt.

390 Renewal of Chattel Mortgages.

A chattel mortgage, being an instrument under seal and not affecting interests in lands, holds the *claim* against the debtor for twenty years. Each Province has, however, fixed by statute a shorter time in which it holds both the lien on the *property* and priority of claim over other creditors. Therefore, if the mortgage is not paid at maturity and it is desired to be binding against third parties it must be renewed promptly within the time provided in each Province.

In Ontario it holds the priority for one year only from date of registration unless renewed, or the goods taken possession of, or a new mortgage executed. To hold the goods against other creditors it must be renewed *within the last thirty days* before the year expires, and so on from year to year as long as it runs.

In Manitoba they run for two years from date of filing, and must be renewed within the last thirty days before the time expires, and the same for each succeeding two-year period from previous filing.

In Alberta, Saskatchewan, Yukon and North-West Territories they remain in force for two years from date of filing without renewal, but must be renewed within the last thirty days before the expiration of the two-year period; and after the first renewal at the end of the two-year period, if the mortgage is not paid it must be renewed annually within the last thirty days every year thereafter from the date of filing the previous statement.

In Saskatchewan amendment of 1909, Chap. 15, fixes the penalty for a false statement in the renewal statement to be a fine not exceeding $100.

The affidavits required for registration of the documents may be administered by the registration clerk. Fee allowed is 25 cents.

In British Columbia they are good for five years without renewal, but may then be renewed.

Creditors of the mortgagor may demand from the mortgagee a full statement of the account between him and the debtor. Such demand must be in writing, accompanied by a statement verified by affidavit showing in full the accounts between such debtor and the applicant. The statement asked for from the mortgagee must be given within fifteen days from such demand, verified by affidavit, otherwise the bill of sale shall be void. Thirty cents per folio may be exacted for such statement and declaration before delivering them. A judge may, for cause, relieve the mortgagee from giving such statement.

A mortgage given by an incorporated company to a bondholder or trustee to secure debentures issued by the company need not be renewed every five years, as other Bills of Sale have to be, provided a copy of the by-law authorizing the issue of the debentures, verified by affidavit and seal, and properly signed, be registered with the mortgagee.

In Nova Scotia they remain in force three years, but may be renewed within the last 30 days before the expiration of the three-year limit, and so on from time to time.

In New Brunswick a renewal statement must be filed each year within the last 30 days before the year expires, showing the amount yet due. If this is not done and the goods are taken under execution, the holder of the mortgage has thirty days in which to file such statement, and if not done he loses his claim on the goods, and they may be sold under the execution. And if default is made in filing the statement notice may be given the mortgagee calling upon him to file such statement, and if it is then not filed within thirty days the bill of sale is void against subsequent purchasers.

The renewal statement is similar in all the Provinces, and must contain the information shown in the following Renewal Form of a chattel mortgage, which gives:

The date of original chattel mortgage, the parties to it, their residence, date of filing, and that the mortgage has not been assigned, and if it has been assigned, it must give the name of the assignee, and if assigned more than once it should give each assignment, and the name of the holder at the time of renewal, also the original amount of the mortgage, the amounts paid, and date when paid, and the amount still due.

The following form, simply by changing name of Province, will answer for every Province:

391 Form of Renewal Statement.

Statement, exhibiting the interest of Walter Winters,(or John Jones, if the mortgage has been assigned), of the City of , in the County of Yeoman, in the property mentioned in a chattel mortgage dated the day of , 19 , made between James Smith, of , Merchant, of the one part, and Walter Winters of , Yeoman of the other part, and filed in the office of the Clerk of the County Court of the County of , on the day of 19 , (if renewed add, and renewed by statements filed on the day of 19 , and on the day of , 19 , as the case may be), and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said Walter Winters is still the mortgagee of the said property, and has not assigned the said mortgage (or the said John Jones is the assignee of the said mortgage by virtue of an assignment thereof from the said Walter Winters to him dated the day of , 19 , as the case may be).

No payments have been made on account of the said mortgage (or, one payment has been made, or the following payments, and no other, have been made, on account of the said mortgage:

19 , January 1, cash received	$230 00

The amount still due for principal and interest of the said mortgage is the sum of dollars, computed as follows:

Principal	$500 00
Interest, one year, ending , 19 , ...	30 00
	$530 00
Cr.	
(By cash, , 19 , ...	$230 00
Balance due	$300 00)

AFFIDAVIT OF MORTGAGEE.

COUNTY OF } I, Walter Winters (or John Jones), of the City of
TO WIT: } in the County of , the mortgagee (or the assignee of the mortgagee) named in the chattel mortgage mentioned in the foregoing (or annexed, or following) statement, make oath and say:

1. The foregoing (or annexed, or following) statement is true.

2. The chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

SWORN before me at the City of , in the County of , this day of , 19 .

WALTER WINTERS. (or John Jones.)

A. B., *a commissioner, etc.*,

392 Assignment of Chattel Mortgage.

A chattel mortgage is not a negotiable instrument, but it may be transferred by *assignment*. The assignment must be filed at the same office where the mortgage is filed, and same fee charged as for a discharge.

In MANITOBA the assignment is required to be registered within twenty days from date of assignment.

In BRITISH COLUMBIA the assignment need not be registered.

393 Discharge of Chattel Mortgage.

When a chattel mortgage has been paid a discharge should be filed also at the office where the mortgage is filed. The fee for Ontario, Manitoba, Alberta, Saskatchewan, and North-West Territories is 50c.; New Brunswick, Nova Scotia and Prince Edward Island, 25 cents.

In British Columbia the mortgage is discharged by being marked "satisfied." The fee is $1.00. Newfoundland fee is $1.50. Yukon Territory fee is $2.00.

394 Form of Discharge.

See following Statutory Form of DISCHARGE:

DOMINION OF CANADA,

PROVINCE OF ONTARIO.

To the Clerk of the County Court of the County of Welland, I, Walter Winters, of the Township of Stamford, County of Welland, yeoman, do certify that James Smith, merchant, of the Township of Stamford, County of Welland, Province of Ontario, hath satisfied all money due on or to grow due on a certain Chattel Mortgage made by James Smith, aforesaid, to Walter Winters, of the Township of Stamford, aforesaid, which mortgage bears date the 2nd day of August, A.D. 1909, and was registered in the office of the Clerk of the County Court of the County of Welland, on the 2nd day of August, A.D. 1909, as No. 4287.

That such Chattel Mortgage has not been assigned, and that I am the person entitled by law to receive the money, and that such Mortgage is therefore discharged.

Witness my hand this 30th day of July, A.D. 1910.

Witness:

CHARLES SUMMERS,
Stamford, Student.

WALTER WINTERS.

AFFIDAVIT OF WITNESS.

ONTARIO: } I, Charles Summers, of the Township of
COUNTY OF WELLAND, } Stamford, County of Welland, student, make oath
TO WIT: } and say:

1. That I was personally present and did see the within Certificate of Discharge of Chattel Mortgage duly signed, sealed and executed by Walter Winters, one of the parties thereto.

2. That the said certificate was executed by the said parties at the town of Welland.

3. That I know the said parties.

4. That I am a subscribing witness to the said Certificate.

SWORN before me at Welland, in the County of Welland, this 30th day of July, in the year of our Lord 1910. } CHARLES SUMMERS.

E. R. HELLEMS, *a commissioner for taking affidavits in H.C.J.*

395 Costs of Foreclosure.

The Ontario Statutes allow the following fees and expenses, and no more unless agreed upon:

1. For making seizure where amount of debt does not exceed $80.00, $1.00.

2. Where it exceeds $80.00, $1.50.

3. One man keeping possession, per day, $1.00.

4. If printed advertisements are used other than newspapers, not to exceed $1.50.

5. For catalogues, sale and commission and delivery of goods, 5 cents on the dollar on the net proceeds of sale up to $100.00. When over $100.00, then 2½ per cent. on the excess over $100.00.

6. When debt is paid before sale, a commission of 2½ per cent., and the amount actually disbursed in cartage not to exceed $2.00.

The party levying the distress must give a copy of the charges to the person distrained upon.

The expense in the other provinces is similar. See "Expense of Distress."

397 Wrongful Conversion of Personal Property.

When one person has found or becomes possessed of the goods or chattels of another and refuses to deliver them over when a proper or legal demand for them has been made he is said to have converted them to his own use.

The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title, unless it be a negotiable instrument, or unless he buys it in the open market from a person dealing in that line of goods, *e.g.*, a store. Hence, if the article purchased has been stolen or obtained by fraud, the purchaser acquires no title to the property. Hollins *v.* Fowler, L. R. 7, H. L. 757.

When anyone has wrongfully deprived another of his goods or chattels the owner may reclaim and take them wherever he happens to find them if he can do so without a breach of the peace. He cannot be prosecuted for trespass, but may be for damages if he commits any injury.

When anyone is in temporary possession of goods of another, and without authority sells them, the true owner may maintain an action for them against either the bailee, or the purchaser. Cooper *v.* Willomatt, 1 C.B. 672.

If chattels sold under a lien note are not paid for according to the agreement and the party having them in possession refuses to deliver them up the action is for unlawful detention. Proof of demand and refusal is essential if the detention should be denied. 14 W.L.R. 262 (1910).

In retaking possession of a chattel sold under a lien agreement, if such agreement does not specify how the article shall be sold, in the event it is taken back, it must be according to the provisions of the Conditional Sales Act.

In case of goods sold under a lien to traders for the purpose of resale in the regular course of business, or chattels sold to a dealer who is known

to be buying them for the purpose of reselling them at a profit (say a machine to an implement dealer) the lien holds good, against other creditors of such trader or dealer, but the ownership passes to the purchaser of the goods, or to the purchaser of the machine if such purchaser had no knowledge of such lien. Brenn *v.* Foorsen, 7 W.L.R. 13; 17 Man. L.R. 241.

If goods or chattels covered by a lien note or chattel mortgage are sold before the incumbrance is discharged, the sale is fraudulent and the purchaser does not obtain a good title. The true owner, or mortgagee, if his lien or mortgage is valid, may proceed against the vendor for wrongful conversion, or he may recover the goods from the purchaser and such purchaser will have recourse against the fraudulent vendor. Singer Co. *v.* Clark, 5 Ex. D., 37.

Even an auctioneer who sold household furniture covered by a chattel mortgage and delivered them to the purchasers has been held liable, although he knew nothing of the mortgage. Lancashire Wagon Co. *v.* Fitzhugh. 6 H. & N. 502.

CHAPTER XIV.

MORTGAGES.

400 Mortgages of Real Estate.

A mortgage of real estate is virtually a deed or conveyance of the property by the debtor to the creditor to secure the payment of a certain sum of money or money's worth, with a "proviso" that it shall become void upon the payment of the debt and accumulated interest. It must therefore be remembered that all the mortgagor retains is the possession and "equity of redemption."

(*a*) Under the Torrens System a mortgage is not a conveyance of the land, but a registered charge upon the land for the payment of the money. See "Torrens System of Lands Transfer."

Mortgages should be executed in duplicate under the Torrens System as well as the old. The mortgagee retains one copy.

401 Securing Clear Title.

Before paying over the money, either on mortgage or for purchase, the following searches must be made if you would know what kind of a title you are obtaining. The routine is much the same in all the provinces:

1. The Abstract Index (and you should read the documents), for deeds, mortgages, assignments, agreements, dowers, trusts, settlements, leases, lis pendens, mechanics' liens, by-laws, plans, cautions (within three years).

2. The General Register, for wills, probates, letters of administration, assignments for benefit of creditors, power of attorney, etc.

3. The Sheriff's office, for executions, attachments, sheriffs' deeds within six months, etc.

4. The Treasurer's office, for taxes and tax sales within eighteen months.

5. See whether a survey is necessary to show that the land mentioned in the instrument is the land you valued and intended to take the interest in.

6. Note whether any easement of way, water, sewer, light, etc., may be held over the land, affecting it injuriously.

In the Solicitor's Abstract from the Registrar, covering Nos. 1 and 2, look out for undischarged mortgages, dower, life estate and other registered claims affecting or overlapping some part of the lands. Without such Solicitor's Abstract properly explained you may be getting a title from some one who has only a life or other small interest, though he may have lived on the property for fifty years.

The Sheriff's Certificate will be safe if it covers all the parties who owned the land during the previous ten years for Ontario and Manitoba. For the other Provinces, see Section 365.

If the present fences and improvements have been standing longer than ten years for Ontario and Manitoba (see "Ownership by Possession for other Provinces), a survey may not be necessary. The survey should show whether there are any water-courses, walks, roads or overhanging caves, or other easements (privilege or right), affecting the land.

Where the Land Titles' Act or Torrens System is in force, the Certificate of Title will contain all the facts under 1, 2, 3 and 6.

Also the terms of tenancy must be made certain if a tenant occupies the premises; also see that no Mechanics' Liens attach within 30 days.

Make sure that your solicitor has ascertained all the above facts before you pay over the money, because these searches are not always made.

402 Registration of Mortgages.

In all the Provinces a mortgage is binding on the property as soon as it is executed, but the first mortgage registered is the one that has priority of claim against the property unless express notice is proved that a prior mortgage exists. If the mortgagor should make a deed of the property or another mortgage to some other person without notifying him of the previous unregistered mortgage, such person would have a good title if his deed or mortgage were registered before the first one executed would be presented to the registry office.

All mortgages and other instruments to be registered must be verified by affidavit in proper form of a subscribing witness present at the time of signing.

(*a*) Where lands are under the Torrens System mortgages must be registered in order to be valid, and they cannot be registered without the production of the Certificate of Title. A memorandum of the transaction is entered by the proper officer at the Land Titles office on the Certificate of Title held by the owner, and also on the duplicate certificate in the office, and this constitutes the registration.

In Ontario the mortgagee would hold the Certificate of Title until the mortgage is paid, but in Alberta the certificate is held by the Land Titles office. The mortgagee may procure Certificate of Charge showing his relation as virtual owner of the property.

403 Fees for Registration.

The fees for registration under the Registry Acts of the different Provinces are very much the same. For Ontario the fees under the old system are $1.40 where the aggregate of words to be copied does not exceed 700, and 15 cents for each additional hundred words up to 1,400, and 10 cents for each additional hundred words or fraction of a hundred over 1,400.

In Ontario the statutes provide that in order to lessen the cost of registration the mortgage may have endorsed upon it "not to record in full," in which case the registrar does not copy the mortgage in his books, but the mortgage is numbered and filed, and merely the date and name entered in the books. The fee is $1.00.

Under the Torrens System the fees for registering the different instruments run from $1.00 to $2.00

404 Implied Covenants in a Mortgage.

The *implied* covenants in a mortgage are:

1. To pay the mortgage money and interest (not the personal covenant.)
2. A good title.
3. A right to convey.
4. That on default the mortgagee shall have quiet possession.
5. Free from all encumbrance.
6. That the mortgagor shall execute such further assurance of the lands as may be requisite.
7. That the mortgagor has done nothing to encumber the lands.

There are no other covenants *implied* in a mortgage, but any others may be expressed that are agreed upon and are legal.

Loan companies and sometimes private individuals put in various extra covenants to better secure themselves, and these should all be carefully noticed before signing the mortgage.

For the usual covenants that a mortgage contains see "Form of Mortgage," which follows the Ontario Short forms of Mortgage with Covenants.

405 The Personal Covenant.

It must not be forgotten that nearly every mortgage contains a Personal Covenant by the debtor to pay the creditor the sum named in the mortgage similar to this:

"The said mortgagor covenants with the said mortgagee that the mortgagor will pay the mortgage money and interest."

Therefore, if the debtor after giving the mortgage should sell the property it is not enough that the purchaser assume the mortgage, because the *personal covenant* still binds the original debtor. The mortgage should either be discharged, or a release under seal obtained from the creditor or mortgagee. In Ontario, on mortgages given since 1894 the personal covenant expires with the mortgage (in ten years after maturity or last payment).

This personal covenant does not hold against the person who may buy the property subject to the mortgage, nor the person who buys the equity of redemption.

If the person buying property subject to an existing mortgage covenants with the mortgagor to pay the mortgage, the mortgagor can enforce its payment when it is due. The *mortgagee*, however, cannot compel the purchaser to pay either principal or interest. Canada Landed and National Investment Co. v. Shaver (1895). 21 Ont., App. 377.

The "personal covenant" is not *implied* in a mortgage, but it is usually inserted, unless omitted for cause. In fact it is contained in all the printed forms so that it must be struck out if it is intended that the mortgagor is not to become personally liable for the debt.

The "implied covenant" to pay the mortgage money and interest given in preceding section, the courts have ruled, is not what is called the "personal covenant" that the mortgagee can sue on to recover any deficiency that may remain after selling the mortgaged property.

If the Personal Covenant is omitted or struck out of the printed form used, and the mortgagor does not repay the loan and interest, the mortgagee has recourse to the property only which has been conveyed to him by way of mortgage, which he may either take possession of and hold, or sell. If he elects to sell such property and it does not bring enough to cover the mortgage debt and interest, he cannot then sue on any *implied covenant* for the deficiency and seize other property not covered by the mortgage.

406 Form of Mortgage.

This Indenture made (in duplicate) the first day of March, one thousand nine hundred and ten, in pursuance of the Short Forms of Mortgages Act:

Between James Robert Manning, of the Township of Ancaster, in the county of Brant, Province of Ontario, yeoman, of the first part, hereinafter called the mortgagor;

Ida Jane Manning, wife of the party of the first part, of the second part;

And William John Brown, of the Township of Ancaster aforesaid, gentleman, of the third part, hereinafter called the mortgagee;

WITNESSETH that in consideration of One Thousand ($1,000) Dollars of lawful money of Canada now paid by the said Mortgagee to the said Mortgagor (the receipt whereof is hereby acknowledged), the said Mortgagor doth Grant and Mortgage unto the said Mortgagee, his heirs, executors, administrators and assigns forever:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Ancaster aforesaid, containing by actual measurement One Hundred Acres, more or less, being composed of Lot Number Twelve (12), on the Fourth (4th) Concession of the Township of Ancaster aforesaid; and Ida Jane Manning, of the second part, hereby bars her dower in said lands.

PROVIDED this mortgage to be void on payment of One Thousand Dollars of lawful money of Canada with interest thereon at five per cent. per annum, as follows: The said principal sum of One Thousand Dollars to be due and payable in four equal annual instalments of Two Hundred and Fifty Dollars each, with interest at the rate of five per cent. per annum on the unpaid principal, payable annually with each instalment of principal. The first of such payments of principal and interest to be due and payable on the first day of March, A.D. 1911, and taxes and performance of statute labor.

The said Mortgagor covenants with the said Mortgagee that the Mortgagor will pay the mortgage money and interest and observe the said proviso, that the Mortgagor has a good title in fee simple to the said lands, and that he has the right to convey the said lands to the said Mortgagee;

And that on default the Mortgagee shall have quiet possession of the said lands free from all encumbrances;

And that the said Mortgagor will execute such further assurances of the said lands as may be requisite;

And that the said Mortgagor has done no act to encumber the said lands;

And that the said Mortgagor will insure the Buildings on the said lands to the amount of not less than Six Hundred Dollars currency;

And the said Mortgagor doth Release to the said Mortgagee all his claims upon the said lands subject to the said proviso.

Provided that the said Mortgagee on default of payment for four months may on giving three months' notice in writing, enter on and lease or sell the said lands

Provided that the Mortgagee may distrain for arrears of interest.

Provided that in default of the payment of the interest hereby secured the principal hereby secured shall become payable.

Provided that until default of payment the Mortgagor shall have quiet possession of the said lands.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of R. H. OLMSTED. — JAMES ROBERT MANNING. (L.S.) — IDA JANE MANNING. (L.S.)

AFFIDAVIT OF WITNESS.

COUNTY OF BRANT, TO WIT: I, Russel Hamilton Olmsted, of the Village of Ancaster, in the County of Brant, manufacturer, make oath and say:

1. That I was personally present and did see the within Instrument and Duplicate thereof duly signed, sealed and executed by James Robert Manning and Ida Jane Manning, two of the parties thereto.

2. That the said Instrument and Duplicate were executed by the said parties at the Village of Ancaster, of the said Township of Ancaster.

3. That I know the said parties.

4. That I am a subscribing witness to the said Instrument and Duplicate.

SWORN before me at the Village of Ancaster, in the County of Brant, this first day of March, in the year of our Lord 1910. — R. H. OLMSTED.

N. H. HIBBARD, *a commissioner for taking affidavits in H. C. J., etc.*

407 Mortgage Under Torrens System.

I, A. B., being registered as owner of an estate (here give nature of interest), subject, however, to such encumbrances, liens and interest as are notified by memorandum underwritten (or endorsed hereon), of that piece of land (describe it), part of ..... Section ....., Township of ..... range ..... (or as the case may be), containing ....acres, be the same

more or less (here state rights of way, easements, if any, intended to be conveyed along with the land, and if the land dealt with contains all included in the original grants refer thereto for description of parcels and diagrams otherwise set forth in the usual way of boundaries, and accompany description with a diagram), in consideration of the sum of.....dollars lent to me by C. D. (insert description), the receipt of which sum I do hereby acknowledge, covenant with the said C. D.:

First, that I will pay to him, the said C. D., the above sum of..... dollars on the ..... day of .....

Secondly, that I will pay interest on the said sum at the rate of .... on the dollar in the year, by equal payments on the ..... day of ..... and on the ..... day of ....., in every year.

Thirdly (here set forth special covenants, if any).

And for the better securing of the said C. D., the repayment in manner aforesaid of the principal sum and interest, I hereby mortgage to the said C. D. my estate and interest in the land above described.

In witness whereof I have hereunto signed my name this ..... day of ..... 19..

Signed by the above named (Signature of Mortgagor.)
A. B., in the presence of (No Seal necessary.)

(Insert memorandum of mortgages and encumbrances.)

When a mortgage is paid under this system a receipt is indorsed on the duplicate mortgage held by the mortgagee, which is then brought to the Land Titles Office, and the fact of the payment of the mortgage is noted on the Certificate of Title.

A mortgage under this system does not convey the property, but the land is simply pledged as security, and after default the mortgagee may either sell or foreclose as though it had been transferred to him by way of mortgage.

For mortgages two copies are executed.

408 Sinking Fund Mortgages.

Sinking Fund Mortgages are those in which the principal and interest together are divided into a number of equal yearly, or half-yearly or quarterly or monthly payments. This form is not used much in Canada since legislation made it compulsory to state in the Repayment Clause the four following particulars: (1) The amount of the loan. (2) The rate of interest. (3) The part of each payment that is for interest. (4) And the part of each payment that is for principal. Section 6, Chap. 120 R.S.C.

With this protection the borrower may know whether he is paying five, six or twenty per cent interest, as the case may be. The Building Societies are about the only institutions still using this old "sinking fund" form of mortgage.

409 Interest on Mortgages.

Interest on Mortgages is implied, unless expressly stipulated to the contrary. Mortgages on real estate may draw any interest that the mortgagor covenants to pay, but in Canada if the rate is not named it will be five per cent.; Newfoundland six.

If the interest is not paid when due the mortgagee usually has power either to take possession, or foreclose and sell, or he may sue for the arrears of interest.

Or if there are goods and chattels of the mortgagor on the premises he may *distrain* for the arrears of interest. The mortgagee cannot seize or sell the goods or crops of a tenant on the property for either overdue interest or principal. Neither can he seize or sell the goods and chattels of the mortgagor that are exempt by statute from seizure under an execution or landlord's warrant.

The mortgagee's right to distrain for interest is limited to one year's arrears of interest as against execution creditors or an assignee for the general benefit of creditors. Goods distrained for interest shall not be sold except after such public notice as is required under a landlord's warrant.

Interest in arrears cannot be recovered after six years, Quebec five years. But, although the mortgagee could not in this case recover more than six (or five) years' arrears of interest by suit or distress, still if the mortgagor ever wanted to redeem the property he would in that case be compelled to pay the arrears of interest.

In Ontario he may sue for the arrears of interest in the Division Court if the amount is within its jurisdiction, but he cannot employ the "judgment summons" process to enforce payment. The different instalments of interest or principal may be sued for separately so as to bring them within the jurisdiction of the Division Court.

For rate of interest recoverable, see "Legal Rate of Interest."

410 Payment of Mortgages.

When a mortgage falls due it may be paid without any notice to the mortgagee, unless it is specified to the contrary in the mortgage.

If it is *overdue* and the mortgagee *demands* payment for the whole amount or even part it may be paid in full if the mortgagor wishes to do so. But if nothing is paid at maturity or only part is paid, together with the interest due, then in that case, unless the *mortgage provides otherwise*, the mortgagor usually cannot subsequently, except by consent of the mortgagee, pay the balance without giving six months' notice, or paying six months' advance interest in lieu of notice. This is a custom that has become law although it is not in the Statutes.

If the mortgagee demands payment, or takes any steps to enforce his mortgage he will not be entitled to six months' notice or interest in lieu of notice.

In Manitoba, Chap. 63 of 1914 provides that notwithstanding any rule, law or agreement to the contrary, where default has been made in payment of any principal money under any mortgage on real property, the mortgagor may within three months after the due date of such payment pay the same to the mortgagee without notice, or payment of bonus interest in lieu of notice, by paying the regular interest to the date of such payment.

If more than three months elapse, then the mortgagor can only make payment by paying the interest to date of payment and three months' additional interest on the principal money in arrears, or he may in lieu of such three months' additional interest give the mortgagee at least three months' notice in writing of his intention of making such payment; but if he fails to make such payment according to the written notice he is then required to pay the three months' advance interest before he is entitled to make the payment. This also applies to those mortgages in which it is provided that if interest is paid promptly a lower rate will be accepted than that provided for in the mortgage.

In Ontario.—By amendment of 1903 it is enacted that where default has been made in the payment of any principal money secured by mortgage on real estate in this Province after the passage of this Act, June 11th, the mortgagor, notwithstanding any agreement to the contrary, may redeem any time upon payment of principal in arrears and three months' advance interest or he may give the mortgagee three months' notice of his intention to make such payment at the expiration of the time named, and if he make such payment on such date, together with the interest due at such date, he need pay no further interest.

If he fails to make payment, however, at the time mentioned in the notice, he cannot, thereafter, make payment without paying both principal and interest due and three months' interest in advance.

This amendment does not affect the provisions of section 25 of the Loan Corporations' Act.

In all the Provinces and Newfoundland, if a mortgage is payable by instalments and one or more instalments are in arrears the mortgagee may sue for the overdue instalments, or he may sue for the possession of the property, but he cannot be thereby compelled to accept the whole sum of the mortgage debt, neither to foreclose unless he desires to do so.

When making payments of either principal or interest it is not essential that they be endorsed on the mortgage for the receipt operates as a legal discharge of the mortgage to the extent of the payment, no matter if the mortgage should be transferred or seized under execution. A mortgage differs in this respect from negotiable paper. But be sure to *preserve the receipt.*

Payment must be made to the mortgagee or his duly authorized agent, or assignee, or executor. Great caution need to be exercised in this matter, for a person may have authority to receive interest, or rent, and yet not the principal. Even a solicitor acting for the mortgagee may not have authority to receive the mortgage money, so the money must not be paid to any other than the mortgagee unless the party assuming the right to receive produces his authority.

411 Notice of Intention to Pay Off Mortgage.

I hereby give you notice that at the expiration of ..... months from date hereof I shall pay to you or your executors, administrators or assigns, the principal money and interest due by me to you on the security of a certain indenture dated the ..... day of ....., 19.., made between ..... (me), of the one part, and ..... (you), of the other part.

Dated at ....., this ..... day of ....., 19..

To (name of Mortgagee). .....

Mortgagor.

413 Prepayment of Mortgages.

If a mortgage has not yet become due, generally speaking the mortgagee cannot be compelled to accept payment, unless there is a clause in the mortgage binding the mortgagee to accept payment sooner. There are, however, some exceptions, as the following:

1. By Dominion statute, chap. 120, sec. 10, R.S.C. 1906, provision is made, which applies to all the provinces, for the payment of mortgages after they

have run five years, no matter for what length of time they were drawn. As the clause is very concise it is here quoted in full:

"Whenever any principal money or interest secured by mortgage of real estate is not in the terms of the mortgage payable till a time *more* than five years after the date of the mortgage, then any person liable to pay or entitled to redeem the mortgage, may, after the expiration of five years, tender to the person entitled to receive the money the amount due for principal and interest, together with three months' further interest in lieu of notice; no further interest shall be chargeable, or payable, or recoverable at any time thereafter on principal money or interest due under the mortgage."

2. If, for default in payment, for either principal or interest or for any other supposed breach of covenant, the mortgagee enters action to recover payment, or demands payment, then the mortgage may be paid in full without further notice and without advance interest.

415 Mortgagee's Privileges at Maturity.

If the mortgage is not paid at maturity the mortgagee has several remedies, any one of which he may pursue:

(*a*) He may allow the mortgage to run on and draw interest, or

(*b*) He may bring action to obtain payment for principal and interest due, or

(*c*) He may bring an action of ejectment and obtain possession of the land by order of the court and then collect the rents and profits until the full mortgage debt and interest are paid, or

(*d*) He may bring suit to have the mortgage foreclosed, in which event all equities of redemption are barred and he becomes the absolute owner, or

(*e*) If the mortgage contains a "power of sale" he may take the legal steps to sell, but if the mortgage has no "power of sale" he may bring action to have the lands sold under the direction of the court, or

(*f*) He may bring an action on the covenant and reach the other property of the mortgagor by way of execution.

417 Transfer of Mortgages.

Mortgages are not negotiable by endorsement, but may be transferred by assignment. The assignment is also an instrument under seal, and must be recorded at the same place the mortgage is registered.

If a mortgage is assigned the assignee takes it subject to all the equities, rights, set-offs, etc., that existed at the time of purchase. Therefore, if a payment were made on it before the assignment the assignee could not force the mortgagor, his heirs, executors, or administrators to pay it again. He could only look to the assignor. And if a payment were made to the mortgagee after the date of the assignment the payment would be allowed if the mortgagor had no notice of the transfer. The registry of the assignment is not a notice to the mortgagor, but only to those claiming an interest subsequent to such registry.

Hence, in transferring a mortgage it is advisable to have the mortgagor connected with the assignment in some way so as to acknowledge the existence of the mortgage debt. If the mortgagor is not a party to the assignment he should be given due notice of the transfer.

Again, if the mortgagor does not concur in the assignment the mortgagee remains liable to account for rents, and profits, and for loss to the estate through the transferee's wilful neglect, if he should subsequently enter into possession of the property. (Armour, 1901 edition, page 209.)

The assignee cannot distrain for arrears of rent which accrued before the assignment.

The assignment of mortgage does not pass arrears of rent accrued before such assignment unless expressly mentioned, and even then the assignee could not distrain for such arrears.

A Power of Sale is a personal right, and cannot be exercised by the assignee unless the mortgage expressly reserves such right.

418 Form of Assignment of Mortgage.

This Indenture made (in duplicate) the first day of September, in the year of our Lord one thousand nine hundred and ten:

BETWEEN William John Brown, of the Township of Ancaster, in the County of Brant, Province of Ontario, student, of the first part, hereinafter called the "Assignor," and James Wilson, of the City of Hamilton, in the County of Wentworth, Province of Ontario, merchant, hereinafter called the "Assignee," of the second part;

WHEREAS, by a mortgage dated on the first day of March, one thousand nine hundred and three, James Robert Manning, of the Township of Ancaster, County of Brant, Province of Ontario, farmer, and wife did grant and mortgage the land and premises therein and hereinafter described to William John Brown aforesaid, his heirs, executors, administrators and assigns for securing the payment of One Thousand Dollars of lawful money of Canada, and there is now owing upon the said Mortgage the sum of One Thousand and Twenty-five Dollars.

NOW THIS INDENTURE WITNESSETH, that in consideration of One Thousand and Fifteen Dollars of lawful money of Canada, now paid by the said Assignee to the said Assignor (the receipt whereof is hereby acknowledged), THE said Assignor DOTH HEREBY ASSIGN and set over unto the said Assignee, his executors, administrators and assigns, ALL that the said before in part recited Mortgage, and also the said sum of One Thousand and Twenty-five Dollars now owing as aforesaid, together with all moneys that may hereafter become due or owing in respect of said Mortgage and the full benefit of all powers and of all covenants and provisos contained in said Mortgage. And also full power and authority to use the name or names of the said Assignor, his heirs, executors, administrators, or assigns, for enforcing the performance of the covenants and other matters and things contained in the said Mortgage. AND the said Assignor DOTH HEREBY GRANT AND COVENANT unto the said Assignee his heirs and assigns, ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Ancaster, in the County of Brant, Province of Ontario, containing by admeasurement One Hundred Acres, be the same more or less, being composed of Lot Number Twelve (12), in the Fourth (4th) Concession of the Township of Ancaster aforesaid, TO HAVE AND TO HOLD the said Mortgage and all moneys arising in respect of the same and to accrue thereon, and also the said land and premises thereby granted and mortgaged TO THE USE of the said Assignee, his heirs, executors, administrators and assigns, absolutely forever; but subject to the terms contained in said Mortgage.

AND THE SAID ASSIGNOR for his heirs, executors, administrators and assigns doth hereby covenant with the said Assignee, his heirs, executors, administrators and assigns, THAT the said Mortgage hereby assigned is a good and valid security, and that the said sum of One Thousand and Twenty-five Dollars is now owing and unpaid AND that he has not done or permitted any act, matter or thing whereby the said Mortgage has been released or discharged either partly or in entirety: AND that he will upon request do, perform and execute every act necessary to enforce the full performance of the covenants and other matters contained therein.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, Sealed and Delivered in the presence of D. E. POTTER.

WILLIAM JOHN BROWN. (L.S.)

JAMES WILSON. (L.S.)

RECEIVED on the day of the date of this Indenture from the said Assignee the sum of One Thousand and Fifteen Dollars.

AFFIDAVIT OF WITNESS.

W. J. BROWN.

COUNTY OF WENTWORTH, } I, Dexter Edgar Potter, of the City of Hamilton, County Wentworth, Province of Ontario, student, make oath and say:
To WIT: }

1. That I was personally present and did see the within Instrument and Duplicate thereof duly signed, sealed and executed by James William Brown, one of the parties thereto.

2. That the said Instrument and Duplicate were executed by the said parties at the City of Hamilton.

3. That I know the said parties.

4. That I am a subscribing witness to the said Instrument and Duplicate.

SWORN before me at Hamilton, in the County of Wentworth, this first day of September, in the year of our Lord 1910. } D. E. POTTER.

J. W. LAMOREAUX, *a commissioner for taking affidavits in H. C. J., etc.*

419 Transfer by Indorsement on Back of Mortgage.

This Indenture made (in duplicate) the first day of September, in the year of our Lord one thousand nine hundred and six:

BETWEEN William John Brown, of the town of Dundas, within named, of the first part, and James Wilson, of the City of Hamilton, of the second part.

WITNESSETH, that the party of the first part, in consideration of the sum of $250 to him paid by the second party, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and assigned, and by these presents doth grant, bargain, sell, and assign to the party of the second part, his heirs, executors, administrators and assigns, all the right, title, interest claim and demand whatsoever of him, the party of the first part, of, in and to the lands and tenements mentioned and described in the within Mortgage. And also to all sum and sums of money secured and payable thereby and now remaining unpaid.

TO HAVE AND TO HOLD the same and to ask, demand, sue and recover the same as fully to all intents and purposes as he, the party of the first part, now holds, and is entitled to the same.

IN WITNESS WHEREOF the parties to these presents have hereto set their hands and seals, the day and year first above written.

Signed, Sealed and Delivered in the presence of } WILLIAM JOHN BROWN. ✳
JAMES BLACK. }

420 Transfer of Mortgage Under Torrens System.

I, C. D., the mortgagee (encumbrance or lease, as the case may be), in consideration of ..... dollars, this day paid to me by E. F., of ..... the receipt of which sum I do hereby acknowledge, hereby transfer to him the mortgage (encumbrance or lease, as the case may be, describing the instrument fully), together with all my rights, powers, titles, and interest therein.

In witness whereof I have hereunto subscribed my name this.....day of ....., 19..

Signed by the said C. D., in the presence of } C. D. Transferrer.
..... } Accepted, E. F., Transferee.
(No Seal necessary.)

Both mortgages and leases under this system may be transferred by endorsement written upon the copy of the instrument held by the proprietor and then registered.

421 Discharge of Mortgage.

When a mortgage has been paid the mortgagee is required to give the mortgagor a discharge, which is a statutory form of receipt. When this has been filled out and signed in the presence of witness duly sworn, it is registered by the mortgagor.

Where there is more than one mortgagee each one must sign the discharge.

If the mortgage has been assigned, the assignment should be as accurately described in the discharge as the mortgage itself. The date, registration, etc., should be taken from the Registrar's certificate on the assignment.

A discharge may be given at any time at or after payment, either by the mortgagee or his assigns or executors.

A discharge operates as a re-conveyance of the lands to the mortgagor or his legal representatives, and is as good as a re-conveyance and costs less.

When a mortgage has been paid in full the mortgagee is compelled by law to hand back the mortgage, and return all title deeds and other papers he may hold in connection with the property that belong to the mortgagor. The mortgagee is also bound to give a discharge when payment in full is made. The mortgagor should immediately register the discharge.

The mortgagor may instead have a re-conveyance of the property prepared and have the mortgagee sign it if he wishes it, but it is sufficient, however, to simply have a discharge executed and registered.

Or he may require the mortgagee to assign the mortgage debt and convey the mortgaged property to any third person the mortgagor directs.

In the absence of agreement to the contrary the mortgagor must pay for the conveyancing, if he leaves it for the mortgagee to do. But in case only a simple Discharge is needed the mortgagor may prepare it himself, or his regular solicitor may, and present it to the mortgagee for signature, who is required by law to sign it, and without any charges.

422 Form of Discharge.

For a Form of Discharge of Mortgage, see "Discharge of Chattel Mortgage," which is the same in every particular, simply by omitting the word "chattel" wherever it occurs and changing the name of Ontario for other Provinces required.

We give here, however, the form of discharge authorized by statute for New Brunswick, which is almost *verbatim* that of Ontario, as follows:

To the Registrar of Deeds of the County of King's, I, John Doe, of the Parish of Havelock, in the County of King's and Province of New Brunswick, farmer, do hereby certify that James Roe, of the Parish, County and Province aforesaid, farmer, and Mary Roe, his wife, have satisfied all money due on or to grow due on a certain mortgage made by the said James Roe and Mary Roe, his wife, to me, the said John Doe, which mortgage bears date the sixth day of September, A.D. 1905, and was registered in the Registry Office for the County of King's, aforesaid, on the tenth day of September, A.D. 1905, in Libro No. 5, as number 54 on folio 5; and that I am entitled by law to receive the money, and that such mortgage is therefore discharged.

In witness whereof I, the said John Doe, have hereunto set my hand and seal this fourteenth day of March, A.D. 1910.

Witness
PETER JONES.

JOHN DOE. ✺

The Discharge must be accompanied by an affidavit of the mortgagee. See following form for New Brunswick:

New Brunswick, King's County, To wit: } On the 14th day of March, A.D. 1910, before me, Peter King, one of His Majesty's Justices of the Peace in and for the said County of King's, personally came and appeared the within-named John Doe and acknowledged that he did sign, seal and execute the within release or discharge of mortgage for the purposes therein contained. PETER KING,

J. P. in and for King's County.

(*a*) Under the Torrens System when a mortgage is paid a receipt is endorsed on the duplicate mortgage held by the mortgagee, which is then brought to the Land Titles Office, and the fact of the payment of the mortgage is noted on the Certificate of Title. There is a statutory form for this discharge.

423 Power of Sale.

Every mortgage contains a clause similar to the following:

> "Provided that the mortgagee on default of payment for four months may, on three months' notice, enter on and lease or sell the said lands," etc.

The statutory time mentioned in this paragraph may be changed by the *mortgage agreement*, and whatever number of months is stated in the mortgage will hold.

If any instalment of principal or interest is not paid when due and the mortgagee gives the required notice of his intention to sell the mortgagor may pay the debt within the time mentioned in the notice and prevent a sale, or leasing.

In case the mortgagee demands payment of the whole mortgage debt, because a payment of either principal or interest is in arrears, the mortgagor may either pay off the mortgage according to the notice, or he may pay the arrears of principal or interest, as the case may be, with interest on the arrears since due, together with the cost of notice, and the mortgage must stand as before. But the payment must be made promptly before action further than the notice is taken.

424 Form of Notice to Sell.

I hereby require you on or before the ..... day ..... 19... (a day not less than two calendar months from the service of the notice, and not less than six months after the default, unless the mortgage provides otherwise), to pay off the principal money and interest secured by a certain indenture dated the ..... day of ....., 19.., and expressed to be made between (here state the parties and describe the mortgaged property), which said mortgage was registered on the ..... day of....., 19.. (and if the mortgage has been assigned, add "and has since become the property of the undersigned"). And I hereby give you notice that the amount due on the said mortgage for principal, interest and costs, respectively, is as follows (state the separate amounts):

And unless the said principal money, interest and costs are paid on or before the said ..... day of ..... I shall sell the property comprised in the said Indenture, under the authority of *The Mortgages Act*.

2. That the said certificate was executed by the said parties at the Town of Welland.

Dated the ..... day of ....., 19..

(Signed) .....

This notice may be registered in the Registry Office of the county or district in which the lands are situate, and serve as proof of compliance with the Act. The two months' notice may run concurrently with the time of default as it may be given any time after default.

When such demand for payment has been made and notice of sale given no other proceedings can be taken until the time expires, unless an order from the Court is obtained.

The mortgagor may pay the debt within the time mentioned in the notice and prevent a sale.

In case of sale the money derived from the sale goes first to cover costs of sale, then the interest and next the principal, and remainder (if any) goes to the mortgagor.

The land may be sold either by public or private sale, and either for cash or credit, and the mortgagee or assigns may buy in and resell the said lands, or any part thereof, either by private sale or public auction, without being responsible for any loss or deficiency for, or on account of such estate.

Where the mortgagee becomes the purchaser he is required to give the mortgagor a release of the mortgage debt and cannot sue on the "personal covenant" for any balance that might remain.

A mortgage might provide for a sale "without notice," but where no time is fixed it must be two months. It is questionable if the courts would uphold a sale "without notice," as it is contrary to equity, and would destroy the equity of redemption. It should not be in a mortgage, but some companies have it inserted.

If a sale is made under the power of sale in the mortgage after a proper tender of payment has been made it will be set aside if the purchaser had notice of the tender. Jenkins v. Jones (1860), 2 Geff. 99.

426 Sale by Second Mortgagee.

If the second mortgagee sells the property under the "power of sale" in his mortgage without redeeming the first mortgage, such sale does not affect the rights of the first mortgagee. The purchaser buys subject to the first mortgage, and merely takes the place of the mortgagor, except as to the "Personal Covenant," which will still bind the mortgagor.

427 Mortgagee Taking Possession.

A mortgagee may take possession of the property at any time after the mortgage falls due, or if interest is past due, and may collect the rents and apply them on the mortgage.

The mortgagor cannot compel him to foreclose nor sell, but he can compel him to give *an account* of the rents and his dealings with the property. But if he is ready to pay the principal and interest he may bring an action to redeem should the mortgagee be unwilling to receive the money.

Also if he makes a proper tender of the mortgage money, interest due and costs, such tender stops the running of interest, but the money must be kept ready to pay over on demand to the mortgagee. Kinnaird v. Trollope (1889), 42 Ch. D. 610.

A tender by letter without actually enclosing the money is not sufficient, as that is only an *offer of tender.*

If the mortgagor should abandon possession of the property it gives the mortgagee the right to take possession, but he must keep an account of all rents and income derived from it, and account to the mortgagor or his assigns for the same or to subsequent mortgagees.

A mortgagee who simply takes possession of the property without foreclosure, or a sale, is not the absolute owner of the property, in reality only a "trustee," as the mortgagor in that event still retains his equity of redemption, and may hold the mortgagee liable for all damages that may be done to the property. The mortgagor may, any time within twenty years, redeem the property by procuring an order from the court, that is, enter an action to recover possession of the property, and in that case the mortgagee would be compelled to account for all his dealings in connection with the property, and make good any waste, such as needlessly cutting down the standing timber, destroying or removing from the property any of the buildings, or for buildings that may have been burned down (if insured), and the insurance money not been used to replace the buildings, etc.

Where a mortgagee takes possession and remains in actual possession of the premises, using them in place of a tenant, he is chargeable for the same rent that a tenant would reasonably be expected to pay for them. This is called "occupation rent." The Statute of Limitations does not apply in a case of "occupation rent," and the mortgagee would get no title simply by possession, but he is rather in the position of a "trustee." Such rent would be applied by the courts first to the payment of interest, and the remainder to the mortgage principal.

A mortgagee taking possession under an agreement with the mortgagor at a certain rental does not bind subsequent mortgagees who did not assent. They can claim a fair rental to be charged, so as the faster to pay off the first mortgage.

To become the absolute owner of the property without the expense of foreclosure or a sale, the mortgagee must obtain from the mortgagor a release of his equity of redemption, either by purchase or otherwise, or let it rest until it is barred by Statute of Limitations.

429 Foreclosure of Mortgage.

The object of foreclosure is to take away the mortgagor's equity of redemption, and also to bar claims of subsequent mortgagees without a sale of property. Foreclosure of mortgage is merely filing a bill of foreclosure against the mortgagor, calling upon him to redeem his estate forthwith, with payment of principal, interest and costs, and if he fail to do so within the time specified by the court (usually six months), he is forever barred of his equity of redemption.

Unless the mortgage specifically provides otherwise, the mortgagee may, upon default in payment of either principal or interest according to the terms of the mortgage, or for the length of time mentioned in the statute, commence a suit for foreclosure.

(*a*) And if the mortgagor desires to prevent the foreclosure he may, any time before judgment, pay the amount of mortgage, interest and expense incurred to date; or if the mortgagor or any subsequent mortgagee desiree to force a sale of the property instead of a foreclosure he may do so by filing in the office from which the writ of foreclosure was issued a memorandum stating as follows:

"I desire a sale of the property instead of foreclosure," at the same time stating the true reason, as for instance, "that the property is valuable and would sell for more than the mortgage debt." In Ontario he would be required to deposit $80 in the court to which he applied for the sale, to cover the expenses of a sale, unless the Judge would not require it, or would order otherwise. Similar provision exists in all the Provinces, and the question of amount of deposit is in the discretion of the Judge.

430 Time Allowed for Redemption.

When an order for foreclosure has been obtained, the mortgagor and subsequent mortgagees have six months in which to redeem before final foreclosure. Where there are several mortgagees or encumbrancers who have proved their claims in defence at the suit for foreclosure, the court will usually grant from one to three months additional time in which for them to redeem, according to their respective priorities. The court may also for sufficient cause allow a shorter period than six months if it is deemed necessary.

(*a*) After foreclosure, if the mortgagee should sue on the covenant for an alleged balance due, it gives the mortgagor the right of redemption in case he pays the balance of debt. In such case the mortgagee must have the mortgaged estate still in his possession, so as to be in a position to be redeemed. Therefore, upon the commencement of the action on the covenant the mortgagor should file a bill for redemption, and upon payment of the debt he will be entitled to the estate and whatever securities the mortgagee held belonging to the mortgagor. Chatfield v. Cunningham, 23 Ont. R. 153.

(*b*) The mortgagee may be put to his election. If, after the final order for foreclosure the mortgagor is prepared to pay off the mortgage debt, and notifies the mortgagee to that effect, and the mortgagee consents to receive the money, the right of redemption is restored. But if he refuses to receive such payment he would be restrained by a court of equity if he should thereafter attempt to sue on the covenant.

It is possible to have a final order of foreclosure set aside, but there must be substantial grounds for it.

The equity of redemption is barred by Statute of Limitations in 20 years, for all the Provinces and Newfoundland, after the mortgagee takes possession. See Section 361

432 Unsatisfied Mortgages.

If a mortgage for a certain amount covers certain properties of a debtor which, upon being sold, do not pay the whole claim of principal, interest

and expenses, and the debtor has other property, the mortgagee can come on that other property until his full claim has been satisfied. To do so he would sue on the Personal Covenant, and thus securing judgment against the debtor personally, issue an execution which would bind all the property of the mortgagor.

Of course the mortgagee could not touch the goods or crops of a tenant, nor even the personal property of the mortgagor *exempt* from seizure, under an execution or landlord's warrant.

If the mortgagee became the purchaser of the mortgaged land when sold he is required in that case to give the mortgagor a release of the mortgage debt. But if sold to a third party and a balance remained unpaid he would then have a further claim as above stated.

CHAPTER XV.

REAL PROPERTY.

440 Property.

The legal definition of property is "The right and interest which a man has in lands and chattels to the exclusion of others." A man purchases so many acres of land and thus acquires the possession and exclusive right to its use. He drains it, plants it with fruit trees, erects buildings upon it, and thus increases its value. The soil itself is not his, but he has acquired the right to its possession and use—a right that excludes all others from its use.

In the common language of the people property means the thing itself. Thus, a man buys a bay horse; he calls it his property, but in legal language it would be his "property in the bay horse"—that is, the right and title to its *possession* and *use*.

441 Two Classes of Property.

Property is divided into Personal and Real, usually called Real Estate. In Quebec they are styled Movables and Immovables.

1. Personal property includes all classes of property except lands and buildings. It consists of such things as are movable from place to place with the owner, as money, mortgages, negotiable paper, letters patent, stocks, carriages, machinery, farm implements, live stock, book accounts, annual crops, nursery stock, good-will and lease of property for a term of years.

2. Real property includes lands, buildings, trees growing upon the soil, and every natural source of wealth, such as coal, gas, oil and minerals that may be buried in the soil.

Temporary buildings, not placed upon stone foundations nor nailed to the permanent buildings, counters, shelving, etc., belonging to tenants, trees and shrubs planted to be removed again, as nursery stock, do not become a part of the realty, but are personal property of the tenant. (See Tenants' Fixtures.)

443 Acquired Rights Over Other's Property—Easements.

A person having property removed from the street or road, and pays another property holder between him and such street or road a certain sum for a right of way, as a lane, to reach his property, he acquires a perpetual right, which also passes to his successors, unless otherwise specified in the contract.

(*a*) Also where a person is permitted to use a way or lane in passing to and from such property without any kind of agreement or remuneration being paid or offered for the full period of 20 years, he acquires a prescriptive right to its continual use. But before the 20 years expire the owner may prevent the prescriptive right by putting a fence across the lane.

If the cornice of a house project over the boundary line of the lot, and the owner of such lot allows it to remain for 20 years without some kind of a written agreement or rental for it, he could not afterwards compel its removal.

To prevent a prescriptive use of a way it must be shown that the right to such way "was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." See following Section.

(*b*) If he has fruit trees standing so near the division line that the limbs overhang a neighbor's property, the fruit on the limbs that overhang the fence still belongs to him, and if it falls on his neighbor's ground he has a right to go on such ground to gather and take it away. He is not liable to an action for trespass for so doing, but would be liable for any damage through the falling of the fruit, or in exercising his right to collect and take it away.

The neighbor also has the right to cut off the limbs that overhang his property, or the roots which extend into it. But before doing so he should give due notice, and demand their removal, and if his demand is not complied with he can then cut them off.

But the provision that formerly protected the owner of a building from having his windows darkened or a pleasant view cut off by the erection of a high fence or a building by his neighbor is now virtually abolished, except where building restrictions are placed in the deed.

444 Acknowledgment for Use of Private Way.

A simple writing like the following, without any seal, will prevent the user of a road or lane from acquiring a prescriptive right.

"I (name), hereby acknowledge that the road (or path) between (state clearly the land over which it passes and its terminal points), over the land of (owner of land), now used by me, my servants, agents and friends, is not used as of right, but by the express written permission of the said (name) owner.

"Dated at ....., this ..... day of ....., 19..

"(Signature)."

445 Extinguishment and Suspension of Easements.

Mere lapse of time is not essential to the establishment of a perpetual easement. It is a well settled fact that when an owner of two adjacent parcels of land creates an easement or privilege in favor of one part, and then alienates either one, the purchaser takes subject to the benefit or the burden, as the case may be. A good illustration of this condition is found in overhanging eaves or underground drains. The eaves of one house may project

over the dividing line on the other, but the purchaser, or subsequent owner, of such property cannot force their removal nor recover any damages. The principle is that a vendor cannot derogate from his own grant. Grace Methodist Church *v.* Dobbins, 153 Penn. State R. 294; Hall *v.* Alexander, D.C. 302 R. 482; Israel *v.* Leitch, 20 O.R., D.C. 361.

It is also well settled that *unity of ownership* extinguishes an easement, while *unity of possession* only postpones or suspends it. That is, when at any time during the twenty years necessary to establish an easement one man becomes the owner in fee simple of both the land carrying the benefit of the easement and also the land carrying the burden the easement is extinguished, and the running of the twenty years must begin anew after such ownership ends.

But if the title in such unity of ownership was in fee simple for one lot, and only, say, a life estate in the other, the easement would only be suspended in such case.

But when there is unity of *possession* only of the two lots, as under a lease, the running of the twenty years is only interrupted. The time may not run during this period of unity of possession, but may run after its termination, the time before and after the unity being added together. Washburn on Easements, page 683, gives Reed *v.* West 16, Gray (Mass.) 283, and a number of other cases. Also Goddard's Law of Easements, pages 17 and 560.

446 Joint Owners and Joint Tenants.

Joint owners of real estate, called also joint tenants, is where two or more persons own property jointly; all have an equal right to it at the same time.

Any estate may be held in joint tenancy, either as joint tenants for life, or joint tenants in fee simple according to the wording of the Deed.

Lands given to A and B as joint tenants would constitute them joint tenants for life. Each one would be entitled to one-half of the profits or income, and upon the death of either, the survivor would be entitled to the whole during the remainder of his life.

Lands given to A and B as joint tenants, and the heirs of their bodies, while both live their rights will be equal, but on the death of either the survivor will take the whole. Then on the decease of the survivor the law severs the tenancy and divides the inheritance between the heirs of the body of A and the heirs of the body of B, and those heirs become what is called "tenants in common."

Lands intended to be given to two or more persons as joint tenants in *fee simple* must limit it to them and their heirs, or to them, their heirs and assigns as joint tenants in *fee*. If the joint tenancy be allowed to continue each one has an equal interest, and when one dies his heirs do not succeed to his interest, but it goes to the surviving joint tenants. Therefore the heirs of the last survivor are entitled to the entire estate. But a joint tenancy can be destroyed. Each one of the joint tenants possesses an absolute power during his lifetime to dispose of his own share of the lands, and such alienation to a stranger destroys the joint tenancy. Such stranger takes his undivided interest in the estate as a tenant in common with the remaining tenants. But if a joint tenant does not dispose of his share of the estate during his lifetime he cannot will it at his death.

The principal use in practice of joint tenancy is for the purpose of vesting estates in trustees.

Sometimes husband and wife have real property deeded to them as joint tenants in fee simple. In such case if neither one disposes of his or her share during life, on the decease of one the survivor takes the whole estate.

Joint walls built by two parties on the dividing line between the two properties would be an illustration of joint tenants, or joint owners.

The class of ownership called "tenants in common" would be where a syndicate of persons combine to purchase and hold a portion of land or other realty for speculative or other purposes. Any of those persons dying, their share could be disposed of by will, or would, in the absence of a valid will, devolve to their heirs.

Also, when a person owning real property dies intestate, his heirs have a joint interest in the estate, as tenants in common.

447 Life Estate in Property.

Life ownership is where a person has the use of property during his natural life. It may be acquired by gift or will. He cannot sell or mortgage more than his life interest in such property, nor make any disposition of at his death. He must not decrease its value by removing buildings, etc. This life estate is a matter that should be carefully looked into when buying real estate, or even taking a mortgage, as the life estate is not always apparent. For instance, a father may in his will bequeath a farm to an unmarried son, with the proviso that should the son die without leaving issue that the property should go to certain other persons. The son may marry and live on the farm for a generation, and yet die without leaving issue, the property would go to the parties named in the will, even though in the meantime it had been sold or mortgaged, and even the widow would have no right of dower or a distributive share in any Province of Canada. A Quit Claim Deed is all that such person could give.

Also, if a person having only a life estate in property were to lease it for a term of years, the death of the life owner would terminate the tenancy. Doe v. Roberts, 16 M. & W. 778.

If he gave a mortgage on the property the encumbrance ends at his death, the successors, called "remainder men," not being in the least liable. Blackman v. Fish (1892), 3 Chancery 209.

448 Sale of Real Property.

There are two kinds of sales, viz., Executed and Executory.

1. Executed Sales are those where the sale has been completed by the payment of the money and the execution and delivery of the deed of conveyance.

Executory Sales are those where possession has been passed by agreement for sale, but the title does not pass until the price has been paid in full.

The seller of real estate, if he has not signed a conveyance, has a lien on the property sold for the purchase price, which is as binding as a mortgage. If payments are not made according to agreement he has the option of suing for them, or if not made within a reasonable time he may regain possession by an action to have the sale cancelled.

In the sale of real estate embracing a dwelling house, barns, etc., the house and barn fixtures, such as gas fixtures, hay forks, etc., go with the property unless they are specially reserved, so would saw logs, cordwood, etc., unless the agreement provided otherwise.

Any person who knows of the existence of an unregistered prior sale, mortgage or other encumbrance upon any real property who fraudulently makes any subsequent sale of the same is liable to one year's imprisonment and a fine not exceeding $2.000.

449 Valid Agreement for Sale of Property.

No agreement for the sale or purchase of real estate is binding unless in writing, signed by the contracting parties or their duly authorized agents. See "Statute of Frauds." No seal is required.

(a) A verbal agreement made, even if money is paid on it to "bind the bargain," does not bind either party if he wishes to repudiate it. Paying down a small amount of money, as is frequently done at such a time, has no legal effect whatever. The party who paid the money, if he changes his mind, could forfeit the money and repudiate the agreement; and the party also who received the money could return it, and repudiate the agreement. A receipt given for such payment by stating what it was given for might hold the one who gave it, but it would not bind the other party.

When a bargain is made for the sale of real estate that cannot be executed immediately, a memorandum of the agreement should be written out and signed by both the parties. This makes the contract binding without anything being paid down. An ordinary agreement without seal is sufficient, simply stating that (S. Smith) agrees to sell his farm or his house and lot (as the case may be), for the price agreed upon, giving the number of lot, etc., the terms of payment, interest, etc., and that (J. Jones) agrees to buy at the price named, and both sign it, will constitute a valid agreement.

There is no statute governing these points, but they come to us from the common law confirmed by numerous court decisions.

450 Part Performance May Validate Verbal Agreement.

If, under a verbal agreement for the sale of real estate, the purchaser legally enters into possession of the property, and does something in addition which could have no other design than that of fulfilling the contract, as, for instance, paying something on the purchase price, it has the effect of taking the matter out of the statute, and by decisions of Courts of Equity the transfer would be valid by what is called "Part Performance." Alderson v. Maddison, 7 Q.B.D., 174.

But part payment alone does not bind either party if he wishes to repudiate the agreement.

And the mere naked transfer of the possession does not validate the agreement. The purchaser in possession in such case is merely a tenant-at-will, and liable to pay for "use and occupation." Such tenancy may be determined by demand for possession. Lewer v. McCullock, 10 N.S.R., 315; Leigh v. Dickeson, 10 Q.B.D., 60.

451 Form of Agreement for Sale.

This agreement for sale of land does not convey a title, but is simply a binding promise to convey, and may be proved by affidavit of witness and

registered by the purchaser, except where the Torrens System is in use. It is also transferable by assignment.

MEMORANDUM OF AGREEMENT made this day of , A.D .191 .
BETWEEN hereinafter called the Vendor , of the First Part
hereinafter called the Purchaser , of the Second Part.

The party of the First Part agrees to sell and party of the Second Part agrees to purchase for the price or sum of Dollars of lawful money of Canada, payable as follows:

The Vendor shall not be required to furnish any Abstract of Title or procure or show any Deed or transfer or evidence of Title not in h possession, or any copies of Deeds or papers. The Deeds or Transfer to be given at the expense of the and to contain only the ordinary statutory covenants and the land to be conveyed free from all dower and encumbrances. The purchaser to be allowed days to investigate the title at own expense and if within that time he shall furnish the Vendor in writing with any valid objection to the title which the Vendor shall be unable or unwilling to remove, this agreement shall be null and void, and the deposit money returned to the purchaser without interest. Time to be the essence of this agreement. The Vendor to pay the proportion of insurance premiums, taxes, local improvements, assessments, sewer rates, etc., of whatever kind, to this date, after which date the purchaser will assume them.

The Purchaser shall be at liberty immediately upon the execution of these presents to enter upon and occupy the said lands and premises as tenant of the Vendor until the completion or cancellation of this Agreement.

Provided always and it is hereby distinctly understood and agreed by and between the parties hereto that in the event of default in payment of any of the instalments of principal or interest for a period exceeding days after the same become due according to these presents, the Vendor may at option cancel this agreement, and in such event, all sums paid shall be forfeited to the Vendor , and the Purchaser shall have no claim against the Vendor in respect thereof.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals.

Signed, Sealed and Delivered
in the presence of

(Signatures, Seals.)

452 Bond to Convey Land.

Know all men by these Presents: That I, John Smith, of the....., in the County of ..... and Province of ....., am held and firmly bound unto Henry Jones, of the ....., in the County of ....., Province of ....., in the penal sum of ($100), to be paid to the said Henry Jones, his certain attorney, executors, administrators or assigns, for which payment well and truly to be made I bind myself, heirs, executors and administrators firmly by these presents. Sealed with my seal. Dated this .... day of ..... A.D. 19 .

Whereas the above bounden John Smith hath contracted and agreed to sell, and also to convey to the said Henry Jones in fee simple absolute the following lands and heriditaments, namely (give number of lot, concession, etc.), in consideration of the sum of (amount), and the said Henry Jones hath agreed to purchase from the said John Smith the said lands upon the conditions aforesaid.

Now, the condition of this obligation is such that if the above bounden John Smith shall, at the request of the said Henry Jones, his heirs, or assigns, on or before the .... day of ....., in the year of our Lord one thousand nine hundred and....., absolutely convey to the said Henry Jones, his heirs or assigns, or to such person or persons as the said Henry Jones shall direct or appoint, the hereditaments hereinbefore mentioned, conformably to the said agreement: Provided the said Henry Jones shall have duly paid the sum of .....in the manner hereinbefore mentioned in

the said agreement, then this obligation shall be null and void; otherwise to remain in full force, virtue and effect.

(Signature and Seal.)

Signed, sealed and delivered in the presence of

(Signature.)

453 Option to Purchase.

There is an important distinction between an *offer* and an *invitation* to treat, to dicker. Thus if A asks B his lowest price on a certain house, and B replies, $5,000; A then says, I accept your offer. This is no *acceptance*, for there had been no offer made. It is in reality an offer, which B may accept or refuse at his pleasure.

Another illustration is the call for tenders—the contractor's tender is the offer, and the call for tenders a mere invitation to treat.

KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of Dollars now paid to me by , the receipt whereof is hereby acknowledged, I , of the of , in the Province of , am held and firmly bound to of the of in the Province of , and to h personal representative and assigns, to sell and dispose of

ALL AND SINGULAR th certain parcel or tract of land and premises situate, lying and being in the of in the of , known and described as follows, that is to say: (*Describe land, number of acres, etc., or street, number of lot, etc.*)
for the sum of Dollars (or at the rate of Dollars per acre), which shall be paid as follows:

IN THESE CONDITIONS I bind myself, my heirs, executors, administrators and assigns firmly by these presents. This agreement to remain irrevocable for the space of months from the date hereof.

IN WITNESS WHEREOF, at the of hereunto set

hand and seal this day of , one thousand nine hundred and

Witness:

(Seal.)

Another Form of Option.

To EDMONTON.

In consideration of listing, advertising and endeavoring to sell my property, I hereby agree to convey to you or your nominee on or before , 19 , the leasehold and freehold property in the , Province of , known as number on Street or Avenue, and having a frontage of feet on Street, by a depth of feet, subject to ;

for the sum of Dollars, with a down payment of not less than Dollars, the balance

Time is to be the essence of this agreement, and I hereby declare that I am the owner of the above property.

Witness:

(Signature, Seal.)

454 Assignment of Option.

The following brief assignment by endorsement will transfer the interest in an option or agreement for sale or purchase, even the last paragraph, beginning "To have and to hold," could be omitted in case of a simple option or agreement.

For value received I hereby transfer, assign and set over unto of and his assigns, all my right, title and interest in the within written instrument, and every covenant, article or thing therein contained.

To have and to hold the same to the said , with power to take lawful measures which I might myself have taken for the full recovery and enjoyment of all rights and provisions in the said instrument.

Witness my hand and seal at this day of , 19 .

Witness:

(Signature, Seal.)

455 Transfer of Part Interest in Option.

John Jones, being the holder of an option for purchase of the and having agreed to sell a half interest therein to and of the same place, IT IS HEREBY AGREED between the said three parties as follows: The purchase price of the property is to be Dollars, to be paid by the said and in cash forthwith on the production of transfer in the joint names of the parties thereto, said sum of Dollars to be in full of the purchase price of the said , sufficient thereof being paid to the registered owner of the property to pay him in full and secure title and the balance to be paid to the said in full of the half interest in the said option. If necessary all parties agree to place a loan on the said quarter for such sum as they consider advisable not exceeding Dollars, in order to assist in financing of the deal. In the event of transfer issuing to the said property in the name of the said only, he hereby agrees to re-transfer to the said and their interest therein as above set out and to do all other acts necessary to perfect title in the names of the three jointly. The consideration hereof is the sum of one dollar now paid by the said and to the said , the receipt of which sum is hereby acknowledged, and the performance of the covenants by the above parties respectively to be performed. Upon request said and agree to loan said up to Dollars on his interest in said property, he signing a second mortgage enabling them to raise up to Dollars.

(Signed.)

The parties above named agree to sell the said if possible for Dollars up to the 1st of (June) and Dollars at any time thereafter and each agree to ratify and confirm any sale provided the price is not less than the sum stated. The first privilege to buy to be given to each other of the said parties to this agreement.

(Signed.)

456 Offer to Exchange.

I, of the of in the of and do hereby make of the of in the of the following offer through , Real Estate Agent, that is to say, I will exchange my property situate in the of Lot No. , Plan , registered in the Registry Office, for the following property, namely: (*Give description sufficient to identify it.*)
Lot No. , Plan , registered in the Registry Office
Neither of us to furnish any Abstract of Title, Deed, Copies, Proof or Evidence of Title not in our possession each of us to search the title at our own expense. Interest, Rent, Insurance Premiums, Taxes, Local Improvements, Assessments, Sewer and Water Rates to be adjusted between us up to date of Transfer.

This offer good for days, and if accepted within that time, all Deeds, Agreements and Transfers to be completed and handed over within days from date of acceptance. Objections to Title to be made in writing within days otherwise Title to be considered perfect.

And I agree to pay the regular commission to

As witness my hand and seal this day of , 191 .

Witness:

(Signature, Seal.)

I, , do hereby accept offer of exchange and conditions, and do hereby agree to carry out the terms and conditions above named.

I agree to pay the regular commission to

As witness my hand and seal this day of , 191 .

Witness:

(Signature, Seal.)

457 Lease with Option to Purchase.

Care must be taken in the wording of an option to purchase. For instance, a lease may contain a covenant that should the lessee, his heirs, his executors, administrators, or assigns choose to purchase, the lessor would on notice, etc., convey the *fee* to the lessee, his heirs and assigns. In this case the executor or administrator could not exercise the option to purchase, because the lessor only covenanted to convey to the lessee or his heirs and assigns. (27 Ch. D. 394).

A makes a lease to B for five years, and in the lease is an agreement that if B decides to purchase the property within a limited time, A will convey it to B for a certain sum. If A should die, B may still exercise the option within the specified time. If A should make a will after making the lease, and give all his real estate *generally* to C, and all his *personal estate* to C and D, and B should exercise the option after the death of A, C would be compelled to convey the property to B, and the money being held to be part of the *personal estate*, D would be entitled to one-half of it.

On the other hand, if the testator had *specifically* devised the lands which were subject to the option to C, in that case the purchase money would go to the specific devised C. (Drant v. Vause, 1 Y & C C, C. 580).

But where a testator *after* making his will, devising his real estate *specifically* to one and bequeathing the residue of his personal estate to another, enters into a contract giving an option of purchase of such real estate, and the option is exercised after his death the real estate is held to be converted and goes to the residuary legatee. (Weeding v. Weeding, 1 J & H, 424).

458 Deed of Land.

A warranty deed with full covenants is one that guarantees a perfect title and quiet enjoyment of property to the purchaser and his heirs and assigns after him. The covenants are all written out at length, but owing to the expense of registering they have been legally "boiled down" so as to express all the covenants in fewer words, and thus called a Warranty Deed with abbreviated covenants. Printed forms kept by leading stationers.

The following is the Ontario short form of Statutory or Warranty Deed with abbreviated covenants:

This Indenture made (in duplicate) the first of November, in the year of our Lord one thousand nine hundred and ten, IN PURSUANCE OF THE SHORT FORMS OF CONVEYANCES ACT.

BETWEEN James Smith, of the Township of King, County of York, and Province of Ontario, merchant, of the first part, and

Mary Jane Smith, wife of the party of the first part, of the second part, and Walter Winters, of the Township of King, County of York, and Province aforesaid, yeoman, of the third part.

WITNESSETH that in consideration of Three Thousand Dollars ($3,000) lawful money of Canada, now paid by the said party of the third part to the said party of the first part (the receipt whereof is hereby acknowledged), he, the said party of the first part, DOTH GRANT unto the said party of the third part, in Fee Simple.

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of King, County of York, and Province of Ontario, containing by admeasurement one hundred acres, be the same more or less, being composed of the south part of Lot Number 19, in the 7th Concession of the Township of King, aforesaid.

TO HAVE AND TO HOLD unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use FOREVER, SUBJECT NEVERTHELESS, to the reservations, limitations, provisos and conditions expressed in the original GRANT made thereof from the Crown.

The said party of the first part COVENANTS with the said party of the third part, THAT he has the right to convey the said lands to the said party of the third part, notwithstanding any act of the said party of the first part.

And that the said party of the third part shall have quiet possession of the said lands, free from all encumbrances.

And the said party of the first part COVENANTS with the said party of the third part that he will execute such further assurances of the said lands as may be requisite.

And the said party of the first part COVENANTS with the said party of the third part that he has done no act to encumber the said lands.

And the said party of the first part RELEASES to the said party of the third part ALL HIS CLAIMS upon the said lands.

And Mary Jane Smith, the party of the second part, hereby bars her dower in the said lands.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, Sealed and Delivered in presence of C. ROY ANGER.

JAMES SMITH. (L.S.)

MARY JANE SMITH. (L.S.)

AFFIDAVIT OF WITNESS.

COUNTY OF YORK, TO WIT: I, C. Roy Anger, of the City of Toronto, County of York, and Province of Ontario, student, make oath and say:

1. That I was personally present and did see the within instrument and duplicate duly signed, sealed and executed by James Smith and Mary Jane Smith, two of the parties thereto.

2. That the said instrument and duplicate were executed by the said parties in the Township of King.

3. That I know the said parties.

4. That I am a subscribing witness to the said instrument and duplicate.

SWORN before me in Toronto, in the County of York, this first day of November, A.D. 1910.

C. ROY ANGER.

JOHN H. WILLIAMS, *a commissioner for taking affidavits in the County of York.*

459 Deed Under Torrens System.

The following is the Ontario form for the transfer of land under the Land Titles system:

I, William James Smith, of the City of , in the County of , merchant, the registered owner of the freehold land registered in the office of Land Titles at , as Parcel 1234, in the Register for Section A, in consideration of the sum of Three thousand dollars paid to me, transfer to John Henry Jones, of the City of , in the County of , butcher, the land hereinafter particularly described, namely; All and singular that certain parcel or tract of land and premises situate, lying and being in the City of , in the County of and being composed of Lot number Ten on the East side of Blank Street, according to Plan 404 E, registered in the office of Land Titles at , being the whole (or part) of the said parcel.

(If married, add:

And I, Elizabeth Ann Smith, wife of the said William James Smith, hereby bar my dower in the said land.)

Dated the day of , one thousand nine hundred and .

Witness:

JOHN THOMAS.

W. J. SMITH.

(ELIZABETH A. SMITH.)

I, William James Smith, the transferor named in the above transfer, make oath and say:

That I am of full age and unmarried.

(Or, That the above named Elizabeth Ann Smith is my wife, and we are both over the age of 21 years.)

Sworn before me at the City of ,
in the County of , this
day of 19 . W. J. SMITH.

A. B., *a commissioner, etc.*

In this system it must not be forgotten that it is not the execution of an instrument that transfers the title, but its registration in the Land Titles Office. For deeds in fee simple one instrument is sufficient.

460 Quit Claim Deed.

A quit claim deed is made by a person who does not hold a perfect title to a property in favor of some one that has a claim to the property. It is much like an ordinary deed, without the *covenants*. It conveys only the party's interest in the property without any guarantee of title. It would be used when a mortgagee purchases the land already mortgaged to him, the covenants being already made in his favor in the mortgage. It would also be used when heirs in common of an estate quit their claim to one another and to executors; and where the vendor has only a life estate in the property he is selling.

461 Form of Quit Claim Deed.

This Indenture made (in duplicate) the first day of October, in the year of our Lord one thousand nine hundred and ten.

BETWEEN James Smith, of the Township of Stamford, County of Welland, Province of Ontario, merchant, of the first part; and Walter Winters, of the Township of Stamford, County of Welland, Province aforesaid, yeoman, of the second part.

WITNESSETH that the said party of the first part, for and in consideration of the sum of Three Thousand Dollars ($3,000) of lawful money of Canada, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged), has granted, released and quitted claim, and by these Presents doth grant, release and quit claim unto the said party of the second part, his heirs and assigns forever, all estate, right, title, interest, claim and demand whatsoever, both at law and in equity or otherwise howsoever, and whether in possession or expectancy of him the said party of the first part, of, in, to or out of

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the Township of Stamford, in the County of Welland, Province of Ontario, containing by admeasurement one hundred acres, be the same more or less, being composed of the south part of Lot No. 19, in the Seventh Concession, in the Township of Stamford, aforesaid.

To have and to hold the aforesaid lands and premises, with all and singular the appurtenances thereto belonging and appertaining unto and to the use of the said party of the second part, his heirs and assigns forever.

Subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, Sealed and Delivered in presence of CHARLES SUMMERS. } JAMES SMITH

Received on the day of the date of this indenture the sum of Three Thousand Dollars ($3,000).

Witness: CHARLES SUMMERS. } JAMES SMITH

462 Trust Deed.

A trust deed is one made to a person called a trustee, conveying property to him to be held in trust for some other person. The Statute of Limi-

tations does not apply in such cases. He is empowered by the conveyance to carry out its provisions whatever they may be, as to collection of rents, sale of property, etc., and for investment of the funds. He cannot use the property for his own personal benefit. The person for whose benefit the trust is held cannot exercise any authority over it.

463 Deed of Gift.

A deed of gift of property from father to son, or from husband to wife, or wife to husband, etc., with "natural love and affection" for the *consideration*, is valid, unless done on the eve of insolvency to defraud creditors, when a creditor may have such conveyance set aside.

If a husband deed his property to his wife to save it from his creditors, he cannot thereafter compel her to re-convey it to him, for *natural love and affection* is as valid a consideration as a *money consideration* is, and the registration of the deed makes it final, and irrevocable by the donor.

A gift of chattels by mere word of mouth is good, if accompanied by delivery; but a gift of chattels by *deed* is binding without delivery.

464 Tax Sale Deeds.

All the Provinces allow the sale of lands for arrears of taxes if there is no personal property from which the tax may be recovered. The title to property derived from a tax sale extinguishes all other titles, heirs included, if the sale was legal and the proceedings according to Statute. In Ontario after three years the land may be sold.

Where the land sold is under the Land Titles Act the purchaser should file a Caution immediately.

466 Purchaser May Restrict Nature of His Title.

In purchasing land a man should decide when having the deed made how he wants to hold it, either:

1. In his own name, his wife holding her dower in the ordinary way, in those Provinces allowing dower; or,
2. In his own name, his wife having no dower in it; or,
3. In his wife's name, he having no interest; or,
4. In the name of man and wife, each having a half interest as partners; or,
5. In the names of man and wife jointly, so that when one of them dies the other owns it all without the formality of a will or any other process. See "Joint Owners."

468 Observances in Writing Deeds.

Any person may write a deed who is capable of describing the property, and it will be legal, but in most of the Provinces they would not dare to make a charge for so doing unless they held the proper license, or were a duly qualified solicitor, etc., and they would not become personally liable for a mistake. In Ontario a charge could be made. The Christian names of the various parties must be given in full. The deed should be written in duplicate, one for registration and one retained by the purchaser. There need also be a witness, who makes an affidavit that he saw the instrument signed. The affidavit may be made before a Registrar, Deputy Registrar, a Judge, a Notary, a Magistrate or a Commissioner for taking affidavits. The forms are practically the same for all the Provinces, and printed blanks can be obtained from nearly any stationer.

An agreement or deed may be signed and sealed, but it has no binding effect on the maker until it is *delivered* into the hands of the parties in whose favor it is drawn, or their representative.

Where there is any contradiction between different parts of a deed or other document, the part that is in writing holds against the part that is printed; and in mortgages what is written first over the last; but in wills the last written holds over the first.

When land is conveyed to a corporation it is made to "their successors" instead of their "heirs;" and to their "successors in office," where a conveyance is made to trustees. Corporation deeds do not need the affidavit of the witness, as the affixing of the corporate seal of the corporation or company is sufficient evidence of genuineness when signed by their chief officer.

469 Who Should Sign a Deed.

Every person who has anything yet to perform should sign the deed. If the purchaser paid the whole purchase price, hence having nothing further to do, he would not sign. If, however, there was a mortgage or claim that he had covenanted to pay off, or to allow a portion of the property to be used as a lane or way, etc., then he would be required to sign so as to bind himself.

For land in which a wife would have no dower she would not be required to sign a deed or mortgage. For this reason the wife does not usually sign a chattel mortgage, unless part of the goods mortgaged belong to her.

470 Registration of Deeds.

All instruments respecting titles of real estate should be registered in the Registry Office, or Land Titles Office of the County or Registration District in which the property is situate as soon as possible after their execution, as all documents take precedence according to priority of registration, whether under the old system or under the Torrens System.

Also, if a deed or mortgage should be lost or destroyed, a duly certified duplicate can be had at any time from the Registrar for a small fee. For twenty-five cents the title of any property may be examined and copies taken from documents respecting it.

The fees for registration vary, according to the number of words in the deed.

All deeds and documents to be registered must be verified by affidavit in proper form of a subscribing witness present at the time of signing.

475 Torrens System of Lands Transfer.

The Torrens System of Lands Transfer has come to us from Australia. A similar system has been in force in England for centuries under the name of Copyhold. It is now in force in Manitoba, Alberta, Saskatchewan, North-West Territories, British Columbia and Ontario. So far in Ontario it has been adopted by the County of York and City of Toronto, County of Elgin and City of St. Thomas, County of Ontario, and the Districts of Algoma, Muskoka, Parry Sound, Nipissing, Manitoulin, Thunder Bay and Rainy River. Other municipalities may introduce it simply by by-law, which should be speedily done. It is referred to as the "Land Titles Act."

If landowners really knew the advantages of this system over the medieval system now in vogue, and the money it would save in *searching titles* every time property changes owners, they would not lose any time in asking the county councils to pass a by-law adopting the Torrens System. But they do not know, hence the waste goes on.

Lands granted by the Crown since the introduction of this system are subject to this Act, and the old cumbersome system of conveyancing cannot be used, but all dealings with such lands must be recorded on the "Certificate of Title." All other lands may be brought under the Act on the application of the persons interested and payment of a small fee.

The application, with the deeds, is left at the Land Titles Office, where the necessary blanks and all information may be obtained. The title is there fully investigated, and if found secure against ejectment or against the claims of any other person, the proprietor will receive a "certificate of title," which operates as a government guarantee that the title is perfect and there is no going behind it. If a certificate of title should be issued to the wrong person the government is liable for the damages to the injured party. The certificates are issued in duplicate, one being given to the proprietor and the other retained in the Land Titles Office. Crown grants of land bought since the Act came into force are also issued in duplicate. The one retained in the office constitutes the Register Book.

Therefore, if a proprietor wishes to mortgage, lease, or in any wise encumber his land he executes a memorandum of such mortgage in duplicate or lease in triplicate, which he presents at the Land Titles Office with the "certificate of title." The proper officer makes a record of the transaction on the certificate of title, and also on the duplicate certificate which is in the office. This constitutes the registration of the instrument, and a note under the hand and seal of such officer of the fact of such registration is made on both duplicates of the instrument, one duplicate is then filed in the office and the other handed to the mortgagee or lessee; thus each party will have a certificate showing him exactly the nature of his interest.

In some of the Provinces the Land Titles Office retains the "certificate of title" when a mortgage is registered, and a "certificate of charge" issued to the mortgagee, but in Ontario the mortgagee holds the certificate of title in the same way he holds the title deeds under the old system.

In none of the Provinces will a certificate of title be issued to a mortgagee, but he may procure a certificate of charge.

In all the Provinces when the registered owner transfers any parcels of the real estate the transfer must be entered on the duplicate certificate in the Land Titles Office, and when all the land embraced in the certificate of title have been transferred the certificate of title must be returned to the office.

A copy of the Act and the Forms may be procured from "The King's Printer," Toronto, Winnipeg, Regina, etc., for the respective Provinces.

480 Ditches and Water Courses Act.

All the Provinces have a "Ditches and Watercourses Act" giving the municipalities power to deal with the question of small streams and drainage, so that in localities where ditches need to be made and the owners of the properties affected cannot agree as to the nature of the drain, or the

division of the cost, they may apply to the clerk of the municipality for such work to be done under the provisions of the Act, and the cost equitably distributed among the properties benefitted.

Whenever stagnant water is allowed to remain within the limits of any municipal corporation any person has a right of action against the corporation on behalf of himself and other residents to compel the corporation to abate the nuisance. There may also be a right of action for damages. Tarry v. Ashton (1876), 1 Q.B.D. 314.

481 Natural Water Courses and Ditches.

A stream or creek flowing through the lands of various persons cannot be diverted to another course without the consent of all the parties who are beneficially affected by such stream passing through their lands.

Surface or other water flowing from the property of one neighbor across the lands of others, and a watercourse, either by artificial, or natural wear of the water having been formed, such ditch cannot be closed up by the owner of any of the lands through which it passes and thereby do injury to other lands by the water backing up and flooding such lands without rendering such person liable in damages.

Lands adjoining a road or highway where the natural course of the water is towards the road may be drained therein, and the municipality is required to provide an outlet for the surface and other water which naturally flow to such road. In case no such outlet is provided the municipality is liable for any damage that may be thereby occasioned other property that may be flooded.

483 Line Fences.

The Legislature of each Province has definitely settled the duties of adjoining property owners or occupiers in respect to fences which mark the boundary between them, and provided an inexpensive way of arbitration for settling disputes over such division fences.

Owners of occupied adjoining lands are required to make, keep up and repair a just proportion (usually one-half) of the fence which marks the boundary between them; and owners of unoccupied lands which adjoin occupied lands shall, upon their being occupied, be liable to the duty of keeping up and repairing such proportion the same as though they occupied the land.

484 Arbitration Concerning Line Fences.

All questions relating to division fences in cities are governed by a city by-law, and in cases where owners of adjoining properties cannot agree as to the quality of fence between their lands, or one refuses to erect any fence, or to share the cost of a division fence, the dispute may be quickly settled by the provisions of such by-law. In Toronto it would be the Property Commissioner and two arbitrators, one to be chosen by each of the two parties. Parties living in other cities can ascertain the name of the proper official by inquiry at the office of the city clerk.

In the rural municipalities the question of disputes concerning division fences would be settled by arbitration of the Fence Viewers. They are allowed $2.00 a day for their services.

In Ontario either one may send the following notice to the other party to the dispute that he will not less than one week from the service of such notice, cause three fence viewers of the locality to arbitrate in the premises:

"Take notice, that Mr. ....., Mr. ....., and Mr. ..... three fence viewers of this locality, will attend on the ..... day of ..... 19.., at the hour of ....., to view and arbitrate upon the line fence in dispute between our properties, being lots (or parts of lots) ..... and in the ..... concession of the Township of ..... in the County of .....

"Dated this ..... day of ..... 19..

"To C. D., A. B.,
"Owner of Lot No.. Owner of Lot No.."

485 Notice to Fence Viewers.

He would also send the following notice to each of the fence viewers not less than one week before their services are required:

"Take notice that I require you to attend at ..... on the..... day of ....., 19.., at ..... o'clock a.m., to view and arbitrate on the line fence between my property and that of Mr. ....., being lots (or parts of lots) Nos..... and.....in the.....concession of the Township of ....., in the County of .....

"Dated this ..... day of ....., 19..

"C. D. A. B.,
"Owner of Lot No..."

Both of the preceding notices must be in writing. The owner thus notified may within the week object to any or all of the fence viewers notified, and in case they cannot agree the Judge of the Division Court shall name the fence viewers who are to arbitrate.

In Manitoba the provision is the same as that for Ontario. If the municipality has not appointed fence viewers, then the parties may appoint three arbitrators, one appointed by each party, and those two appoint a third. If either party neglects to appoint a fence viewer after a demand in writing to do so, the other interested party may apply to a Justice of the Peace to appoint an arbitrator, who shall act as though appointed by the other party to the dispute.

Their award is filed with the County Court and has the force of a Judgment of the Court.

British Columbia is the same as Ontario.

If the other party objects to any or all three fence viewers named, and they cannot agree on fence viewers, then a Judge of the County Court may appoint three persons to act. Appeal from the arbitrators' decision would be to the Supreme Court.

CHAPTER XVI.

PERSONAL PROPERTY

495 Sale of Personal Property.

In the sale of personal property, as in all other contracts, the parties themselves must be *competent to contract*. The seller must have a *valid title* to the property to be sold; the property must be something *not forbidden by law* to be handled, and the sale must be without fraud.

1. A contract of sale may be absolute or conditional.

2. When under a contract of sale the *property in the goods* is transferred from the seller to the buyer the contract is called a *sale*; but when the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an *agreement* to sell.

3. An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred.

4. Selling personal property, which is still retained in possession, is binding as between the parties themselves, but is not binding against creditors or subsequent purchasers unless a Bill of Sale is registered.

497 When Sale is Legally Completed.

In sales that have been completed there is usually a delivery of the property and a continued change of possession, but not necessarily so. Goods yet in charge of a railway or in a warehouse may be delivered by simply handing over the bill of lading or warehouse receipt. This is called a "constructive delivery."

(*a*) When the contract for the sale of specific articles or goods is completed the right to the property is immediately vested in the buyer, as also the risk, and the right to the price in the seller, unless the contract specially provides otherwise.

If the buyer assumes the risk of the delivery or leaves the goods in possession of the seller and they are destroyed before delivery, it will be the loss of the buyer; but if the seller assumes the risk of delivery then the loss will be his. The courts have ruled "that where a *legal bargain* is made for the purchase of goods and nothing is said about payment or delivery the ownership nevertheless passes immediately so as to cast upon the purchaser all future risk," and the parties are in the same position as they would be after a delivery of the goods. If this fact is borne in mind it will remove all doubt in numerous cases of injury, or death of live stock, etc., between the time of purchase and removal of the goods or chattels. (See following section.)

(*b*) In case of live stock, for instance, say a team of horses were purchased and $20 paid on account of the price, with the agreement that they were to remain on the premises a few weeks, the sale would be completed and the *risk* as well as the *ownership* would pass to the *purchaser*. If either of them should die or be stolen before removal the vendor would not be responsible for the loss unless it could be shown that the death or loss was occasioned by his gross or wilful negligence. If he can by reasonable or

ordinary care prevent the animals from being stolen or from dying while in his possession, he is bound to exercise such care, and if he should neglect to do so, and loss result from such neglect, he will be liable to the purchaser to the extent of the loss.

498 Written Agreement for Sale of Goods.

Memorandum of agreement made this ..... day of ....., 19.., between A, of (place), of the one part, and B, of (place), of the other part, witnesseth:

That the said A agrees to sell and the said B agrees to buy the goods hereinafter mentioned, the property of the said A, for the price or sum of ..... dollars.

(Enumerate and describe the articles so they can be identified.)

(Signed) A.
(") B.

Agreements with corporations would need the corporate seal, but with other agreements relating to personal property, no seal is necessary.

The above simple memorandum of agreement would be binding between the parties themselves in all the Provinces for any amount of goods, or by a slight change for real estate.

In Manitoba a written agreement for the sale of goods not accompanied by actual delivery of same, is by statute, deemed to be a sale and is required to be registered same as a bill of sale.

500 When a Verbal Agreement Is Binding.

In all the Provinces the verbal or oral agreement to sell personal property is binding up to a certain sum, but beyond that amount it does not bind either seller or buyer, no matter how many witnesses there may be to the bargain.

In Ontario, New Brunswick and Nova Scotia anything under $40 will bind; but if the amount is $40 or more, it is utterly worthless.

In Manitoba, Alberta, Saskatchewan, North-West Territories, British Columbia, Yukon Territory and Quebec anything under $50 binds.

In Prince Edward Island, $30; Newfoundland and England, $50.

In each place if the amount is not *under* the figures here named, then in order to be binding, the contract must either be in writing, or a part or the whole of the goods delivered, or a part payment made.

But up to the amounts here named for the respective Provinces, a bargain made " by word of mouth " is every whit as binding as though it were in writing.

Retail merchants and other traders giving verbal orders to commercial travellers or others for a smaller sum than those respectively for the different Provinces named above cannot cancel their order, except by permission of the wholesale house or the manufacturing firm; and if the goods are not received when shipped in accordance with the order, the shippers have an action for damages, which would naturally be the price of the goods. But if the amount is over the sums named here for each Province, the order may be cancelled any time *before the goods have been actually shipped,* and the wholesale house or manufacturer has no option in the matter. Benjamin on Sales, page 88. Addison on Contracts, page 261.

502 Breach of Valid Contract of Sale.

If either party should violate a binding contract of purchase or sale, he would incur a penalty to the amount of damages the other party could

prove he had suffered by the breach of contract, which amount would naturally be the price of the article. Illustration: A cattle buyer agrees to purchase ten head of cattle from a stock raiser and pays $20 to bind the bargain, and is to take them within ten days. After he goes away he sees the market quotations show a great depreciation in foreign prices and he concludes not to carry out his contract. He cannot recover the $20 he paid. The stock raiser cannot compel him to carry out his contract, but he can sue him for the balance of purchase price and recover it.

It must be remembered that usually only such damages can be recovered as actually occur. When an article or goods have been bought for the purpose of resale, and if at the time of the purchase the existence of a sub-contract for the goods is made known to the seller, and the seller then makes default in delivering the property, the purchaser may either purchase the article from some other person to fulfil the sub-contract and charge the seller with the advance price he may be compelled to pay, or he may repudiate the sub-contract and recover damages from the seller and for whatever damages he may be charged with for breach of the sub-contract.

504 Bill of Sale.

Every written agreement for the sale of goods and chattels shall be deemed to be a sale, and if not accompanied by an immediate delivery and continued change of possession must be registered as a Bill of Sale in the office where Chattel Mortgages for that district are filed, in order to make such a sale binding against judgment creditors, and subsequent purchasers and mortgagees for value. It will be noticed here that a Bill of Sale differs from a Chattel Mortgage in that it is an absolute sale of the goods, and not merely a *lien* on them as a security for payment of a debt. (See form in following section.)

506 Form of Bill of Sale.

This Indenture made the fourth day of April, in the year of our Lord one thousand nine hundred and ten, between James Smith, of the Town of Welland, in the County of Welland, and Province of Ontario, merchant, vendor of the first part, and Walter Winters, of the City of Toronto, County of York, and Province of Ontario, gentleman, the vendee, of the second part.

WHEREAS the said party of the first part is possessed of the stock of dry goods and groceries and store and office fixtures hereinafter set forth, described and enumerated, and hath contracted and agreed with the said party of the second part for the absolute sale to him of the same for the sum of six hundred dollars.

NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of six hundred dollars of lawful money of Canada, paid by the said party of the second part, at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged), he, the said party of the first part, hath bargained, sold, assigned, transferred, and set over by these Presents doth bargain, sell, assign, transfer and set over unto the said party of the second part, his executors, administrators and assigns, ALL THOSE the said dry goods and groceries and store and office fixtures, as per inventory hereunto attached and marked "A."

AND all the right, title, interest, property, claim and demand whatsoever, both at law and equity, or otherwise howsoever, of him the said party of the first part, of, in, to and out of the same and every part thereof.

TO HAVE AND TO HOLD the said hereinbefore assigned dry goods, groceries and store and office fixtures and every of them and every part thereof, with the appurtenances, and all the right, title and interest of the said pary of the first part thereto and therein, as aforesaid, unto and to the use of the said party of the second part, his executors, administrators and assigns, to and for his sole and only use forever.

And the said party of the first part doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with the said party of the second part, his executors and administrators, in the manner following, that is to say: That he, the said party of the first part, is now rightfully and absolutely possessed of and entitled to the said hereby assigned dry goods, groceries and store and office

fixtures, and every part thereof; and that the said party of the first part now hath in himself good right to assign the same unto the said party of the second part, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these Presents; and that the said party hereto of the second part, his executors, administrators and assigns, shall and may from time to time, and at all times hereinafter, peaceably and quietly have, hold, possess and enjoy the said hereby assigned goods and fixtures and every of them, and every part thereof, to and for his own use and benefit, without any manner of hindrance, interruption, molestation, claim or demand whatsoever of, from or by him the said party of the first part, or any person or persons whomsoever and that free and clear, and freely and absolutely released and discharged, or otherwise, at the cost of the said party of the first part, effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and encumbrances whatsoever.

And, moreover, that he, the said party of the first part, and all persons rightfully claiming, or to claim, any estate, right, title or interest of, in, or to the said hereby assigned goods and fixtures and every of them, and every part thereof, shall and will from time to time, and at all times hereafter upon every reasonable request of the said party of the second part, his executors, administrators or assigns, but at the cost and charge of the said party of the second part, make, do and execute, or cause or procure to be made, done and executed, all such further acts, deeds and assurances for the more effectually assigning and assuring the said hereby assigned goods and fixtures unto the said party of the second part, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these Presents, so by the said party of the second part, his executors, administrators or assigns, or his counsel shall be reasonably advised or required.

IN WITNESS WHEREOF the said party to these Presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in presence of CHARLES SUMMERS. } JAMES SMITH. ✺

Affidavit of purchaser as to the sale being *bona fide* for value:

COUNTY OF YORK, TO WIT: } I, Walter Winters, of the City of Toronto, in the County of York, the vendee in the foregoing Bill of Sale named, make oath and say:

That the sale therein made is *bona fide*, and for good consideration, namely, the actual present payment in hand to the vendor by the vendee of the sum of six hundred dollars, and not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of the said bargainor, or any of them.

SWORN before me at Toronto, in the County of York, this 4th day of April, A.D. 1910. } WALTER WINTERS.

JAMES BROWN, *a commissioner for taking affidavits in H. C. J.*

AFFIDAVIT OF WITNESS.

COUNTY OF YORK, TO WIT: } I, Charles Summers, of the City of Toronto, in the County of York, make oath and say:

That I was personally present and did see the within Bill of Sale duly signed, sealed and delivered by James Smith and Walter Winters, the parties thereto, and that I, this deponent, am a subscribing witness to the same. And that the name Charles Summers, set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent, and that the same was executed at the City of Toronto, County of York, on the 4th day of April, A.D. 1910.

SWORN before me at the City of Toronto, County of York, this 4th day of April, 1910. } CHARLES SUMMERS.

JAMES BROWN, *a commissioner for taking affidavits in H. C. J.*

507 Barter vs. Sale.

Barter is where one article is given in exchange for another or for services, and if there is no warranty given as to the soundness or quality the

property in each passes with the delivery of the article and the exchange is complete. Neither party can forcibly or otherwise take the article back he bartered away, except by consent of the other, without becoming liable to an action for theft and also for damages. In a *sale* the price is payable in *money.*

510 Sales on Trial.

When articles are purchased on trial at a certain price they must be rejected before the time expires if they do not suit, or the sale is complete, and the party bound to keep them.

The purchaser must also put the article away in some safe place where it will not be liable to receive damage, as he then occupies the place of a bailee and would be liable for even slight negligence if the article received injury. See "Bailment."

511 Selling Under Guarantee.

The descriptions of machinery as to manner and excellence of work, or the quality of other goods, that appear in newspaper advertisements and circulars cannot be made a binding guarantee to protect the purchaser. To have an effective guarantee of excellence or that the machine or instrument will do what is claimed for it in the circulars, it must either be in a definite form of a guarantee, or in a written or typewritten letter. The courts allow for a good deal of what may be called exaggeration in mere advertisements.

What is said in circulars is merely "a statement of intention," and not a guarantee. If it is absolutely untrue it makes a difference, as it would then be a case of false pretence.

If an agent were to say what the circular says, and on the strength of that statement you buy the machine, you could cancel your contract on the ground of deceit, but you would have to be in a position to prove it if he did not put it in writing.

In cases where there is a verbal warranty by the agent besides, and perhaps differing from the statement in the circular, you cannot take both, but must elect which one you will rely on to support your case.

A warranty given at the time of the sale of chattels is good, but a warranty after the sale is not good, because there is nothing to support the subsequent agreement. (Benjamin, page 606.)

In regard to live stock, if the purchaser wishes that a "warranty" shall be part of the contract he must make that clear when the bargain is made, so that an express or implied statement with regard to the qualities, disposition, soundness or age of the animal would operate as a warranty. Shand v. Bowes, 2 A.C. 480.

In Alberta, Chap. 15 of 1913, provides that in the sale of farm machinery (not second-hand) of every description any covenant or condition the agreement may contain, if a Judge deems it unreasonable he may set it aside. And in selling such implements the person effecting the sale is held to be the agent of the vendor, and the vendor is made responsible for all the representations of such persons; and notwithstanding any agreement to the contrary, all such farm machinery is held to be guaranteed and warranted to do the work for which it is intended, and, with proper care and use, to be reasonably durable.

512 Sales by Sample, or Description.

Sales by sample or description are made on the warranty, either implied or expressed, that the goods when delivered will correspond in kind and quality with the description given or sample shown, and if such is not the case, there is no binding sale, and the article should not be retained or used. If the seller agreed to remove the article if unsatisfactory, the notice should be given as per agreement, and the article cared for until removed. If a cumbersome machine were left an unreasonable time, it must still be cared for, but storage could be charged and collected before delivering the property.

In case of dispute between the seller and the buyer before the seller can recover payment he must prove that the goods for which payment is sought are the actual goods sold.

513 Sale of Stolen Goods.

Selling stolen goods does not give them a good title in the hands of an innocent purchaser for value, as it does in the case with promissory notes. They can be retaken wherever found. Receiving stolen goods, knowing them to be stolen, is an indictable offence. Punishment—Fourteen years' imprisonment.

514 Auction Sales.

The auctioneer is the agent for both the seller and the buyer; hence, binds both by his acts. When he is selling, he is acting as agent for the seller, but in the act of "knocking down" the article to a certain bidder he is agent of the purchaser, and in the memorandum of the sale he makes in his book he acts for both parties, and binds both. Auctioneers' licenses are granted by counties and cities, who may charge a fee, and also give special rules for their governance; and no other person may sell by public auction.

In Ontario, and probably all the Provinces, a merchant could not sell his own goods by public auction without a license.

Bailiffs who sell goods under distress for rent need no license.

An auctioneer in selling goods is subject to the "Statute of Frauds," as to the amount for which a "verbal agreement" is binding in the Province in which the sale takes place unless the auctioneer makes the entry of sale himself. He cannot transfer his authority as agent to the clerk who is making the memorandum; therefore, the bargain between seller and buyer is only a verbal one in all cases where a clerk makes the entry of sale.

515 Sale of Accounts or Choses in Action.

Merchants' accounts and every form of debt due a person or chose in action may be sold by *assignment* as readily and validly as negotiable paper may be by delivery and endorsement. The following brief instrument is sufficient:

> *For value received, I hereby sell, assign and transfer to (person's name) the accompanying accounts and claims against the persons whose names are enumerated (enumerate the names and accounts).*
>
> (Date.) J. WINTERS.

The debtor should be notified at once that the account has been transferred and that he is to make payment to the assignee. The creditor, as a matter of courtesy as well as business, would generally notify his former customer that he had transferred the account.

(*a*) A brief notice similar to the following would answer:

Dear Sir,—

Take notice that I have this ..... day of ....., 19.., assigned to C. D., of (place), the debt (or account) of ..... dollars due from you to me; and I hereby request you to pay the said sum to him forthwith, and I declare that his receipt for the same shall be a sufficient discharge to you from the said debt. Yours, etc.,

To (name). A. B.

516 Assignee Notifying Debtor of the Transfer.

Dear Sir,—

I, the undersigned, of (place), hereby give you notice that the debt of ..... dollars owing by you to Mr. ..... has been this day assigned to me, and I require you to pay the same to me.

Dated this ..... day of ....., 19..

(Signature and Address).

After receiving such notice either from the creditor or the assignee, the debtor can only legally pay the debt to the assignee.

The transfer of a debt by assignment is not like transferring a negotiable instrument before maturity by indorsement, which gives the holder a right to collect the face of the paper without regard to any counter-claims the maker might have against the payee. But the transfer of a debt by assignment does not shut off any counter-claims the debtor may have against the assignor at the date of the transfer; therefore the assignee is bound by all the rights and equities of the defendant who could set off counter-claims, or damages allowed by the jury. The assignee merely takes the place of the creditor at the date when the assignment was made.

In Saskatchewan, an assignment or sale by any retail merchant or trader, of book debts or accounts must be in writing, verified by affidavit and registered the same as a chattel mortgage or bill of sale. Chapter 46 of 1912-13.

517 Form of Assignment of Debt.

The following form of assignment with warranty is preferable to the briefer form under "Sale of Accounts":

Know all men by these Presents that I, ..., of ....., in consideration of..... dollars to me paid by ....., of ..... (the receipt whereof I hereby acknowledge), do hereby assign to the said ..... absolutely, a certain debt owing to me from ....., of ....., for (goods supplied or as case may be), and all and every sum or sums of money now due, or to become due thereon, and I hereby warrant that the said debt is still due and owing to me from the said ....., and that I have not previously assigned or encumbered the said debt or any part thereof.

In witness whereof I have hereunto set my hand and seal this ..... day of ....., 19..

Signed, sealed, etc. Signature.

518 Default of Payment Under Sales or Agreements For Sale.

In the absence of fraud, misrepresentation, defects in quality, or damage through shipment, etc., if payments are not made according to contract, the following are general remedies provided:

1. Where goods are sold on credit, without any lien reserved, and payments are not made, the vendor's only remedy is by suit. He cannot

reclaim the goods either in the hands of his debtor or any person to whom they may have been sold.

2. Where goods are sold under a lien note or agreement, and payments are not made according to contract, the vendor's remedies are discussed under "Conditional Sales," which see. (N.B.—As in this case, the purchaser does not obtain the title of ownership until the goods are paid for, if he should sell them before fully paid for, this subsequent purchaser does not get a good title, and the legal owner may retake them.—See "Wrongful Conversion.")

3. As regards default in payment under a chattel mortgage, the mortgage always provides the remedies.—See "Chattel Mortgages."

4. In regard to real property sold under an agreement to purchase, and payments not being made according to contract, or failure to perform any other covenant included therein, a properly worded agreement will provide the remedies. The usual remedies, however, are:

(*a*) Suit for payment of amount due.

(*b*) Action for cancellation of contract, which, in some cases, would include damage for breach.

(*c*) Specific performance, an action to enforce the contract according to its exact terms.

520 Stoppage in Transitu.

Goods not yet paid for, having been shipped to the purchaser may be stopped by the unpaid seller while they are in transit under certain well-defined conditions.

If after shipping the goods the seller receives an intimation that the purchaser has become insolvent or is on the eve of insolvency, he may forbid the delivery of the goods to the purchaser, and the carrier company must obey such order, if it still holds the bill of lading.

If it should turn out, however, that the purchaser is not insolvent, then the seller who unlawfully stops the goods in transit may be required to make good the purchaser's loss, or to deliver the goods and pay damages sustained by the delay in delivery.

The right of *stoppage in transitu* ends when the goods have been legally delivered by the carrier or wharfinger to the purchaser. The delivery of the bill of lading to the buyer is *ipso facto* an actual delivery of the goods.

The purchaser, however, may extinguish the vendor's right of stoppage in *transitu* before the *transitus* is ended:

1. By transferring the bill of lading to a *bona fide* purchaser for value, or

2. When instead of selling the goods the bill of lading is transferred to a *bona fide* pledgee, as security for an advance, or a debt.

522 Bailment—Bailor, Bailee.

There are many transactions taking place in every community which involve the rights, duties and obligations of bailor and bailee, hence a section covering that subject belongs to this chapter.

Bailment is the delivery of goods in trust by one person to another for a specific purpose, and the acceptance by the other party of such goods on a trust express or implied to be delivered up at the time agreed upon or when the contract is complied with.

Bailor is the one owning the property: the bailee the one to whom the property is entrusted.

A carter of goods, a carrier, as railway, steamer, express company, are bailees, so is a tailor of the goods to be made into a suit, and a bank for the keeping of securities or even jewels that may be deposited in the vault for safe keeping.

The obligations of the various classes may be summarized as follows:

1. Where goods are left in care of another without payment, merely taken as a matter of friendship. Such bailee would only be liable if loss occurred through his gross neglect.

2. Where goods are left in care of another person for hire. Such person would be liable if loss occurred through ordinary negligence.

A horse and carriage hired from a livery or any person would come in this class.

3. Where goods are left in the hands of a person to be sold, say on commission. The consignee in such case must exercise ordinary diligence in caring for the goods, such diligence as a prudent man would give to his own goods. He has a lien on the goods for all his charges and commission.

4. Where property is borrowed to be used for the benefit of the borrower. In such cases where nothing is paid as compensation the borrower is required to exercise the utmost diligence in caring for the property and will be required to make good any damage.

In cases where property thus loaned is not returned the owner has the choice of two or three kinds of action. He can replevy or sue for the recovery of the goods, or sue for the value.

5. When property is left as a pledge or collateral security for a debt or loan, the holder must use ordinary diligence in caring for the goods, and if the debt is not paid the holder may dispose of the goods according to the contract.

"Ordinary diligence" in caring for the article depends more on fact than on law, as there are many circumstances which must be taken into account in each case of bailment. It means in each case the diligence which a prudent person would exercise in his own matters of similar nature. Vaughan v. Newlove, 3 Bing. N.C. 468, 475.

The duty of a bailee is to put the article to no other use than that for which it is taken, to use it well and restore it at the appointed time. If he sells it or parts with it the bailor may recover the chattel from the person in whose possession it has passed, or he may sue him for the price.

525 Conditional Sales of Personal Property.

Conditional sales are what have been referred to under the head of "Lien Notes," which see. Newfoundland has no Conditional Sales Act.

In selling sewing machines, organs, pianos, agricultural and other machinery, it is common to sell them under a *lien agreement*, the buyer obtaining the *possession and use* of the article, but the seller retaining the *ownership* until it is paid for. These conditional sales are binding and enforceable by *common law*, and all the Provinces recognize them; but each of the Canadian Provinces has enacted special legislation, some of them to protect the interests of innocent third parties, but all of them to protect the *unpaid seller*, if he complies with the requirements of the Act.

Notwithstanding the misleading language of the Statutes in calling the agreement in a conditional sale a "hire receipt," the courts invariably construe the agreement as a conditional sale. A *hire receipt* is a different contract, and should not be confused with a binding agreement to sell, which

transfers the ownership of the article when it is paid for. Mason v. Johnson, 27 U.C.C., 208; Goldie and McCulloch v. Harper, 31 O.R. 288. So the vendee cannot relieve himself from liability to pay for the article by returning it, or offering to do so.

A man purchasing an article under these lien agreements and not acquiring the *ownership* of it, merely its *possession,* until it is paid for, if he were to sell it, could not give a good title, and the sale would be *fraudulent.* The real owner can recover the property from the person to whom it has been sold. Singer Co. v. Clark, 5 Ex. D., 37.

Landlords may seize and sell such property for rent, but they must pay the balance of purchase money. It is the same with execution creditors.

Also chattels purchased by the tenant, but affixed to the realty, remain subject to the *lien,* and the owner or a mortgagee can only retain such chattel by paying balance of purchase price. Hall Mfg. Co. v. Hazlet, 11 A. R., 749.

526 Conditional Sales Act of Quebec.

In Quebec these conditional sales, or sales under a lease, do not require registration.

Under Quebec law there is no such thing as a chattel mortgage, so there can be no subsequent mortgagee to acquire an interest in such goods as in the other Provinces.

If a party holding such goods should sell them, the sale is null and void, and the articles may be retaken from third parties who may have purchased them even in good faith, unless they were purchased at a fair, or market, or a public sale or from a trader dealing in such articles. The buyer could recover damages from the seller if he were ignorant of the fact that the goods did not belong to him. 1487 C.C.

Such goods are liable to the landlord for rent, unless and until the owner served a notice on the landlord that the goods belonged to him, and therefore could not be held as security for the rent. 1622 C.C.

Municipalities have no lien on such goods for taxes where the amount is due by the party in possession, and if a seizure should be made by the municipality the actual owner could obtain possession of his goods by means of an Opposition under Section 646 of the Code of Civil Procedure.

And if such goods are seized and sold under execution against the party in possession the proceeds of such sale could be claimed by the actual owner to the extent of his claim. 646 CC.

In default of any payment all prior payments are forfeited to the vendor in lieu of rent, if the agreement so states, and he can retake possession of his goods. Should the lessee refuse to allow the owner to take possession, he is entitled to take possession under a writ of Revendication.

527 Registration of Conditional Sales.

All the Provinces, except Quebec and Manitoba, require the registration of these conditional sales, under certain circumstances, in order to protect the vendor against subsequent purchasers for value or mortgagees without notice in good faith.

It must be noted that the classes of persons that the lien agreement would be void against if the provisions of the Conditional Sales Act are not complied with are "subsequent purchasers and mortgagees without notice in good faith," so that other parties—general creditors—could not come in, even if the Act is not complied with, for a *creditor* can have no

better right to his debtor's goods than the debtor himself has. Dominion Bank v. Davidson, 12 App. R., 92. Even buying at a sheriff's or bailiff's sale would not give a good title if the vendee had no title.

In Ontario the Lien Law provides that for these conditional sales in order to be binding against subsequent purchasers or mortgagees without notice in good faith for valuable consideration:

1. The agreement must be in writing, and signed by the bailee or his agent.

2. That a copy of the agreement shall be left with the vendee at the time of the sale, or within twenty days after the execution of the agreement.

3. That a copy of the agreement shall be filed within ten days of its execution in the office of the County or District Court, in all cases except the following:

(*a*) A contract respecting manufactured goods, including pianos, organs, and other musical instruments which at the time possession is delivered have the name and address of the seller painted, printed, stamped, or engraved thereon, need not be filed.

(*b*) A contract respecting household furniture other than pianos, organs, or other musical instruments need not be filed.

For all other goods and for live stock registration is necessary. Fee for filing is 10 cents.

In New Brunswick three things are required. (1) The name of the manufacturer must be printed, stamped or painted on the article. (2) A copy of the writing filed in the office of the Registrar of Deeds for that county within 15 days from the execution of such receipt note. Fee for filing, 10 cents. (3) The manufacturer or seller must leave with the purchaser a copy of the lien agreement or hire receipt at the time of sale or within twenty days from the delivery of the chattel.

On demand of any creditor or interested person the vendor is required to file with the registrar within twenty days a sworn statement of the amount due thereon, and if he neglects to do so he loses his rights against such creditor.

In Nova Scotia the agreement must be signed by the parties, with affidavit setting forth the contract and filed in the office where chattel mortgages are registered. If removed into another registration district it must be registered there within two months from such removal.

In Prince Edward Island to be binding against third parties one of two things must be done. Either (1) the name of the manufacturer must be printed, stamped on or otherwise attached to the article, or (2) a copy of the lien agreement or receipt note must be filed in the office of the Prothonotary or Deputy Prothonotary within ten days from execution. This does not apply to household goods, except pianos, organs or other musical instruments.

In Manitoba, the agreement must be in writing, signed by the person taking possession of the chattel, and in case of manufactured articles the name of the vendor must be stamped, or printed on it. The manufacturer or his agent must forthwith upon application of any interested party furnish information as to the amount yet due, and in case of neglect or refusal he is liable to a penalty of not less than $10, nor more than $50, on conviction by a Justice of the Peace.

Alberta and Saskatchewan. when for a sale of $15.00 or over to be binding against executions, attachments, subsequent purchasers or mortgagees without notice for valuable consideration, the agreement must be in writing, signed by the manufacturer or agent, or vendor, and such writing or a copy of it filed in the office of the Registration Clerk for Chattel Mortgages in the Registration district in which the purchaser resides, or where the goods are delivered, within thirty days from the actual delivery of the goods. And if such goods are removed after delivery to another district then a new registration must be made in such Registration district within sixty days from such removal, verified in each case by affidavit of the vendor or his agent that the sale is *bona fide*. They take priority from date of filing and hold good for two years. Fee for registration is 25 cents.

In Saskatchewan the agreement need not be registered if the name of the vendor is painted on or attached to by means of a plate or other similar device and such vendor keeps an office within the Province where enquiries may be made and information given respecting the amount yet owing for such goods. Such information must be given within five days after request.

Like chattel mortgages in both Provinces, if not paid sooner, there must be a renewal statement filed during the last 30 days before the expiration of the two-year period, and thereafter yearly from date of previous filing.

Any false statement in the renewal statement incurs a penalty not exceeding $100. The seller is also bound by the statement, and the payment of such amount cancels the debt.

In the Yukon and North-West Territories, if the amount is $15.00 or over, the agreement must be in writing and registered within thirty days from the delivery of the goods to the purchaser, in the office where chattel mortgages are registered in the registration district in which the buyer lives, or to which the goods may be removed, and verified by affidavit of the seller or his agent. It holds good for two years, and may then be renewed by filing a statement in the same office similar to the statement for the renewal of a chattel mortgage (which see). The statement must be filed during the last thirty days before the expiration of the two years, and thereafter the renewal must be annual.

For a false statement in the renewal statement the seller becomes liable to a fine not exceeding $100. Fee for registration of each document is twenty-five cents.

In the Northwest Territories if the goods are removed to another registration district, the agreement must be registered again within sixty days from such removal in the district to which they have been transferred.

In British Columbia all conditional sales are void against subsequent purchasers and mortgagees without notice in good faith for valuable consideration unless a true copy of the receipt, note or instrument is filed within twenty-one days from the delivery of the goods at the office where Bills of Sales are filed for that district. Here the articles need not bear the manufacturer's or vendor's name. On request by an interested party for a statement of amount yet due, the information must be given within five days or be liable to a penalty not exceeding $50. Fee for registration is twenty-five cents.

528 Vendor Retaking Possession.

Articles thus sold and the note not being paid at maturity, the seller may retake them at once, or he may sue on the note, and if he fails to

recover he may then retake the articles. It is not necessary to procure the help of an officer, but care must be taken not to commit a breach of the peace. If the conditional purchaser resists, force must not be used, but the article must then be taken by an "action of replevin," if it cannot be obtained peaceably by any other way; it would not be theft to take it without permission.

All those clauses in the agreements that are so commonly inserted, giving the vendor or bailor the right to break open doors and locks and retake the goods, are illegal, and if such criminal acts are committed the party who thus breaks in is liable to imprisonment.

When the vendor takes possession on default of payment and resells, it operates as a recision of the original sale and dissolves the contract Harris v. Dustin, 1 Terr. L. R., 404.

But if the agreement is that the vendee shall still be liable for the balance, if any remain after reselling the article, then the vendee may be sued for such balance. Arnold v. Playter, 22 O. R., 608.

529 Time Allowed to Redeem Before Sale.

In Ontario, Alberta, Saskatchewan, and New Brunswick, goods thus retaken by the manufacturer or seller must be retained twenty days from the time possession was retaken before they can be sold to others, unless the agreement provided otherwise. Any time during those twenty days the purchaser may redeem them by paying arrears, interest and legal costs.

In Nova Scotia the article must be retained three months before being sold.

The North-West Territories, British Columbia and the Yukon require the goods to be retained for twenty days, even though the value of the goods is less than $15.00. In each case if the agreement fixed the time during which the property must be redeemed that would hold good.

530 Statutory Notice to Debtor of Sale.

In all the Provinces and North-West Territories, except Saskatchewan and Quebec, goods sold under these liens being thus retaken possession of for a breach of the condition, must not only be retained for twenty days, but cannot be sold without five clear days' notice to the debtor. The notice may be given orally or by letter. If sent by letter it should be registered and posted at least seven days before the day of sale. The said five days or seven days may be part of the twenty days in previous section.

In Saskatchewan and Alberta eight days' notice must be given, and if sent by mail the letter must be posted ten days before the sale. In Nova Scotia twenty days' notice must be given, by being left at his residence, or sent by registered letter 22 days before such intended sale.

531 Form of Notice to Debtor

To (person's name), of (place):

Sir,—Please take notice that at the expiration of five days from the service of this notice upon you, *to wit*, upon the ..... day of ..... 19.., I shall proceed to sell the following goods or chattel (describe the property) at the ..... in the ..... of ..... in the county of ..... province of ..... The said goods were taken possession of by me on account of a breach of condition in the conditional sale or promise of sale thereof to you by me. If you desire to redeem the said goods or chattel you may do so at any time within the twenty days required by Statute after the ..... day of ..... (the day of taking possession) on

payment of the sum of $...., being the amount in arrears on such conditional sale, together with the interests, costs and actual expenses incurred in taking possession.

Dated this ..... day of ....., 19... (Signed) .....

532 Creditors Asking Statement of Account.

In all of the Provinces any creditor or a prospective purchaser of an article thus covered by a lien may demand, and is entitled to receive, within a certain number of days after the demand from the manufacturer or vendor claiming ownership, full information concerning the amount yet due and the terms of payment. A refusal or neglect to furnish such information incurs a penalty not exceeding $50.00 upon conviction before a Stipendiary or Police Magistrate or two Justices of the Peace. Appeal from such judgment is to the Judge of the County Court without jury. The inquiry may be by letter, giving the name and post-office address, and a reply within the time allowed by registered letter to such address would be sufficient.

In Ontario, British Columbia, Saskatchewan and Alberta, the information must be given within five days. Manitoba forthwith. Nova Scotia and New Brunswick must, on demand file a statement of amount yet due, within twenty days or forfeit all rights against such inquirer.

533 Copy of Agreement to Be Given Vendee.

The Act requires that a true copy of the lien note or agreement be left with the vendee at the time of its execution, or within a certain number of days thereafter.

CHAPTER XVII.

MARRIED WOMEN'S PROPERTY RIGHTS.

540 Married Women's Property Rights.

An unmarried woman, either as spinster or a widow, is as free to contract as a man in all the Provinces, Newfoundland and England. But if she has a husband living some of that freedom is lost in the business complications growing out of, or inseparably connected with, the dual relationship. The following sections give in brief her rights and liabilities as a consort.

542 Married Women's Control of Their Separate Estate.

A married woman in Canada and Newfoundland may hold her own separate property in her own name. She may contract in respect to her separate estate, sue and be sued in her own name; and her own estate only be liable for such debts and contracts. She has the same remedies for the protection of her separate estate against her husband that she has against other parties.

In any proceeding concerning their property, the husband and wife are competent to give evidence against each other.

She now not only holds all her separate estate both personal and real property free from the control, debts and obligations of her husband, but also entirely free from any estate therein by her husband during her lifetime. Even though she may not possess any separate estate at the time she enters into a contract she may still incur the liability, and bind whatever prop-

erty she may thereafter acquire except such property as she is "restrained from anticipating." (See next Section for Quebec.)

543 Married Women's Rights Under Quebec Legislation.

In Quebec there is sufficient variation to make it advisable to give the main features separately. In this Province married women may be either *in community* of property with their husbands or *separate* as to property. If *in community* the husband has the administration of it, but at his death or a dissolution by order of the court she takes half the common property. Husband can only will his own half.

Community of property between husband and wife exists unless there has been a contract or covenant to the contrary; hence, if married without any marriage contract being executed before marriage, the contracting parties are in *community* of property, and in general terms the property of the wife is liable for the debts of the husband, and the property of the husband is liable for the debts of the wife. Community of property situate in Quebec holds good no matter where the domicile may be removed.

When in community of property, the wife cannot hold movable property in her own name, except what may be willed or bequeathed to her by third parties and declared to be her private property.

Immovable property belonging to her before marriage or bequeathed to her by parents or ancestors does not become part of the *community*, but is hers absolutely. The rents and incomes from such real estate belong to the *community*.

The consorts may also contract before marriage that they will be *separate as to property*, or separation as to property may be obtained by an order of court. When thus separate she can administer her separate estate and transact her business in her own name, invest her income in stocks and other property as freely as though not married.

When *separate* as to property she has the control of, and may dispose of her movable property, but cannot sell or transfer her real estate or bank stock without the authorization of her husband, or upon his refusal, an order from the court.

Also, when separate as to property, she is required to contribute in proportion to means toward expenses of household and education of the children by her.

If she becomes a *trader* she must *register* her intention of carrying on such business. And if she is not separate as to property her goods would be liable for her husband's debts; also, if she has no separate estate either by marriage contract or a judgment of the court the husband would be liable for her debts. She cannot bind herself as surety for her husband.

544 Earnings of Married Women.

In all the Provinces and Newfoundland every married woman is now entitled to hold as separate property, and to dispose of as separate property, the wages, earnings or money acquired in any employment or trade in which she is engaged, or any income from any literary or artistic skill or other source of income (in which her husband has no proprietary interest) entirely free from her husband's control and debts.

545 Wife's Financial Investments.

In all the Provinces (except Quebec), Newfoundland and England, any shares or stock in any Bank, Stock or Loan Company, or any debentures

standing in the name of a woman married are deemed her own separate property, unless otherwise shown; and she has a right to all dividends and profits arising therefrom, and to transfer the same without the concurrence of her husband, the same as though she were not married.

But if a married woman should purchase such shares or stocks with her husband's money, without his consent, the husband may procure an order from the court to have such investments and dividends thereof transferred to him.

If, also, a married woman made such investments with her husband's money, to defraud his creditors, such investments may be followed by the creditors and taken to satisfy their claims.

547 Wife Disposing of Her Real Estate.

In all the Canadian Provinces except Nova Scotia and Quebec, she may not only hold her own real estate entirely free from her husband's control and debts, but she may dispose of it during her lifetime without her husband's consent or signature, and by will at her decease. A married woman may also sell her separate property direct to her husband, or the husband direct to the wife, without making the transfer through a third party.

In Newfoundland the law is the same in each particular.

In Nova Scotia the wife cannot deed away real estate or dower in real estate without her husband joining in the deed. She may dispose of her real estate by will, but the husband may choose between what is left him in the will or his right of curtesy in the property.

In Prince Edward Island a married woman may now acquire, hold and dispose of by deed or will real and personal property acquired since 1896, in the same manner as though she were not married. In real property acquired by her before 1896 the husband would still have his right by the curtesy after her decease.

In New Brunswick she can only sell or will her real estate subject to the husband's right of curtesy.

549 Property a Wife Cannot Bind in Mortgage.

A wife endorsing or signing notes with her husband or entering into any other contract renders liable whatever property she has in possession at the time, or may acquire afterwards, except such property as she is "restrained from anticipating." Property *restrained from anticipation* usually comes to a married woman under the "terms of a will," and while she gets the income from it, the principal cannot be dealt with by her in any way. Such restraint must be clearly expressed in the instrument; it will not be implied by law. Such property cannot be considered an asset by her; that is to say, she cannot mortgage, or by ordinary contract bind it, nor will the law construe it as an asset or allow it to be seized in execution or otherwise.

In New Brunswick the Supreme Court of Equity may, by her consent, if it believes it for her benefit, give order to bind her interest in any property even though restrained from anticipating.

Newfoundland allows such property to be liable for law costs in suits brought by herself or next friend on her behalf.

550 Wife's Financial Liabilities.

A married woman is liable to the extent of her property after her marriage for the debts she contracted before marriage, and for all contracts entered into or wrongs committed before marriage, and all sums recovered against her for such contracts or cost incurred therefor are payable out of her separate estate. If she is a trader she is subject to the bankruptcy or insolvency laws the same as a man would be. If she lends money to her husband it becomes an asset of his, and in case of his insolvency, in most of cases, she would only take her dividend after other creditors for valuable consideration had been settled with. A mortgage on his real estate for money loaned him would hold, so would a promissory note in the hands of third parties.

552 When Husband Is Liable for Wife's Contracts.

The husband is liable for the debts of his wife contracted and for all contracts entered into and wrongs committed by her before marriage, to the extent of the property he has come in possession of through his wife, except in Manitoba, where her own property only is liable.

A husband and wife may be sued jointly in respect of any such debt or liability contracted or incurred by the wife, as mentioned in previous paragraph, but if the plaintiff fails to establish the husband's liability in respect to the property he may have acquired through his wife, the husband will obtain judgment for the costs of defence, whatever may be the result of the action against the wife. If the plaintiff succeeds in establishing the husband's liability, he will obtain joint judgment against the husband personally, and against the wife as to her separate property, and if the husband's liability does not extend to the amount of the claim or damages, the residue will be against the wife's separate estate.

553 Wife's Property Not Liable for Family Debts.

For instance, a wife keeping boarders and buying goods on credit for the general family expense does not render her separate estate liable for the debts. The husband and the husband's property only are liable. If the merchant wishes to render the wife liable he must make the contract with her by having her purchase in her own name, or to guarantee the payment.

A married woman, however, engaged in business in her own name, any goods which her husband orders for her and she accepts are chargeable against her, the husband being merely an agent.

554 Mortgage and Wife's Property.

The husband cannot mortgage any goods that belong to the wife, obtained either by purchase with her own money, or gifts from other persons. The wife need not sign a chattel mortgage unless she owns part of the goods, and desires to mortgage them.

555 Wife's Right of Dower.

Dower is a life estate a wife has by law (in those provinces which allow dower) in the lands acquired, or held by her husband during coverture in which she has *not barred her right* to dower. It is, of course, not available until after the husband's death. If marriage has been legally dissolved the right of dower ceases.

Corresponding to the wife's right of *dower*, there exists also a similar right of a life estate for the husband in the real property of the wife, called *tenancy by the curtesy*.

A wife is also entitled to dower in the equitable estates of the husband to which he was beneficially entitled and had not parted with in his life time. For instance, a legacy in land due but not yet taken possession of, is subject to dower.

Money directed to be turned into land descends to the heir the same as the land would. Therefore money belonging to a married woman which had been directed to be converted into land would be liable to the husband's curtesy. And the wife would similarly have a right of dower in such money belonging to the husband.

Widow has no dower in lands in which the husband had a life interest only; neither has she in purely mining property, or in lands disposed of by the husband while they were yet in a state of nature (wild lands).

If the husband dies possessed of real estate and leaves a will, she can either take the portion left to her by the will, or she can refuse to take under the will and claim her dower. If nothing is stated in the will that the bequest is in *lieu of dower*, she is entitled to both.

The right of dower is determined by the laws of the Province, or State, or country in which the land is situate, and not by the laws of the place where the husband and wife may live.

The dower is a one-third life interest in the real estate. It may be arranged either that one-third of the real estate be set apart for the widow, or one-third of the income from the whole real estate, or a yearly sum equivalent to one-third the income from the whole real estate. The husband cannot deprive her of this right of dower during his lifetime by selling or mortgaging the real estate he has in his own Province, or in any other Province or foreign country which allows dower, unless she bars her right of dower by signing a deed or mortgage of such property, or is barred in divorce proceedings or separation deed.

A wife need not be twenty-one years old to bar her dower in a mortgage or by signing a deed.

A wife cannot be compelled to bar her right of dower in property her husband is selling. Samson *v.* Samson, 1 Chancery Chambers 265.

If a wife refuses to bar her dower the purchaser may rescind the contract, or a portion of the purchase money sufficient to satisfy the dower may be set aside until the wife's death, and the interest thereon paid to the husband during his life if he should die before the wife does.

If a wife sign a *deed* it bars her dower, but a wife barring her dower in a *mortgage* only affects her to the extent of the rights of the *mortgagee*, and dower is due if the husband is dead on the surplus after payment of mortgage. It is calculated on the basis of the amount realized from the sale of the land. If the land sold for $3,000, and the mortgage was $2,000, she would be entitled to the income from the whole of the surplus, viz., $1,000 as dower. Other creditors could not touch it.

In Ontario, where a husband goes away and is not heard from for seven years, he is *presumed* to be dead, and if the widow wishes to take her dower out of his real estate, she is entitled to claim it. The right to claim dower would commence to *outlaw* at the end of the seven years.

In Ontario, New Brunswick, Nova Scotia and Prince Edward Island the wife's dower is a one-third life interest in the real estate.

In Manitoba, Saskatchewan, Alberta, the Yukon and North-West Territories the wife has no dower in the lands of her deceased husband.

In British Columbia, Newfoundland and England the wife has no dower unless the husband dies without having disposed of his lands during his lifetime or by will at his death. The dower is then a one-third interest in the real estate. A written agreement on the part of the husband not to bar dower is enforceable.

In Quebec, *legal* or *customary* dower consists in the use for the wife, and the ownership for the children of one-half of the immovables. *Conventional* dower, where there is no agreement to the contrary, also consists in the use for the wife, and the ownership for the children of the portion of the movable and immovable property, according to the marriage contract. The wife enters at once upon the use of the property after the husband's death, but the children cannot take possession until after her death. If wife die first, the children enjoy the dower as owners after the father's death.

In Alberta and Saskatchewan if a husband dies leaving a will, and the widow feels that she is left less than would have been her right if he had died intestate, she may apply to a Judge of the Supreme Court in Chambers for relief, and the Judge is given authority to make such allowance out of the estate as may seeem equitable. The Saskatchewan Statute (Chap. 13 of 1910-11) narrows the widow's right by saying "if she receives less under the will than she would have received if he had died intestate, leaving a *widow and children*," she may apply to the Judge for relief.

556 Election Between Dower and a Distributive Share.

If a husband dies possessed of real estate and leaves a wife and children but no valid will, the widow may elect whether she will take dower in such realty, or a distributive share in both real and personal property after the payment of the debts. If she does not elect to share in the distribution she takes no share, but is entitled to dower only. Of course if there are no children election is not called for.

Her election applies to all the dowable property the husband left. She cannot take dower out of certain parcels of land and a distributive share in other parcels.

If she elects to take a distributive share instead of dower, the portion that then falls to her of both the personal and real property becomes hers absolutely and not merely a life interest.

The election must be by an instrument in writing but not necessarily under seal, and in either case must be attested by at least one witness. It is not enough that the widow merely assume ownership in the land, but she must by a writing of some kind make it clear that she *elects* to take a *distributive* share in lieu of *dower*.

In cases where money has been settled on a woman by ante-nuptial contract in lieu of all right to dower, or where land has been settled on her in lieu of dower to be enjoyed by her after the husband's death, it not only bars her right to dower but also to a distributive share in the estate.

Also after marriage where a wife accepts a settlement in lieu of dower, or in a deed of separation bars her claim to dower, she cannot claim a distributive share in the personal property.

In Ontario the election is required to be made within six months from husband's death, but in every Province the widow should make her election as soon as the executors have determined the value of the whole estate, both personal and real, and also ascertained the amount of the debts and testa-

mentary expenses, as she is then in a position to decide which is better for her—a distributive share as hers absolutely, or dower out of the land.

557 Order of Protection for Earnings of Minor Children.

Any married woman having a decree for alimony against her husband, or being for any legal cause separated from him, either through his cruelty, insanity, imprisonment in the Provincial Penitentiary or in gaol for a criminal offence; or whose husband, through habitual drinking or profligacy neglects or refuses to support her, may obtain an order of protection, entitling her to the earnings of her minor children, entirely free from the debts and obligations of her husband and from under his control.

When the married woman resides in a town or city where there is a Stipendiary or Police Magistrate, the order would be obtained from him, but when there is no such officer where she resides then the order would be given by the County Judge.

Order of Protection may also be procured for her own earnings and for the purpose of engaging in trade in those Provinces where such orders are required.

558 Civil Relationship Between Husband and Wife.

The civil relationships are the same between husband and wife as between other persons in community. The one may steal from or defraud the other, or be guilty of criminal acts toward each other. In all cases the injured party has the same redress they would have against other persons for similar acts. The husband cannot sell the wife's property or that of the children which comes to them personally by gift or otherwise. Husbands cannot sell or mortgage wife's furniture, silver-ware, or any other goods or property belonging solely to her by gift or otherwise, unless she signs the mortgage or assents to the sale.

An agreement, or contract entered into by the wife with and for the husband through *duress* (force) or undue influence may be set aside the same as concerning other parties, but she must act promptly in repudiating it as soon as free from the influence.

Where a husband, through drink, violence, abusive language, or other vicious conduct renders it impossible for the wife to live with him in safety and honor she can leave him, and such conduct is sufficient ground to sustain an action for alimony.

559 Business Relationship Between Husband and Wife.

If a husband makes improvements on wife's property and she dies intestate he has no claim on the estate for their value unless there was a written agreement between them that he was to be paid for such improvements or to have an interest in the property to that extent and *vice versa* if the wife uses her money in improving husband's property under similar circumstances, she acquires no lien on the property.

Also in cases where the husband gives money or his earnings to the wife and she deposits the money in the bank in her own name the money becomes hers, unless there was an understanding between them that the money was merely left with her in trust. Everything depends on the intention between the parties as the law will not presume a *trust* where money is given by the husband to the wife.

New Brunswick makes an exception and the implication is that all the money the husband gives the wife beyond what is necessary for wearing apparel and personal use, belongs to him still unless there is an understanding to the contrary. Chap. 78, Sec. 4, R.S., 1903.

Where husband and wife are living separate, and the husband wishes to mortgage or sell his real estate without the wife's signature, he may obtain an order from the court under following circumstances: (1) If the wife is insane and confined in an asylum. (2) If separate from her husband under such circumstances as disentitle her to alimony. But in both cases while the husband may sell or mortgage his land "freed and discharged from any claim of his wife for dower therein," still the court will also provide a method by which the wife will be secured the *value* of her dower. If the wife were living separate under circumstances where her conduct disentitle her to dower then no provision would be made by the court to reserve its *value* to her.

Wife having means and the husband none, and being an invalid, she would be compelled to supply him with the necessaries of life.

A husband advertising in a newspaper that he will not be responsible for goods purchased by his wife on his credit after the date of such advertisement (or for her contracts), does not necessarily free from such liability. The wife is presumed to be competent to purchase necessaries for herself and family, and if she has been in the habit of so purchasing from merchants on her husband's credit, the courts have ruled that "notice given in a newspaper not to trust his wife (with goods purchased on the credit of her husband) is of no effect in cases where dealers have not had knowledge of it." The husband would have to prove that the merchant had knowledge of such advertisement before the goods were purchased in order to escape payment. It would be much safer, and more proper, in the most of the cases, to send a printed notice to dealers where the wife would be likely to ask for credit.

A husband *deserting* his wife, if he have means or an income, the wife may either take an action for "Alimony" against him; or she may take proceedings before a Police Magistrate or two Justices of the Peace under the "Deserted Wives' Maintenance Act," and procure an order for a certain sum per week for support of herself and children.

For a wife to recover a judgment for Alimony three things must be proven to the satisfaction of the court: (1) A legal marriage; (2) the need of the wife; (3) the desertion by the husband, or his refusal to support her. Therefore a lawful wife who is in need, not having independent means of support, and where husband deserts her, or refuses to support her, may obtain a decree from the court for alimony which will fix a sum in proportion to the property and means of the husband.

By a recent decision of the Privy Council it is settled that in Canada and Great Britain a wife's written guarantee of a debt of her husband is not binding on her unless she had independent legal advice in giving such guarantee. See section 122.

560 Custody of Children of Separated Parents.

The custody of the younger children when husband and wife separate is entirely in the discretion of the court before whom application may be made, having regard to the welfare of the children. After hearing the facts of the case, if the court or judge is of the opinion that either the mother or the father would be a more suitable custodian of the children they will be

given to such parent, without regard to age or sex. The Ontario statute says: "The court may make such order as the court or judge sees fit regarding the custody of the infant and the right of access thereto by either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes of the mother as well as of the father."

As a general rule, however, if the wife is deemed a suitable guardian she will be given the custody of children under seven years of age, and the husband, if he is deemed a proper guardian, those over that age.

561 Divorce and Deed of Separation.

It is commonly understood that in Canada divorce can only be procured from the Dominion Senate, but this is not a fact, for the Divorce Statutes of Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, which were in force before they entered Confederation, have not as yet been repealed by the Dominion Parliament. British Columbia still claims the right and grants divorces. But none of the other Provinces except those named here have any Divorce Courts, and the application for divorce must be made to the Dominion Senate.

At least $200 is required to be paid in with the application for divorce, but the expenses usually go far above that sum. There is provision made for persons too poor to pay the costs under what is termed proceedings *in forma pauperis*, but few persons have ever been willing to admit such poverty.

In cases where husband and wife find it impossible to live together, and yet a divorce cannot be obtained, a "Deed of Separation" may be executed that will effectually bind them to live separate from each other, make the proper division of property, barring the right of dower and the right of tenant by the curtesy. Of course, neither one can legally marry again while the other one is living. If either one should marry, he or she, as the case may be, would be liable to a prosecution for bigamy, and the wife in such illegal marriage would have no right of dower in such husband's real property, nor a distributive share of his personal estate.

CHAPTER XVIII.

LANDLORD AND TENANT.

565 Landlord and Tenant.

The relation subsisting between landlord and tenant is that which subsists between the owner of houses and lands and the person to whom he grants the use of them for a specified time for a stipulated consideration called *rent*. In law the landlord is called the *lessor* and the tenant the *lessee*. The same class of persons who can contract in regard to notes and bills can contract as regards landlord and tenant; that is, those of the full age of twenty-one years and of sound mind.

In this chapter the essential provisions of the law of Landlord and Tenant, as applicable to all the Provinces and Newfoundland will be given, and as the cases where landlord and tenant are liable to disagree through a conflict of interest have been so often settled by suit there remains scarcely any reasonable grounds for a misconception of rights and obligations.

566 Lease of Real Property.

Lease is the name given to the contract between landlord and tenant. It may be either verbal, or written, or under seal. Oral, verbal and parol mean the same thing, viz., by word of mouth. In this chapter, *verbal* will be employed, as it is in common use.

It must be remembered that a lease is the *agreement*, and not the paper on which it is written. A lease, if written, should be under seal—that is by Deed. Where a seal is not attached the writing amounts to no more than an oral or verbal lease.

The lease should state all the conditions and agreements, for verbal promises do not avail much in law where there is a written instrument. The tenant might sue the landlord on a separate and distinct verbal agreement that the house should have certain things done by the landlord in consideration of the tenancy being created by the written lease, but it should be in the lease to make it unquestionable.

568 Terms of Lease.

The usual terms of lease are (1) week; (2) month; (3) quarter; (4) year; (5) at will; and (6) for life.

1. In all the Provinces a verbal lease (a demise) for one year and under is valid.

But an *agreement* to demise, no matter for how short a time, is an agreement for an interest in lands, hence, must be in writing to be binding, according to the Statute of Frauds. Cavalero v. Puget, 4 F. & F. 537;

An agreement to secure a lease for another party affects lands, hence, comes within the Statute and must be in writing. Horsey v. Graham, L.R. 5, C.P. 9.

2. A demise (lease) for a term not exceeding *three years* from the making thereof, when completed by entry, need not be in writing, as the Statute applies to leases exceeding three years. But where there is no entry, or no payment of rent, it amounts to a mere agreement and then must be in writing.

But a verbal lease, or a writing not under seal, to lease premises for three years from a *future* time, thus making the time more than three years from date of making, the lease is void against third parties.

A verbal *agreement for a lease* for a term not exceeding three years is not binding if he does not enter upon the premises, as it is an agreement for an interest in lands, hence, must be in writing. Bank of Upper Canada v. Tannant (1860), 19 U.C.R. 423.

3. A lease for a term exceeding three years must be in writing and under seal, otherwise it would be held a tenancy " at will " only.

4. In Manitoba, Saskatchewan, Alberta, British Columbia, Yukon, North-West Territories and Nova Scotia a lease exceeding three years is required to be registered as well as under seal. In Ontario and New Brunswick a lease for a term under seven years does not need registering.

In all the Provinces a lease requiring to be registered, if not so registered, a person buying the property without notice of such lease, could by giving the legal notice to vacate required in case of a yearly tenancy, evict the tenant.

In Quebec leases for over one year must be registered. House lease is presumed to be from May to May, if renting by the year, and farm lease from October to October.

A lease of a house where no time is specified, is held to be annual, terminating May 1st each year, where the rent is at so much per year, but a monthly lease where rent is at so much per month.

580 When Rent is Payable.

Rent may be payable in any way agreed upon, either in advance or at the end of the term. It might be a monthly tenancy, and yet the rent payable weekly; or a yearly tenancy, with the rent payable monthly or quarterly. Whatever the agreement may be for payment, the tenant has the whole day on which the rent falls due in which to pay it, and no expense can be incurred until the day after the rent is due.

Rent, like other debts, cannot be sued or distrained for until it is due, even though the tenant may be leaving the premises.

581 Lease by Minors, Idiots, Lunatics, Etc.

A lease by a minor is not absolutely void, but voidable. The lessee cannot void it, but when the minor comes of age he may void it, or ratify it.

Leases to minors are not absolutely void, but may be voided by the minor if it is not for necessary apartments or lodgings, according to their station in life.

If the rent falls due after they attain their majority and they have not repudiated the lease, they will be liable for the rent, no matter whether it was for necessary lodgings or not.

In Quebec an emancipated minor would be liable on such contracts in connection with his business.

Idiots and lunatics in all the Provinces may also make leases that are necessary, but cannot be made to take a house that is unnecessary if the landlord was aware of their condition and took advantage of it.

In Manitoba an habitual drunkard cannot make a valid lease. In Ontario and the other Provinces if he were so drunk as not to be capable of knowing that he was making a lease, he may void it when he becomes sober, or he may ratify it and make it binding.

583 Joint Tenants.

Joint tenants is simply another name for joint owners of a building or other property as defined under "Joint Ownership," which see; and "tenants in common," means owners in common, same as "heirs in common" to an estate, and are in some respects similar to a partnership firm.

For "Joint Tenants" to lease their joint property requires the consent of both, but either one may, without concurrence of the other, give a legal notice to vacate, may also distrain for his share of overdue rent, or may demand a higher rent, or require it to be paid weekly or monthly, or in advance; of course, in such case, being required to give the proper legal notice.

One joint tenant cannot sell the whole estate without the concurrence of the other joint tenant. Each of the joint tenants may sell his own interest in the estate. But a sale by one joint tenant of his interest in the estate puts an end to the joint tenancy, and turns it into a "tenancy in common."

585 Tenancy at Will, or Sufferance.

A tenancy at sufferance is where one comes in by valid lease or title and afterward wrongfully continues in possession without the consent or dissent of the person next entitled.

A mortgagor remaining in possession after a sale by the mortgagee is a tenant at sufferance.

A "tenancy at will" is where the letting is for no certain term, but is to continue so long as both parties please, but no longer.

Where a person enters or remains in possession by consent of the owner of land it is a tenancy at will; also

Where a person enters under an agreement to purchase. If the purchase does not take place and he continues in possession the tenancy may be determined without notice. Doe v. Chamberlain, 5 M. & W. 14.

A tenant allowed to remain in possession after his lease has expired pending a lease for a further term may be turned out without notice. Doe v. Stennet, 2 Esp. 717; Simkin v. Askhurst, 1 C.M. & R. 261.

When a verbal lease is for a term, which the Statute of Frauds requires to be in writing, it becomes a tenancy at will. Hobbs v. Ontario, L. & D. Co., 18 C.R. 498.

But in all the above and similar cases, unless otherwise agreed upon, a demand of possession must be made before taking action for ejectment. Wright v. Beard, 13 East. 210; Ball v. Cullomore, 2 C.M. & R. 120.

587 The Landlord's Covenant.

The only covenant the landlord usually makes and the only one found in any of the printed forms now in use is to give the tenant "quiet enjoyment." If evicted by another person, who has a prior or better claim to the property, the tenant may recover from the landlord any damages that he may sustain. If the landlord is to make any repairs it must be mentioned in the lease.

In Quebec the landlord's implied covenant means something, see section on "Repairs."

588 The Landlord's Guaranty.

In all the Provinces, except Quebec, if the landlord is to be held responsible for the sanitary condition of the house there must be a special guarantee on his part that those conditions are good. Then, if a house were leased with such distinct assurance on the part of the landlord that it was in good sanitary condition, and it subsequently turned out that the landlord's statement was untrue, the tenant could move out and refuse to pay rent. The landlord would also be liable in an action for damages.

But if nothing were said about the sanitary or other conditions of the house before the tenant enters, he could not then avoid paying rent even though the house were unsafe to occupy, neither could he recover damages from the landlord.

In Quebec the landlord is held liable without this special assurance of fitness.

590 Lease vs. Mortgage.

If a valid lease is given prior to a mortgage the mortgage will not affect the tenant's rights. In case the mortgagee takes possession before the

lease expires he merely takes the place of the landlord and must give the usual notices to quit. Doe v. Lewis, 13 M. & W. 241.

But if a lease is given after a mortgage is placed on the property and the mortgagee takes possession he can dispossess the tenant without notices, and even take the growing crops. Keech *v.* Hall, 1 Doug. 21.

Of course, the tenant would have a cause of action against the landlord, but a landlord who had lost the property under a mortgage would not be likely to be in a financial position that the tenant could recover any money from him by way of damages.

592 Tenants' Privileges and Rights.

The execution of the lease vests the tenant with all the rights incident to possession. He has the exclusive use of the property, and exercises all the rights of the owner for the time being, and may even eject the landlord should he trespass.

He has a right to a legal notice to quit from the landlord if his lease is for an uncertain time.

Also to the crops that are on the ground if his tenancy is terminated unexpectedly and not through his fault.

Also to sublet the premises or a portion of them to others, unless his contract prohibits it.

The tenant, in case of fire, is free from rent, and no proceedings can be commenced for the recovery of any such rent until the premises are rebuilt or made fit for the purposes of the lessee.

In Quebec the law is the same.

593 Tenants' Liabilities Under the Lease.

There is an implied covenant in all leases, verbal or written, that the tenant will take reasonable care of the premises and make all breakages good, and deliver the property up at expiration of lease in as good condition, save "ordinary wear and tear," as when he took it. Therefore, if the tenant damages the property the landlord may sue and obtain judgment. He has no lien, however, on the tenant's goods for the damages, and if he were to retain any article for such purpose the tenant could recover damages.

Also, if the tenant circulated a false report that the premises were unsanitary, and the landlord thereby suffered loss through failure to sell or lease the property, the tenant would be liable in an action for damages, providing the report was positively untrue and the landlord could prove actual loss thereby.

In Quebec the tenant is deemed to be liable for injuries and loss to the premises during the lease, unless he can prove that he is without fault; also for fire, unless he can prove to the contrary.

595 Form of Short House Lease.

This Indenture made the fourth day of April, in the year of our Lord one thousand nine hundred and ten, in pursuance of the Short Forms of Leases Act, between John Batten, of the Town of Thorold, in the County of Welland, gentleman, hereinafter called the lessor, of the first part, and Leslie McMann, of the same place, merchant, hereinafter called the lessee, of the second part.

WITNESSETH, that in consideration of the rents, covenants and agreements hereinafter respectively reserved and contained on the part of the said lessee, his executors, administrators, and assigns, to be respectively paid, observed and performed, the said lessor hath demised and leased, and by these Presents doth demise and lease unto the said lessee, his executors, and administrators, all that certain tenement or business premises known and described as the Batten Block, No. 120 Front Street, in the Town of Thorold, County of Welland, Province of Ontario, including the basement or cellar, yard and outhouse, together with all other rights and appurtenances thereto belonging, or usually known as part or parcel thereof, or as belonging thereto; TO HAVE AND TO HOLD the said premises for and during the term of three years, to be computed from the fourth day of April, 1910, and from thenceforth next ensuing and fully to be completed and ended.

YIELDING and paying therefor yearly, and every year during the said term hereby granted unto the said lessor, his heirs, executors, administrators, or assigns, the sum of three hundred dollars in lawful money of Canada, to be paid in even quarterly instalments on the following days and times, that is to say: on the fourth days of July, October, January and April in each and every year during the continuance of the said term, without any deductions, defalcation, or abatement whatsover, the first of such payments to become due and be made on the fourth day of July next, and the said lessee, his heirs, executors, administrators and assigns, doth covenant, promise and agree to, and with the said lessor, his heirs, executors, administrators or assigns, in manner following, that is to say:

That he, the said lessee, his executors, administrators, and assigns shall and will well and truly pay or cause to be paid to the said lessor, his heirs, executors, administrators or assigns, the said yearly rent hereby reserved at the time and in the manner hereinbefore appointed for payment;

And to pay taxes, except for local improvement;

And to repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted;

And to keep up fences;

And that the said lessor may enter and view state of repair, and that the said lessee will repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest excepted.

And will not assign or sublet without leave;

And that he will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted;

Provided that the said lessee may remove his fixtures.

Provided that in the event of fire, lightning or tempest, rent shall cease until the premises are rebuilt or made fit for the purposes of the lessee.

Proviso for re-entry by the lessor on non-payment of rent, or non-performance of covenants.

The said lessor covenants with the said lessee for quiet enjoyment.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of ADAM YOUNG.

LESLIE MCMANN. (L.S.)
JOHN BATTEN. (L.S.)

The most of the Ontario blank forms of leases contain a covenant by which the tenant waives his right to the statutory exemptions in case the landlord distrains for arrears of rent, which has been omitted from the above form.

The Quebec lease differs some in form. See printed blanks.

596 Lease Under the Torrens System.

For leases of land for a term exceeding three years, the owner shall execute a lease in the form provided in the Act, which will be entered on the certificate of title when presented at the Land Titles Office.

For leases under this system three copies are to be executed like the following:

I, A. B., being registered as owner, subject, however, to such mortgages and encumbrances as are notified by memorandum underwritten (or endorsed hereon) of that piece of land (describe it), part of ..... Section....., Township of ....., range ..... (or as the case may be), containing ..... acres, more or less (here state rights of way, privileges, if any, intended to be conveyed along with the land, and if the land dealt with contains included in the original grant or certificate of title or lease refer thereto for description and diagram, otherwise set forth the boundaries of metes and bounds), do hereby lease to C. D., of (here insert description), all the said land, to be held by him, the said C. D., as tenant, for the space of ..... years, from (here state the date and terms), at the yearly rental of ..... dollars, payable (here insert terms of payment of rent), subject to the covenants and powers implied (also set forth any special covenants or modification of implied covenants).

I, C. D. (insert description), do hereby accept this lease of the above described land, to be held by me as tenant, and subject to the conditions, restrictions and covenants above set forth.

Dated this ..... day of ....., 19..

Signed by above A. B., as lessor, and C. D., as lessee, in the presence of } Signature of Lessor (A. B.). " Lessee (C. D.). (No Seal.)

(Here insert memorandum of mortgages and encumbrances, if any.)

When a lease is surrendered it has "surrendered" endorsed on it, "signed" by the lessee and "accepted" by the lessor, and being properly attested is brought to the office where the proper officer records the fact of its surrender on the certificate of title.

599 Farm on Shares.

A person working a farm on shares and having the exclusive possession becomes a *tenant* and subject to the laws of Landlord and Tenant, and entitled to six months' notice to quit, same as other yearly tenants. But if he were to work it on shares, each party furnishing a part of the seed and dividing the profits, both parties thereby being *equally in possession,* there is no *lease,* and the owner, in case the laborer or tenant had agreed to pay a certain amount in money, could not distrain for it.

601 Repairs During Term of Lease.

Except in Quebec the relationship between landlord and tenant does not bind either one to make repairs. It is entirely a matter of *agreement.* If the landlord has not agreed to make repairs he cannot be compelled to

do so during the term of the lease. The tenant cannot make the repairs, no matter how much they are needed, and deduct the cost from the rent; and if he moves out in consequence of the bad condition of the premises he must still pay rent until his lease expires, even though the premises are in an unsanitary condition. Denison *v.* Nation (1862), 21 U.C.R. 57.

It must be remembered that everything depends upon the agreement. If there is nothing in the lease (or bargain) binding either of the parties to make repairs, then neither party can compel the other to make them.

The following sub-sections cover the points where misunderstanding is most likely to occur between landlord and tenant:

1. Repairs necessitated by natural decay the landlord is "supposed" to make, also to keep in repair the roof, outside doors and locks; but all breakages are to be made good by the tenant. If, however, there is no agreement, either verbal or written, for the landlord to keep the premises in a fit and proper condition for habitation, or in a healthy condition, the tenant cannot compel such repairs to be made even though the house becomes uninhabitable, or unsuitable for use in the tenant's business. Colebeck *v.* Girdiers Co., 1 Q.B.D. 234; Brogel *v.* Robins, 14 Times, L.R. 439. Hence, if a front door or a plate glass window were broken and the tenant wanted a new one he would have to put it in himself if there is no covenant in the lease for the landlord to repair. Neither could the tenant be compelled to replace them if not broken through his negligence unless the agreement bound him to make repairs. If the tenant moves out before the expiration of the lease he will still be required to pay rent, unless the landlord "accepts possession" by taking the key, or rents the place to another.

2. If in the lease, either verbal or written, the landlord agrees to make repairs or certain repairs, and subsequently refuses or neglects to do so, the tenant may bring an action for breach of contract, or he may notify the landlord of the repairs to be made, and that in his default in making them within a certain time (give date), he will do so, or cause them to be done. He can then make the repairs, should the landlord fail to do so within the time named in the notice, and either sue the landlord for the amount or deduct it from the rent. Mehr. *v.* McNab, 24, Ont. R. 653.

But the tenant cannot make the repairs and then deduct the amount from the rent unless he has previously given this notice and demand.

A mere verbal *promise* to make repairs is not binding on the landlord unless some consideration can be shown to support the promise. For instance, to pay a higher rent than it would be without the repairs, or to pay in advance, or to take a new lease for a longer term, etc., neither would a mere promise on the part of the tenant *bind him.*

3. The breach of a covenant to repair gives the injured party the right of action for the damages sustained, but does not give the tenant a right to vacate, nor the landlord to evict the tenant. The courts, however, have almost nullified this liability on the part of the landlord for actual loss or injury the tenant, or his family, may sustain through a breach of this covenant to make special repairs. Generally the landlord is not held to be liable for any further damages than the cost of making the repairs. The tenant knows the defects and has the authority after due notice to make the repairs himself and deduct the amount from the rent. This seems to be the tenant's only remedy.

4. If the agreement to repair is conditional on prompt payment of rent, then falling in arrears of rent would relieve the landlord from making the repairs. But if it were not so *conditional*, then the fact of the tenant falling in arrears of rent would not relieve the landlord from his covenant to repair.

5. If the payment of rent is *conditional* on the landlord making certain repairs then the tenant is relieved from payment of rent until the repairs are completed as per agreement.

6. Unless the lease requires the tenant to repair he will not be liable for injuries done to the property, which were not caused by his own acts or negligence, or those of his agents.

7. Written leases usually contain a proviso that the tenant shall repair, "reasonable wear and tear, accidents by fire, lightning and tempest excepted." Such exceptions include the renewing and repairing of plumbing, furnaces and pipes, leaky roof, and broken door locks, which the tenant cannot be forced to make.

The mechanic who does the repairing must, of course, in all cases look for his pay to the party who engaged him.

The above proviso saves the tenant from the obligation to rebuild in case the building was destroyed or partially destroyed by fire not caused by the tenant's negligence. For Quebec see following section.

602 Repairs Under Quebec Leases.

In Quebec the relation between landlord and tenant differs materially from that of the other Provinces. There is an implied warranty on the part of the landlord that there are no faults or defects on the premises that will prevent or diminish their use by the tenant. C.C. 1614.

If there should be a defect unknown to the landlord, he cannot be made to pay damages further than an equitable reduction of the rent, or a cancellation of the lease.

The landlord is required to make all necessary repairs during the term of the lease, unless the lease provides otherwise.

Landlords are under obligation to inspect their own property to ascertain the necessity for repairs they are required to make, and are not exempt from liability for accidents for want of notice on the part of the tenant that such repairs are necessary. C.C. 1613. Trudeau *v.* Meldrum, 8 R de J., 410.

The landlord is liable in damages for accidents and injuries to wife and children of tenant if caused by defects in the building. The tenant cannot, however, remain quiet about defects until rent is due and then complain of damages caused by landlord's neglect as ground for non-payment of rent.

If the landlord neglects to make repairs stipulated in the lease, or which he is compellable by law to make, the tenant may, by summary proceedings:

1. Either compel him to make them; or,

2. To obtain permission to make the same at the expense of the landlord; or,

3. In default of making such repairs to rescind the lease; or,

4. To recover damages for the violation of the obligations imposed by or arising from the lease.

The tenant is required to make good all breakages caused by him or his agents and to leave the premises in as good a condition as he found them, ordinary wear and tear excepted.

603 Frozen Water Pipes.

If the lease provides that the tenant shall make all repairs, then in that case the tenant would be liable for the repairs to frozen water pipes. But if there is no written agreement or lease then the question of liability for such repairs will depend entirely upon which party was "responsible for the damages" occurring. If the freezing and bursting of the pipes was caused by the improper construction of the house, or by the negligence on the part of the landlord, or his agent, and not due to any act or neglect on the part of the tenant, then the landlord will be liable for the cost of repairs. But if the freezing of the pipes was caused by negligence of the tenant, then he, and not the landlord, will be liable for the repairs. The plumber, however, must look to the party who hired him for the payment of his bill.

605 Tenant and Taxes.

In all ordinary written leases the landlord must pay the taxes, unless an express proviso is made to the contrary.

If the tenant is not assessed his goods cannot be seized for taxes and he should not pay them, for if a tenant "voluntarily" pays taxes which he is not obliged to pay, he cannot deduct the amount from the rent. Herring *v.* Wilson, 4 O.R., 607; MacAnany *v.* Tickell, 23 U.C.R. 499.

But if the tenant is assessed and his name on the collector's roll, his goods are liable and may be seized (although the agreement may be that the landlord is to pay the taxes), in which case he should pay the taxes before seizure and then demand the amount from the landlord, or he may legally deduct it from the rent.

If a tenant agrees to pay taxes and does not do so, the landlord may sue for the amount, and if he wishes to do so he is entitled at the same time to obtain an order from the Court to evict the tenant for non-performance of agreement.

If the landlord agrees to pay water rates and does not do so, and the tenant is compelled to pay them, he can deduct the amount from the rent.

A covenant in a lease to pay taxes does not include local improvement taxes unless that is specially stated in the lease. This does not apply to ground rent, where the tenant owns the building, as:

In Ontario a lease for seven years or over, when the land only belongs to the lessor, and made under the Act respecting Short Forms of Leases, containing the covenant to pay taxes and omitting the words "except for local improvements," shall be deemed a covenant by the lessee to pay local improvement taxes.

It would be the same in all the Provinces where only ground rent is paid and the building the property of the lessee.

606 Tenant's Fixtures.

There are "tenant's fixtures," "landlord's fixtures," "trade fixtures," and "immovable fixtures," but a reasonable regard to the circumstances in each particular case, coupled with a sense of natural justice, will always determine the individual rights involved.

The regulations are the same in this respect in all the Provinces. The law is briefly stated in the Ontario Statute, which reads:

"The lessee may, on or prior to the expiration of the term, remove and carry away all fixtures, fittings, machinery or other articles upon the premises, which are in the nature of trade or tenant's fixtures, or which were brought upon the premises by the lessee. But he shall make good any damages to the premises caused by such removal." All the Provinces have like provisions.

1. Tenant's fixtures must be something of a personal character. Anything that is affixed to the freehold so that it cannot be separated without doing serious damage to the freehold becomes a part of it.

2. Anything that is sunk into the ground, as a well, trees, buildings of stone or brick, are the same as the soil itself, and therefore a part of the freehold. But temporary buildings placed on stone boulders, or posts, or plate, are "tenant's fixtures," and may be removed without injury to the soil, hence remain the property of the tenant.

3. The machinery of a manufactory is a trade fixture, and can be removed. Temporary partitions, counters, shelving, etc., placed in the building by the tenant, would be trade fixtures, and could be removed; but doors and windows, likewise permanent partitions, could not be removed, as they become a part of the building proper.

To determine in all cases what are "fixtures," is one of the most difficult questions in connection with the law of landlord and tenant. Much depends on the agreement, something on the nature and length of the tenancy, and the kind of business carried on by the tenant on the premises, so that what under certain circumstances could be removed as being tenant's fixtures, would, under different circumstances, be a criminal act to remove them. For instance, if a tenant dug a well and put a pump in it and used the same for a few years, he could not then, when moving out, take away the pump or fill up the well without becoming liable in an action for damages as "committing waste," unless he had that agreement with the landlord. But if the tenant were engaged in a business that required the well and pump to conduct it, they would then become a part of the machinery and be "trade fixtures." When leaving the premises he could remove the pump, and, to save himself from liability for accidents, could fill up the well. The preceding illustrations will be sufficient to enable any person to be reasonably certain what would in each case be a "tenant's fixture" and capable of removal.

Where there is doubt as to whether a certain fixture should be regarded as a tenant's fixture or be held as part of the freehold, the presumption is always in favor of the freehold.

It is an axiom in law "that the expression of one thing is an omission of all the rest," and for this reason, if anything is mentioned in the lease as a tenant's fixture, other things, though of a kindred nature, would be supposed to be omitted intentionally, and therefore remain a part of the freehold.

A tenant claiming anything as a fixture must remove the article promptly or make it known that he claims it, otherwise he waives his right to it.

The law in Quebec is the same for this Section.

607 Tenant Moving Out.

A tenant can move out of premises any time he desires to do so before the tenancy expires, and if there is no rent due the landlord cannot stop the goods. But if there is any rent due the landlord can prevent the removal of the goods (except the exemptions) until the arrears of rent are paid.

But a tenant moving out before the expiration of his lease is still liable for the stipulated rent until the lease expires, unless:

1. The landlord accepts the premises, thus releasing him; or,

2. Unless another tenant, acceptable to the landlord, enters, and the landlord releases the first tenant.

If there is nothing in the lease forbidding the tenant to sublet the premises, he may rent them to another person, but he will remain liable to the landlord for the rent, so must collect the stipulated rent from the new tenant and not trust him to pay the landlord direct. He is also liable for all the covenants in the lease so he must bind the sub-tenant to the same conditions.

In such cases where there is nothing in the lease forbidding the tenant to sub-let, the landlord will be compelled to either accept the new tenant, or to receive the premises and free the tenant.

608 New Tenancy by Implication.

Where a tenancy for one or more years expires by lapse of time or by notice, and the tenant remains in possession, without any new agreement being made, paying the same rent, it becomes "a yearly tenancy" by implication of law, and the presumption is that the terms of the former lease will hold good. Any time afterwards that either party wishes to terminate it, the regular six months' or three months' notice, as the case may be, would be required. It is the same for a quarterly, monthly, or weekly tenancy. See section 615 for a valid notice in each case.

A "tenancy by implication" is ordinarily implied by the payment and acceptance of rent, and such implication can only be prevented by one or the other of the parties interested giving satisfactory proof that it was paid or received by mistake, or upon some other condition or agreement than a new term.

As tenancy by implication is a question of fact, and not of law, the facts must be evident. Hyatt *v.* Griffiths, 172, B. 505.

In Quebec if a tenant remains in possession more than eight days after the expiration of his lease without any opposition or notice on the part of the lessor, a tacit renewal of the lease takes place for another year, or other term for which such lease was made if less than a year.

609 Overholding Tenant.

The mere fact of a tenant remaining in possession after his lease expires, does not of itself constitute a new tenancy or bind either party to consent to a new term. There must be rent paid, or something else done by which a new tenancy is implied, or the tenant is only liable to pay for the time actually occupied, which is not called rent, but for "use and occupation." In such cases the tenant may move out at any time without notice, and will be liable to pay only for "use and occupation" up to the time of vacating, which amount will be fixed by the court, and possibly for damages for retaining possession after his lease expired. And during this time of *overholding* the landlord cannot distrain for the usual rent, as there is no tenancy, but he can sue for "use and occupation" and recover under

execution what would be a " reasonable rent," and if he suffered actual loss by such overholding he may recover damages.

In case a tenant wrongfully remains in possession after his right of occupation has expired, either by the terms of the lease or after a legal notice to quit, the landlord has at least the option of three courses:

1. He may either apply to the Judge of the County Court for an order to evict him under the "Overholding Tenants Act"; it gives justice but costs too much; or,

2. He may bring an action of ejectment by an ordinary writ of summons; or,

3. If a yearly tenant, he may after demand and notice in writing to deliver up possession of the premises, double the rate of rent so long as the tenant unlawfully retains possession of them, and collect the same by suit (R.S.O., Vol. III., Chap. 342, Sec. 20).

This last section (No. 3), will hold good in all the Provinces where the English common law prevails, and doubtless in Newfoundland also.

610 Notice Claiming Double Rent.

To W. WINTERS, St. Catharines, Ont.

I hereby give you notice that if you do not deliver up possession of the house and premises situate No. 10 Queen Street, in the city of St. Catharines, on the first day of June next, according to my notice to quit, dated the 25th day of April, I shall claim from you double the yearly value of the premises for so long as you keep possession of them after the expiration of the said notice, according to the statute in that case provided.

Dated the 20th day of May, 1910.

Witness: JAMES SMITH,

J. SAUNDERS. (*Landlord*).

612 Re-entry by Landlord.

One of the usual "provisos" of a lease is that the landlord shall have the right to re-enter and re-possess the premises on *non-payment of rent* or non-performance of *covenants*. The non-payment of the rent or the breach of other covenants does not cancel the lease, bue merely gives the landlord the right of re-entry. But this right is not enforceable until the landlord has given the tenant a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring the tenant to remedy the breach. Then if the tenant does not, within a reasonable time, or within the time named in the notice (which must also be reasonable), perform the covenant, the right of re-entry may be enforced.

Even then the court will always relieve against forfeiture where no substantial injury has resulted, or where the injury or damage, if any, can be made good, so a landlord cannot succeed in ejecting a tenant simply because rent has fallen in arrears if the tenant pays the sum in arrears.

614 Increasing the Rent.

The landlord cannot raise the rent merely by giving the tenant a written notice that at such a time the rent will be increased; such notice amounts to nothing. The amount of the rent payable is a material part of the contract and the landlord cannot raise the rent or change the agreement in any other way without the consent of the tenant, any more than the tenant can lower the rent without the landlord's consent.

It has been held that even an agreement for a new lease upon different terms not amounting to an actual demise will not be sufficient without a notice to quit to determine a previous tenancy. John v. Jenkins, 1 Cr. & M. 227; Jones *v.* Reynolds, 12 B. 506.

The only way a landlord can legally increase the rent while a tenant is in possession, and who will not agree to an advance, is to *terminate* the *tenancy*, hence:

1. The notice must be to *vacate*; that is, order the tenant out, thus ending the tenancy. Then, after this is done, he may give the notice for an advance in rent, or the two notices may be given at the same time. Ahearn *v.* Bellman, 4 Ex. D. 201 C.A.

The two notices could also be joined by adding at the end of the "notice to vacate" a clause like the following: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual (or monthly) rental of the premises now held by you from me will be $——, payable (state how)."

If the tenant then remains in possession after his lease expires he thereby tacitly agrees to pay the higher rent and will be bound to do so.

2. Also where a lease has expired and the tenant remains in possession without a new agreement, thus becoming a "tenant at will," the landlord may, before receiving any rent, give notice of raising the rent, and the tenant in that case must either accept the terms and pay higher rent or move out. In this case the tenant is not entitled to a notice to vacate, because his legal right to occupy the premises has already expired, and he has not as yet acquired a new tenancy by implication. In Quebec the notice must be given within the eight days' limit.

A notice of raising the rent for a future tenancy given previous to, or upon the day of expiry of a lease, need not, of course, be accompanied by a notice to vacate. If the tenant then remains in possession he is bound to pay the price asked.

615 Notice to Quit.

1. Where property is leased for a definite time, the lease expires at that date, and neither party need give the other notice to terminate it or to vacate. The tenant may then go out, or the landlord may lease the property to another party.

If a new agreement, either verbal or written, is made for a further stated period, then no notice will be needed at the end of such new term.

2. But in cases where this first or a subsequent period has been passed *without any new agreement* being made, and the tenant, instead of moving out, simply remains in possession, paying the same rent which is accepted by the landlord, then a new tenancy has been created by "implication of law." Then after such weekly or monthly or quarterly or yearly tenancy has been created a notice to vacate becomes essential before either one can terminate it without the consent of the other.

3. The notice to vacate should be clear and distinct with no conditions or provisos in it. If any conditions are desired to be stated they may be given in a separate letter, which may accompany the notice, but the notice itself must not contain any conditions.

A verbal notice would be legal, but it is better to be in writing, either

as an ordinary letter or a formal printed or written notice, handed to the other party or sent by mail.

4. If there is no agreement as to the time when notice to quit must be given, then the *statutory notice* is required, but if there is an agreement, that, of course, will hold. If the agreement says, "thirty days," or "three months," that means "thirty days" or "three months" before the date of the termination of the lease; and if the agreement is that the notice may be given "at any time" without regard to the date when the monthly or quarterly or yearly tenancy would end, then the party giving such notice, whatever it may be, is released from giving the "statutory notice."

The statutory notices for all the Provinces, except for Nova Scotia and New Brunswick, are as follows:

1. A yearly tenancy, six clear calendar months, and not a day less.
2. A quarterly tenancy, three clear calendar months, and not a day less.
3. A monthly tenancy, one clear calendar month, and not a day less.
4. A weekly tenancy, one clear week's notice, and not a day less.
5. A tenancy at will, no time.

A tenancy "from year to year, so long as both shall please," may be terminated at the end of first year by giving six months' notice. But where it reads "one year certain and so on from year to year," it will be for two years at least and cannot be terminated at end of first year, except by mutual consent.

In Nova Scotia the yearly tenancy requires only three months' notice; a quarter or month, one month's notice; and a week, one week's notice.

In New Brunswick a yearly or six months' tenancy requires three months' notice, a quarterly or monthly tenancy one month, a weekly tenancy one week.

In Quebec a written lease terminates without notice at expiration of term agreed upon. But when the lease is verbal, or presumed or the term uncertain, three months' notice must be given if the rent is payable at terms of three or more months.

A notice of three months is necessary to terminate a yearly lease.

When a written lease has been continued by tacit renewal the notice to terminate it must be in writing, as such lease is not deemed a verbal lease.

5. It must be borne in mind that in all the Provinces this notice to quit (except by special agreement) cannot be given at random, but must be given so that the "month," or "quarter," or "six months," as the case may be, will expire at the date when the tenancy commenced. For instance, in case of a monthly tenancy which begins May 1st the notice to quit should be given not later than March 31st in order to leave a clear month. April 1st would be too late.

6. The notice to quit must be received by the other party within the time mentioned, not merely dated within the time. Handed to the person or an inmate of the house, or put under the door would be service.

7. A valid notice to quit terminates the tenancy, whether given by the landlord or the tenant, and if subsequently withdrawn by consent of the other party, such withdrawal does not *revive the tenancy.* The parties may *agree* to a new tenancy on the old terms or by acts *create a new* tenancy. But until such new tenancy is created it is only a "tenancy at will" and may be terminated without notice. He may also vacate without notice.

An *invalid* notice to quit does not *terminate a tenancy even* if verbally accepted by the other party. Hence, if a yearly tenant gave such invalid notice and the landlord did not accept it in writing and the tenant then remained in possession, the tenant would not be liable under the Overholding Tenants' Act, nor to double rent.

616 Form of Notice by Landlord.

Please take notice that you are hereby required to surrender and deliver up possession of the house and lot known as No. 4 James Street, in the village of Merritton, which you now hold of me; and to remove therefrom on the 31st day of May next, pursuant to the provisions of the Statute relating to the rights and duties of landlord and tenant.

Dated this 29th day of April, 1912.

Yours truly,

JAMES SMITH,
(*Landlord*).

To WALTER WINTERS,
(*Tenant*).

617 Form of Notice by Tenant.

I hereby give you notice that on the 31st day of May next, I shall quit and deliver up possession of the premises I now occupy as tenant, known as house and lot No. 4 James Street, in the village of Merritton.

Dated this 29th day of April, 1912.

WALTER WINTERS,
(*Tenant*).

To JAMES SMITH,
(*Landlord*).

618 Notice to Quit Not Acted Upon.

Upon the expiration of a valid notice to quit given by either party the tenancy ceases, and unless a fresh tenancy be afterwards created the landlord cannot distrain for subsequent rent, notwithstanding the tenant continues in possession after the expiration of the notice. Jenner *v.* Clegg, 1 Moo. & C. 213; Williams *v.* Stiven, 9 Q.B. 14.

In Ontario and all the Provinces where the English common law prevails, if a tenant, after giving notice of intention to quit the premises, holds over after the time mentioned in such notice without the landlord's consent he becomes an "overholding tenant" and may be ejected, or if a yearly tenant may be charged double rent to be recovered by suit but not by distress.

620 Distraining for Rent.

The Common Law gives a landlord a right under certain circumstances, to distrain for rent if the tenant does not pay it when due. In such cases any person may act as the bailiff for the landlord, whether a regular bailiff or not, and in such capacity possesses the same authority as the landlord possesses, but no more.

Distress may be levied under following conditions:

1. Rent may be distrained for the day after it is due and earned by occupation whether payable by the month, quarter or year, or as the case may be; but not until a demand has first been made for payment.

2. If the agreement is for rent to be payable in *advance*, it may be sued for the day after it is due. If it is not paid when due it gives a right of re-entry to the landlord. The common law gives the right to distrain for rent in *arrears*, but is rent actually in *arrears* at the beginning of the term,

before the rent has been earned by occupation? The courts, however, are not restraining such distress.

Taking a promissory note by a landlord from a tenant for the rent will postpone the right of distress until the maturity of the note, and probably would extinguish the right altogether.

An assignee cannot distrain for rent due before the assignment.

A landlord cannot distrain for rent after he has assigned his interest.

A mortgagee can distrain for arrears of interest on the goods of the mortgagor *only*.

A mortgagee cannot distrain for rent due the mortgagor. Dauphenais *v.* Clark, 3 Man. L.R. 225.

A mortgagee after giving notice of the mortgage to the tenant in possession under a lease created prior to the mortgage may distrain for rent in arrears which may accrue after such notice, Pope *v.* Biggs (1829) 9, B. & C. 245.

3. *When seizure may be made.* Seizure must not in any of the Provinces, be made before sunrise, nor after sunset, nor on Sunday, nor a legal holiday, except by order from a court.

In Quebec seizure cannot be made on a Sunday, or a public holiday, or before seven o'clock in the morning, or after seven o'clock in the evening, without leave of the judge or prothonotary, except in case of fraudulent removal or if the goods are upon the highway.

4. *Where distress may be made.* Distress must be made on the premises only, except under certain circumstances. If a tenant is removing his goods subject to seizure on the day that rent is due and the landlord forbids their removal, he may then seize them on the highway or follow them for 30 days and seize unless in the meantime the goods have been *bona fide* sold for value.

Also in case of live stock, if the bailiff saw them being driven off the premises to escape distress he could seize them off the premises.

Goods cannot be seized before rent is due even though the tenant is intending to move out.

In Quebec goods of the lessee may be seized on the premises or within eight days after removal, if they have not been *bona fide* sold to a third party before seizure.

The landlord has a privileged right for his rent upon the movables of the lessee and if they are removed the new landlord has no claim to them to the prejudice of the former landlord if followed within the eight days. C.C. 1619.

5. *When right of distress is barred.* In most of the Provinces distress may be made at any time within six months after the expiration of the lease if the tenant is still in possession and the landlord still retains his title or interest in the premises. If he has sold the property he cannot distrain; neither can the new owner; but it may be recovered by suit.

Manitoba allows distress for only three months if renting by month or quarter; or for one year, if payable less frequently than quarterly.

It is not now necessary that a Sheriff or Constable be present or assist at any distress for rent.

10. When a landlord has issued a distress he loses his right by abandoning it or withdrawing it, and cannot make a second seizure of the same goods for the same debt, unless there has been some mistake in the first seizure; or unless the first one was withdrawn by request of the tenant.

621 What Goods Landlord May Seize.

A landlord may legally distrain (a) upon goods and chattels which belong to the tenant; (b) the equity which a tenant may have in goods on the premises, as in case of goods purchased under a conditional sale, (c), the goods also of wife, or children or near relatives on the premises, if such other near relatives live on the premises as a member of the tenant's family.

Goods purchased on a lien agreement are liable to seizure for rent if there is not enough other goods to satisfy the claim, but the landlord must pay the balance of the purchase price.

Goods of third parties transiently or accidentally left on the premises, or there for repair, are not liable to seizure.

Goods of third parties on the premises by consent of such parties are liable for seizure if the landlord was not notified that they were the property of such third parties, but they must be released when proof of ownership is given.

In cases where the husband rents a house, but the household goods belong to the wife, the goods are liable for the rent while they are on the premises. But if they decide to move out before the lease expires they can do so if there is no rent due. The husband would be liable for the rent until the termination of the lease, but the goods of the wife would not be liable to seizure for the rent, either under a landlord's warrant or an execution.

In Quebec if the lease prohibits sub-letting the goods of sub-tenant would be liable to seizure.

If the lease permits sub-letting then the goods of sub-tenants are not liable further than their indebtedness to the tenant. C.C. 1621.

Every person who serves a Distress shall immediately give the person whose goods are seized a notice of the distress, giving the amount of rent distrained for, and an inventory of the articles taken, together with a copy of his charges and cost of seizure. If the tenant, after receiving such notice, neglects for five days from date of seizure to pay the rent or replevy the goods the landlord is at liberty to sell the goods for the best price he can get for them, and after payment of rent and cost of sale if there is any surplus it must be paid to the tenant.

622 Roomers and Lodgers.

Lodgers are temporary lessees, and are subject to the same laws and have similar privileges in respect to the rooms they occupy as a regular tenant in all the Provinces. Their goods are not liable to seizure for their landlord's rent. Boarders are not liable for damages they may do to the premises through accident, but they are liable if done through negligence, or maliciously, the same as other tenants are.

A verbal contract for ready-furnished rooms is not binding, as exclusive possession is bargained for.

But where a contract is for board and lodging at a boarding house, but in no specific room, the contract is valid, although not in writing. Wright *v.* Stewart, 2 E. and E., 721.

In case a boarder's or lodger's goods are distrained for rent due by his landlord, he must serve the superior landlord or bailiff, or other person levying the distress, with a written declaration that the tenant has no right of property or beneficial interest in the goods or chattels distrained, or

threatened to be distrained, and that they are the property of, or in the lawful possession of, such boarder or lodger. If he should owe the tenant for board or otherwise, he may state the amount and pay it over to the superior landlord or the bailiff, or enough of it to discharge the landlord's claim, if the boarder should owe that much.

And such payment made by the boarder to the superior landlord is a valid payment on account due from him to the tenant.

If a boarder gets in arrears for board, the boarding-house keeper or hotel keeper has a lien on the baggage and goods of such boarder and may retain them until the bill is settled. If the debt remains unsettled for three months the goods may be sold by public auction after giving one week's notice in a public newspaper. In Ontario, by amendment of 1910, the wearing apparel of a servant or laborer must not be held for a greater sum than $6, and when that is paid or any less sum that is due, the clothing must be given up, no matter how much more may be owing.

If unfurnished, or even furnished, rooms are rented for a definite term, it becomes a tenancy. Should such tenants fall in arrears for rent their goods are liable to distress for arrears the same as in case of other tenants, and should they undertake to move out without paying the rent, the rooms may be locked and their goods retained until settlement, or advertised and sold under landlord's warrant.

But if they are merely "roomers" and not tenants the boarding-house keeper has a lien upon their goods for the accommodation supplied, but such goods cannot be sold without waiting the three months as stated above.

623 Landlord's Priority for Rent.

Where there are other creditors, the landlord can only recover, prior to them, for one year's rent. After that he must take his share ratably with the rest. In case of an insolvent lessee, see "Priority of Claims."

Goods seized under execution and in the custody of a sheriff or bailiff cannot be distrained; but such goods cannot be sold or removed by said officer without the landlord's preference claim of one year's rent being provided for, or so much of arrears of rent for a less period as is due up to the time of seizure.

The landlord must give such officer a written statement of the terms of the lease and the amount in arrears. If the goods were sold and paid into court before the landlord had notice of the seizure, such written statement would be given to the clerk of the court instead of to the bailiff.

624 Landlord's Bailiff Not a Trespasser.

Collecting money under a landlord's warrant does not belong to a bailiff's official duties or the official duties of any other court official. A tenant may resist and prevent the entrance of a bailiff or other person who may come with a landlord's warrant.

A bailiff with an execution from a court must not be resisted, but a bailiff with a landlord's warrant has no more authority than the landlord has. It is simply brute force against brute force. A landlord's bailiff, however, is not a trespasser and violence dare not be used in resisting his entrance and seizure, neither is he a court official so must not commit a breach of the peace.

But after a bailiff lawfully gains admittance resistance should cease, for even if he then were ejected he would have the right to return and even

break open the doors to enter again. Bannister *v.* Hyde, 2 E. & E., 627 (1860). After making an inventory of the goods and giving it to the tenant the goods are said to be "impounded," and are then in possession of the law.

Where such bailiff fears violence or is threatened he may procure police protection, but the policeman must not assist to open the building or in making the distraint, simply protect the bailiff from harm. Skidmore *v.* Booth, 6 C. & P., 777.

625 Tenant Claiming His Exemptions.

In Ontario the same goods and chattels which are exempt from seizure under an execution are also exempt from seizure under a landlord's warrant. For full list see "Exemptions from Seizure." Hence if a tenant's goods are distrained by his landlord he has the right to take his *exemptions* and move out.

If the landlord distrains, the tenant has the legal right to select and point out the goods and chattels for which he claims exemptions. For instance, there are six chairs named among the exemptions; hence the debtor, instead of taking six common chairs, may select six of the best in the house, and the same all through the list.

If a tenant sign a lease with a clause in it barring his right to the statutory exemptions, of course such contract will bind him. A tenant is very foolish to sign any such Shylock lease which deprives his family of the protection which the legislature has provided for them.

The tenant who claims the benefit of the exemptions in case of a landlord distraining for rent, must give up possession of the premises forthwith, or be ready and offer to do so. The offer must be made to the landlord or his agent, and the person making the seizure is considered his agent for this purpose.

The surrender of the possession in the pursuance of the landlord's notice is a termination of the tenancy, and the tenant has the option of paying the rent and costs and moving out, or to take his exemptions and move out without paying the rent or costs, and leave the remainder of his goods to be advertised and sold under the landlord's warrant. (See Exemptions.)

In Quebec, also, the exemptions hold good against an execution by a landlord for arrears of rent, but in no other Province has the tenant any relief against his landlord.

626 Monthly Tenancy in Ontario.

On a monthly tenancy in Ontario, the exemptions only hold against two months' arrears of rent. If the monthly tenant owes for a longer period than two months, the landlord can distrain and sell to recover what is due over the two months, even if it takes all the goods. This "benighted" amendment, Section 32 of the Landlord and Tenants Act, is variously interpreted by the courts, and a landlord would not be safe in touching the exempted goods. The other Provinces have no such discrimination among tenancies.

627 Seizing Exempted Goods.

If the tenant neither pays the rent nor gives up possession after being legally notified to vacate, the landlord may, both in Ontario and Quebec, give him another written three day notice similar to the following, after which he can seize and sell the exempted goods to recover the amount of rent due and the costs. The notice must be something like the following:

Take notice, that I claim $..... for rent due to me in respect of the premises which you hold as my tenant, namely: (here briefly describe them, giving the number and street, or lot, concession, etc.): and unless the said rent is paid I demand from you immediate possession of the said premises; and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by The Landlord and Tenant Act entitled to seize and sell, and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent.

Dated this.....day of.....A.D. 19...

To C. D. (*Tenant*). A. B. (*Landlord*).

After giving the above notice, if the tenant still remain in possession, the landlord can seize and sell the last article on the premises belonging to the tenant to recover the amount due, and costs. If the tenant does not wish to lose his exemptions he must take them and move out within the three days. See following section.

Quebec's Three-Day Notice.

Quebec has a summary way of dealing with a tenant who does not pay his rent, that is effective and fair. When rent is due and unpaid, the landlord may give the tenant not less than three days' notice to vacate the premises, and if he moves out within that time the overdue rent is remitted him. If, after receiving this notice, he remains in possession without paying the rent, he loses his exemptions, and the landlord may bring suit in the proper court and sell under execution any or all the goods of the tenant to recover the debt and costs.

The landlord need not take this course, but may bring suit and endeavor to collect under execution, or by summary proceedings provided by the code of Civil Procedure and evict the tenant.

628 Fraudulent Removal of Goods.

Any time before rent is due a tenant may move out of the premises leased without any color of fraud, even if they are removed with the intent to prevent distress it is not a fraudulent act, if the rent is not due. Whitelock *v.* Cook, 31 Ont., 463 (1900.)

To constitute removal with the intent to defraud the rent must be actually due at the time of the removal of the goods, otherwise the right to follow and distrain them does not arise. Rand *v.* Vaughan, 1 Bing., N.C. 767 (1835.)

There must be a fraudulent intent on the part of the tenant to deprive the landlord of his right of distress, as, for instance, removing the goods on the day that the rent falls due and after the landlord had forbidden their removal until the rent was paid, or moving out during the night of the day the rent falls due to escape distress would give the landlord a right to distrain off the premises wherever they may be found, if in the meantime they have not been sold to a *bona fide* purchaser for value.

Where goods have been fraudulently removed after rent falls due the person so removing or helping to remove them is liable in action by the landlord for double the value.

The goods in such case must be goods liable to seizure if they were not removed, otherwise such removal gives no right to follow, or to recover damages. Gray *v.* Stait, 11 Q. B., D. 668 (1883.)

A mortgagee may remove goods off the premises by the consent of the tenant.

A creditor may also, by consent of the tenant, remove goods in satisfaction of a debt if done in good faith.

A purchaser for value before actual distress may remove the chattels he has purchased.

The goods of third parties, even relatives, living with the tenant, may remove their goods any time before seizure is made.

629 Illegal Distress.

If goods are distrained which are exempt from distress, the seizure will be illegal and the landlord will be liable to an action, and if the bailiff made the mistake he will have to bear the costs.

In case a distress is illegal the purchaser acquires no title against the tenant, or the owner of the goods if the goods belonged to a third party. Harding *v.* Hall, 14 L. T., 410 (1866.)

For an irregular or an excessive distress a tenant may recover full satisfaction for the damages actually sustained, but nothing by way of penalty.

If a landlord enters a house after sunset and interferes to prevent the removal of the goods, the tenant is entitled to recover the full value of the goods distrained. England *v.* Cowley, L.R., 8 Ex. 126 (1873.)

If a landlord distrains for rent before it is in arrears it is illegal, and even if the tenant were to sign a document without consideration and not under seal, giving the landlord the right to seize before the rent was due, it could still be voided if any one were to challenge it. Brayfield *v.* Cardiff, 9 Man., L.R. 302 (1893.)

Distress for rent under a lease that has been surrendered is illegal. If a landlord on account of a breach of covenant on the part of the tenant to pay rent enters an action for re-entry, he cannot distrain after entering such action. But if he distrains first he may subsequently enter action for forfeiture.

He must not break open outside doors, nor open windows to enter, and if he does he commits an illegal act and a distress if levied would be void. Nash *v.* Lucas, L.R., 2 Q. B. 590 (1867.)

If the door is not locked the bailiff may open it, and if the key is in the lock he may unlock it, but he must not take down a key he may discover hanging or placed nearby and unlock the door, as that would be a criminal act, and the seizure would be void. Miller *v.* Curry, 25 N.S., R. 502 (1892.)

He may enter through an open window or transom or sky-light, but must not force any of them open, for to open an unfastened window if closed would be an illegal act, as stated above.

If a window is partially open he may push it further open so as to enter.

He must not put his hand through a hole in the door, or through a broken window to remove fastenings. Handcock *v.* Austin, 14 C.B. N. S. 634.

After he lawfully gets inside the outer door he may break open any inside door necessary to find any goods which are distrainable.

630 Penalty for Illegal Seizures.

1. If a landlord distrain before rent is in arrears the tenant may recover double the amount of goods distrained with full costs of suit.

2. If the landlord were to enter the house after sunset and prevent the removal of the goods this will be illegal, and the tenant may recover the full value of the goods distrained. The landlord must wait until the next day and then follow the goods if they have been removed. A distress on Sunday is also illegal.

3. The landlord is not liable for any illegal acts committed by the bailiff unless the acts were authorized or subsequently ratified by him. Therefore, if the bailiff is authorized to seize the tenant's goods and he seizes those of a stranger, or to seize on the premises and he seizes off the premises, or if he breaks into the premises, the bailiff only is liable. Also, if he were to seize and sell the exemptions illegally, the bailiff would be liable. But the action would be against the landlord.

632 Form of Distress Warrant.

To Mr. A. B., my Bailiff in this behalf:

I do hereby authorize and require you to distrain the goods and chattels of C. D. (tenant), liable to be distrained for rent, in and upon the....., now or lately in the tenure and occupation of.....situate on..... in the county of....., for the sum of.....dollars.....cents, being the rent for the term of....., due to me for the same on the.....day of....., in the year of our Lord one thousand.....hundred and.....; and for the said purpose distrain within the time, in the manner, and with the forms prescribed by law, all the said goods and chattels of the said ....., wheresoever they shall be found, which have been carried off the said premises, but are nevertheless liable by law to be seized for the rent aforesaid, and to proceed thereon for the recovery of the said rent as the law directs.

Dated the..... day of....., 19... E. F. (*Landlord*).

633 Form of Inventory of Goods Seized.

An Inventory of the several goods and chattels distrained by me, E. F. (or if as Bailiff, say A. B., as Bailiff to Mr. E. F.), this..... day of ....., in the year of our Lord, 19.., in the house, outhouse and lands, (as the case may be) of C. D., situate at....., in the county of....., (and if as bailiff, say by the authority and on behalf of E. F., your Landlord) for the sum of.....dollars, being.....rent due to me (or to the said E. F.) on the .....day of....., 19.., and as yet in arrears and unpaid.

1. In the dwelling house:

Kitchen (name chief articles, but not exempted articles).
Dining room (name the articles, but not exempted articles).
Parlor (name the articles, but not exempted articles).

2. On the premises:

In barn (name articles).

Describe all the articles seized as nearly as can be, according to the place where they are found. And then at the bottom of the Inventory subscribe the following notice to the tenant, and leave the Inventory and notice with him; Mr. C. D.

Take notice that I have this day distrained (or that I, as bailiff to E. F., your Landlord, have this day distrained) on the premises above-mentioned the several goods and chattels specified in the above Inventory for the sum of.....dollars, being.....rents due to me (or to the said E. F.) on the.....day of....., 19.., for the said premises; and that unless you pay the said rent with charges of distraining for the same, or replevy the said goods and chattels within five days from the date hereof, the said goods and chattels will be appraised and sold according to law.

Given under my hand this.....day of....., 19...

Witness: { E. F. (*Landlord*)
or A. B. (*Bailiff*).

(In distraining on farm stock or growing crops, the Inventory and notice would be varied by giving number of lot, concession, township, etc., and the disposition made of the crops, etc.) Notice of sale must be posted up in three public places.

634 Tenant's Request for Delay.

Mr. A. B.,

I hereby desire you will keep possession of my goods which you have this day distrained for rent due, or alleged to be due, from me to you, in the place where they now are, being in the house number.....street (name of town), for the space of.....days from the date hereof, on your undertaking to delay the sale of the said goods and chattels for that time, to enable me to discharge the said rent, and I will pay the man for keeping the said possession.

Witness my hand this.....day of .....19...

Witness { C. D.
E. F.

635 Tenant's Set-off Against Rent.

A tenant may set-off against the rent due a debt due to him by the landlord. It may be given either before or after seizure, and may be in the following or similar words:

Take notice that, under The Landlord and Tenant Act, I wish to set-off against rent due by me to you the debt which you owe to me on your promissory note for ..... dated ..... (or for eight months' wages at $20 per month, $160, or as the case may be).

Dated this .....day of..... 19....

Signature.

In case of such notice the landlord can only distrain for the balance due him after deducting any debt justly due by him to the tenant, and if he distrains for more he will be liable for illegal seizure.

636 Legal Costs of Distress.

The Ontario Statutes allow the following expenses if the amount distrained for does not exceed $80:

1. Levying distress under $80, $1.

2. One man keeping possession per day, 75 cents.

3. Appraisment, whether by one appraiser or more, two cents on the dollar for the value of the goods.

4. If any printed advertisement, not to exceed in all, $1.

5. Catalogue, sale and commission, and delivery of goods, five cents in the dollar on the net proceeds of the sale.

When the sum exceeds $80, $1 per day may be charged for the man left in possession of the goods, and the other expenses allowed are about double those mentioned here.

In cases of dispute as to costs either party, by giving two days notice in writing, may have the bill taxed by the Clerk of the Division Court where the distress takes place, upon payment of a fee of twenty-five cents. Similar procedure in all the Provinces.

The costs are very similar in all the Provinces, and we will, therefore, only give those for Manitoba and other Western provinces.

For Manitoba the costs allowed are as follows for both chattel mortgage and under landlord's warrant:

1. Levying distress, $1.

2. Man in possession per day, $1.50.

3. Appraisement, two cents on the dollar on value of goods up to $1,000, and one cent per dollar all over $1,000.

4. All reasonable and necessary disbursments for advertising.

5. Catalogue, sale, commission and delivery of goods, five per cent. on the net proceeds of the goods up to $1,000, and two and one-half per cent. thereafter.

6. Mileage in going to seize, fifteen cents per mile one way.

7. All necessary and reasonable disbursements for removing and storing goods, and keeping live stock, and any other disbursements which in the opnion of the judge before whom the question of costs might be brought for decision, would be regarded by him as reasonable and necessary.

No other or greater costs or charges shall be taken from tenant, or the proceeds of the sale, and no charge shall be made except for what is actually done. Any violation of this provision incurs a penalty of treble the amount of the overcharge.

The same charges are allowed for seizure under a chattel mortgage.

For British Columbia the costs allowed for seizures are as follows:

1. Levying distress when the amount is not over $100, $1.50; over $100, but not exceeding $500, it is $2.00.

2. Man in possession, per day, $3.00.

3. Appraisement, if under $100, is $2.00; if over $100, it is two per cent. on the value as appraised.

4. All necessary and reasonable disbursements for advertising.

5. Catalogue commission for selling, delivery of goods, if not exceeding $100, ten per cent. on the proceeds of the sale; if over $100, but not exceeding $500, seven and one-half per cent.; and if over $500, five per cent. on the next $1,000; and four per cent. on the next $1,000, and three per cent. on all exceeding $2,500.

For Alberta, Saskatchewan and North-West Territories, costs allowed for both chattel mortgage and under landlord's warrant are as follows:

1. Levying distress, $1.00.

2. Man in possession, per day, $1.50.

3. Appraisement, two cents on the dollar, up to $500, and one per cent. for each additional $500 or fraction thereof up to $2,000, and one-half per cent. on all sums thereafter.

4. All reasonable and necessary expenses for advertising.

5. Catalogues, commission, and delivery of goods, three per cent. on net proceeds of goods up to $1,000, and one and one-half per cent. thereafter.

For Yukon, both for chattel mortgage and under landlord's warrant:

1. Levying distress, $2.50.

2. Man in possession, per day, $4.00.

3. Appraisement, two cents on the dollar up to $500, and one cent on the dollar for each additional $500 or fraction thereof up to $2,000, and one-half cent on the dollar on all over that amount.

4. All reasonable disbursements for advertising.

5. Catalogues, sale, commission, and delivery of goods, three per cent. up to $1,000, and one and one-half per cent. thereafter.

CHAPTER XIX.

PRINCIPAL AND AGENT.

640 Principal and Agent.

Agency is where one person transacts business for, or represents another. The errand boy, the clerk, the conductor, engineer, switchman, the commission merchant and the farm laborer are all agents as much as those engaged in selling machinery or fruit trees on commission or salary. In all branches of business where one person acts for another there is an agency. Each member of a partnership business is an agent for the others and binds the firm by his acts and contracts connected with the partnership business.

Any person may act as agent that the principal employs, even a minor employed as agent may make any contract that his principal could make.

The powers, rights, duties and liabilities of agents are determined by the rules of the common law, hence, are invariable, and there is no excuse for those who blunder through ignorance or carelessness.

In Ontario, chap. 30 of 1914 enacts that no person can now act as insurance agent without having a certificate of agency from the Superintendent of Insurance. This does not apply to Fraternal Societies nor to Mutual Fire or Weather insurance companies registered in the Province.

641 Express or Implied Appointment of Agents.

An agent may be appointed simply by word of mouth, by writing, or by Power of Attorney, or it may be only gathered from facts and general course of business.

When the business to be performed by the agent is of such a nature that it requires him to sign notes, accept drafts, issue cheques, etc., the appointment should be by writing, that is a power of attorney should be given for the specific authority that is conferred; and if he is to sign deeds, mortgages etc., or to enter into other contracts under seal, a Power of Attorney under seal should be given.

The Power of Attorney may be general—giving the agent power to transact all the usual business of the principal; or it may be specific—giving authority only to one or more particular acts, and no more. A Power of Attorney may also be proved by being executed in the presence of a notary public who places thereon his attestation of its execution, but this is not essential except that it leaves no room for a question of forgery in subsequent complications.

642 Form of Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS that I, James Everingham, of the Town of Strathroy, in the County of Middlesex, and Province of Ontario, merchant, do nominate, constitute and appoint James Marion, of the City of Chatham, County of Kent, my true and lawful attorney, for me, in my name and on my behalf to (give in full the work to be done by Marion for Everingham).

AND for all and every of the said purposes hereinbefore mentioned, I do hereby give and grant unto the said James Marion, full and absolute power and authority to do and execute all acts, matters and things necessary to be done for the full and proper carrying out of all said matters entrusted to him and do hereby ratify and confirm, and agree to ratify and confirm and allow all and whatsoever the said James Marion shall lawfully do by virtue thereof.

In witness whereof I have set my hand and seal this 31st day of August, 1910.

Signed, sealed and delivered in the presence of A. L. JONES. } JAMES EVERINGHAM. ✺

643 General and Special Agent's Authority.

General agents are those who have authority to act in all capacities in the place of and for their principal, or act in a certain locality, or for a certain work or kind. General agents bind their principals, rendering them liable to third parties *even for the fraud or neglect* on the part of the agent.

Commission merchants, secretaries and treasurers and managers of stock companies, employees of railroad and steamboat companies, etc., are all general agents.

Special agents are those who are limited to a certain class of action or kind of work, and do not bind their principal only in so far as they keep *within the scope of their authority.* If they pass beyond this, or are guilty of a fraudulent act, they only render themselves liable, and not their principal.

But if an agent should do business for the principal which he is not authorized to do, and the principal accepts it, he thereby ratifies it, and thus becomes responsible, not only for that particular transaction, but for all similar acts. *Ratification* of an act has the same effect as prior authority. Ratification may be effected in two ways: (1) By express words. In case of corporations and stock companies it is usually done by resolution. (2) By accepting the benefits accruing from the act.

By refusing to make the transaction his own, either by express words, or by refusing to accept the benefits accruing from it is *disaffirming* the act, and frees him from liability.

644 Fraudulent Acts by Agents.

Fraud will vitiate any transaction, and the principal is civilly responsible for the fraudulent acts of his agent on his behalf, even though he takes no part in the fraud of the agent.

Firms, companies, and corporations cannot retain any benefit which they have gained through the fraud of their traveller or agent. (Western Bank of Scotland v. Addie L. R., 1 H. L., 145).

645 Third Parties Dealing With Agents.

Third parties should ascertain the authority possessed by *special agents* if they would protect themselves when contracting with such, if it is important to them that the *principal* should be held responsible.

An agent should always have the evidence of his authority with him, and if he has it not, no important transaction should be performed with him. It is not enough to bind the company, that an agent *declares* himself to be either a special or general agent, for his misrepresentation would not bind the company. The parties in dealing with him must demand the *proof* of his authority if they would be safe.

Money paid to an agent who has no authority to receive it cannot be recovered from the principal (or any other person).

Money should never be paid to an agent for a note unless he has the note to deliver over, nor even to the original payee.

A contract made with a special agent who is exceeding his authority cannot be enforced against his principal.

Notice given by the agent to third parties is notice given by the principal; and notice given by third parties to the agent is notice given to the principal and at the same time it was given to the agent. Payment tendered to the agent is payment tendered to the principal, and *vice versa*.

Where the parties dealt with are aware that they are dealing with an agent, they cannot hold the agent personally liable upon a contract made by him, on behalf of his principal. If, on the other hand, the agent represents himself as the principal, the third party will have the right, either to hold the "agent" responsible personally for the contract, or he may enforce it as against the "principal" when discovered, providing he is a *general* agent, or a special agent acting within the scope of his authority. He cannot, however, sue the agent, and afterwards bring an action against the principal. He must elect which he will hold.

646 Agent's Signature is Public Notice.

An agent's signature to a paper or document of any kind is public notice that he is acting under a limited authority, whether he has previously stated that he was merely an agent or not, and the principal is bound by such signature only so far as the agent is acting within the actual limits of his authority, but no further.

An agent may disclose the fact that he is only acting as agent by using in connection with his name any of the following or similar terms: "Per," "pro," "pro con," "for," or "agent for."

If the agent does not disclose the fact of his agency when signing his name to a contract he binds himself.

It is preferable to sign the principal's name first, as:

James Smith,
per W. Winters, Agent.

Dominion Transportation Co., Ltd.,
per W. Winters, Manager.

W. Winters, Manager,
Signed for and on behalf of Dominion Transportation Co., Ltd.

If W. Winters, acting as agent, were to sign a note or accept a draft by signing his name as

W. Winters, Agent,

it would bind himself personally and not the principal, in all cases.

649 British Columbia Employment Agencies.

Chapter 10, 1912, enacts that no person in British Columbia shall conduct an employment agency or intelligence office without a license from the Superintendent of Provincial Police.

The license remains in force one year, and is renewable indefinitely from year to year.

Every license holder must keep posted up in a conspicuous place in his office the words "Licensed Employment Agency."

The license is not transferable. A printed copy of the scale of fees must be posted up in the office, and no other charges may be made. A breach of the Act incurs a penalty of not less than $10, nor more than $100; and in default of payment imprisonment not exceeding three months. A third conviction within three years forfeits the license.

REAL ESTATE AGENCY.

650 Real Estate Agency.

The same laws and usages hold good between estate agents and the proprietors of property, and purchasers of property that rule in other branches of the agency. An agency may be created by verbal or written agreement, or it may be by implication, or created by the usual course of such business. As the chief business of an estate broker is the buying and selling, and leasing of real estate, and that fact being well known to property owners, an agency is easily created—either express or implied.

The following features of this branch of agency have been finally settled by cases before the highest courts in the realm, and Unite dStates, and they cover the points concerning which litigation is most likely to occur.

The proprietor of the estate should state definitely, when naming the price at which he will sell, whether such price includes the agent's commission, or whether it is the net price; otherwise if the agent effects a sale for the amount named he will be entitled to his commission out of such amount.

If a property owner does not desire an agent to handle an estate he may be offering for sale, when an estate broker offers his services he must refuse them. If he does not definitely refuse to allow such agent to act, and the agent subsequently introduces to such proprietor a prospective purchaser of the property, and a sale subsequently takes place, the agent will be legally entitled to the usual commission.

(a) Delay in Consummating Sale. If an agent approaches a property owner concerning an estate, or if the proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a *general* employment; and should the estate eventually be sold to a purchaser introduced by the agent, the latter will be entitled to his commission, even though the sale does not take place for some time after, and even though by an agreement with the proprietor such persons take a lease of the property with the option of buying within, say, a year; if the sale is then effected the agent will be entitled to his commission. The negotiations are not broken off, but the time for concluding the sale is by agreement delayed for a year. It is a continuation of the negotiations, and after the purchase is concluded the agent may claim and recover his commission. Morson *v.* Burnside, 31 O.R., 438 (1900).

(b) Commission Not Yet Earned. If the owner obtains a purchaser without anything being done in connection therewith by the agent whom he employed for that purpose, the agent cannot recover commission, and could not, even though he had another purchaser ready to buy, but who had not yet become known to the principal. Rimmer *v.* Knowles, 30 L.T. N.S. 496.

(c) Agent Discharged After Purchaser Introduced. "Where there is a *general* employment to sell, and the agent takes the usual course in such matters, of entering the property in his books and advertises it, and thereafter gives an introduction which results in a sale, he must be held to have earned his commission, although he does not make the contract of sale or adjust its terms; because in that case he fulfils his contract by giving the introduction, and the employer cannot defeat his right to commission by determining his employment before the sale is effected." Lord Watson, in Toulmin *v.* Millar, 58 L.T., N.S. 96.

(d) Engaged to Rent Only. "Again where the employment is *limited*—if for instance, he was simply to let—he would have no right to commission upon a subsequent sale made to the tenant of the property let during the currency of the lease. In that case his employment and his consequent right to commission would, in the absence of any stipulation to the contrary, terminate with the execution of the lease which he was employed to negotiate." Lord Watson, in Toulmin *v.* Millar.

(e) Contract Either to Sell or Let. "On the other hand, suppose a proprietor goes to an agent for the purpose of letting and instructs him to let. The agent says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' In this case there is not a general employment to sell. It gives a limited mandate to sell for the price specified instead of letting; and the agency would come to an end when the agent failed to obtain that price and carried out the alternate scheme of letting the estate to the tenant." Lord Watson and Lord Fitzgerald before the House of Lords, in case of Toulmin v. Millar.

(f) Stipulated Price and Agent. "The mention of a specific sum which the proprietor is willing to accept for the property prevents the agent from selling at a lower price without the consent of the employer; but it is

given merely as the basis of future negotiations, leaving the actual price to be settled in the course of the negotiations; therefore, if the proprietor concludes a sale to the purchaser introduced by the agent at a price less than the sum named at the time the employment was given, the agent, in the absence of definite stipulations to the contrary, will be entitled to his commission out of the sum obtained." Lord Watson, in Toulmin v. Millar.

(g) Breach of Faith by Owner. "If a property owner offers a broker a certain sum to obtain a purchaser for his property and the broker procures a party to enter into negotiations for the purchase, and pending the negotiations the proprietor allows such party a definite time to decide upon terms proposed, and before the expiration of such time sells to a third party, the broker is entitled to recover the stipulated compensation." Reed's Executors v. Reed, 82 Pa., Lt. 420.

"In the case of *Green v. Bartlett*, 14 C. B., N. S. 581 (1863), where an agent had failed up to a certain time to effect a sale, whereupon the owner told him he had concluded not to part with his property; but subsequently the owner privately negotiated a sale to a person who, as it was shown, had been attracted to the office of the broker by the advertisements displayed by him, and had learned from him the name and address of the owner, it was held that the agent was entitled to his stipulated commission."

(h) No Commission Apart from Contract. "If a broker has no employment to sell either express or implied, he can have no claim to be remunerated, even though he can prove that he introduced to the owner the person who afterwards purchased the estate, and that his introduction became the cause of the sale." Lord Watson, in *Toulmin v. Millar*, made this point very clear. In order to found a legal claim for commission there must not only be a causal relation between the introduction and the ultimate transaction of sale, but there must be a contract of employment as well.

In Alberta, no commission for the sale of real estate can be recovered unless the contract for the same is in writing, signed by the party sought to be charged, or by his agent, lawfully authorized in writing (Chap. 26 of 1906).

It applies to all transactions since May 9, 1906.

This places such agreements under the Statute of Frauds and Perjuries in that Province.

(i) Principal Changing His Mind. If the broker fully performs his contract with the land-owner he cannot be prevented from recovering his commission because the owner subsequently changes his mind about making a sale or trade of the property. Neiderland v. Starr, 50 Kan. 770.

Neither can he avoid the contract with the broker on the ground that he has a better offer. He is free to accept the better offer, but he must compensate the broker who has produced a purchaser at the stipulated price before the better offer was accepted. Thornton v. Moody, 24 S.W., 331.

(j) Negligence of the Principal. "Where a purchaser acceptable to the principal is found within the time specified, but delay in closing the sale caused by the principal's failure to keep appointments with the purchaser, or through other fault, fraud or negligence of the principal, the sale falls through, the agent who finds the purchaser is entitled to his commission. Ralts v. Shepard, 37 Kan. 20.

The burden of proof is on the principal to show why he did not keep such appointments.

The question as to whether the principal wilfully broke off the sale which the broker worked up is for the jury to decide.

(k) Sale Thwarted by Principal. A broker undertaking to sell property for another for a certain commission who finds and produces a satisfactory purchaser, able, ready and willing to purchase at the price and on the terms stipulated, has earned his commission though the sale is never completed, if the failure to complete the same is on the part of the principal through no fault of the agent or the purchaser, and the agent may recover damages to the full amount of the commission. Roberts v. Bernard, 1 Cab. & E., 336 (1884).

Neither can the right of the agent to his commission be barred by the fact that the sale is prevented by the principal's attempt to change the terms of sale, or impose additional ones. Hildebrand *v.* Lillis, 10 Colo., App. 522.

(l) Principal Refusing to Enforce Contract. In cases where a broker has effected a bargain and sale by a contract which is mutually obligatory on vendor and vendee, he is entitled to his commission whether his employee chooses to comply with or enforce the contract or not. Love *v.* Miller, 53 Ind., 294 Am., Rep. 192. Either of the principals to a binding contract for the sale of real estate may enforce it against the other. If neither one does, the agent must look to his employer for his compensation.

The default of the principal in none of the preceding cases will be assumed, but it must be averred and proved.

(m) An Oral Agreement. Although the contract between the broker and the purchaser is merely oral, if it is one that the purchaser is ready and willing to carry out but for the default of the principal, the broker's right to commission will not be affected by the principal's refusal to consummate the sale.

Also in cases of an oral agreement made between the principal and a purchaser procured by the broker, if the purchaser is able and willing to carry it out and the principal refuses under the Statute of Frauds to execute it, the agent is entitled to his commission. But if the purchaser refused to execute it, of course, the agent would not be entitled to commission, because the principal would have no power to enforce the oral agreement.

(n) Inability of the Principal to Convey. Where a broker finds a purchaser acceptable to the principal, but the sale falls through because the wife will not sign the deed, barring her right of dower, the agent is entitled to his commission unless the agreement with the agent provided for such contingency. Clapp *v.* Hughes, 1 Phila. 382.

If through any other cause, as, for instance, a defective title, the owner is unable to complete the sale after a purchaser acceptable to him has been found, he is liable for the commission. If, however, the agent knew the defect in the title, he could not then recover commission.

(o) Justifiable Refusal to Sell. In many cases the refusal of the principal to sell is justifiable,—as where a broker refuses to disclose the name of the intending purchaser to his principal, it was held that the latter had a right to assume a private speculation of the property on the part of the broker himself, and might, therefore, refuse to close the transaction without liability for commission. Hayden *v.* Grillo, 35 Mo., App. 647, 654.

Also if the purchaser introduced by the broker would not be financially responsible, in the estimation of the principal, to carry out the undertaking; or if the purposes for which the premises were intended to be used would be objectionable; or for any other justifiable cause of disapproval the proprietor may refuse to sell and not be liable for commission.

To give the agent the right to commission without a sale, the refusal on the part of the owner must be unjustifiable, or against the agreement with the agent.

(p) Broker as Agent for Purchaser. If a person engages a real estate agent to purchase a certain property at a certain price and agreed to pay a specified commission therefor and the broker secures such property at the agreed price, and is ready and able to have the property deeded to him, and then such party refuses to take the property or to pay the stipulated commission, the broker will recover his commission and a judgment to that effect would not be set aside. Ackerman *v.* Bryan, 33 Neb. 515.

(q) Broker as Agent for Both Seller and Buyer. Although there might be conditions under which a broker could honorably act as agent for both seller and purchaser and receive a commission from each, yet such circumstances are so rare that such double agency is held to be illegal. If either party before paying the commission should discover that he was acting as agent for the other party also, and on that ground refused to pay the commission, he could not recover it by suit; and if he had paid the commission and then discovered that the agent had taken commission from the other party, he could recover it back. S. C. Chap. 33, of 1909.

Even when an agent employed to sell property receives secret profit from the purchaser, he must not only account for that profit to his principal, but is not entitled to any commission from him. (Porter on Principal and Agent, page 129).

Also when an agent in collusion with the purchaser acts against the interest of the seller he forfeits his commission. (Andrews v. Ramsay, 2 K. B., 638 (1903).

When an agent employed to sell land sold it to a company in which he was interested as a shareholder and director, it was held that he was not entitled to any commission. (Solomons v. Pender, 3 H & C., 639, 1864).

(r) Revoking Broker's Agency. A real estate agency may be terminated in the same way as are other agencies:

1. If the agreement called for the sale to be made in a specified time, the agency will end at that time, unless extended.

2. Death or insanity, or other incapacity of either principal or the agent, terminates the agency.

3. The insolvency of the principal dissolves the agency.

4. A legal revocation by the principal terminates the agency.

The revoking, however, must not be in bad faith as a device for escaping payment of commission. McKnight *v.* Thayer, 48 N. Y., S.R. 620, 622.

The principal may withdraw the property from sale or may revoke the agent's authority at any time if the agreement with the agent is not for any definite period and no one is ready to purchase; it would not be fraud, although it might not be fair.

He cannot arbitrarily cut off the agent's authority in the midst of what the broker can show would be a successful agency and then refuse compensation. He can at least recover for his time, labor and expenses on a *quantum meruit*—as much as he has earned. Jaekel *v.* Caldwell, 156 Pa., 266, 267.

If there is fraud on the part of the principal in the revocation of the broker's authority, and he avails himself of the information procured by the broker in effecting a sale, the agent will still be entitled to his commission. Beale *v.* Creswell, 3 Md., 196, 201.

(s) Broker Forfeiting His Commission. An agent who performs his duties in such a way that no benefit results therefrom to the principal, or who enters into an arrangement for his own benefit, adversely to that of the principal, even though not corruptly, forfeits his commission. (Hammond v. Halliday, 1 C. & P. 384; Harrington v. Victoria Graving Dock, 47 L. J. Q. B. 594 (1878).

(t) Action to Recover Commission. The action of the broker against the principal on account of his failure to carry out the contract is for damages and not for commission. The measure of damages would naturally be the amount of commission that would have been payable under the contract.

The contract between the broker and the principal which stipulates that the commissions are to be paid out of the purchase money cannot be taken advantage of by the principal in an action to recover commissions where the sale has been prevented by the fault or refusal of the principal.

It is not necessary for the purchaser who is ready, able and willing to complete the contract in every respect to tender the amount of purchase money before the broker brings an action to recover his commission where the principal refuses to execute conveyance to the purchaser. Vaughan *v.* McCarthy, 59 Minn., 199.

In an action to recover commission where the sale fails to be made, the broker must show:

1. That he had received authority from the principal to make such sale, and that such authority had not been revoked.

2. That the person furnished by him to make the purchase was willing to accept the offer precisely as made by the principal.

3. That he was able to carry out the agreement.

4. That he was an eligible and such an one that the principal was bound in good faith between him and the broker to accept.

CONVEYANCING.

654 Conveyancing.

In all the Provinces, except Manitoba, any person may perform services for others which come under the name of conveyancing without a license and receive fees for drawing documents, but to be able to collect his fees by suit, and take affidavits, it is necessary to procure an appointment, either as a Commissioner, or a Notary Public, or a Magistrate.

655 Conveyancers as Agents.

Next to solicitors, conveyancers are the most important among agents, and are entrusted with duties that require expert knowledge, unfailing fidelity and the utmost care in drawing the documents that emanate from their hands, so that they accurately express the will and intention of the respective parties to the agreement, and at the same time conform to the requirements of both the Statute and the common law, of the place of contract, and also of the place where the contract is to be performed.

656 Knowledge Essential to Safe Conveyancing.

While the conveyancer should be very familiar with nearly every chapter in this book, the following Chapters and Sections will be found to bear directly on his work.

The following suggestions and reminders indicate "danger spots," where loss and litigation have resulted from lack of knowledge in many cases and from faulty construction in others which left the intention doubtful.

See 468 and 469 for critical information in writing deeds.

Examine also "Purchaser Restricting Nature of Title," section 466.

Read critically "Who Should Sign" documents in *agreements, leases, deeds* and *wills.*

See section 14 as to when seals should be used.

See Legal and Illegal, Valid and Invalid Contracts, so your clients do not rely on agreements the courts will not enforce.

Study the "Requisites of a Binding Contract" until they become clear. Also note 69, 70, 75, 76 and 82.

It is the signature of the *principal* that is needed on every document in his name. If it is signed by an agent or attorney you must know that he has the legal authority to sign.

Devour that short chapter on "Guaranty and Suretyship."

Every section of the chapters on "Real Property" and "Personal Property" affects the conveyancer's work.

The chapters on "Promissory Notes," "Acceptances," and the sections respecting cheques should be critically studied, as they are liable to crop up in any kind of a transaction.

In writing leases, that whole chapter on "Landlord and Tenant" should be at the "fingers' ends" of the conveyancer, so that the lease does not open the way for a needless lawsuit.

The chapter on "Wills" contains about every point that is necessary to be noted. Be specific in the provision that is made for the widow; don't let a legatee, or the wife or husband of a legatee, sign as a witness; and be sure to mention that the estate is given to the executors *in trust* for the beneficiaries.

Where there are minor children who will become orphans by the death of the testator, see section 825 as to the naming of a guardian in the will.

Note the special wording which rules in distinguishing between valid and invalid bequests, section 824.

Remember the *execution* of a document means its signing and delivery. Documents have no binding force until they are duly signed and lawfully delivered. See Section 150.

In deeds and mortgages the land must be correctly and minutely described.

Conveyances respecting real estate must be made to comply with the laws of the Province or country in which the land is situate, otherwise the documents could not be registered.

Instruments affecting personal property must be registered in the proper office, otherwise they are void against third parties.

It is no matter where the parties to a contract live, or whether they are British subjects or aliens.

In property held *in trust* by A for B, A is the legal owner and B the equitable owner, and the instrument creating the trust should state whether both the legal and equitable owners must sign the deed in case of sale.

657 Telegraph Companies as Agents.

Telegraph companies are agents of the sender of the message, and bind him in contracts made with the receiver of the message through such message. If the telegraph company fail to properly deliver the message or if it make a mistake in transmitting the message and loss occurs, the sender may recover from the company whatever loss he can prove resulted from the negligence of the company or its employees.

659 Common Carriers. Three Classes.

1. Persons who carry goods without charge, merely to accommodate. If loss occurs while goods are in their charge they are only liable for damages, if they are guilty of very gross negligence.

2. Those who carry goods privately for *hire*. That is those who do not make it a business to carry goods, but do so occasionally and take pay for it when they do. Such persons are liable for mere carelessness or common negligence, if loss occurs.

3 The Common Carrier is one who holds himself out to the public as a carrier for hire. Railways, express companies, steamboats and vessels, draymen, carters, transfer companies, etc., are *common carriers*.

660 Relation of Carrier to Shipper and Consignee.

When the seller ships goods to the purchaser in his name and delivers the way-bill to the common carrier or wharfinger, the purchaser is deemed to have possession. The carrier or wharfinger is the agent in such case of the *purchaser* to receive *possession*.

If, however, the seller ships the goods in his own name, the carrier is then the agent for the seller only.

To establish the fact that the goods were damaged *while in the hands of the carrier*, it is sufficient to show that the company received the goods in apparent good condition and delivered them in bad condition, and these two facts must be proved.

When goods are accepted at the owner's risk of breakage and loss, it does not include damage caused by negligence of the company (Pidgeon *v.* Dominion Ex. Co., R.J.Q., 11 C., Sec. 276.)

The consignee cannot refuse to receive the goods from the carrier because they were damaged, but has his remedy in an action of damages. Halcrow *v.* Le Mesurier, 21 Rev., Leg. 28.

The acceptance of the goods and payment of the transportation charges *without protest* extinguish all right of action against the carrier; unless the loss or damage was of such a nature that it could not be known at the time.

The claim, then, must be made *without delay* after the loss or damage becomes known to the claimant.

661 Common Carriers Are Insurers of the Goods.

With common carriers the liability for loss or damage through their negligence, cannot be evaded, no matter what *conditions* are printed in the bill of lading. In fact with such carriers it is not a question of negligence merely, as it is with other carriers, but railways, express companies and navigation companies are insurers of the goods entrusted to them and they cannot relieve themselves of the liability for indemnity if loss occurs. Hart *v.* Jones, Stuarts Rep. 589. Again in a Supreme Court decision in case of Vogel *v.* G. T. R. Co., 11 S. C. R. 612; Chalifoux *v.* C. P. R. Co., M. L. R., 3 Q. B., 324.

665 Limitation of Liability.

Although common carriers cannot by contract exempt themselves from liability for negligence by any notices or conditions in the bill of lading, still they are not precluded from limiting their liability as to the *amount of damages* to be recovered for loss or injury to such goods.

A typical case is where a valuable horse was delivered to the railway company for carriage and the shipper signed a contract in which it was stipulated that the company should in no case be responsible for any amount exceeding $100. The horse was killed by the negligence of the company's servants and the shipper sued for $5,000, as the horse was a racer, but was non-suited on the ground that the contract was valid. The company, had it known the horse was valued at $5,000, would have placed it in a different class and charged more. So in all cases where the amount of damages is settled by the shipping bill, that will hold good. 24 O.R. 73, and pages **206,** 208 and 227.

(a) *Liability in Cases of Perishable Goods.* In the case of perishable goods, such as fresh fruit, fresh meat, plate glass, etc., there is nothing in the railway Act which prevents companies from charging special rates for the carriage of such goods, providing such rate is charged equally to all persons under similar circumstances and if such rate is not objected to by the railway commission, but they cannot relieve themselves from liability if damage or breakage occur through *negligence.*

If fruits are damaged through their own weight, the company is not liable. But if damaged through pressure of other goods, the company is liable.

If loss to perishable goods, as fresh fruit, occur through unreasonable delay in transit, for instance, a delay of from twelve to twenty-four hours, the courts have held the company liable, as such delay is unreasonable. Delorme *v.* C. P. R., 11 Leg. News., 106.

(b) *Liability in case of Live Animals.* In the carriage of live animals, if they injure themselves through their unruliness, the company is not liable. But if injury results through negligence of the company or its servants, or through defective accommodations, or through the car being thrown from track, etc., even when no negligence occurred, the company, as insurers, is liable.

(c) *Limiting Liability Beyond Line.* The condition on the back of a shipping bill freeing the company from liability for delays, or damage of goods after they are delivered to a connecting line to be carried to destination, has been held by our Canadian Courts to be binding on the shipper.

The shipper may recover damages for loss or injury from the company on whose line the loss occurred.

(d) *Liability After Arrival of Goods.* On the arrival of goods it is customary for railway and express companies to give notice to the consignee of their arrival and that the goods will be stored and will remain at the risk of the consignee. The liability of the carrier, as insurers, ends when the goods reach their destination, and when placed in the freight or storage house the company then becomes liable as warehousemen only, which is liability for loss that may occur through their *negligence.* And in such cases the consignee is required to make out at least a *prima facie* case of negligence before he could recover damages.

CHAPTER XX.

MASTER AND SERVANT.

670 Master and Servant.

The relation subsisting between master and servant is in many respects the same as that subsisting between principal and agent.

In order to constitute a contract of hiring and service there must be either an *express* or *implied* mutual engagement binding one party to *hire* and remunerate, and the other to *serve* for some determinate time. In cases where the employer only agrees to pay as long as the servant remains, leaving it optional either for the servant to serve or the master to employ, there is no *contract* of service and hire.

671 Contract of Service and Hire.

Oral as well as written agreements between master and servant, and between master and journeyman or skilled laborer in any trade or calling are binding unless the term exceeds one year.

If for a longer period than one year it must be in writing and signed by the contracting parties, and if for a shorter period than one year, but which does not commence in time to be completed within the year, it is required to be in writing.

No voluntary contract of service shall be binding on either party for a longer time than nine years from date of contract.

If no *express* contract has been made for hire between the parties a contract will be *presumed* if the service is performed, unless it is with near relatives, as with parent or uncle.

If service has been performed without anything being said about wages the *law presumes* that the parties agreed for the customery wages for that kind of service paid in that community. But the law will not presume either "a contract of hire" or "an agreement to pay wages" where service is rendered with near relatives, as a parent or uncle. In such cases an ex-

pressed hiring must be *proved* in order to support a claim for wages. Where it is not specially agreed to the contrary, wages would be payable at the end of the time.

675 The Employee as to Holidays.

Whether the employee is compelled to work on Sunday and legal holidays depends altogether on the agreement made, and the nature of the work to be done. Some kinds of work require something to be done every day; for instance, the hired man on a farm would be compelled to feed and care for the stock on Sunday, milking cows, etc., unless there was an express agreement to the contrary. The same would be true as to the servant doing housework.

Unless there is an agreement, expressed or implied, to the contrary, employees, or apprentices, cannot ordinarily be compelled to work on legal holidays, nor can they be discharged for absence, or for not working on such days.

Employees working by the week, month or year are entitled to pay for the legal holidays unless there is an agreement to the contrary.

676 Master Liable for Servant's Acts.

The master's liability is not boundless, but justice and common sense fix certain well-defined limits. In general terms the master is liable for all those acts which are brought about through his instrumentality, as:

1. He is liable for the acts of his servant performed within the scope of his employment, however wrongful they may be, but he is not responsible for the wrongful act if it is not done in the execution of his authority and in the course of his employment; and,

2. Where a servant is driving a horse, which runs away and does damage, if on the master's business; or,

3. Where in executing his orders with reasonable care and does damage; or

4. Where he does an injudicious act and does damage; or,

5. When the servant even wantonly does injury if acting within the scope of his employment; or,

6. For injury done by the servant through drunkenness, if acting within the scope of his employment; or,

7. If he orders his servant to commit a trespass, or if the trespass results from the action to be done, the master is liable.

678 Servant's Personal Liability.

A servant may render himself liable:

1. On contracts made on behalf of his master if he does not disclose the fact of his agency. When contracting in his own name for the employer he should always use words describing his capacity, as "agent for," or "per," "pro," etc.

2. For damages committed on behalf of his master he is liable as well as his master, and to all third parties he stands as a *principal.*

3. He is also liable for a joint fraud committed with his master, for no contract of service compels a legal obligation to commit a fraud or do a wrong.

4. In *crimes* as well as in *injuries* he is liable, and cannot evade responsibility by saying that he was only a servant and acting under his master's orders.

679 Notice to Leave.

A person hired for a definite period, either for a day, a week, a month or a year, may, on the termination of the time, leave, or the master may discharge him without giving any notice.

Where the hiring is for no definite time and the wages paid so much per day, week, month or year, when either party wishes to terminate the contract the other party is entitled to a "reasonable notice," but there is no statute requiring a notice. The following is the customary notice:

If paid by the week.....A week's notice.
If by the month.....A month's notice.
If by the year.....Three months' notice.

The notice need not be in writing, but where the time is longer than a week it would be much better to give a written notice.

Discharge may take place without notice by payment of a week's or month's wages, as the case may be.

WORKMEN'S COMPENSATION ACT.

681 Employer's Liability for Injuries.

By the common law an employee has a case for damages or compensation against the employer if he receives injury through the due performance of his allotted task, but each Province has enacted varying provisions for the same under the "Employers' Liability Act" or "Workmen's Compensation for Injuries Act." The employer is held liable for injuries resulting:

1. From defects in what are called "ways, works, machinery, plant, buildings, or premises," connected with the business of the employer.

2. From negligence of any person in the service of the employer who has any superintendence entrusted to him.

3. From 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 when such injury resulted from his having so conformed.

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, or

Where the workman knew of such defect or negligence which caused his injury and did not give information to the employer, or other person superior to himself in the service of the employer, he would not be liable unless such workman was aware that the employer or such superior knew of the defect or negligence.

If the injury was caused by some party in the service of the employer, the injured party has the option of proceeding against such party for damages, or the employer for compensation, but not against both.

The Acts do not apply to farm laborers, or to domestic servants or servants in general, nor to clerical work in offices, but to the building trades, factories, machine shops, etc., and to transportation companies.

In Ontario the new Workmen's Compensation Act, which is expected to come in force Jan. 1st, 1915, deals with the question somewhat adequately. Its chief merit, however, is that in future the injured workman will not be required to go to court to recover compensation, but a "Workmen's Compensation Board" deals with the matter instead of a court. But if anyone, other than the employer, is the cause of the accident, the injured workman may enter action against such party.

GIVING NOTICE OF INJURY. In all the Provinces notice of the injury or death is required to be given within what would under the circumstances be regarded as reasonable time, and before the injured workman voluntarily left the employment in which he was engaged.

In Ontario, notice of the accident must be given as soon as practicable, and the claim for compensation made within six months from the accident or from the time of death. Notice must also be given to the Board by delivering it at the office of the Secretary or by sending it to him by registered mail.

In Manitoba, notice of the accident is required to be given within fourteen days, but if the dependants live out of the Province twenty-eight days are allowed; and notice of claim for compensation within three months, and if no agreement can be reached arbitration proceedings must be commenced within six months.

In Saskatchewan notice of the accident is to be given promptly, and the employer is required forthwith after the happening of any accident to an employee, to report such accident to the Secretary of the Bureau of Labor at Regina, giving the date and the details of the injury. There is a lengthy "Form" provided, which can be procured from the Bureau.

If the accident is not reported within ten days the employer is liable to a penalty of $300 and costs, and a further penalty of $10 for each day after ten days, and in default of payment to imprisonment for a term not exceeding three months.

In Alberta, British Columbia and Nova Scotia notice of the accident must be given as soon as practicable, and the claim for compensation made within six months from the accident, or the death, if death results.

In New Brunswick notice must be given within twelve weeks, and action commenced within six months from the accident, or the death, if death results. In Newfoundland notice of the accident must be given within six weeks and action commenced within a year.

AMOUNT OF COMPENSATION. In nearly all the Provinces and Newfoundland the average weekly wages paid the injured workman during the previous three years in the same grade of work, or the estimated amount if the employment was less than three years is made the basis for fixing the amount of compensation in case of permanent disability.

In Manitoba the amount of compensation is limited to $1,500; and in case of weekly payments they are not to exceed $10 for adults, and $6 for apprentices.

In British Columbia, New Brunswick and Nova Scotia the sum is not to exceed $1,500. For weekly compensation for injuries, British Columbia,

Quebec and New Brunswick allow fifty per cent. of the average weekly wages during the past year, and Nova Scotia limits the amount to $7 per week.

In Alberta the amount is limited to $1,800, and the average weekly compensation to $10 per week, and if the injured workman is under age the weekly payment is limited to $7.50.

In Ontario the compensation and the weekly payments are determined by the Board according to numerous conditions, and in the Yukon, North-west Territories and Newfoundland the court determines the amount of compensation.

FORM OF NOTICE

To A. B. (insert employer's name and address).

or,

To the Company (or as the case may be),

Take notice that on the day of , 19 , I (or name and address of the injured person), a workman in your employment, sustained personal injury (if the person died, add of which he died) and that such injury was caused by (state shortly the cause of the injury, *e.g.*, the fall of a beam).

Date.

Yours truly,
X. Y.

In Quebec, for accidents resulting in absolute and permanent incapacity the injured person is entitled to a rent equal to 50 per cent. of his yearly wages.

For permanent but only partial incapacity a rent equal to half the sum by which the wages have been reduced.

For temporary incapacity if the inability lasted more than seven days, a rent equal to one-half the daily wages received at the time of the accident, payable while the incapacity lasts.

Where the yearly wages exceed $600, only $600 are taken account of. The surplus over this sum up to $1,000, gives a right to only one-quarter the compensation mentioned here. If the wages are over $1,000 a year, there is no compensation provided for by the statute.

687 Alien Labor Act.

According to the Dominion Alien Labor Act, R.S.C., chap. 97, "It shall be unlawful for any person, company, partnership or corporation in any manner to prepay the transportation, or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada under contract of agreement, parol or special, express or implied, made previous to the importation or immigration of such alien to perform labor or service of any kind in Canada."

And if such alien, engaged before entering Canada, or so assisted in his passage, enters upon his employment, it renders the employer liable to a penalty of not less than $50, nor more than $1,000.

The forfeit may, by the written consent of the Judge of the court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action. Separate suits may be instituted for each alien or foreigner who is a party to such contract or agreement. See. 6.

The master of any vessel who knowingly brings into Canada on such vessel, or permits to be landed from any foreign port or place, any alien laborer, mechanic or artisan who, previous to embarkation on such vessel,

had entered into such contract to perform labor in Canada, is liable to a penalty not exceeding $500 for each such foreigner, or to imprisonment for a term not exceeding six months.

The Act only applies to such countries as have enacted and retain in force similar alien labor laws applying to Canada.

Exemptions.

Foreigners living in Canada temporarily may contract with foreigners to act for them here as private secretaries, servants or domestics.

Also any firm engaged in a new industry not at the time established in Canada may contract for and bring in skilled labor for that purpose if it cannot be obtained in Canada.

The Act does not apply to professional actors, artists, lecturers, or singers, or to persons employed strictly as personal or domestic servants.

Persons may also assist any member of the family, or relative, or personal friend to come from a foreign country to a position here if the purpose is to become a citizen of Canada.

CHAPTER XXI.

PARTNERSHIP.

692 Partnership Firms.

Partnership is a contract between two or more persons, not an incorporated company, who join together for the purpose of conducting a certain business, with an understanding to participate in certain proportions in the profits or losses. They may join their money, goods, labor and skill, or any or all of them. Firm, Company, House or Co-partnership are all synonymous terms used to represent a partnership business.

They are formed by agreement of the parties, either *express* or *implied*. The express may be either oral, written or under seal. The test of partnership is a "common fund" and "a community of profits," hence, in any case where parties are associated in business, if it is necessary to prove the existence of a partnership, about all that is needful to do is prove that there is "a common fund" for the parties associated, and "a community of profits," and it would be difficult for such parties to establish the fact that there was not a partnership.

Partnership may be formed for commercial enterprises, manufacturing and mining in all the provinces and Newfoundland, but not for banking, railway construction, or insurance.

In Alberta, Saskatchewan, North-West Territories and British Columbia no general partnership can now be carried on composed of more than twenty persons without registering as a company, but the other Provinces have no restrictions as to number.

In Newfoundland the number is ten.

In Quebec partnership firms have to pay a provincial business tax. A statement according to statutory requirements must be forwarded to the Provincial Treasurer on or before 1st day of May each year, and the tax is payable in advance on the first juridical day in July each year (Chap. 10, 1906).

693 Dangers of Partnership.

That laconic expression, "Partnership is a poor ship to sail in," is full of meaning. It does not take long for a dishonest, or incompetent, or stubborn partner to wreck any business. The joint-stock company, the main features of which are given in the following chapter, is far preferable. If a particular name is specially desired, it is wise to *register* first as a partnership, and then *incorporate* under same name, as the government would not be likely to refuse it or change the name, it being already registered and in use by the same persons.

694 The Partnership Name.

There are no restrictions placed upon the choice of a firm-name for a partnership, as in the case of a stock company, except that the name must not be the same as that of any other registered firm or so similar as to cause confusion.

Any individual who wishes to add "& Co." to his name, or to use any special name other than his own, may do so by *registering* such name, the same as though a number of persons were united, and he is liable to the same penalty if he does not register within the specified time.

In Quebec a person doing business in any name other than his own must not only register as a partnership, but all contracts, notices, advertisements, notes, cheques, invoices, etc., must bear the word "Registered." The penalty for neglect so to use the word is a fine of $200.

695 The Partnership Capital.

The capital a partner contributes to the partnership may be in cash, real estate, personal property, or secret process of manufacture, a patent right, copyright, labor, skill, or time in management, good-will of an established business, etc., and in each case be subject to the same liabilities, possess equal privileges, and share profits or losses, according to the agreement.

696 Two Classes of Commercial Partnership.

There are two distinct classes of commercial partnership—General, and Limited—both having the same powers, but differing in their formation, registration and the individual liability of the members.

In a *general partnership* the members are not only jointly liable for the debts and obligations of the firm, but each member is also personally liable for all the debts of the firm, if the partnership assets are not sufficient to pay them in full.

For liability of partners in a Limited Partnership see second following section, "Limited Partnership."

699 Three Classes of General Partners.

1. Dormant, silent or sleeping partner is one who has an interest in the business, but whose name does not appear. He is represented in the firm name by "& Co."

2. Ostensible partner is one who lends his name to the firm but who has no financial interest in the business.

3. Actual partner is one who has both an interest and whose name appears in the firm name. They are all equally liable to the public for partnership debts.

700 Limited Partnerships.

A Limited Partnership is composed of one or more persons called General partners, who conduct the business, and one or more persons who contribute in actual cash payments a specific sum as capital to the common stock, who are called Special or Limited partners. Such Special partners are not liable for the debts of the partnership business beyond the amounts they contributed to the capital.

This Special or Limited partner must not have anything whatever to do with the management of the business, and take no part in the work. He may give counsel to the firm, examine the state and progress of the business, but if he takes any part in its management he makes himself a General partner, and thus personally liable for all the debts of the firm.

His name must not appear in the firm name by his knowledge, or he becomes a General partner.

A continuation of the business beyond the time fixed for the Limited partnership without being filed again as at first, or a removal from the location of the business without being certified to and registered as at first, it becomes a General partnership.

Also, if there is any alteration in the names of the partners, or in the capital, or anything differing from the original certificate, it is deemed a dissolution; and if not filed again as at first, it becomes a General partnership.

Such Special partner cannot withdraw his *stock* in the shape of dividends, profits, interest or otherwise during the continuance of the partnership, and if he does he is bound to replace it so as to keep his stock intact. But any such partner may receive his share of the dividends or lawful interest on the sum contributed by him to the capital, if the payment of such interest does not reduce the original amount of his capital in the business.

There can be no dissolution of such partnership previous to the time mentioned in the certificate until a notice has been filed in the office where the original certificate was recorded, and in Ontario it must also be published once each week for three consecutive weeks in a local newspaper where such business is conducted and for the same time in the *Ontario Gazette*.

In cases of insolvency Special partners do not rank as creditors until the claims of all others have been satisfied; neither are they personally liable for the debts of the firm beyond the amount of capital they invested.

Limited partnership is not deemed to be formed until the certificate is filed. If business is done before filing it is deemed a General partnership and all are individually liable.

Every renewal of a Limited partnership is required to be filed exactly the same as at first, otherwise it becomes General.

702 Civil Partnerships.

Firms that are not trading firms, or engaged in manufacture or other commercial business, such as a law firm, do not come under the partnership law, neither can they give a promissory note as a firm. They may all sign it, but it is only as a joint and several note, the same as though they were not associated personally. The same is true in regard to church trustees, and the officers of social and benevolent associations.

Where one member of a non-trading partnership indorses in the firm's name a bill payable to the partnership, the title passes to the indorsee, but the firm cannot be sued on the indorsement. The partner so signing is, however, liable on his indorsement.

In Quebec Civil Partnerships differ from those in the other Provinces. They may bind themselves as a firm, but the liability is *joint,* and each one is liable to creditors in equal shares, no matter what their respective shares in the partnership may be. The liability is joint, and not joint and several. But in Commercial partnership the liability is joint and several, the same as in all the other Provinces. C. C., 1871.

704 Partnership Agreement.

Some of the evil effects of a partnership association might be averted by a carefully prepared written agreement covering the following facts:

1. The name in full of each member, and their places of residence.
2. The nature of the business to be conducted.
3. The place where it is to be conducted; that is, the name of the town or village, etc.
4. The amount of capital that each partner invests.
5. What partners are *general,* and which are Special or Limited, if any.
6. If any partner makss no cash investment, but whose experience, or skill, etc., is his investment, that should also be inserted.
7. The date of commencement and duration of the partnership, if it is for a definite period.
8. If a division of work is agreed upon between the partners, such as for one partner only to sign all orders for goods, accept all drafts, issue the notes, etc., it should be clearly stated in the agreement.
9. Provision for settlement in case of the death or retirement of a partner, or for dissolution in case of *disagreement and friction should not be omitted.*

Besides these, there are various other things which could profitably be embodied in the agreement, such as that neither should be a candidate for a municipal office, or an active political partisan without the consent of the firm; also, that neither partner should indorse paper for others, or become bail for any person, without consent of the firm; or to engage in any other business that would require investment.

705 Form of Articles of Partnership.

The following agreement may serve as a guide, as it covers the chief points that should be included:

Articles of Agreement made the tenth day of September, in the year of our Lord one thousand nine hundred and ten.

BETWEEN George Carlisle, John Adams and Charles Andrews, all of the City of Hamilton, in the County of Wentworth, Province of Ontario.

WHEREAS the said parties hereto, respectively, are desirous of entering into a Copartnership, in the business of the Manufacture and Sale of Furniture, at Hamilton, aforesaid, for the term, and subject to the stipulations hereinafter expressed.

NOW, THEREFORE, THESE PRESENTS WITNESS, that each of them the said parties hereto, respectively, for himself, his heirs, executors and administrators, hereby covenants, with the other of them, his executors and administrators, in manner following, that is to say:

1. That the said parties hereto, respectively, shall henceforth be, and continue partners together in he said business of the Manufacture and Sale of Furniture, for the full term of Five Years, to be computed from the tenth day of September, one thousand nine hundred and ten, if the said parties shall so long live, subject to the provisions hereinafter contained for determining said partnership.

2. That the said business shall be carried on under the firm name of The Hamilton Furniture Co.

3. That the said parties shall invest capital as follows: George Carlisle, two thousand dollars, cash; John Adams, fifteen hundred dollars, cash; and Charles Andrews, nine hundred dollars and tools and machinery valued at two thousand dollars.

4. That the said partners shall be entitled to a salary in lieu of services, as follows: George Carlisle, as foreman of factory, twenty dollars per week; John Adams, as book-keeper, twenty dollars per week; and Charles Andrews, as salesman in the store, fifteen dollars per week.

5. That the said parties shall furthermore be entitled to share the profits of the said business in the proportion following, that is to say: According to the respective investment at commencement for the first year, and according to the net credit of each at the beginning of each subsequent year:

And that all losses in the said business for any year shall be borne by them in the same proportion (unless the same shall be occasioned by the wilful neglect or default of either of the said partners, in which case the same shall be made good by the partner through whose neglect the same shall arise).

6. That the said partners shall each be at liberty, from time to time during the said Partnership, to draw out of the said business, for private use, any sum or sums not exceeding for each, the sum of three hundred dollars per annum in excess of salary, such sums to be duly charged to each of them, respectively, and no greater amount to be drawn by either of the said partners except by mutual consent; and interest at five per cent. per annum shall be charged to each partner for such withdrawal from the date of withdrawal until it is repaid, or until next annual settlement.

7. That all rent, taxes, salaries wages and other outgoing expenses incurred in respect of the said business, shall be paid and borne out of the profits of the said business.

8. That the said partners shall keep, or cause to be kept, proper and correct books of account of all the partnership moneys received and paid, and all business transacted on partnership account, and of all other matters of which accounts ought to be kept, according to the usual and regular course of the said business, which said books shall be open to the inspection of all the partners, or their legal representatives. A general balance or statement of the said accounts, stock in trade and business, and of accounts between the said partners shall be made and taken on the first day of March in each year of the said term, and oftener if required.

9. That the said partners shall be true and just to each other in all matters of the said co-partnership, and shall at all times, during the continuance thereof, diligently and faithfully employ themselves, respectively, in the conduct and concerns of the said business, and devote their whole time exclusively thereto, and neither of them shall transact or be engaged in any other business or trade whatsoever: And the said partners, or either of them, during the continuance of the said co-partnership, shall not, either in the name of the said partnership or individually in their own names, draw or accept any bill or bills, promissory note or notes, or become bail or surety for any person or persons, or knowingly or wilfully do, commit or permit any act, matter or thing by which, or by means of which, the said partnership moneys or effects shall be seized, attached or taken in execution; and in case either partner shall fail or make default in the performance of any of the agreements of articles of the said partnership, in so far as the same is or are to be observed by him, then the other partner shall represent in writing to such partner offending, in what he may be so in default; and in case the same shall not be rectified by a time to be specified for that purpose by the partner so representing, the said partnership shall thereupon at once, or at any other time to be so specified as aforesaid by the partners offended against, be dissolved and determined accordingly.

10. That in case either of the said partners shall die before the expiration of the term of the said co-partnership, then the surviving partners shall, within the six calendar months after such decease, settle and adjust with the representative or representatives of such deceased partner, all accounts, matters and things relating to the said co-partnership, and that the said survivors shall continue to carry on thenceforth, for their sole benefit, the co-partnership business.

In witness thereof the said parties hereto have hereunto set their hands and seals.

Signed, Sealed and Delivered
In the presence of
W. Sweetman.

George Carlisle. [L.S.]
John Adams. [L.S.]
Charles Andrews. [L.S.]

706 Registration of Partnership.

Every General partnership must be registered or filed within a definite time, which varies some in the different Provinces, or be liable to a heavy penalty.

Limited partnership is not deemed to be formed until the certificate is filed. If business is done before filing it is deemed a General partnership, and the Special partners become liable for debts equally with the General.

In Ontario Limited partnership must be filed at the office of the Clerk of the County Court before commencing business; and a General partnership at the County Registry Office where the business is carried on within six months after the partnership is formed. The penalty for not registering is $100 to each member, one-half to go to the prosecutor and the other to the Crown. The fee for registering Limited partnership is 25c., and 50c. for General.

In Manitoba General partnership must be filed within six months. For the Eastern Judicial District they are filed at the office of the Clerk of the Court of King's Bench, and for the Western Judicial District with the Deputy Clerk of the Crown and Pleas. The penalty for not registering within the six months is $100 fine for each member of the firm. The fee for filing is $1. Limited partnership to be filed in the office of the Judicial District in which the principal place of business is situated, and if the principal place of business is not in a Land Titles district then it must also be filed in the office of the Registrar of the registration district in which it is situated. Fee for filing, $1.

In British Columbia General partnership must be registered within three months with the Registrar of the County Court. Fee for filing, $1 if not over 200 words, and 20 cents for every 100 words thereafter. Limited partnership certificate must be signed before a notary public and filed in the office of the Registrar of the County in which the principal place of business is situate. Fee for filing, $2.

In Alberta, Saskatchewan and North-West Territories General partnership must be registered within six months in the office of the Registration Clerk of the registration district for registration of chattel mortgages in which the business is to be conducted. Fee for filing, 50c. The penalty for not registering within the time specified is $50 for each member of the firm.

The certificate for Limited partnership must be signed before a notary public, who will certify the same, and then filed in the office of the Deputy Clerk of the Supreme Court where the principal place of business is situate. Fee, 25c.

In Yukon Territory General partnership must be registered in the office of the Registration clerk of the registration district where the business is conducted within two months after formation. Fee for registering, $2. Penalty for not registering within the two months is a fine not exceeding $500, and thereafter $20 a day while such default continues.

In New Brunswick both General and Special partnerships must be registered before commencing business, and the certificate must be signed by each member of the firm. Fee for former, 25c.; for latter, 50c.. Limited partnerships must be filed in the office of the Registrar of Deeds of the county

in which the principal place of business is situate, and when there are places of business in different counties, then a certified copy of the certificate must be filed in each such county. A copy of the certificate must be published for three months in a newspaper published in the county where principal place of business is situate, and an affidavit of the publisher of such paper must be made before a Justice of the Peace verifying such advertisement must be filed in same office as the partnership is registered. (See Chap. 144, Sec. 6, R. S., N.B.)

A copy of the certificate must also be published two consecutive weeks in the *Royal Gazette*.

The penalty for failure to file the certificate or to publish it, as directed above, is a fine of $60, and $10 per day for each day of such neglect after notice so to do from any creditor or interested party, or the Clerk of the Peace where such notice should be filed.

In Nova Scotia the certificate to be filed in the office of the Registrar of Deeds within three months. The fee is 25c. if not over two hundred words.

The failure to register incurs a penalty not exceeding $25 per day and a like sum for every manager who knowingly permits the use of such unregistered name. The certificate for Limited partnership must be acknowledged by the parties signing it before a Judge of the Supreme Court or a Justice of the Peace and then filed, after being certified, in the office of the Registrar of Deeds in the county in which the principal place of business is situate. At the same time and place must be filed an affidavit by one or more of either the General or Limited partners declaring that the sums specified in the certificate had in good faith been paid. As soon as such partnership is registered it shall be published at least six weeks in the *Royal Gazette* and one other newspaper published at Halifax, and by handbills posted up in some public places in the township where the business is carried on.

In Newfoundland the certificate must be acknowledged before a notary public, who shall certify whether it was made in Newfoundland or abroad. The certificate is then filed in the office of the Colonial Secretary. When there are places of business in different districts a copy of the certificate certified by the Colonial Secretary must be recorded in the office of the Registrar of Deeds for such districts. At the time of filing the certificate an affidavit of one or more of the partners must be made that the sums specified in the certificate had been in good faith actually paid. The terms of the partnership must also be published at least in six consecutive issues of the *Royal Gazette* after registration, and in one or two other papers as the Colonial Secretary shall designate. If not so registered and so published the partnership shall be deemed a General partnership. The form of certificate is similar to the one shown in this book for Limited partnerships. For affidavit of newspaper publishers as to publication and other forms see Consolidated Statutes, Chap. 88.

In Quebec both General and Limited partnership, the declaration must be signed and certified before a notary public and filed with the Prothonotary of the Superior Court of the district and with the Registrar of the county in which the principal place of business is situate within sixty days after formation of the partnership. Failure to comply incurs a penalty of $200. Fee for filing, 50 cents.

In Quebec every married person doing business as a trader, whether alone or in partnership, is required to register within 60 days from date of commencing business or of his marriage, whether he is under community or separate as to property, in the office of the Prothonotary of the Superior Court of the district in which the business is carried on.

And in case of either *community* of property or *separation* of property by marriage contract, the declaration shall mention the date, the name and domicile of the notary before whom the deed was passed. And if by *judgment* the declaration shall give the number of the case, the date of the judgment, and name of the district in which the judgment was rendered. C. C., 1831.

Declaration of a Married Man Entering Business.

Province of Quebec, District of (Montreal). { I, A. B., of the City and District of (Montreal) hereby certify that I have carried on and intend to carry on business in the (City of Montreal) under the name of A. B.

I, the said A. B., declare that I am married and in community of property with my wife by marriage contract, the deed having been executed before J. B., Notary, of (Montreal), on the day of , 19 .

Witness my hand at Montreal this day of , 19 .

A. B.

A Declaration similar to the above must be registered in the office of the Prothonotary of the Supreme Court within sixty days. The fee is $1.50.

707 Form for Registration of General Partnership.

The declaration for registration must be signed by each member, either personally or by proxy duly authorized.

PROVINCE OF ONTARIO, County of Wellington. { We, James Smith and James Robinson, of the City of Guelph, County of Wellington, Province of Ontario, hereby certify:

1. That we have carried on and intend to carry on the trade and business of Carriage Building and General Blacksmithing at Guelph, in partnership, under the name and firm of Smith & Robinson.

2. That the said partnership has subsisted since the 15th day of May, 1910.

3. That we are and have been since the said day the only members of the said partnership.

Witness our hands at Guelph, this 2nd day of June, 1910.

JAMES SMITH.
JAMES ROBINSON.

The above form of declaration is identical in all the Provinces, as provided by statute. Simply change the name of Province to suit.

But in Quebec the declaration must also state whether each or any of the partners are married, and, if married, whether they are separate or in community as to property. See previous section.

Declaration Filed with the Prothonotary of Supreme Court.

Province of Quebec, District of Montreal. } We, the undersigned James Brown and Arthur Warren, both of the City and District of Montreal, Commission Agents, etc., hereby certify by these presents that we carry on and intend to carry on business in the City of Montreal as Commission Agents, etc., under the name and style of James Brown & Co., and that we are the sole members of the said partnership.

I, the said James Brown, declare that I am married and separate as to property with my wife according to the laws of the Province of Ontario.

I, the said Arthur Warren, declare that I am a bachelor.

In witness whereof our hands at Montreal this 12th day of June, nineteen hundred and eleven.

Signatures.

The Fee for filing a Partnership is $1.50; for a Limited Company, $2.00.

708 Form for Registration of Limited Partnership.

Province of ..... } We, the undersigned, do hereby certify that we
County of ..... } have entered into co-partnership under the style or firm of (B. D. & Co.), as (Grocers and Commission Merchants), which firm consists of (A. B.), usually residing at.. ...., and (C. D.), residing usually at....., as General partners; and (E.F.), residing usually at....., and (G. H.), residing usually at....., as Special partners, the said (E. F.) having contributed $4,000, and the said (G. H.) $8,000, capital stock of the said partnership.

The said partnership commenced on the.....day of....., 19.., and terminated on the..... day of....., 19...

Dated this.....day of....., 19..

Signed in the presence of
T. M.,
Notary Public.

A. B.
C. D.
E. F.
G. H.

The certificate for a Limited partnership must be signed before a notary public, who shall duly certify the same. If any false statement is made in such certificate all the members shall become liable as General partners.

For registration in Quebec the declaration must also state whether each or any of the members are married, and, if married, whether they are separate or in community as to property. C.C., 1834.

709 Declaration for one person in Business, but under a Firm Name

The following form is suitable for all the Provinces, where one person engages in business in a firm name:

PROVINCE OF QUEBEC, DISTRICT OF } I, , of in (grocer, or as the case may be) do hereby certify that I carry on and that I intend to carry on business as (grocer, or as the case may be), at , district of , under the style of , and that no other person is associated with me.

(Signature.)

See sections 694 and 706 for information respecting Registration.

710 Powers and Limitation of Partners.

Each General partner, unless prohibited in the articles of co-partnership, becomes a general agent of the firm and has power to act for the firm.

He may bind the firm in all matters that come within the limits of the business undertaken by the firm. For instance: If a firm were engaged in the grocery business a partner could bind the firm in such transactions as would properly belong to the grocery trade; but he could not for anything pertaining to a coal business, or in real estate, etc., or in matters for himself.

Each partner can act for the firm unless he is prohibited in the partnership agreement. He may receive payments of bills and accounts, compromise with a debtor, or represent the firm in a suit at court, or borrow money necessary to carry on the firm's business and bind the firm in each.

He may make a note or accept a draft for the firm in the regular course of business, if the partnership agreement does not prohibit him, or do any other act he deems necessary in the interest of the firm.

If a bill or note is signed by one of the firm, the firm can be held liable, providing that two things can be proved; viz., that it was for the firm purposes, and that the person signing it had proper authority to do so.

A promissory note or acceptance bearing the firm name signed by a partner, although not given for firm purposes, will be collected if it passes before maturity into the hands of an innocent holder for value, but the original payee could not hold the firm if he knew it was given for purposes not connected with the business of the partnership.

A partner not invested with the right, and binding his co-partners, renders himself liable to them if loss occurs.

One partner cannot bind the firm by an instrument under seal unless he has been empowered by an instrument under seal to do so; for instance, if authorized in the Articles of Partnership, which should be under seal.

One member of a firm has no right to sign the firm name for purposes of suretyship or on private account. He must not employ the property of the firm for his own private use. He must not pledge the credit of the firm for his own personal benefit. He must not give a firm note in payment of a private debt. All such betrayals of trust violate the partnership compact, and afford grounds for a *dissolution*.

711 Partner Selling His Interest.

A partner should not sell his interest without the consent of his associates. If he should sell without such consent it voids the partnership agreement, and a dissolution must take place. The remaining partners may accept the new member, but it makes a new partnership and must be registered again, even though no other change may be made in the articles of agreement, than substituting the new name for the old.

Where no fixed time has been agreed upon, a partner may dissolve the partnership at any time by giving a reasonable notice of his intention so to do to all the other partners. Where the partnership was formed by Deed, a notice in writing, signed by the partner giving it, is sufficient for the purpose.

712 A Partner Retiring.

A retiring partner from a partnership firm, in order to protect himself from the *future liabilities* of the firm, must, in addition to the advertisements already mentioned, register a declaration of the dissolution at the office where the partnership is registered.

This, of course, does not free him from *previous liabilities* incurred while he was a member. Nothing but a *release* from the individual creditors can free him from the past liabilities, and from the *landlord* to protect him from payment of rent, and the covenants in the lease.

713 Insolvent Partnerships.

A partnership firm becoming insolvent, the entire partnership property would be taken first to satisfy the firm's debts. If this did not satisfy the claims, then the private property of all or any of the General partners would, subject to priority of the partner's private creditors, be taken to satisfy the debts.

714 Suits Against a Partner.

In suits against an individual partner for a debt contracted either before or after the partnership was formed, the sheriff may seize, under execution, the partnership goods and sell the debtor's share, whatever may be the difficulties which arise thereafter.

The Judge may, however, on application order that such partner's interest may be charged for the payment of the debt, and may also appoint a receiver to receive such partner's share of the profits to apply on the debt, but such course is wholly optional with the Judge. Harrison *v.* Harrison, 14 Practice Law Reports, 436.

If a receiver should be appointed he cannot interfere in the management of the business, and cannot compel the partners to show him the books. The other partners are at liberty to redeem such partner's interest that is charged, and in case a sale of the interest is ordered they may purchase it.

A partner cannot sue the firm, as that would be in reality suing himself, for the firm does not exist without him. If, however, he has a private debt or claim against the firm which the firm will not pay, he may assign it to a third party and they may sue.

715 Dissolution of Partnership.

The following are among the things that call for a dissolution of partnership:

1. Insolvency of one of the partners in his private business.
2. Insanity of one of the partners.
3. Death of one of the partners.
4. Mutual consent.
5. Marriage of a female partner in some of the Provinces.

The above events do not necessitate a dissolution, but they are a sufficient cause, and if any of the firm should demand a dissolution it must be complied with.

In Quebec the death of a partner terminates the partnership, and also the right of the remaining partners to act for the firm in the absence of a special agreement to the contrary. (C. C. 1892, 1897).

They are also dissolved by expiration of time, by the completion of the work for which they were formed, or by a decree of the court.

716 Form for Dissolution by Agreement.

The following brief agreement of dissolution is sufficient, and may be endorsed on the back of the partnership deed or articles of agreement:

We, the undersigned, do hereby mutually agree that the partnership heretofore subsisting between us, as Furniture Manufacturers, under the within Articles of Co-Partnership, be and the same is hereby dissolved, except for the purposes of the final liquidation and settlement of the business thereof; and upon such settlement wholly to cease and determine.

In witness whereof we have hereunto set our hands and seals this.....

day of....., A.D., 19..

Signed, Sealed and Delivered in the presence of LEONARD SPEDDING. } GEORGE CARLISLE. JOHN ADAMS. CHARLES ANDREWS.

717 Dissolution by Decree of Court.

Sometimes partners fail to agree, and by continual quarrelling and pulling in opposite directions the business of the partnership suffers. If they cannot agree on a dissolution they may apply to a competent court and obtain an order for dissolution. The following would be grounds upon which such an order may be obtained:

1. Fraudulent conduct by a partner.
2. Violation of the articles of partnership.
3. Unreasonable exclusion of partner from sharing in the management of the business.
4. Quarrelling to an extent to render it impossible to properly and successfully carry on the business of the firm.
5. Inability of the partner to act, on account of permanent illness, or being otherwise disabled.
6. Intemperance or immorality of a partner that would have the effect of injuring the business, or impairing the credit of the firm.

718 Form for Registration of Dissolution.

A notice of a dissolution of a partnership is required to be recorded in the same office in which the certificate of partnership was filed at its formation and the same fee charged. The following is a statutory form provided by the various Provinces:

PROVINCE OF ONTARIO, County of Lincoln. } I, James Robinson, formerly a member of the firm carrying on the business of Carriage Building and General Blacksmithing at Guelph, County of Wellington, under the style of Robinson & Co., do hereby certify that the said partnership was, on the 2nd day of September, dissolved.

Witness my hand at Guelph, this the third day of September, 1910.

JAMES ROBINSON.

As a usual thing all the members of the firm would sign the declaration of dissolution to be registered, and in such case the pronoun "we" instead of "I," *James Robinson*, etc., would be used at the beginning of this notice.

The form as it is used here would be suitable for a retiring partner to register if the other members of the firm did not file a declaration of dissolution.

719 Advertising the Dissolution.

For firms whose business is confined to any one Province, notice of dissolution would be given in the *Official Gazette*.

For firms whose business extends to other Provinces, notice must be given in the *Canada Gazette*.

It is also customary to give notice in the local press and to send circulars to each individual firm with whom business has been done.

In all cases it is also necessary when dissolution takes place before the term of partnership expires, that a declaration of dissolution be filed in the office where the certificate of partnership was filed at its formation.

In New Brunswick any change that takes place in the firm, or in case of dissolution, a certificate of such change or dissolution must be filed within thirty days and published the same as at first.

In Nova Scotia, besides the filing of the declaration of dissolution as here stated, it is necessary to advertise it four weeks in the *Royal Gazette* and four weeks in a newspaper where the business is located.

Newfoundland also requires the publication in the *Gazette*, and one other paper for four weeks, besides filing the declaration of dissolution in office of the Colonial Secretary.

720 Form of Newspaper Notice of Dissolution.

The following is the usual form of notice inserted in the *Official Gazette* and local newspapers:

Notice is hereby given that the co-partnership heretofore subsisting between the undersigned as General Merchants, under the firm name of Dell, Austin & Co., of Brantford, Ont., has been this day dissolved by mutual consent. All debts due to the said partnership are to be paid to W. A. Dell at his office, 106 Main Street, and all partnership debts to be paid by him.

WM. A. DELL.
Brantford, June 20th, 1910. E. AUSTIN.
P. DE WITT.

If the business were intended to be continued, and merely a change of some of the partners taking place, the following addition to the notice would answer:

Notice is hereby given that the co-partnership heretofore subsisting between the undersigned as General Merchants, under the firm name of Dell, Austin & Co., at Brantford, Ont., has been this day dissolved by mutual consent. The business will hereafter be carried on by W. A. Dell and E. Austin, by whom all debts of the old firm will be paid and to whom all outstanding accounts due the old firm are to be paid.

WM. A. DELL.
Brantford, June 20, 1906. E. AUSTIN.
P. DE WITT.

721 Winding Up Business After Dissolution.

After dissolution no partner has a right to sign the firm's name without a power of attorney. If a note has to be given the only alternative is for each partner to sign his name separately.

A partner, after dissolution, has power to demand that the assets be used exclusively to pay off the firm's liabilities before anything can be appropriated by the partners.

CHAPTER XXII.

JOINT STOCK COMPANIES.

725 Joint Stock Companies.

There are two methods by which corporations are constituted in Canada: (1) By special Act of Parliament, either of the Parliament of Canada, or of the Legislature of the Province in which the business is to be conducted; (2) by Letters Patent issued under the Companies Act, or by Registration.

In Alberta, Saskatchewan, North-West Territories, British Columbia, Nova Scotia and Newfoundland joint stock campanies are formed by Registration instead of Letters Patent. That method of *forming* a company will be treated at the close of the chapter, beginning at Section 768. In other respects they are the same as those formed by Letters Patent.

Owing to the fact that the Dominion Parliament and the Legislatures of nine Provinces are legislating respecting Joint Stock Companies, and the Legislatures making frequent changes, every director and officer of a company should have a copy of the Act under which such company takes its charter. This chapter will be found of special value, as it deals particularly with those features in which the public at large are interested.

726 Advantages of Incorporation.

Among the advantages of incorporation the four following are of chief importance: (1) A larger number of persons, including employees, may become financially interested in the business than would be possible in any other way. (2) Ample capital may be secured and, if desired, largely from small investors. (3) If a shareholder wishes to draw out he can do so simply by selling his stock, and his withdrawal does not disturb the business or status of the company as it would in a partnership. (4) And, lastly, the limited liability of shareholders. If the business does not prove successful no one need lose more money than the stock he subscribed for, thus differing entirely from an individual business or a general partnership.

727 The Prospectus.

In cases where capital is desired from the public outside the parties immediately interested in the formation of the company a Prospectus is usually issued. This, however, is only a business circular to solicit shareholders and may take any form the judgment of the promoters suggest. It should contain for its heading the name of the company, and set forth the prospective advantages and gains truthfully, as there is stringent legislation and heavy penalties against *misrepresentation* in the "Prospectus." As every promoter or organizer of a Company for Incorporation would have a copy of the Act under which it is applying for charter, it would be needless to give here the facts and information which either the Dominion or any one or more of the Provincial Acts require to be stated in the Prospectus.

As the Prospectus contains what is virtually the consideration or grounds upon which the subscriber is induced to enter the company, he should not fail to read such Prospectus throughout critically before he obligates himself by subscribing for any shares, and a copy of the Prospectus should be retained.

To protect as far as possible the investing public from wildcat schemes that seldom profit anyone except the promoters, the Companies Act of all the Provinces and the Dominion require all the essential facts and information that the purchaser of stock should know to be set forth in the Prospectus, among those of chief importance is amount of commission or shares or other interests that are to be given the promoter for organizing the company. Also if any property or industry or interest are taken over by the Company before its organization full details concerning such and the amount to be paid for them must be stated. As the subscriber is entitled to a copy of the Prospectus he must study that and judge for himself as to the safety of his investment.

Every director or other person responsible for the issue of a Prospectus that violates these provisions is liable, on summary conviction, to heavy penalties, in Ontario $200 and costs; unless it can be shown that he was not cognizant of any violation, or that the non-compliance arose from an honest mistake of fact on his part. This section does not apply to a circular inviting existing shareholders to subscribe for further shares or debentures.

In all the Provinces after incorporation, if the company in effect adopt the Prospectus by allotting the shares subscribed for on the strength of the Prospectus, then in all the Provinces the remedy for deceit in the Prospectus would be against the company as well as against the promoters.

After a company has been formed and the stock previously subscribed for has been issued, the purposes of the Prospectus are ended, and a person who subsequently purchases stock in the market cannot sustain an action against the company for his loss on account of misrepresentation in the Prospectus.

When a person has subscribed for shares through fraudulent statements or claims in the Prospectus, the action would be for cancellation of the contract to take shares, or it may be for damages, or both.

All purchasers of stock or debentures or other securities are deemed to be induced to be purchased on such Prospectus; and any condition stated in the Prospectus to the contrary shall be void. And no subscription for stock, debentures or other securities obtained by verbal representation shall be binding upon the subscriber unless prior to such subscription he received a copy of the Prospectus.

728 How to Form a Company.

About the first step taken, either by the solicitor, or any person doing the official correspondence, is to communicate with the Secretary of State, Ottawa, or with the Provincial Secretary, as the case may be, concerning the formation of the company, who will forward a copy of the Act together with the necessary instructions, and also a blank petition for the signatures of the applicants. This is always necessary, as the regulations are liable to be changed by Order-in-Council, and it saves time to get the information direct from the Government at the time, and also because the blank forms cannot be obtained from any other source.

If the business of the company is intended to extend to more than one Province, as, for instance, a steamship line between Toronto and Montreal, then the charter should be taken from the Dominion Government and the application should be addressed to

The Honorable
The Secretary of State, Ottawa, Canada.

A Dominion charter empowers the company to carry on business in every Province in Canada, without procuring a Provincial License. See section 740.

But if the business would be confined to the one Province, as a mercantile firm or manufactory, then the charter would be obtained from the Provincial Government and the application addressed to

The Honorable

The Provincial Secretary,

Toronto, Ont.

Or Winnipeg, or Halifax, or as the case may be.

For the Yukon, address

The Honorable

The Commissioner of Joint Stock Companies,

Office of Territorial Secretary, Yukon.

But wherever it is possible it is advisable to incorporate under the Dominion Act, as it is clear with no pitfalls in it, and gives the right to deal in every part of the Dominion.

The next thing to be done is to open a stock book, which gives the name of the company, the amount of capital, the number of shares and the amount of each share. In this book the subscribers enter their names and the number of shares they wish to take; when the proportional amount of stock has been taken, the required amount paid in, and the notice given in the *Official Gazette*, where that is required, application may be made for Letters Patent.

In Ontario the stock book must be made in duplicate, and forwarded to the Provincial Secretary along with the petition and the memorandum of agreement.

730 Advertising in the Official Gazette.

Before the application can be made for incorporation in some of the Provinces, a notice of intention to apply must be given in the *Official Gazette*, and generally in a local newspaper.

Ontario, Nova Scotia and British Columbia do not require the notice in the *Gazette* except in special cases where the department directs that it be given.

New Brunswick, two weeks notice in *Royal Gazette*, if the capital exceeds $5,000; P. E. Island, two issues in the *Official Gazette;* in Alberta, Saskatchewan, North-West Territories and the Yukon, one notice in the *Official Gazette*, and in three consecutive weekly issues of a newspaper published at or nearest to the chief place of business for the company.

Manitoba requires one month's notice in the *Manitoba Gazette*.

731 Form of Stock Book.

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 Companies Act*, under the name of The ..... Company of ....., (Limited), or such other name as the Secretary of State 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 amount 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.	Seal.	Date and Place of Subscription.			Residence of Subscriber.	Name of Witness.
		Amount of Subscription	Date.	Place.		

The above is the model for the stock-book if taking letters patent from the Dominion Government.

Only two changes are necessary to use it for any of the Provinces, except for those formed by registration. For instance, instead of saying the Companies Act, R.S.C., 1906, use *The Ontario Companies Act*, etc. Instead of saying Secretary of State, use Lieutenant-Governor. In Quebec the word "Limited" would not be used.

Two signatures at least must be on the page containing the agreement to take stock (as above).

For Ontario and under Dominion Act also the stock-book must be in duplicate and both duplicates forwarded with the petition.

If the subscriptions are to be subject to any conditions, such conditions must be mentioned in this agreement.

If preference stock is issued, the conditions must be mentioned also.

If a signature is by power of attorney, such power must be filed along with the stock-book.

Witnesses must by affidavit prove each signature.

The stock-book must show that the requisite proportion of the nominal capital has been subscribed.

733 The Petition or Application.

The Government furnishes the blank printed forms of Petition and full instructions for signatures. After being filled out according to instructions it is forwarded to the Secretary of State, or the Provincial Secretary, or the Registrar of Joint Stock Companies, as the case may be, accompanied by the government fee, affidavits and copy of advertisement, where advertisement is required, and the memorandum of agreement.

The Petition for all the Provinces is nearly identical.

The Dominion Act requires that the Petition must be signed by at least five persons of the full age of 21 years.

Ontario, Manitoba, Quebec, New Brunswick and British Columbia also require not less than five signatures, while Alberta, Saskatchewan, N. W. Territories, Yukon, Nova Scotia and Newfoundland require not less than three.

Upon receipt of the Petition, with the fees, if charter is granted, notice will be given by the Department in the *Official Gazette* of the issue of the Letters Patent, when the parties therein named and their successors become a body corporate and politic by the name mentioned in the same.

The Dominion Act requires that as soon as the notice from the Secretary of State appears in the *Canadian Gazette* the company must publish a copy of it in four separate issues of at least one newspaper published in the county or city or place where the head office or chief agency of the company is established. The penalty for failure to publish such copy on summary conviction before two Justices of the Peace, is a sum not exceeding $20 for each day that such neglect continues.

735 Corporate Name of Company.

The name of the company must not be the same or even similar to that of any other company, whether incorporated or not, and must not be objectionable in any other way. The word "Royal" cannot be used as part of the name without a special license from the Home Office.

In Alberta any person, partnership, company or society in the Province, which has not been registered in Alberta or incorporated under the Parliament of Canada assuming a name which includes any of the words, "Loan," "Mortgage," "Trust," "Investment," or "Guarantee," or in combination with other words, which is likely to mislead the public, is liable to a penalty of $100.

736 Registered Place of Business.

All the Provinces and Newfoundland require every Limited company, whether by Letters Patent or by Registration, to have a registered place of business within the Province or Territory to which all communications may be addressed. A heavy penalty is attached for not having such registered office. In all the Western Provinces and Territories the penalty is a sum not exceeding $25 for every day that business is carried on without such head office.

In Quebec its registered place of business must be advertised in the *Quebec Official Gazette.*

Failure to file the statutory declarations of incorporation and chief place of business within the Province renders the company liable to a fine not exceeding $200, and the president, or manager or chief agent, responsible for the negligence, to a fine not exceeding $100.

738 The Government Fee for Charter.

The government fee to be forwarded with the petition for charter or for Registration, is not an annual fee, but is only payable once. As it is liable, both under Dominion and Provincial charter, to be changed at any time by Order-in-Council, parties interested in forming a company may, by applying to the Department, obtain the then current schedule of fees. The following indicates the range of fees now charged from small to largest capital stock, for those Provinces whose statutes give the schedule of fees.

The Dominion Act at present requires a fee of $100.00 when the proposed capital does not exceed $50,000, and increasing to $500, when the capital is $1,000,000, and to $2,300 when the capital is $10,000,000.

In Ontario the Revised Statutes of 1914 do not contain the tariff of fees, but they will likely be the same as those given above for the Dominion.

In Nova Scotia for companies divided into shares the fee is $30, if the capital does not exceed $10,000; and $30 also for companies not divided into shares where the number of members does not exceed twenty.

In New Brunswick when the capital does not exceed $5,000; the fee is $30; when above $5,000 up to $10,000 the fee is $40, and increasing to $250 for a capital of $1,000,000.

In Prince Edward Island the fee is $20, when the capital does not exceed $10,000, and increasing until the fee is $100, for a capital of $500,000.

In Quebec the fee is $40, when the capital does not exceed $20,000; and increases to $500 when the capital is $1,000,000.

In Manitoba the fee is $15 when the capital does not exceed $5,000; when over $5,000, but not exceeding $20,000 the fee is $40, and increases to $200 when the capital is $1,000,000.

In Saskatchewan the fee is $40 for companies divided into shares when the capital does not exceed $20,000; and for companies not divided into shares the fee is also $40, when the number of members does not exceed twenty and increasing to $200 when the membership is not limited.

In Alberta and North-west Territories the fee is $10, when the capital does not exceed $10,000; and for companies not divided into shares the fee is $10, when the number of members does not exceed ten, and increasing to $25 when the membership is 100, and to $100 when the membership is unlimited.

In British Columbia the fee is $25 when the capital is divided into shares and does not exceed $10,000, and $10 for companies not divided into shares where the members do not exceed twenty.

In the Yukon the fee ranges from $100 when capital stock is less than $10,000, to $500 when capital stock is $400,000 and upwards.

In all the Provinces associations not having gain for their object, as educational, athletic associations, etc., the fees are nominal.

740 Extra-Provincial Companies.

Companies duly incorporated in any other Province of Canada or in another country, need not obtain fresh Letters Patent, but must secure a license, or register in the Province in which they wish to establish branch places of business, or may secure a License under the Dominion Act, if the business is inter-provincial in its character. They must also make the required government returns annually. If they undertake to sell shares or transact business without a license they are liable to severe penalties and are debarred from entering any of the courts to enforce their claims. They must also have a *registered* place of business within such Province.

The fees for such Provincial license is the same as for letters patent or for registration for local companies.

If an extra-Provincial or foreign company transacts any business before taking out a license, but subsequently procures a license, the past transactions are thereby validated.

In the case of John Deere Plow Co. v. Agnew, 10 D.L.R. 576 (1913), it has been definitely determined that the phrase "carrying on business" within the Province, used in all the Provincial Acts, respecting Extra-Provincial Companies, means to have a fixed place of business within the Province at which it carries on part of its business, or the selling through bona fide travellers, or agents, or representatives, and not persons or firms who buy such goods and handle them on their own account. Hence chartered companies of one Province may freely fill orders from any other Province, protect their interests by special contracts by keeping a lien on the goods until they are paid for, and enforce their contract rights, and sue for payment in the Provincial courts, without having a license in such Province.

Also by a recent decision of the Privy Council in an appeal case from British Columbia, The John Deere Plow Company v. Theodore Warton and Garnett Duck, 31 T.L.R. 35, it was definitely and finally settled that a company duly incorporated under the Dominion Act can transact its legitimate business in every Province of Canada without obtaining either a Provincial Charter or a Provincial License, and can use the courts through which to enforce its contracts.

741 Supplementary Letters Patent.

If stock companies desire to make any of the following changes in their charter they are required to obtain supplementary letters patent:

1. To change its corporate name.
2. To obtain further or additional powers.
3. To either increase or decrease its capital stock.
4. To subdivide its existing shares.

Government fees are about half the fees charged in each Province for Letters Patent, and also under the Dominion Act.

In Ontario the capital stock cannot be increased, until 90 per cent. thereof has been subscribed and 50 per cent. paid in.

The directors by resolution may provide for any of the above changes but it must have the sanction of the shareholders, representing at least two thirds in value of all the subscribed capital or two-thirds of the number so present or represented at a special general meeting of the company duly called for consideration of such change, and afterwards be confirmed by supplementary letters patent.

In those Provinces where companies are formed by Registration the company may by special resolution change the name of the company, or subdivide the shares, or increase or diminish the amount of its capital, or increase or diminish the number of its members, as the case may be, but all such changes must have the approval of the Registrar; and to reduce its capital it is necessary to obtain an order from the Supreme Court.

742 Provisional Directors.

The provisional directors named in the Letters Patent manage the affairs of the company until the first general meeting of its members, when permanent directors are elected by vote of the shareholders, but the provisional or first directors hold office and manage the affairs of the company until their successors are duly elected.

The directors must be petitioners, and shareholders in their own name.

The Dominion Act requires that the board of provisional directors be not less than three nor more than fifteen, and a majority to be residents of Canada.

Ontario, New Brunswick and Prince Edward Island, not less than three; and in Alberta, Saskatchewan, Manitoba, North-west Territories and Yukon not less than three nor more than nine.

Nova Scotia and Quebec not less than three nor more than fifteen.

Yukon requires a majority of the first directors to be residents in Canada, and in Quebec the majority are to be British subjects as well as residents of Canada.

In British Columbia the number is determined by the Memorandum of Association, and by Chap. 14 of 1914, one, at least, must reside in the Province.

As soon as convenient after the incorporation of the company and notice of the granting of the letters patent appears in the official *Gazette*, the provisional directors are required by registered letter addressed to each shareholder to call at some convenient place a general meeting of the company for the commencement of business, election of permanent directors, enactment of by-laws, etc. In Ontario if the directors do not call such general meeting within two months of the date of the letters patent, any three or more of the shareholders have power to call such meeting and to proceed to the organization of the company.

743 Commencement of Business.

In all the Provinces and Newfoundland if the newly chartered company does not commence its operations within a reasonable time fixed by each province, it forfeits its charter.

Under the Dominion Act, if the company does not go into actual operations within three years after the charter is granted, or if it does not use its charter for three consecutive years any time thereafter, it forfeits its charter. In Ontario the time is two years, for Manitoba three years.

Also under both the Dominion and the Quebec Act, a company must not commence business until at least 10 per cent. of its authorized capital has been subscribed and paid for and a declaration under oath by the secretary, stating such fact has been deposited in the Department.

Every director who directly or indirectly authorizes such operations shall be personally liable, as well as the company, for the payment of such liabilities.

In Ontario a company must not commence business or exercise borrowers' powers unless:

(*a*) Shares have been duly allotted to an amount not less than the minimum subscription fixed.

(*b*) And every director has paid to the company the full amount on each share taken by him for which he is liable in cash on application and allotment same as required for public subscription.

(*c*) And there has been filed with the Provincial Secretary the required statutory declaration that the aforesaid conditions have been complied with, and the Provincial Secretary has issued his certificate entitling the company to commence business.

If a company commence business or exercises borrowing powers in contravention of this section every person responsible for such contravention shall be liable to a penalty not exceeding $50 for every day during such contravention.

744 Capital Stock.

The Capital Stock of a company is that which is named in the charter as the maximum limit of stock that can be taken up, and usually designated Authorized Capital or *nominal* capital.

Subscribed capital is that portion of the authorized capital that has been issued to subscribers. It may be all paid up or only partly paid. The part of the subscribed capital that is unpaid is an asset to which either the company or creditors may have recourse.

In Ontario where any advertisement, letter-head, document, etc., issued by any corporation, officer, agent or employee of such company states the capital of the corporation it must state the capital actually subscribed unless it states it to be the "authorized capital." The penalty for a violation of this requirement is a fine not less than $50, nor more than $200.

In Saskatchewan, if the amount stated as the subscribed capital is greater than the capital actually subscribed, it incurs a penalty not exceeding $200, and in default of payment, the officer responsible for such statement may be imprisoned for a term of not less than one month nor more than three, and for a subsequent offence imprisonment for not less than three months nor more than twelve.

In all the Provinces the *common stock* entitles its holders to share *pro rata* in the profits of the business.

Preference stock is that which is issued entitling its holder to a certain, fixed rate of dividend out of the net profits in priority to the holders of common stock, but in other respects, subject to the wording, they have the same rights and same liabilities that the holders of common stock have.

Watered Stock is that which is issued, generally to previous stockholders, as fully paid up, when only a part or none of it has been paid. Such stock is nearly always issued to defraud the public in some way. It may be only to conceal the actual rate of dividends, or to give the original stockholders a bonus before placing stock on the market, etc., by which some profit at the expense of the many.

In Quebec *watered* stock is prohibited, all such stock if issued shall be null and void. The capitalization of surplus earnings and the issue of stock to represent such capitalization is prohibited, and if such stock is issued it shall be null and void, and the directors consenting to such issue are jointly and severally liable to the holders thereof for the reimbursment of the amount paid for such stock.

In Manitoba any company desiring to issue shares at a discount or premium, twenty days' notice must be given each shareholder of the proposed by-law before the special or general meeting called for the purpose of considering such by-law (Chap. 8, 1908).

In Manitoba any person receiving any shares, or other benefit of an incorporated company as consideration for allowing the use of his name as a director, trustee or member of the board of management of any such company, is liable to a penalty of not less than $200, nor more than $2,000. The company may also by suit have such shares reconveyed to it. If they have been transferred to an innocent third party the value of such shares must be returned to the company (Chap. 14, of 1906).

Stock Dividends, the Ontario Act of 1907 empowers directors in cases where dividends may lawfully be declared payable in money to declare

stock dividends instead, and to issue shares of the company fully or partially paid-up, as the case may be; or they may credit the amount of such dividend in shares already issued, but not fully paid.

Debenture Stock is the same as the ordinary debentures of the company, and carries no greater privileges. The holders of debenture stock have none of the privileges or liabilities of the shareholders of the company. It is a debt of the company, draws the stipulated rate of interest, and in case the company is wound up, is payable out of the assets of the company.

746 Share Warrants.

In Ontario, British Columbia and Saskatchewan, a company, if so authorized in its charter, may, with respect to shares fully paid up, issue share warrants, stating that the bearer of the warrant is entitled to the shares specified therein; and may also provide by coupons, or otherwise, for the payment of dividends on such shares.

Such shares may be transferred by the delivery of the share warrant.

The bearer of a share warrant may, subject to the provisions of the charter, surrender to the company such warrant and have his name entered as a shareholder in the register of shareholders.

The holder of a share warrant by depositing the warrant with the company, may, after two clear days from such deposit, and so long as it remains deposited, attend the meetings, vote and exercise the privileges of a shareholder the same as though his name were on the register of members.

The company must on two days' notice, return the share warrant.

747 Unpaid Stock or Shares.

Stock that has been subscribed for but not paid up stands as a resource to the company and new calls may be made as necessities or interest require. It is an asset, and a security to the public. In case of insolvency of the company each shareholder would have to pay up the balance of his shares but no more. Creditors cannot sue the shareholders until they have failed by *execution* to recover from the *company property*.

In case a shareholder is sued by a creditor on his unpaid stock, he has the same right of set-off against such creditor that he would have against the company, except a claim for unpaid dividends or salary, or other official allowance.

748 Transfer of Shares.

Shares in a stock company are personal property. Fully paid-up stock may be transferred almost as freely as a promissory note, except where the *Certificate of Stock* places some restriction on its transfer, which, of course, must be complied with. Shares not fully paid up can only be transferred where the directors are willing to accept the transferee, and a record of the transaction is made in the companys' books.

In Ontario in the transfer of shares not fully paid up the transferor now is held liable until it has been paid, even though the directors have given consent to the transfer. The transferee is also liable.

Shares of a stockholder may be taken in execution, or order from competent court the same as other personal property and the purchaser's name will be entered in the company's books, as the owner of the shares.

In Quebec, and now also in Ontario, when shares in any stock company or bonds, debentures or debenture stock are transferred, a tax of two cents on every $100 of par value must be paid in stamps, affixed to the Transfer Book.

750 Rights and Responsibilities of Shareholders.

Shareholders in a stock company may contract with the company the same as any other person, sue and execute their judgments against the company's goods, and in case of winding up they rank with the other creditors for debts due them.

They have, however, no right to the property of the company nor to the profits until a dividend has been declared. In conducting company business they can only work through the company. They cannot be expelled from the company nor be deprived of their right to vote by either the officers or directors and the other shareholders combined.

They are not responsible for any act or default of the company, nor for any engagement, debt or loss or injury in connection with the company, beyond the unpaid portion of their respective shares in the stock of the company.

The number of shareholders, however, must not be less than the number required by statute in each Province, hence if the business of the company is carried on with less than that number, for a period of six months, the members individually become liable for company debts if they know the number has been so reduced. They may free themselves from personal liability by serving a written protest upon the company, and by registered letter notifying the Provincial Secretary or Registrar of such protest and the facts upon which it is based. If company refuses to increase the number of members to the required number its charter may be revoked.

751 Limited Liability of Shareholders.

In stock companies a shareholder is only liable to creditors to the amount of stock he has subscribed for. This is the great distinctive feature of joint stock companies. The company may be wrecked by bad management and subscribers lose to the extent of the stock they subscribed for, but their loss stops there. If their stock is paid up in full no more can be claimed from them. If their shares have not been paid up in full they are liable to creditors for the unpaid portion, but not even then until an execution against the company has been returned unsatisfied in whole or in part.

The law in this respect is the same in all the Provinces and Newfoundland for companies whose capital stock is divided into shares.

752 Double Liability on Bank Shares.

A stockholder in a chartered bank is liable to creditors for double the amount of stock he subscribed for. That is, in case the bank fails he is required to pay the whole of the stock he subscribed for, and then another sum of the same amount, if necessary, to pay the bank's liabilities. This is Dominion legislation, and applies to all the banks in Canada, except the Bank of British North America, which has an Imperial charter.

It is the same in Newfoundland.

753 Use of the Word Limited.

The word *Limited* in connection with a company's name is the *notice to the public* that Parliament has provided respecting the *limited liability* of the shareholders composing such companies.

The Dominion Act, also that of Manitoba, Newfoundland and the Yukon require that every incorporated company shall have its name with the word "Limited" after the name on the outside of its office or place of business in legible letters. Penalty for neglect is $20 per day, in Newfoundland $25, and in Manitoba, a second offence incurs a fine of $50 per day.

In Alberta, Saskatchewan, North-West Territories, British Columbia and Nova Scotia, every *limited company,* whether limited by *shares* or by *guarantee,* shall have its name painted or affixed to the outside of the building with the words "Limited," or "Limited by Guarantee," as the case may be. Penalty for neglect is $25 per day during the default, and every director or officer who knowingly permits such neglect is liable to a like penalty.

The Ontario Act as now amended does not require the name to be on the outside of the place of business, but if it is used the name must be in legible characters and the word "Limited" in its unabbreviated form as the last word of the name.

In most of the Provincial as well as in the Dominion Act the word *Limited,* and for companies formed by registration the words *Limited Liability,* must also be on its seal, and used as the last word of the firm name on its invoices, advertisements, contracts, and in signing receipts, notes, drafts, cheques, letter heads, and wherever the name appears.

And every director or officer of such company, under the Dominion Act, who authorizes or permits the use of a company seal without the word "limited" engraved on it, or who authorizes the issue of any notice, advertisement, or other official publication, or signs or authorizes the signature of any bill of exchange, note, cheque, invoice receipt, etc., without using the word "limited" with its name incurs a penalty of $200, and also become personally liable to the holder of any such paper for the amount unless the same is duly paid by the company. In Alberta, Saskatchewan, North-West Territories, British Columbia and Nova Scotia the penalty is $250.

Each Province also provides for penalties in case any person or firm uses the word "Limited" with the name if it is not a Limited Company.

In Ontario, in cases where the words "Company," "Club," "Association," or similar words, form part of the name, the word "Limited" may be abbreviated, as "Ltd.," but where such words do not form part of the corporate name, then the word "Limited" must appear in full and in same size of letters as the rest of the name. Marking packing boxes, etc., the word "Limited" need not be used, as that is not deemed an advertisement or contract.

For neglect to so use the word every company, director, manager and employee responsible for the default shall incur a penalty not exceeding $10 for the first offence, and not exceeding $100 for every subsequent similar offence.

Companies not having gain for their object may, in their charter of incorporation, be exempted from such conditions as above.

Every private company must have on its seal the words "Private Company," and also must have the same words printed or written on every Share Certificate the company issues.

The Quebec Act does not allow this use of the word "Limited" with the name of a company formed by Letters Patent.

754 Voting by Shareholders.

Subject to the charter or by-laws of the Company, the person whose name is on the register for shares has a vote for each share he holds, but he cannot vote on any share for which he is in arrears for any call. An absent person may vote by proxy, and a person holding shares in trust for another person may vote on them if his name stands on the register as holding such shares in trust.

In Saskatchewan and British Columbia each member has a vote for every share up to 10, and one additional vote for every 5 shares after the 1st 10 up to 100, and an additional vote for every 10 shares beyond the 1st 100 shares.

The personal representative of a deceased shareholder may represent such deceased person and vote at the meetings.

A chairman may vote on his own shares, and also has a casting vote in case of a tie.

755 Dividends Payable Out of Profits.

Dividends can only be legally paid out of profits. If there has not been a profit over the running expenses, no dividend can be declared, for if the officers were to declare a dividend out of the capital they would make themselves personally liable for the amount of dividend in case the company went into liquidation.

Among several other recent cases where directors have been required to make good to the creditors the amount of dividends paid out of capital the Yarmouth Bank suit may be given, in which case Justice Meagher gave judgment in the Court of Appeal for the directors to repay a dividend of $15,000 that had been paid out just before the bank failed.

Dividends which have been earned but not declared by the directors until after the transfer of any shares are payable to the purchaser, whether the transfer has been registered or not, and no matter when the dividend was earned. It is a matter wholly in the hands of the directors whether to declare a dividend or not, or to use the profits for an extension of business, and the courts will not interfere in such matters unless it is evident they have acted in bad faith or positive neglect of duty.

757 Annual Government Statement.

The Government each year furnishes the company with blank forms to be filled in by the officers of the company, giving detailed information on company affairs, the stockholders, transfers, etc., one copy of which to be forwarded to the Government and the other to be posted up in the head office of the company before a certain day named.

If this is not done by the proper date the company, in all the Provinces, incurs a heavy penalty for every day during which the default continues. And every director, manager or secretary of the company who knowingly or wilfully permits such default, incurs the like penalty.

In Alberta, Saskatchewan, British Columbia, Nova Scotia, and North-West Territories, the penalty is $25 per day. In Ontario, Manitoba and Quebec, $20 per day. The New Brunswick statute does not fix the penalty.

758 What Books to Be Kept.

The Companies Act, both of the Dominion and of each Province, requires certain books to be kept by the Secretary or some other officer, wherein shall be recorded for the information of shareholders and creditors a copy of the letters patent and a classified record of the company's status and doings.

They are as follows:

1. A book containing a copy of Letters Patent, and of any supplementary letters patent, and of the preliminary memorandum of agreement and of all by-laws thereof.

2. A register of shareholders present and past, alphabetically arranged, giving the address and calling, as far as can be ascertained, of every such person while such shareholder.

3. The stock ledger, giving number of shares held by each stockholder, the amount paid in, and the amount unpaid.

4. A register of transfers of stock, in which shall be entered the particulars of every transfer of shares in the capital stock of the company.

5. A register of directors, giving the names, addresses and calling of all persons who are or who have been directors, with the dates at which each one became or ceased to be a director of the company.

All these books, or books containing the above information, are to be at the head office of the company, and open for inspection by shareholders and creditors at all reasonable hours on business days, and such persons or their representatives may make extracts from them.

Any director or officer or servant of the company who knowingly makes or assists in making any untrue entry in any of such books, or wilfully neglects or refuses to make any proper entry therein, or to exhibit the same, or to allow the same to be inspected and extracts to be taken thereform, is guilty of an indictable offence. In Ontario is liable to a penalty of $100.

Every company which neglects to keep such books shall be liable under summary conviction before two justices of the peace to a penalty not exceeding $20 for each and every day while such neglect continues.

In British Columbia neglect to keep such books incurs a penalty not exceeding $250, for each day during such neglect. Chap. 12 of 1914.

759 Board of Directors.

The affairs of stock companies are managed by a board of directors elected by ballot by the shareholders in a general meeting of the company. For the number of directors allowed in each Province see Section "Provisional Directors."

In the absence of other provisions in the charter of incorporation or in the by-laws of the company, directors hold office for one year, but are eligible for re-election indefinitely, and in every case hold office until their successors are duly elected.

To be eligible for election or appointment as director, a person must be a shareholder, owning stock absolutely in his own right, and to the amount required by the by-laws of the company, and not in arrears in respect to any call thereon.

Every election of directors must be by ballot.

Vacancies in the board may be filled for the remainder of the term by the directors from among the qualified shareholders.

The directors elect from among themselves the president and other officers of the company. Directors cannot vote by *proxy*. They can only legally vote at the meeting, and cannot elsewhere give separate assent to the proceedings of the board.

The directors have the entire management of the company and its operations, and have exclusive authority as to the appointments, duties and removal of all agents, officers and employees of the company, the security given by them to the company and their remuneration.

But in respect to all other by-laws they may make or repeal, or amend or re-enact, unless confirmed at a general meeting of the company called for that purpose, they only have authority until the next annual meeting if they then fail to receive the confirmation of the shareholders.

In Ontario a company may by by-law vary the number of its directors, but not so as to be less than three; or may change the head office in Ontario.

But no by-law for either purpose shall take effect until it has been confirmed by a vote of not less than two-thirds in value of the shareholders present in person or by proxy at a meeting called for considering the same. A copy of such by-law certified under seal of the company shall forthwith be filed in the office of the Provincial Secretary, and published in the *Ontario Gazette;* and, in case of removal of the head office, twice in a newspaper published in the place where the head office is fixed, and also where it is removed from.

A majority of the directors constitute a quorum for the transaction of business, even though the company may have only three directors.

760 Liabilities of Directors.

The Companies Act of the Dominion and of all the Provinces make the directors personally liable for gross negligence and in following particulars:

(*a*) For companies with *limited liability* if they neglect the proper use of the word *Limited* in connection with the company name on their seals, or outside of their place of business, and wherever the name appears on negotiable paper, invoices, agreements, etc., as stated in section

(*b*) If they pay dividends when there have been no net profits, thus reducing the capital, they become liable to creditors if the company fails.

(*c*) If they make loans to shareholders contrary to the charter of incorporation, they become personally liable if loss results.

(*d*) If they wilfully neglect or permit of neglect to make the annual returns to the Government within the required time, and also for any false statement respecting the business contained in those returns the directors are personally liable.

(*e*) If entry is made in the company's books for the transfer of stock not fully paid up to a person who is not apparently of sufficient means, the directors are jointly and severally liable to creditors for the unpaid part.

(*f*) In case of insolvency they become personally liable to clerks, laborers and apprentices for wages performed while they were directors; in Alberta, Saskatchewan, N.-W. Territories, Quebec and Yukon for six months' wages, and in Ontario, and under the Dominion Act, and Manitoba, for one year. In each case a director is not liable unless the labor was performed while he was a director, and unless the company has been sued for the amount within one year after the debt became due, and within one year from the time he ceased to be a director, or unless an execution against the company has been returned unsatisfied.

761 Directors Are Trustees.

Directors act in the double capacity of *agents* and *trustees* for the company, and must therefore act within their authority to bind the company.

They must not purchase the company property even under execution, or foreclosure sale. If they do they are deemed trustees for the company and must turn it over to the company when repaid the price. Every director in justice to himself should obtain a copy of the Act under which the company is incorporated, and ascertain his personal responsibilities, as the statutes of the different Provinces are not entirely the same.

Section 415 of the Criminal Code says: "Everyone is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk or servant, with intent to defraud, makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering, any material part from or in any book, paper, writing, valuable security or document."

Directors' Duties. Although the president and managing director have most responsibility, and are in a position to know in detail the state of company business, and are paid to administer their trust efficiently, still the other directors are not relieved from personal responsibility for seeing that such trust is honestly administered.

Justice Meagher, in his judgment in the Yarmouth Bank suit (N.S.), said: "A director is not obliged to examine the books, but if he becomes aware of anything which reasonably suggests the need of an inquiry, it is his duty to ascertain from the officials what it means, to seek full information and explanation regarding it, and if in the course thereof he should be misled by them, he is not blameable if he abstains from further enquiry, unless there are circumstances connected with the incident or the explanation which cast a doubt upon the matter."

762 Calls.

The Dominion Act and that of all the Provinces require for companies divided into shares that not less than ten per cent. be called in and made payable within one year from the incorporation of the company, and the residue as the letters patent or the by-laws of the company direct.

If any shareholder does not pay the calls on or before the date of payment he is liable to pay interest until payment is made.

If any call duly made upon a share is not paid within the time fixed for payment, the directors may by resolution declare such share forfeited, and it shall become the property of the company. Notwithstanding such forfeiture, the holder of the share remains liable to the then creditors of the company for the full amount unpaid on such shares.

The directors may, instead of declaring a share forfeited for non-payment of a call, enforce payment of the call and interest thereon in any court of competent jurisdiction.

Directors may also receive payment for shares in advance of the amount called, and allow such rate of interest as may be fixed by the directors, but this advance payment would not draw dividends. Sec. 61, Chap. 79, R.S.C.

764 When Company Is Deemed Insolvent.

A company is deemed insolvent:

1. If it is unable to pay its debts as they become due.

2. If it calls a meeting of its creditors for the purpose of compounding with them.

3. If it exhibits a statement showing its inability to meet its liabilities or otherwise acknowledges its insolvency.

4. If it assigns, removes or disposes of any of its property with the intent to defraud its creditors.

5. If with such intent it has had its lands or property seized under execution or other process.

6. If it has made an assignment for the general benefit of its creditors.

7. If a creditor to whom the company is indebted in a sum exceeding $200 serves on the company a demand in writing requiring payment of the sum so due, and the company does not pay or otherwise satisfy such creditor within 90 days in case of a bank, or 60 days for all other companies, such company is deemed to be insolvent.

765 Winding-Up Act.

When a company becomes insolvent a creditor for the sum of not less than $200 may, after four days' notice to the company of his intention to do so, apply to the court in the Province where the head office of the company is situate for a winding-up order.

If the company's head office is not in Canada, then the application would be made in the Province in which its chief place of business is situate.

If the company opposes the application on the ground that it is not insolvent, the court will cause the necessary investigation to be made before the order is granted or refused.

The court, in making the winding-up order, may appoint one or more liquidators of the effects of the company. Such liquidator may be the assignee or receiver of such company, or an incorporated company or any person the court may appoint.

From the time of the making of the winding-up order the company must cease from carrying on its business except as the liquidator allows in the interest of the creditors. Any transfers of shares or alteration in the status of members made without the assent of the liquidator are void.

766 Liquidators.

Upon the appointment of the liquidator all the powers of the directors cease, except in so far as the liquidator or court sanctions the continuance of such powers.

Upon his appointment he takes into his custody all the property effects and choses in action to which the company appears to be entitled.

A liquidator may resign or may be removed by the court on due cause shown, and any vacancy in the office of liquidator shall be filled by the court.

Broadly, the liquidators and the insolvent estate are in the hands of the court, and shareholders and creditors may be heard, the proceedings stayed, or delayed, or any change made that the court deems best.

CHARTERING COMPANIES BY REGISTRATION.

768 Provinces Incorporating Companies by Registration.

In British Columbia, Alberta, Saskatchewan, N.-W. Territories, Nova Scotia and Newfoundland stock companies are formed by Registration instead of by Letters Patent, as in the other Provinces.

In British Columbia, Alberta, Saskatchewan, N.-W. Territories and Nova Scotia no company consisting of more than twenty persons, and in Newfoundland ten persons, can carry on business within the scope of the Stock Companies' Act for the purpose of gain unless registered as a stock company, or unless working under some other Act or Letters Patent.

The following sections will give the method of incorporation by registration:

770 Memorandum of Association.

In British Columbia to form a company any five or more persons, twenty-one years of age, may subscribe their names to the Memorandum of Association, and forward the same with the necessary affidavits, Government fee, etc., to the Registrar of Joint Stock Companies, and thus become an incorporated company either with or without limited liability, according to the articles of association.

If any incorporated company carries on business when the number of members is less than five, for a period of six months thereafter, every member that is cognizant of that fact becomes personally liable for debts contracted during such period, the same as in a General partnership.

In Alberta, Saskatchewan and N.-W. Territories, any three or more persons twenty-one years of age may sign the Memorandum of Association addressed to the Registrar of Joint Stock Companies. After registration, if the company carries on business when the number is less than three for six months, every member who knows that fact becomes personally liable for the debts contracted during such period.

In Newfoundland any three or more persons may subscribe their names to a Memorandum of Association and register as a company. Fee for registering when capital does not exceed $10,000 is $10, and when it is $25,000 a fee of $25.

In Newfoundland correspondence is addressed to

The Honorable The Colonial Secretary,
St. John's.

There are three classes of companies under this system, described in the three following sections:

771 Articles of Association.

The Memorandum of Association *may* in case of companies limited by *shares*, and *shall* in case of a company "limited by guarantee," or an unlimited company, be accompanied by Articles of Association prescribing the regulations by which the company is to be conducted. The Articles of Association are to be printed and signed by each subscriber in the presence of, and attested by, at least one witness, and when registered bind the company, the members, their heirs, executors and administrators to the conditions.

It is generally required that the Articles of Association be written in separate paragraphs numbered arithmetically. In case of a company with the capital divided into shares it must state the amount of capital with which the company proposed to be registered; and in case of a company whose capital is not divided into shares it must state the number of members with which the company proposes to be registered.

773 Liability Limited to Unpaid Shares.

Where the liability is to be limited to the amount unpaid on the shares, the Memorandum of Association must contain:

1. The name of the proposed company, with the addition of the word "Limited" as the last word of the name.
2. The place within the Province where the registered office of the company is to be located.
3. The objects for which the company is to be established.
4. The time for its continuance, if for a fixed time.
5. A declaration that the liability of the member is to be limited.
6. The amount of capital, divided into shares of fixed amount.

No subscriber can take less than one share.

Mining companies may have their liabilities restricted to the amount paid on their shares if such provision is made in their Memorandum of Association.

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

(1) The name of the Company is "The Rathburn Stove and Furnace Company, Limited."

(2) The registered office of the Company will be situate in

(3) The objects for which the Company is established are "The manufacture and sale of stoves and furnaces."

(4) The liability of the members is limited.

(5) The capital of the Company is dollars, divided into shares of dollars each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names:

Names, Addresses and Descriptions.	No. of Shares taken by each subscriber.
1. John Jones, of , Merchant	200
2. John Smith, of , Merchant	25
3. Thomas Green, of , Merchant	30
4. John Thompson, of , Merchant	40
5. Caleb White, of , Merchant	15
Total shares taken	310

Dated the day of , 19 ,

Witness to the above signatures,

A. B., of .

774 Liability Limited by Guarantee.

Where the liability of members is to be limited to the amount they respectively undertake to contribute to the assets in the event of the company being wound up, the Memorandum of Association must contain:

(1) The name of the proposed company, with the addition of the words "Limited by Guarantee" as the last word of the name, except for British Columbia, where the single word "Limited" is sufficient. Chap. 7, 1910, section 14.

(2) Object for which the company is to be formed.

(3) Place within the Province in which the registered office is to be situated.

(4) A declaration that each member undertakes to contribute to the assets of the company a sum not exceeding a specified amount in case the company is wound up while he is a member, or within one year afterwards, in settlement of liabilities contracted before the time at which he ceased to be a member.

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE.

(1) The name of the Company is "The Western Ranchmen's Supply Association, Limited."

(2) The registered office of the Company will be situate in

(3) The objects for which the company is established are "The purchase of all classes of goods, wares and merchandise, and the supplying the same to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

(4) Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member or within one year afterwards for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member and the costs and charges and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves such amount as may be required, not exceeding dollars.

We, the undersigned persons, whose names and addresses are subscribed are desirous of being formed into a company in pursuance of this memorandum of association.

Names, addresses and descriptions of subscribers:—

1. John Jones, of , Merchant.
2. John Smith, of , Merchant.
3. Thomas Green, of , Merchant.
4. John Thompson, of , Merchant.
5. Caleb White, of , Merchant.

Dated the day of , 19 ,
Witness to the above signatures,

A. B., of .

775 Unlimited Liability.

In companies where there is no limit placed on the liability of members (General partnership) the Memorandum of Association, besides giving the proposed name of the company, place of business, and object, must also be signed by each subscriber in the presence of, and be attested by, at least one witness. This, when registered, binds the company and the members, their heirs, executors and administrators, to observe all its conditions, as though it were an instrument under seal. This is the same for the other forms of company as well.

CHAPTER XXIII.

MECHANICS' AND WAGE-EARNERS' LIENS.

780 Mechanics' Liens.

According to the provisions of the Mechanics' and Wage-Earners' Lien Act, unless he signs an express agreement to the contrary, every mechanic, machinist, builder, miner, laborer, contractor or other person doing work upon or furnishing material to be used in the construction or repair of any building or erection or mine, or supplying machinery of any kind in connection therewith for any owner, contractor or sub-contractor, has a lien upon such building, erection or mine and upon the land occupied thereby for the sum justly due for such labor, or material or machinery.

In case property upon which a lien is given burns down is covered by insurance, the insurance money takes the place of the property and shall be subject to the liens the same as though the property were sold to enforce a lien. Quebec is given separately at the end of the chapter.

In British Columbia for contracts of over $500 *the owner* must file in the nearest County Court Registry the particulars of the improvements to be done or building erected, the nature of his interest in the land, name and residence of the contractor and the contract price.

781 Limit of Lien Claim.

The lien, whether claimed by the contractor, sub-contractor or other person, cannot make the owner liable for more than the sum *justly owing* by the owner to the contractor. In Manitoba, Alberta and British Columbia the claim or combined claim must not be less than $20 to be a first lien on the property.

In Ontario and Manitoba the Act states that for wages up to thirty days it is not necessary to register the lien, and third parties must inquire concerning wages due if they would be safe.

In Nova Scotia laborers in connection with mining operations have a lien for two months' wages, registration to be in the office of the Commissioner of Public Works and Mines at Halifax.

In Ontario, by amendment of 1906, every miner, mechanic, laborer or other person who performs labor for wages in connection with any mine, has a lien for 30 days' wages, to be enforced in same way as other mechanics' liens, and no agreement to deprive mine workers of benefit of their lien shall affect the right of lien.

Also an Ontario amendment of 1906 provided that every mechanic, laborer or other person who performs labor for wages upon the construction or maintenance of a railway or the works connected therewith, has a lien upon the railway and other property connected therewith for 30 days' wages, or a balance equal to 30 days, to be enforced the same as other mechanics' liens.

In the Yukon a lien is a charge upon the works up to 10 per cent. for 10 days after works are completed or the delivery of materials, but no longer unless notice in writing is given to owner, or the lien registered.

In Newfoundland wages for 12 days have a lien on buildings, etc., and for railways and mines for 30 days.

Wages up to 30 days or a balance due equal to 30 days have right to lien in all the Provinces. In Alberta wages for six weeks are a first lien.

782 Lien When Work is Done for Tenant.

In case where work is done for a tenant, the building is holding for the lien, but the real estate itself cannot be held liable except by consent of the owner of the freehold, given in writing at the time of registering the lien.

In British Columbia and Alberta the owner of the land is deemed to have authorized the erection of the building unless, within three days after he has knowledge of the construction of the building or repairs, he posts up a notice in some conspicuous place upon the premises that he will not be responsible for the same.

784 Mortgage and Lien Claim.

In case where the land upon which the work is done or material furnished is encumbered by a prior mortgage or other charge, and the selling value of such land is increased by such work or placing of material, the lien shall rank upon such increased value in priority to the mortgage.

785 Combining and Transferring of Lien Claims.

A claim for lien 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. A lienholder may assign his right of a lien by an instrument in writing. A lienholder dying, his right of lien passes to his personal representative.

786 Statutory Protection of Owners.

Each of the Provinces requires the owner as the work progresses to retain a certain percentage of the money due the contractor for thirty days after completion or abandonment of the work with which to satisfy lien claims. He is not liable for any greater sum than this for any liens of which he has not, before making payment, received notice in writing.

In Ontario and Manitoba, when contract does not exceed $15,000, the percentage is 20 per cent.; when it exceeds that sum, 15 per cent.

In New Brunswick 15 per cent. if contract does not exceed $1,000, 12½ per cent. if over $1,000 and under $5,000; and 10 per cent. on all other sums.

In British Columbia on contracts exceeding $500, the owner is not required to make any payments on the contract price unless a copy of the receipted pay-roll is posted upon the works on the first legal day after pay-day from 12 o'clock noon to one o'clock p.m.; and the contractor has also furnished him with the original pay-roll containing the names of all the laborers employed by him on such works, and of persons placing material for him on such works with a receipt in full from each of the said parties set opposite their respective names. No payment made in the absence of such pay-roll shall be valid to defeat any lien on such property.

In Alberta, Saskatchewan and Nova Scotia the owner may retain 20 per cent. for 30 days unless there is an agreement to the contrary, and all payments up to 80 per cent. are valid if no notice of liens has been given. In the N.-W. Territories and the Yukon 10 per cent. may be retained for 30 days with which to satisfy liens, and in each of these Provinces, if the contract price exceeds $500, no contractor is entitled to receive payment until he or some person in charge of the works furnishes a receipted pay-roll giving names of laborers, amounts due and paid, and the owner must retain the amount due laborers. No payments in the absence of such pay-roll are valid against lienholders.

In Alberta the owner is liable for amount of wages due laborers up to six weeks, even though there may not then be that much yet owing the contractor; he must, therefore, require a receipted pay-roll of workmen's wages, and he is entitled to retain an amount equal to the unpaid wages and for any other claims of which he has received notice in writing before paying the contractor.

And if the supplier of material gives the owner more than one notice of material furnished, the last notice must state the whole amount due, otherwise the owner is not required to retain more than the sum stated in such last notice.

787 Registration of Liens.

A claim for a lien may be recorded in the Registry Office, or Land Titles Office for the district in which the land is situated, and in British Columbia in office of the nearest County Court Registry in the county where the work is done. The claim shall state:

1. The name and residence (1) of the person claiming lien, (2) of the owner of the property to be charged, (3) of the person for whom the work was performed, or material furnished; also the time when the work was done or completed, or material furnished.

2. A short description of the work done, or materials furnished.

3. The sum claimed to be due, or to become due.

4. A description of the land (number of lot, etc.), to be charged sufficient for the purpose of registration.

5. The date of expiry of the period of credit (if any) agreed for payment of work or material.

Every claim must be verified by affidavit.

A lien when registered, becomes an incumbrance against the property. The fee for registering a lien for wages is about twenty-five cents. If several persons join in one claim, a further fee of ten cents is charged for every person after the first. In Newfoundland twenty-five cents for each person after the first. In Ontario the fee is thirty cents when filed in the Land Titles office, and twenty-five cents when filed in the Registry office.

In British Columbia no lien can be claimed for materials unless notice in writing of the intention to claim such lien has been given the owner before delivery or within 10 days thereafter. The notice may cover any specific delivery or all deliveries within ten days prior to such notice, or deliveries yet to be made. Registration must be within 31 days after placing the last of the material so furnished. Amount of lien must not exceed the sum actually owing the lien holder. Chap. 31, section 6, of 1910.

788 Form for Registration.

A.B. (name of claimant), of (residence of claimant), under the Mechanics' and Wage-earners' Lien Act, claims a lien upon the estate of (name and residence of owner of land upon which the lien is claimed), in the undermentioned land in respect to the following work (service or materials); that is to say (give a short description of the work done or materials furnished), which work (or service) was (or is to be) done (or materials were furnished) for (name and residence of person upon whose credit the work was done or materials furnished), on or before the ..... day of .....

The amount claimed as due (or to become due) is the sum of $....

The following is the description of the land to be charged: (give number of lot, street, or concession, etc., sufficient for the purpose of registration).

When credit has been given, insert: The said work was done (or materials furnished), on credit, and the period of credit agreed to expires (or will expire) on the ..... day of ....., 19...

(Signature of claimant.)

If several join all should sign.

N.B. There is no necessity for incurring or adding any expense or costs when filing a lien claim—not until legal proceedings are taken to enforce payment.

789 Time for Registering Liens.

A claim for a lien *by a contractor* or sub-contractor may be registered before or during the contract, or within thirty days after its completion.

A claim for lien *for materials* may be registered before or during the furnishing thereof, or within thirty days after furnishing or placing the last of the material. In Alberta and British Columbia the time allowed for registration, both for *materials*, and by the *contractor*, is 31 days.

A claim for lien *for services, wages or work* may be registered any time during the performance of the service or work, or within thirty days after the completion of the service or the last day's work for which the lien is

claimed; thirty-one days for British Columbia and Alberta, 60 days for laborers in mines for Alberta.

Every lien not registered within the time mentioned here ceases at the expiration of that time, unless action has been brought to realize the claim and a certificate thereof duly registered.

In Saskatchewan by Chap. 38 of 1913 it is provided if a lien is not filed or action commenced within the time specified in this section the right is not lost, except against intervening parties becoming entitled to a lien and whose claim is registered prior to the registration of such lien, or as against an owner in respect of payments made in good faith to a contractor after the expiration of the said period of thirty days and before any notice of the claim of lien is given the owner.

In Ontario and Saskatchewan where a building is under the supervision of an architect or engineer, upon whose certificate payments are to be made, the claim for a lien may be registered as stated in this section, or within seven days after said architect, engineer or other person has given his final certificate, or has, upon application by the contractor, refused a final certificate.

790 When Registered Liens Expire.

In most of the Provinces, every lien which has been duly registered absolutely ceases to exist after ninety days from the time when the work or service ended, or the materials were furnished, or the expiry of the period of credit, unless in the meantime an action to realize the claim under the provisions of this Act has been instituted and a certificate thereof duly registered. In British Columbia they expire 31 days after filing unless action is taken to enforce them, or the written consent of the owner or the party whose interest is charged is filed in the County Court Registry. Chap. 31, 1910.

In Saskatchewan the lien remains binding until cancelled by the filing of a receipt of payment or by a judge's order.

And any person interested in the property affected by a lien may any time after thirty days from its filing require the Registrar to notify the lien holder that unless he enters action to enforce his lien within thirty days from receipt of such notice the lien shall cease, the Judge may, for sufficient cause, grant an extension.

791 Lienholders' Priority.

Liens have priority over all judgments, executions, assignments, or garnishments issued after such *lien arises*, and over all payments made on account of the sale of the property or a mortgage thereon after notice in writing of such lien to the person making such payments, or *after the registration* of the lien.

Among the lienholders themselves each *class* shall share the proceeds recovered *pro rata*, according to their several classes and rights.

In all the Provinces persons having claims for labor or material against a lienholder may notify the owner within 30 days after the material was furnished or the labor performed and rank *pro rata* upon any amount paid to such lienholder, subject to the exemptions from garnishment.

792 Priority for Wages.

Every mechanic or laborer whose lien is for wages shall, to the extent of thirty days' wages, have priority over all other classes of liens to the extent of the amount of the percentage reserved from the contract price in

each Province except Alberta and British Columbia, where the priority is for six weeks' wages. All such mechanics or laborers share *pro rata* in the sum recovered. Wage-earners may also enforce a lien before the contract is completed.

In case of a contractor or sub-contractor making default in finishing his contract, the percentage due such contractor or sub-contractor for work done or materials furnished at the time when the lien is claimed by wage-earners cannot be used for any other purpose, or for payment of damages for the non-fulfilment of the contract to the prejudice of the wage-earners.

Every device by any owner, contractor or sub-contractor to defeat the priority thus given to wage-earners for their wages is null and void.

793 Discharge of Registered Lien.

A lien may be discharged by a receipt signed by the claimant or his agent, duly authorized in writing acknowledging payment and verified by affidavit and registered. The fee for registering the discharge is the same as for registering the claim.

In Manitoba, by Chap. 28, of 1908, it is provided that the accepting of a promissory note or other security, does not destroy or discharge the liens, and if such note is discounted or negotiated, the lienholder still retains his right of lien for the benefit of the holder of the note or other security. Doubtless the same would hold good in every Province unless agreement provided otherwise.

Upon payment into Court or receiving sufficient security, or upon other grounds, the Court or Judge may vacate a registered lien.

794 Lienholders Demanding Terms of Contract.

If the owner or his agent refuses to give information concerning the terms of the contract, or knowingly falsely states the terms, or the amount due and unpaid thereon when demanded by a lienholder who suffers any loss thereby shall be liable to him in an action to the amount of such loss.

795 Mode of Enforcing Liens.

It is not necessary to issue a writ of summons, but merely to file in the proper office a *statement of the claim verified by affidavit.*

Any number of lienholders having a claim on the same property may join in the action.

An action brought by any lienholder is deemed to be brought on behalf of all the other lienholders on the property in question.

In Ontario an action to enforce a lien may be tried by a Judge of the High Court, or by the Master in Ordinary, a Local Master of the High Court, or Official Referee, or a Judge of the County Court.

In British Columbia and Manitoba proceedings would be in the County Court.

In Alberta, Chap. 4, of 1909, provides that proceedings may be taken before the Judge in a summary way instead of by suit in the ordinary way. An appeal is allowed by the Supreme Court if the amount of the lien or combined liens is $200 or over.

In Saskatchewan, the District Court, and North-West Territories, in Supreme and Territorial Court for the Yukon.

In New Brunswick, County Court.

In Nova Scotia, under $200 may be in County Court, over that in Supreme Court.

796 Cost of Entering Action.

In Ontario and most of the Provinces, wage-earners have nothing to pay, and the cost to others is nominal. In Ontario, liens for material furnished or liens by the contractor are charged a fee of $1.00 for a claim not exceeding $100, and $1.00 for each additional $100 or fraction of $100, up to $1,000, but no more than $10 is charged even though the lien claim is more than $1,000. It is the same in British Columbia, up to $1,000 for materials supplied.

797 Contracts to Waive Remedies Void.

Every agreement, verbal or written, expressed or implied, by which any workman, laborer, servant, mechanic, or other person employed in any kind of manual labor waives the application of the various Acts which provide remedies for the recovery of wages by such employee is void.

This section in Ontario, Manitoba and British Columbia would not apply to any foreman, manager, officer or other person whose wages are more than $5.00 per day.

798 Removing Property Affected by Lien.

During the continuance of a lien none of the property affected by a lien can be removed to the prejudice of the lien; and the attempt at such removal may be restrained on application to the High Court, or to a judge or other officer having power to try an action to realize a lien, the amount of costs to be at the discretion of the Court or Judge.

799 Laborers on Public Works.

In Ontario in case any contractor or sub-contractor for any public work makes default in payment of wages of any foreman, workman, or laborer, or for a team employed on the work, the claim for wages must be filed in the office of the member of the Executive Council who let the contract not later than two months after the claim became due, and payment will be made to the extent of any securities or moneys for securing performance of the contract in the hands of the Crown at the time of filing the claim. Similar provision is made in all the Provinces. This provision does not include liens for material that has been furnished the contractor.

805 Lien on Articles Repaired.

Every mechanic or other person who has bestowed labor, money or material upon any chattel, as a wagon, organ, etc., has a lien upon it for the amount of his claim, and may hold it until it is paid. He must keep the article in his possession to retain the lien. The property must also be cared for as though it were in a warehouse. In Ontario, if the amount due is not paid within three months from the time it should have been paid, he may sell it by auction on giving one week's notice in a local newspaper, stating the name of the person indebted, the amount of the debt, a description of the article to be sold, time and place of sale, name of auctioneer. A like notice in writing must be left at the last known place of residence of the owner, if a resident of that municipality. After payment of debt, costs, etc., the balance of proceeds of sale must be paid over to the debtor if applied for.

It is not necessary to get judgment first, if this course is taken under the Lien Act.

In British Columbia, two weeks' notice must be given in the newspaper, and a notice of the results of the sale sent to the debtor.

In New Brunswick, the advertising is to be done by posters put up in three or four public places instead of by the newspapers.

In Saskatchewan, N.-W. Territories and the Yukon one month's advertisement in a local newspaper is required and if there is no paper published within ten miles of where the work was done, then five notices may be posted up in the most public places for one month, giving the facts stated above. It is the same in Alberta except that the advertisement need only be two weeks instead of one month.

806 Quebec's Lien Act.

Quebec's Mechanics' Lien Act, as contained in the Civil Code, article 2013, and amendments.

Laborers, workmen, architects, and builders have a preference claim over a vendor and other creditors on the immovables to the extent of the additional value given to the property by the work; and the privileges rank as follows:

1, Laborers; 2, Workmen; 3, Architects; 4, Builders.

The right of preference exists without registration during the whole time the work is being performed. To preserve the preference the laborer and workman must give notice in writing, or verbally before a witness, to the proprietor of the immovable that they have not been paid for their work at each term of payment due them. Such notice may be given by one of the employees in the name of all the other laborers or workmen who are not paid, but in such case the notice must be in writing.

When the workmen give the proprietor notice of the amount due them, such sum is then deemed to be seized in the hands of the proprietor, *pro rata*, up to the amount due. If the claims are not paid within five days after such notice, the workmen may commence judicial proceedings against the contractor, making the proprietor a party to the suit.

But after the work has been finished in order to preserve the privilege the claim must be registered within 30 days in the registry office of the division in which the property is situate.

The right of preference exists only one year from date of registration unless suit is commenced in the meantime, or unless a longer period for payment has been stipulated in the contract.

To meet the privileges of the laborer and workman, the proprietor of the immovable may retain out of the contract price an amount equal to that which he has paid, or will be called upon to pay, mentioned in the notices he has received, so long as such claims remain unpaid.

If a difference of opinion exists between the debtor and creditor as to the amount due, the creditor shall, without delay, give the proprietor a written notice, stating the name of both the debtor and the creditor, amount claimed, and the nature of the claim. The proprietor then is required to retain the amount in dispute until notified of an amicable settlement or a judicial decision.

The architect and builder shall likewise inform the proprietor or his agent in writing of the contracts which they have made with the chief contractor within eight days of the signing of the same.

The supplier of materials shall, before the delivery of the materials, give notice in writing to the proprietor of the immovable of the contracts made by him for the delivery of the materials, the cost of the same, and the immovable for which they are intended.

The preceding notice has the effect of an attachment by garnishment on the contract price.

Action must be taken within three months after giving such notice if the debt is not settled, otherwise the preference lapses.

In case a proprietor builds the structure himself without the intervention of a contractor, and borrows money for the same, the notices previously mentioned are to be given to the party advancing the money and he becomes subject to the same provisions as the proprietor would in other cases.

No assignment or transfer of any portion of the contract price, or the money borrowed, as the case may be, either before or during the execution of the work, can be set up against the said suppliers of material; nor any payments exceeding the cost of the work done according to a certificate of the architect or superintendent of the works affect their rights.

After notice and registration, the suppliers of material rank after the laborers and workmen.

In case the proceeds are insufficient to pay the laborers, workmen, architect and builder; or in case of contestation the aforesaid privileged claims over the vendor and other creditors are paid only upon the increased value given to the immovable by the work done, which estimated relative value is ascertained in a manner prescribed by the code of Civil Procedure.

In case there are several vendors whose prices are wholly or partially due, the first vendor is preferred to the second, the second to the third, and so on.

The same right extends to donors for repayment, to co-partitioners, co-heirs and co-legatees.

Every builder or contractor who employs workmen by the day or by piece-work must keep a list showing the names and wages, or price of the work of such workmen; and every payment must be attested by the signature or cross of such workmen affixed thereto who also signs it. C. C. 1627a.

807 Form of Claim for Registration.

I, A. B. (name and residence of claimant), do hereby declare that I have worked upon the immovable of (name of proprietor) at the following work (state nature of work),—(or, I have supplied, *if he be a supplier*, etc., as the case may be, since (give the date); that the amount due me is (amount of claim); that the immovable on which I have worked is described as follows: (No. of house, street, etc., or describe by metes and bounds as much as possible).

Sworn before me at ....., this ..... day of ....., 19...

Signature. Signature,

C. D. A. B.

J. P., or

Commissioner of S. C.

This notice must be made out in duplicate and sworn to before a Justice of the Peace or a Commissioner of the Supreme Court, one copy to be retained by the Registrar and the other sent to the claimant with the Registrar's certificate thereon.

The creditor must also within three days from the registration of the memorial or notice give a written notice of such registration to the proprietor of the immovable, or to his agent if he cannot be found.

CHAPTER XXIV.

WILLS—DESCENT OF PROPERTY—SUCCESSION DUTIES.

810 Wills.

A Will is a written instrument left by a person in which he gives directions for the disposal of his property after his death. A person to make a valid will must be of the age of twenty-one years (except in Newfoundland), of sound mind and free from constraint, or any undue influence.

There is no statutory form for a will. The fewer and the simpler the words used the better. The following brief will written on his shirt cuff by a man in a row boat before it sank in a storm has been held in Canada as valid: "After my decease, all my real and personal property is to go to my wife." This was dated, and properly signed by the testator and two witnesses It is always better to give full names of beneficiaries.

In Newfoundland a person seventeen years of age may make a valid will.

Married women may dispose of their own estates by will as freely as though not married, except in a couple of the Provinces, where the husband's consent is still imagined to be essential. "Old wrongs die hard."

Soldiers in service and sailors at sea may dispose of their effects by simply signing a written statement of how they wish their personal property to be disposed of. But soldiers in barracks are not included in this special provision.

A person can only leave one valid will, but may leave several codicils to it, hence every will and codicil should be dated. If two or more wills were left by the testator and neither one dated, neither one would have any effect and there would be an *intestacy*. If all were dated, then the one bearing the latest date must be accepted, unless the heirs could unanimously agree to accept and probate one of earlier date in preference.

The lawyer's toast, "Here's to the man who writes his own will," should not be forgotten by laymen. Not everyone is fit to write a will; some lawyers are not fit. A will should not be the last act of a man's life. No wonder that so many of them are broken in the courts—dictated under intense excitement, and drawn in haste, they do not represent the deliberate judgment of the testator, nor meet the requirements of natural justice.

In the *interpretation of Wills* regard will always be had to the circumstances existing at the time the will is made, and to the evident *intention* of the testator. If there is any discrepancy between the various clauses of the Will what was written *last* will hold over the first written.

A father is not compelled to leave any portion of his property to the children, but in Ontario and the other Provinces which give the wife a right of dower, he cannot deprive her of her life interest in one-third his real property.

811 Changing of Wills.

Alterations made in a will before its signing would not affect its validity, but to take effect as part of the will they must be initialed on the margin of the will by both the *testator* and the *witnesses* as evidence that they were made before the will was signed; or they might be referred to in a separate memorandum in another part of the will.

A person living several years after making a will, if circumstances require many alterations, it is better to make a new will and burn the old one, instead of making a *codicil*.

A will is *revoked by* the testator afterwards marrying, unless the will states that it was made in anticipation of marriage; or where the husband or wife elects by instrument in writing to take under the will; or where it is made in the exercise of a power of appointment, and the property would not in the absence of such appointment pass to the testator's heir, executor, or next of kin.

812 Codicil.

When only a few minor changes might be desired to be made in a will, sometimes, instead of making a new will, it is as well simply to make a codicil to the will. Such a codicil should set forth clearly:

1. That it is a codicil, and describe accurately the Will that it belongs to.

2. It should be signed and witnessed the same as a will, but using the word "codicil" in place where "will" is used.

3. If it gives a legacy to one who already had a bequest, it should state whether this is a second bequest or merely a confirmation of the one already given.

4. If advances had been made during lifetime to a child on account of legacy, such fact should be noted in the codicil.

5. If there has been a change in the property either by the acquisition of more, or the disposal of any part of the former, the codicil should regulate the bequests accordingly.

813 Preventing Litigation.

Sometimes in making a will the testator adds a clause that in the event of any person commencing proceedings to break the will, such person shall not receive any portion whatever, even though they had been mentioned in the will to receive a legacy. Such proviso would hold good, unless the suit to set aside the will succeeded.

814 Who May Draw a Will.

The testator may write his own will if he desires to do so, and every man should be able to write his will. None of the Provinces except Quebec place any restrictions as to who may write wills, but prudence would dictate that none but a person of experience and ability should be entrusted with so important a matter.

In Quebec there are three classes of wills;

1. The notarial will, called "authentic form," is made before two notaries, or one notary and two witnesses of the male sex and of full age. It need not be probated, but the notary grants authentic copies.

2. The English form, which any person can write, but must be signed in the presence of at least two witnesses of either sex. It must be probated.

3. The holograph will, which is one wholly written and signed by the testator. It needs no witness, but must be probated.

815 Requisites of a Valid Will.

The things requisite to a valid will are but few in number.

1. A valid will can only be made by a person of sound mind of full age.

2. The Instrument must be signed by the testator personally, or by another under his direction.

3. It should plainly state that this is his *last will and testament.*

4. That it revokes all former wills and testaments.

5. It should be properly *dated,* and the signature of testator witnessed by *at least two* persons. If only one witness signed, the will would be void, and there would be an intestacy, except in the case of a holograph will in the Provinces where they are recognized.

Besides the above essentials, there are other important considerations, as:

1. The name in full of the testator, his occupation, residence, etc.

2. The plainest of language should be used, and it is safer to use a separate paragraph for each bequest.

3. It should provide how debts and expenses are to be paid.

4. A clear and definite statement of how the property is to be divided, and full particulars of each bequest. Where all the property of the testator is left to one person it is not necessary to specify the property in detail.

5. It should give the Christian names in full of all the legatees, and if there are more than one person of the same name, the occupation and residence should be given so a mistake would be impossible.

6. The testator should sign at the foot of the will in the presence of the two witnesses. If the testator is unable to write his name, it may be signed by some other person for him, but in his presence or by his direction. Or he may sign by making his mark or having his hand guided while making his mark, providing he understands the meaning of what is being done and assents to it.

7. Executors should be appointed whose consent to act has been obtained.

No seal is necessary to a will, though sometimes a seal is attached. It does no harm and does no good.

816 Two Witnesses Essential to Wills.

Two subscribing witnesses are essential to the validity of wills (except holograph wills). The two witnesses must not only be both *present together* and *see the testator sign* the will, but they must sign it themselves as witnesses in *the presence of each other,* as well as in presence of the testator.

The witnesses may be minors, except in Quebec, if old enough to understand what they are doing, and to give evidence in court, if necessary. An executor or a creditor could also be a witness.

The death or subsequent incapacity of either or both the witnesses before the death of the testator would not invalidate the will.

Legatee as witness. If a legatee or devisee were to sign a will as witness, it would not invalidate the will, but the bequest to such person would be void. Also a bequest to the wife or husband of the person signing as witness to a will is void in all the provinces.

In Quebec the clerks and servants of the notaries cannot be witnesses. The notaries must not be related to the testator in the direct line, or to each other, or in the degree of brothers, uncles or nephews. The witnesses may be related to the testator, or the notaries, or to each other. Legacies in favor of the notaries or witnesses, or to wife or husband of the notaries or witnesses, or to any relation in the first degree are void.

Ministers of religion may be witnesses but cannot act as notaries and write Wills in Authentic Form, but may in the English form.

Wills in the English form may be written by any person and females may serve as witnesses the same as in the other provinces.

In Saskatchewan, if there are two other competent witnesses to a will, besides a legatee or devisee, who may happen to sign as a witness, then such devise or bequest shall not be void.

In Newfoundland the husband or wife may sign a will as witness without losing a devise or bequest to them, if the will can be proved without their being called upon as witness.

818 Residuary Clause.

Where there is a residuary clause in a will every lapsed legacy or bequest, and every other legacy which on any ground fails to take effect, will fall under the control of that clause and pass to the residuary legatee, also any property not disposed of by the will falls under the control of that clause.

819. Holograph Wills.

A "holograph will" is one wholly written and signed by the testator himself. Such a will, in those Provinces which admit them, does not require the attesting witnesses as other wills do to make them valid. But in probating such a will the signature would have to be proved, so where it is convenient it would be advisable to have the two witnesses sign it as well.

Quebec, Manitoba, Alberta and the North-west Territories recognize the holograph will.

820 When Wills Take Effect.

Wills do not take effect until after testator's death, and all gifts and legacies become "vested" at the same time, whatever the interest may be. If such person should die after the testator, but before obtaining possession of the bequest or legacy he could dispose of it by will, or if no will were left it would go to his heirs, and if such person were married the husband or wife would take same interest as though the property were actually in possession.

Shares or stocks specifically bequeathed to any person the title in such stocks is vested at the time of the testator's death, and any dividend declared thereafter belongs to such legatee although such shares may not have been transferred into his name.

821 Probating Wills.

After the decease of the testator, as soon as convenient or becoming, the will should be read in the presence of the parties interested, and then as a usual thing it should be proved in the Surrogate Court. But there is no statute compelling such reading of the will, and except in Quebec and Prince Edward Island it is not compulsory to probate the will.

In cases where parties claiming to have the will refuse to either read it in presence of those interested or to probate it, any of the heirs or next-of-kin may apply to the court either for letters of administration of the estate, or for an order compelling the production of the will. The Surrogate Court has jurisdiction in such matters, and a subpœna issued by the court to such party would produce the will in court.

Executors may perform the duties imposed upon them by the will without probating it, except in Prince Edward Island and Quebec, but in large estates it is better to probate them, as that secures an authoritative declaration from the Surrogate Court that the will is valid. It also clothes the

executor with the legal authority to administer the affairs of the estate and enter the courts, if necessary.

In Prince Edward Island the will must be probated within thirty days after the death of the testator; for Quebec, see section 814.

Wills bequeathing real estate should be *registered* as well as probated, so that the titles of the devises may be more easily traced. The will, of course, carries the title to the property without registering, but by registering the title is completed in the Registry Office. They must be probated before they can be registered. With *lands* under the Torrens System registration is essential.

Probating and registering wills furnish evidence of their validity, but neither one can prevent an action from being taken to cancel them.

The probate fees can be ascertained by inquiry at the Surrogate Office in the county in which the will would be proved. The tariff of fees is not fixed, as circumstances in different cases differ. A solicitor who would be engaged to fill out the papers is allowed about $12, if the estate does not exceed $4,000.

822 Devisee or Legatee.

A legatee is one who receives personal property under a will. Devisee is used when the bequest is in land.

A legacy to a friend or relative other than a child who dies before the testator lapses unless the will provides otherwise.

A legacy to the testator's child, who dies before the testator, will go to the children of such legatee, *i.e.*, to the grandchildren.

A legacy to a witness or to the wife or husband of a witness is void.

A devise to widow in bar of dower has priority over other legacies.

Legacies not paid at maturity can be sued for the same as any other debt, and interest collected one year after the testator's death, as the executor is allowed one year in which to distribute the estate.

An annuity or rent charge payable out of the land should be registered.

A pecuniary legatee, who is also a debtor to the testator, must account for the debt on payment of his legacy. If the debt has been outlawed it would be optional with the executor, unless the Will directed otherwise, whether to deduct it from the legacy or not, except in Quebec, where the debt would be cancelled as well as the right of action barred.

823 Valid and Invalid Bequests.

A devise to A on condition that he pay a certain legacy to B if B should die before the date of payment, the gift to A becomes absolute. Graham *v.* Bolton, 9 O. R., 481.

A bequest of an annuity to a son's widow so long as she remains unmarried is valid, and would also be valid in case of any other person who had once been married. Cowan *v.* Allen, 26 S.C.R., 292.

It has also been held that the limitation of an estate to a person till married is valid, the intention benig to provide for such person while he or she remains unmarried and not to pevent him from marrying. In Judge *v.* Splan, 22 O.R., 409, it was "held that an estate given to a daughter so long as she may live on the place and remain numarried is a valid restriction."

But the condtiion attached to a bequest to a person that he or she must not so marry is held to be void, because it is in restraint of marriage.

A devise to children as joint tenants with the condition that they must not sell any portion of it except to each other, and so descend to their heirs is valid, but the condition is void, Gallagher *v.* Farlinger, 6 C.P., 512.

A condition annexed to a devise in fee simple to a wife, with the condition that in the event she does not dispos of such property during her lifetime, or by will at her death, so much of it as remains shall be paid to others is an absolute gift, and the condition is void, as it is an attempt to control the devolution of land in an intestacy. Bowman *v.* Oram, 26 N.S.R., 318.

A devise in fee simple, with the condition that if the devisee die intestate and without issue the estate shall go to some other person, such condition is also void. Farrell *v.* Farrell, 20 U.C.R., 633.

A condition attached to a bequest that the devisee will never dispose of the property, but will kepe it for his heirs, is void. *Re* Watson *v.* Woods, 14 O.R., 45.

A bequest on the condition that none of the devisees will ever sell or mortgage the lands is void. Quinlan, 28 O.R., 372.

If the testator desires to exercise what is called a "gift over" after the death of the devisee, he must make the bequest for *life* only, and not in *fee simple*.

824 Bequests to the Wife.

The will should state definitely whether the bequests to the wife are in addition to dower or in lieu of dower.

If real property is bequeathed to her, it should be clearly stated whether it is in fee simple or only a life estate.

If she is left a cash annuity it should be made a charge upon the land.

If she is to retain her home at the homestead, a certain portion of the house should be reserved for her exclusive use.

If she is to have a horse, or cow, or poultry, etc., it should be stated how the food for the same is to be provided, and in the event that any of them should die, the will should settle how the loss is to be made good; also what buildings are reserved for them during winter and pasturage during summer.

If the farm is to be worked by the son or other near relative, and a share to be given the wife for her support, the will should clearly state the conditions of the lease, and the relative proportion of meadows and crops, the wife's share in each, her share of garden vegetables, fruit, grapes, etc.; or the wife should be left free to make her own terms through the executor.

It must be remembered that a will is not a lease, but it may be made to operate as a lease, and, if carelessly drawn, the door for future friction is left wide open. It may also tie the hands of the executor.

825 Executor, Executrix.

An executor, or executrix if a woman, is one appointed by will to carry out its provisions and distribute the estate among the beneficiaries.

An executor may be a legatee, or a creditor, or a debtor. It was formerly the rule if a debtor were appointed executor his debt was forgiven, but that is no longer the case.

An executor may enter at once upon the work of carrying out the provisions of the will, as soon as it has been publicly read, before being proved, except in Quebec and Prince Edward Island. For the other Provinces, where there is no money in a bank to be drawn out, and no debts requiring them to enter the courts to collect, it is only a waste of money to probate an ordinary will.

An executor may be appointed guardian as well, and if not so appointed by the will and there are minor children who have no guardian, he may apply to the Surrogate Court to be appointed guardian. In cases where minor children would be left with both parents dead, the testator should appoint an executor a guardian as well to such infants, thus saving the cost of appointment by the court.

An executor appointed by will dying, his executor may continue to administer the estate; but if the deceased executor had been appointed by the Surrogate Court, then another executor would have to be appointed to take his place, either by the Surrogate or High Court.

Executors who cannot agree as to the management of the estate, either one or all may apply to the court for instruction. The court may then either direct what shall be done or may itself assume the administration of the estate, in which case the executors are freed from future liability. In all cases where executors need advice they may apply to the court.

Executors cannot act by proxy except in merely clerical work, neither can they employ solicitors to do what they should do themselves, and charge the cost against the estate.

In Quebec a married woman cannot act as executrix without consent of the husband or judicial authority.

In New Brunswick an executor who does not file an *inventory* with the Registrar within three months may be served with a notice in writing by any interested person to file such inventory within ten days, and if not filed within the ten days from receipt of such notice application may be made to the judge to demand inventory. If no such inventory is filed and no person applies to the judge for its filing, the judge, after thirty days from the time when the inventory should be returned, may on his own motion make an order for the return of such inventory.

826 Executor's Notice to Creditors.

The following form of notice executors may use in a local newspaper or the official *Gazette*:

Re estate of....., deceased.

Notice is hereby given, pursuant to Chapter 129, Section 38, R.S.O. (or similar for other provinces), that all persons having claims against the estate of....., late of the Township of....., County of..... (yeoman, or as the case may be), who died on or about the.....day of....., 19.., are required to deliver their claims and full particulars of such claims to....., of the town of....., Executor, on or before the..... day of....., 19.. And that after the said.....day of....., 19.., I will distribute the assets of the said deceased among the parties entitled thereto, having regard only to the claims of which I shall have received notice. A. D., *Executor.*

After the due publication of the above notice the executors may, after the expiration of the time stated in the notice, proceed to pay those who have delivered their claims, and then distribute the balance among the beneficiaries.

If debts should afterwards appear, be sued for, and recovered, each one shall refund and pay back to the executor or administrator his rateable part of the debt and costs.

827 Powers and Liabilities of Executors.

They represent the deceased in settling the affairs of the estate, and distributing the proceeds among the beneficiaries according to instructions in the will, but if no will, then according to Statute.

They may pay debts or claims upon any evidence that they deem sufficient, may compromise or submit to arbitration any debt or claim as they think best, may give and execute such agreements, releases, etc., as they deem expedient without becoming responsible for any loss occasioned thereby, unless forbidden by the instrument appointing them.

They may complete whatever contracts the deceased was bound to complete if he had not died.

They may maintain an action for all torts or injuries to the person or estate of the deceased, except in cases of libel and slander, that have not been barred by statute. Third parties may also bring action against the executors or administrator for torts or injuries, as well as debt that they could have brought against the deceased if he had not died.

An executor of a deceased executor may draw deceased's executor's trust funds from a bank.

The Statutes allow an executor or administrator to withdraw money deposited in a bank in the name of the deceased testator.

Executor may mortgage an estate for necessary improvements, but not to himself. He could subsequently buy the mortgage and have it assigned to him, and hold it as security for the principal money and interest.

In Nova Scotia, chapter 27, 1910, provides that the conditions in such mortgage must have the approval of the Court endorsed on it.

Executors may provide for the education of the minor children and pay necessary expenses out of the estate.

Executors of a deceased member of a partnership firm do not become partners, and cannot interfere with the partnership business. The deceased partner's interest must be ascertained and paid over by the surviving partners, and if this cannot be done satisfactorily to the executors, the executors may enter action for the partnership business to be wound up and the assets converted into cash and divided as per partnership agreement.

829 Discharge of Executors.

An executor, who is believed by the heirs to be acting unwisely or unjustly, may be compelled to show his books before the County Judge by any of the heirs who is twenty-one years of age.

An executor that is found to be wasting the estate or committing acts of injustice against the heirs, may be removed by proceedings in the Surrogate Court. A guardian may also be required to produce and pass his accounts in connection with the property of infants under his control.

Also, where an executor, or one having a life estate in property, becomes insane, the heirs or any person interested in the estate as "reversionist" may apply to the court for an order for the administration of the estate, and the court will take the property out of the hands of the executor or such tenant for life.

830 Remuneration of Executors.

The expenses of executors are a charge upon the estate, and they are entitled to an equitable percentage of the proceeds of estate or trust funds to

recompense them for their time and labor. There is no fixed tariff of fees for executors, but if the beneficiaries object to the amount charged, the executors should put in an itemized bill of their expenses and the percentage they deem they are entitled to, usually not exceeding five per cent., before the Judge of the Surrogate Court, who, in passing the accounts, has power to either increase or diminish the amount charged as seems to him to be equitable in each particular case.

831 Executors' Release.

When an estate has been distributed among the beneficiaries, debts of deceased of which the executors have had notice been paid, and their own remuneration been received, it is not necessary to present an itemized statement of the dealing with the estate to a Judge and receive a discharge. The following form of release, giving the name and address of each person receiving a bequest or a distributive share of the estate signed by them with a witness to their signature, as shown below, is a legal discharge of the executors from future personal liabilities therewith, and does not take from the estate the heavy court fees that the other method involves:

Know all men by these presents that we, A.B., of the..... County of ..... (occupation); C. D., of the ..... County of ..... (spinster, married woman, or as case may be); E. F., of the ..... County of....., etc., hereby acknowledge that we have received from ....., executors of the estate and effects of....., late of the said (place), in the County of....., deceased, the sum hereinafter set opposite our signatures in full satisfaction and payment of all sum or sums of money due to us, the children (grandchildren, if any), of the said..... deceased, as our distributive shares of the said estate of ....., deceased.

And we therefore do by these presents remiss, release, quit claim and forever discharge the aforesaid executors, their heirs and administrators of and from any claim for said distributive shares.

In witness whereof we have hereunto set our hands and seals this .....day of.....19....

Signed, Sealed and Delivered

in the presence of:

As to signature of.....			
A.B.	A.X.	✺	$
As to signature of.....			
B.C.	X.Y.	✺	$
As to signature of.....			
C.D.	R.A.	✺	$

It would add to the appearance if the above form would be written on a typewriter, as it would be if prepared in a law office, but the names of recipients of the witness must be in the handwriting of the persons themselves.

833 Intestacy.

Intestacy is where a person dies without leaving a will. In such case, if property is left, unless the heirs can agree among themselves as to the

division of the property, it must be distributed according to the Statutes of the Province in which the property is situate. Also if the deceased left debts due him that could not be collected without suit, an administrator would have to be appointed in order to sue. And if the intestate left money in a bank, an administrator would have to be appointed in order to draw it out, unless he left a signed cheque covering the amount, or a signed cheque in blank, but such cheque must be presented to the bank for payment before the bank has notice of the death of the depositor." See section 295. In negotiable paper, "notice" means "knowledge," no matter how obtained.

834 Administrator.

Administrator is the one appointed by the Surrogate Court or Court of Probate to settle the affairs of the estate of a person who dies without leaving a will, or neglects to name an executor in his will, or names one who refuses to act.

In Newfoundland the Supreme Court, and in Yukon the Territorial Court, grants letters of administration and probate.

The regulations in each of the Provinces concerning the settlement of estates vary considerably, as also do the succession duties; hence, it is advisable for a person acting as an executor or administrator to either consult a lawyer or take full instructions from the office where wills are probated.

But a person dying intestate and leaving real and personal property, it is not legally compulsory for any of the heirs to take out letters of administration. If the heirs can all agree as to the distribution of the property among themselves, they can draw up an agreement to that effect, which, being signed by all, and sealed, will bind all to abide by it. And if land is to be sold, the widow and heirs all joining in the deed give a good title, providing they are all of full age.

An administrator's duties are exactly the same as those of an executor, so are his liabilities. An administrator must, however, give a bond for the due performance of his trust, while an executor usually need not do so.

In case a will is made, but no executor appointed in it, the administrator must carry out its provisions the same as an executor would do.

As soon as an administrator is duly appointed he will take possession of the property and divide it according to the Statutes, or Will, if there is a will. A child, husband, wife, or any other person who may chance to be in possession, has no more authority over the property than others, unless they have a valid lease, in which case they may hold it until the lease expires, unless sooner terminated by mutual consent.

Where an intestate dies leaving property and there are no known heirs, a creditor (if any) may apply for letters of administration. The Attorney-General is the proper person to take charge of such estates, who will attempt to discover heirs.

In cases where no will is found, or persons claiming to have the will refuse to read it, any of the heirs or next of kin may apply to the Surrogate Court for letters of administration, and to secure an order for the production of any supposed will, and to examine witnesses therewith.

In Ontario an amendment of 1909, chap. 32, provides that letters of administration shall not be granted to any person not a resident of Ontario.

836 Distributing the Estate.

Executors must remember that legatees are not required to demand payment, but it is the executor's duty to pay the legacies to the rightful persons. Moneys due legatees who cannot be found must either be retained, or safely invested, or paid into court in order to free themselves from personal liability.

Executors must also remember that they are to pay the legacies and the debts of the testator only. If the same person were executor for both husband and wife he must not mix the money of the two estates; for debts, funeral expenses and legacies of each must be paid out of the proper estate.

Personal property of the deceased is the proper fund out of which debts are to be paid and not out of real estate. If that is not sufficient, then any other property that has not been "specifically bequeathed" to any person should be resorted to, then after that the property "specifically bequeathed" is available.

Money from an insurance policy is payable according to its terms, and does not become part of the estate unless it has been included in the will. If not mentioned in the will, the executors have nothing to do with it. Whether mentioned in the will or not, it is free from all claims of creditors if payable to wife or children or other preferred beneficiaries.

In the matter of insurance, however, if the money is made payable to the wife, who dies before the testator, then in that case the money will fall into and become part of the estate.

Where a will is made and any portion of the property of deceased was not disposed of in the will, it falls to the heirs as though no will had been made, and the executors must divide it among them according to Statute and without regard to the bequests in the will, unless there is a *residuary clause,* in which case it would fall under that clause.

Property bequeathed in trust to executors to pay over the income to a certain person for a term of years or for life is a separate trust, and must be kept separate from the rest of the estate, and must not be used for payment of debts except in the event that there is not sufficient other property.

Where there is a deficiency of assets to pay debts it shall be distributed *pro rata,* without preference, among them all. A debt due an executor has no preference over others, neither has a judgment.

Property in another Province or country must be managed according to the laws of that Province or country, no matter where the testator lived. Where there is doubt as to certain legacies to whom to pay, the executors may pay the money into court, and in that way free themselves from liability.

In the matter of dower, in a case where the wife has been absent and unheard of for seven years, the law *presumes* that she is dead, so that after that length of time the executors are protected from personal liability in paying the whole estate over to the heirs. Giles *v.* Morrow, 1 O.R., 527.

Those who may assert that the absent one is alive after that length of time must be prepared to prove it. Wing *v.* Angrave, 8 H.L., Cases 183.

Executors are to endeavor to collect in all debts within a reasonable time, or they become personally liable for any loss that occurs, especially those debts standing out upon personal security. To allow a debt to outlaw would be deemed *culpable neglect,* and the executors would by law be required to make it good.

Executors must not pay a debt of the testator that has been barred by Statute unless the will so directs.

838 Form of Will.

There is no statutory form for wills. The printed "blank forms" for wills that are being sold by stationers are merely a commercial enterprise by the publisher. If they are used, great care must be exercised in filling in the *blank spaces*, and *marking out* such of the printed words as do not apply in that particular case, otherwise a serious mistake may be made.

Laymen, when writing their own wills should avoid all technical terms, only using words, the meaning of which they are sure.

The word *devise* is used when willing real estate, and *bequest* when willing personal property.

The following Form may be found useful as a guide for those not accustomed to the drawing of Wills, as it is made to cover various kinds of bequests:—

I, William Smith, of the City of Toronto, in the County of York, merchant, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

1st. I hereby appoint my son Clarence, and Elias Augustine, both of the City of Toronto in the County of York, to be my co-executors of this my last will, directing my said executors to pay all my debts, funeral and testamentary expenses out of my estate as soon as conveniently may be after my decease.

2nd. After the payment of my said debts, funeral and testamentary expenses, I give, devise and bequeath all my real and personal estate which I may now or hereafter be possessed of or interested in, in the manner following, that is to say:

3rd. I give, devise and bequeath to my beloved wife, Harriet Amelia (in lieu of dower), without impeachment of waste, all that my freehold with buildings and appurtenances thereto belonging, known as Lot No. 6, in the second concession of the Township of Ancaster, County of Wentworth, and Province of Ontario, containing by admeasurement one hundred acres, be the same more or less, for her sole use during her natural life, and upon her decease to my children and their heirs, respectively, share and share alike.

4th. I also devise and bequeath to my said wife all that freehold messuage or tenements in which I now reside, known as Lot No. 36, Howland Avenue, in the City of Toronto, with the garden, outbuildings and appurtenances thereto belonging, together with all my household furniture, plate, china, and chattels of every description being in and on the premsies, for her own use absolutely; also I bequeath unto my said wife the sum of two thousand dollars now deposited in my name in the Traders' Bank at Toronto.

5th. I give, devise and bequeath to my son, Harry Edmund, the farm known as the Walnut Grove Place, being Lot No. 8, in the First Concession of the Township of York, in the County of York, together with all the crops, stock and utensils which may be thereon at the time of my decease; and also the property in the City of Toronto, Ont., known as the Arlington Block, being Lot No. 18, on the north side of King Street, subject to a legacy of five hundred dollars to be paid to my nephew, John Alexander Smith, in two equal annual instalments of two hundred and fifty dollars each without

interest, the first payment to become due and payable when he becomes twenty-one years of age, said legacy to be the first charge on the said property.

6th. I give and bequeath to my daughter Grace, wife of James D. Allen, fifty shares in the capital stock of the Provincial Natural Gas Company, which stand in my name on the books of the said company; also two thousand dollars in cash, payable out of my funds in the Traders' Bank.

7th. I give and bequeath my gold watch, with chain, guard and appendage, to my brother, James Edwin, for his own use.

8th. I give and bequeath to my niece, Alice Matilda Krafft, as a specific legacy, my fifty shares, numbered 101 to 150, both inclusive, in the Toronto Street Railway Company.

9th. I give and bequeath to my nephew, John Alexander Smith, aforesaid, a legacy of five hundred dollars hereinbefore provided for. But in case my said nephew, John Alexander Smith, shall die under the age of twenty-one years, then I direct that the said $500 shall go to my sister, Abigail Jane, for her absolute use and benefit.

All the residue of my estate both person and real not hereinbefore disposed of I give, devise and bequeath unto my son Clarence, his heirs and assigns forever.

In witness whereof I have hereunto set my hand this tenth day of June, in the year of our Lord one thousand nine hundred and ten.

Signed, Published and Declared by the said William Smith, the testator, as and for his *Last Will and Testament*, in the presence of us, both present together at the same time, and in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses to the due execution thereof.

WILLIAM SMITH.

CHARLES SUMMERS.
F. W. WILLIAMS.

Some might prefer the following beginning for the will:

In the name of God. Amen.

I,....., of the Township of....., in the County of ..... farmer, (or, as the occupation may be), considering the uncertainty of human life and having property, both real and personal, do make, publish and declare this Instrument of Writing my last Will and Testment, in words following:

Referring to a life of threescore years and ten, the stated life of man, and with it health, peace and a large portion of comfort and its attendant blessings, the Lord of all the earth hath permitted me to enjoy, I would here render thanks to Almighty God for His kind dealings and extended mercy to me, trusting and ever praying that the residue of my days may be an entire submission to His Divine will, and for the future hoping and believing in salvation through the merits and mediation of Christ my Redeemer, the Saviour of the world; my worldly possessions I would also at this time arrange, and will and order as follows: 1st I hereby appoint, etc., etc.

839 Codicil Revoking Will.

I (insert name and profession) do hereby revoke an instrument bearing date (give date and witnesses), and purporting to be my last will and testament.

In witness whereof I have hereunder set my hand, this ..... day of ....., in the year of our Lord one thousand nine hundred and .....

Signed, published and declared by the said ..... the testator, in the presence of us, etc. (same wording as in the will).

(Testator's name.)

843 Trustees and Trust Funds.

No technical words are needed for the creation of an express trust. A will that devises or grants real estate unto A in trust for B, or which directs A to sell such property and pay the proceeds to B, or to apply the proceeds for the benefit of B extending over a number of years creates a trust in favor of B, and places upon A the responsibility of a *trustee* if he accepts the trust.

The statutes of all the Provinces hold trustees rigidly to their obligations. The trustee, whether a trust company or an executor or other person, must carry out the instructions of the instrument appointing him.

He also has a discretionary power outside of such provisions in the administration of the trust. If he errs in judgment, the court may correct him, but if he acts in bad faith he will be held liable for any loss resulting therefrom.

They have power to compound and settle disputes, may accept such security for debts as to them, or a majority of the trustees or executors or administrators seem best, or give time for payment, and will not be responsible for loss if done in good faith.

They have power to administer the estate, receive incomes from it, make necessary repairs, but have no authority to make merely ornamental improvements, as that would be speculative.

All the Provinces and Newfoundland absolutely prohibit speculation with trust funds, and the desire to secure larger revenue from such funds in speculative projects is no palliation for the crime of gambling with other people's money.

The Trustees' Act of each province and Newfoundland enumerate various investments that are safe, and any trustee is unwise if he goes outside of those lists and thus incurs personal liability unless he knows absolutely that there can be no loss, or unless he is prepared to make good any loss that may occur.

Trustees or executors are authorized by statute to invest trust money in any stock, debentures or securities of the Dominion or Provincial Governments, and on the first mortgage on land held in fee simple, providing such investments are reasonable and proper.

They may also invest in public securities of the United Kingdom or of the United States, and also in municipal bonds and debentures.

There are also various mortgage and other financial corporations in whose stocks and debentures trustees are permitted to invest trust funds, which should be ascertained by persons acting as trustees in any province or in Newfoundland.

If a trustee improperly lend money on a mortgage security beyond the amount that would be *reasonable* he is personally liable to make good the sum advanced in excess of what should have been loaned, and interest on the same.

A trustee or guardian who invests trust funds in his own name, or deposits such money in a bank in his own name without in some way designating his representative capacity, becomes personally liable if loss occurs. It is the same if they lend trust money on a promissory note made payable to themselves personally, if loss occurs they will be required to make it good. To free themselves they must in every case designate that it is *trust money.*

A trustee's powers may be suspended by a decree of a court granting an injunction, or a receiver for the estate, or placing the execution of the trust in the hands of the court.

A trustee may also, if he wishes to be discharged from the duties, apply to the court for relief.

The trustees are *individually liable* and accountable for *their own* acts, receipts, neglects or defaults, and not for those of each other, nor for any banker or other person with whom trust funds may be deposited, or for any other loss unless the same shall happen through their own wilful neglect.

For comparatively large estates it is doubtless preferable to make one of the "Trust Corporations" the trustee. They are financially responsible, have wide experience and ample opportunities for safe investment, and charge no more than a private person is entitled to charge.

845 Laws of Descent of Real and Personal Property.

Descent of intestate estates.—Where the owner of property dies *leaving no valid will,* the rule is that the distribution of the *personal* estate is to be regulated by the law of the Province or country wherein he was a domiciled inhabitant at the time of his death without regard to the place of birth or death, or the situation of the property at that time. A man is domiciled where he has his permanent home to which, after every temporary absence he will return. A wife's domicile is that of her husband, unless they have separated, in which case she may acquire a domicile of her own. On the other hand the right of succession to the deceased's *real* property is regulated according to the law of the Province or country in which the land is situate, and the administration of the estate must be there also.

The laws of descent are similar in all the Provinces and Newfoundland, but where they vary they will be noted in the following resume:

Descendants. Children means immediate children of the deceased, and does not include grandchildren. Children share equally. If there are children from two husbands or two wives they share equally, that is those of half blood share equally with those of whole blood.

A posthumous child, meaning one born after the death of the father, shares equally with the others. Even where a will is left, if no provision is left in it for a posthumous child, the latter nevertheless is entitled to a share equal to that of the other children, and each of these must abate enough to make up the amount, that is take as if there were an intestacy.

An adopted child, or a step-child, does not share in the estate except where the statutes provide otherwise. Nor does an illegitimate child, that is one born before the marriage of the parents, except in Alberta and North-

west Territories, where such inherits from the mother equally with the legitimate.

Children of deceased children take their parents' share, as in law they represent their parents. But this applies only to deceased children of the *intestate,* and not to his or her deceased nephew or niece, and the children of the latter would not so share. No relations more remote than children of the intestate's brothers and sisters may share, unless there are no near kin.

Those who represent deceased children of an intestate are the *descendants,* not 'next of kin'; hence a son dying before the intestate and leaving a widow and a child, the child being a descendant, takes all, and the widow none. Prince v. Strange, 6 Medd, 162.

A second or a third wife, surviving her husband takes the same share that the first wife would have taken.

Rules Governing Distribution,

where the deceased leaves no valid will and is—

(*a*) *An Unmarried Man or Woman.*

In Ontario, the father, mother, brothers and sisters share equally in both the real and personal estate, the children of deceased brothers and sisters taking their parents' share. If the father and mother are dead, the brothers and sisters and children of deceased brothers and sisters take all. If there are no father, mother, brothers or sisters, then the grandparents, if living, take all; if no grandparents, then uncles and aunts of deceased share equally, children of deceased uncles and aunts taking their parents' share.

In Manitoba, Nova Scotia, New Brunswick and Prince Edward Island, all the real and personal estate goes to the father; if father be dead, then to mother, brothers and sisters in equal shares; if father and mother be dead the brothers and sisters take all in equal shares; if no heirs as above, then to next of kin in equal degree.

In British Columbia the real and personal estate also goes to the father, and if he be dead then to the others as given in the previous paragraph for Manitoba, etc., except as to real estate which came to the deceased through the mother. In such case if the mother be still living, the inheritance would go to her for life, and the reversion to the deceased's brothers and sisters, and if there are none living the mother takes the estate absolutely. If the mother be dead the inheritance goes to the father for life, and the reversion to the brothers and sisters of deceased, and if none are living the father takes absolutely.

In Alberta, Saskatchewan and North-west Territories, all the real and personal estate goes to the father; if he be dead then to the mother; if both be dead, then to the brothers and sisters equally, children of deceased brothers and sisters taking their parents' share; if no heir as above, then to next of kin.

In Nova Scotia, New Brunswick and Prince Edward Island, the whole estate goes to the father, if living; if no father, then to mother, brothers and sisters equally, descendants of deceased brothers and sisters taking their parents' share; if no father or mother, then to the brothers and sisters and descendants of deceased brothers and sisters; if no heirs as above, then to next of kin.

In Quebec the succession is divided into two equal proportions; one-half goes to the father and mother, sharing equally, and the other half to brothers and sisters of deceased, equally, children of deceased brothers and sisters taking their parents' share. If either father or mother be dead the survivor takes the whole half. If both be dead the brothers and sisters and children of deceased brothers and sisters take all. If there are no heirs as above, the estate goes to the ascendants, being divided equally between the paternal and maternal line. If either line has become extinct the relatives of the other line inherit the whole.

(*b*) *A Widower or Widow Without Issue.*

The real and personal estate is divided in the same way as set out in (*a*), for each Province respectively.

(*c*) *A Widower or Widow With Issue.*

The real and personal estate goes to the children equally, descendants of deceased children to the remotest degree taking their parents' share. If the deceased had issue once but survived them all, then the grandchildren take equally, children of deceased grandchildren taking their parents' share, if the latter died after the grandparent. If there are no children or descendants of deceased children the estate goes to the "next of kin."

(*d*) *A Married Man With Issue.*

In Newfoundland and all the Provinces except British Columbia, Nova Scotia and Prince Edward Island, one-third goes to the widow absolutely, and the residue to the children equally, the children of deceased children taking their parents' share.

In British Columbia, Nova Scotia and Prince Edward Island one-third of the personal estate goes to the widow absolutely, and the residue to the children; and one-third interest in the real estate goes to the widow for life, the residue to the children equally, children of deceased children taking their parents' share. On death of the widow her third interest also passes to the children.

In Newfoundland and all the Provinces which allow dower, the widow may elect by instrument in writing whether she will take her share in both the personal and real property, subject to the debts and funeral expenses, or her dower out of the real property free from debts.

In Quebec, if there is community of property, the surviving consort takes the one-half absolutely, and also the use of the children's half until they attain the age of eighteen, but must support and educate them.

(*e*) *A Married Man Without Issue.*

In New Brunswick, Prince Edward Island, Quebec and British Columbia, one-half goes to the widow absolutely, the residue to the next of kin as set out in (*a*). In New Brunswick the other half would go to the father, if living.

In Nova Scotia one-half goes to the widow and the other half to the father; if the father be dead, then the half goes to the mother, brothers and sisters of deceased equally.

In Manitoba, Alberta, Saskatchewan and North-west Territories the widow gets the whole estate.

In Ontario the widow gets $1,000 out of the whole estate and one-half of the remaining estate, the residue going to the next of kin as set out in (*a*). If after paying the debts and testamentary expenses the estate does not exceed $1,000, the widow, of course, gets all.

In Newfoundland, if after paying the just debts and testamentary expenses the estate does not exceed $2,000, the widow receives all absolutely. If the estate exceeds $2,000, she receives the said $2,000 and one-half of the remainder; the residue going to the next of kin as in (*a*), the widow also having a charge against the estate for interest at four per cent. from the date of the husband's death until the $2,000 are paid to her.

(*f*) *A Married Woman With Issue.*

In Newfoundland and all the Provinces (except British Columbia, New Brunswick and Nova Scotia), a married woman having separate property in her own name, the husband takes one-third interest in both the real and personal property absolutely, the residue going to the children equally.

In British Columbia and Nova Scotia one-third of the personal property goes to the husband absolutely, the residue to the children equally; while one-third of the real property goes to the husband for life, the residue to the children equally; on the death of the husband his third interest goes to the children equally.

In New Brunswick the husband gets one-half of the estate absolutely, the other half going to the children.

(*g*) *A Married Woman Without Issue.*

In Ontario, Quebec, Nova Scotia, British Columbia and Newfoundland, the husband receives half the whole estate absolutely, the residue going to the next of kin. In New Brunswick the residue would go to the father, if living.

In Manitoba, Alberta, Saskatchewan, North-west Territories, New Brunswick and Prince Edward Island, the husband gets the whole estate absolutely.

(*h*) *If a Will be Left by the Deceased.*

In those Provinces which allow dower, a widow may elect to take her dower out of the real property instead of what is left to her in the will; in all the other Provinces the will governs, except in Alberta and Saskatchewan, where the widow is given the right to apply to a Supreme Court Judge for relief. See section 555.

A widower also, except in Ontario, Manitoba, Alberta, Saskatchewan, North-west Territories and the Yukon, may elect whether he will take under the will or claim his right of tenant by the curtesy, in the wife's real estate undisposed of at her decease.

850 Succession Duties.

All the Provinces have a Succession Duties Act, by which the estate of persons dying wealthy shall return a reasonable percentage to the Provincial treasury. As it has proved to be a source of considerable annual revenue, the rate of the taxation has, so far, been subject to frequent changes by the

various Legislatures, and therefore we are not giving the percentages for the different classes beyond the immediate family of the deceased.

In Ontario gifts *bona fide* made, and however made, at least twelve months before the death of the donor, and of which actual possession is taken by the donee and retained to the exclusion of the donor are free of duty.

Property given absolutely more than three years before the death of the donor to a child, son-in-law, daughter-in-law, or to father or mother, not exceeding in value or amount $20,000, in the case of any one person is not dutiable, if actual, *bona fide* possession is immediately taken by the donee and retained to the exclusion of the donor.

Property given to any one person other than those mentioned above, not exceeding $500, is not subject to duty.

Property devised or bequeathed to religious, charitable or to educational purposes to be carried on by a corporation or a person domiciled within the Province is exempt from duty.

No duty is leviable on any estate, the aggregate value of which does not exceed $10,000.

On property passing by will or otherwise to parents, grandparents, husband, wife, child, daughter-in-law or son-in-law of deceased, the aggregate value of which does not exceed $50,000 no duty is leviable.

The scale of duty where it exceeds $50,000 is one and one-half per cent. up to $75,000; and from that to $100,000 it is three per cent., and thus increasing to ten per cent. for $1,000,000.

In Quebec if the estate passing to husband or wife, or to children, or to the parents, or father-in-law or mother-in-law or to son-in-law or to daughter-in-law does not exceed $15,000, it is exempt from duty.

If it exceeds $15,000 and passes to the persons named above, the duty is one and one-quarter per cent. on all over $5,000 up to $50,000; exceeding $50,000 up to $75,000, the duty is one and one-half per cent. on all over $5,000, and thus increasing until it reaches five per cent. for $200,000 and over.

Bequests to educational, charitable and religious institutions carried on within the Province are exempt from duty.

When the whole amount passing to one such person exceeds $100,000, a further duty of 1 per cent. is added up to $800,000, when it is 3 per cent. additional.

Life insurance policies are dutiable the same as other property, unless they do not exceed $5,000.

In New Brunswick the Act does not apply to any estate which, after payment of debts and expenses of administration, does not exceed $5,000, or the property bequeathed to religious, charitable or educational institutions, or to property passing to parents, husband, wife, child, grandchild, daughter-in-law or son-in-law, which does not exceed $50,000.

Where it exceeds $50,000 and passes to father, mother, husband, wife, child, brother, sister, daughter-in-law or son-in-law the duty is one and one-half per cent. up to $50,000, and five per cent. thereafter.

Bequests to religious or charitable institutions, and property situate in Great Britain and Ireland, which is subject to duty there, are exempt.

Exceeding $10,000 and passing to grandparents and other lineal ascendants, except parents, 5 per cent.

Exceeding $5,000 and passing to other collaterals or to strangers, 10 per cent.

Legacies passing to any one person not exceeding $200 are exempt from duty.

In Nova Scotia the Act does not apply to any estate which, after payment of debts and expenses of administration, does not exceed $5,000, or to property passing to father, mother, husband, wife, child, grandchild, grandparent, daughter-in-law or son-in-law of deceased where the value does not exceed $25,000.

When it exceeds $25,000 and passes to the persons here named, except to grandparents the duty is two and one-half per cent. up to $100,000, and when it exceeds $100,000 it is five per cent.

When the value of the property exceeds $5,000 and passes to other relations the duty is five per cent. and when going to strangers in blood the duty is ten per cent.

Where the whole value of property passing to any one person does not exceed $500 it is exempt from duty.

Gifts of property or money made twelve months before the death of the donor, of which the donee took actual possession and held continuously, are exempt.

In Prince Edward Island the Act does not apply to any estate which, after payment of debts and expenses of administration, does not exceed $3,000, nor to property passing to father, mother, husband, wife, child, grandchild, grandparent, daughter-in-law or son-in-law of deceased where the property does not exceed $10,000.

In Manitoba the Succession Duties do not apply to any property which, after deducting all debts, obligations and liabilities, does not exceed $1,000.

Or to property passing to parents, husband, wife, child, grandchild, grandparent, daughter-in-law or mother-in-law, where the aggregate of dutiable property does not exceed $25,000.

Where it exceeds $25,000 and passes to the persons named here the duty is one-half per cent. up to $50,000 and increasing until it is nine per cent. on $800,000 and upwards. And to others it ranges from five per cent. up to fifteen per cent.

But if any of the property passing to any one person of the classes previously named does exceed $2,000, it is exempt from duties.

In British Columbia the Act does not apply to any estate not exceeding $5,000, nor to any property passing to husband, wife, father, mother, child, daughter-in-law or son-in-law of deceased which does not exceed $25,000.

Where it exceeds $25,000 and passes to the persons named here the duty is one and one-half per cent. up to $100,000, and two and one-half per cent. thereafter up to $200,000, and five per cent. thereafter.

Amendment of 1908 provides that where the property exceeds $5,000, and passes to any lineal ancestor of deceased, except to father or mother, or to any brother or sister of deceased, or to their descendants, a duty of 5 per cent. is levied on the whole property; and where it passes to any more distant relatives, or to strangers, 10 per cent. on the whole property.

Alberta, Saskatchewan and North-West Territories Succession Duties Act does not apply to any estate that does not exceed $5,000, nor to property passing to husband or wife, child or grandchild, daughter-in-law or son-in-law or to parents (or to brothers or sisters of deceased for N. W. Territories) where the estate does not exceed $25,000.

Property exceeding $25,000 and passing to persons named above 1½ per cent. on the whole estate up to $100,000; 2½ per cent. on property exceeding $100,000, but not over $200,000; exceeding $200,000, 5 per cent. In Alberta the extra duty is levied on the excess over $25,000 and not on the $25,000.

Where it exceeds $5,000, and passes to grandparents or other lineal ancestors, or to uncles and aunts, or to brothers and sisters of deceased, 5 per cent. on the whole amount.

When passing to other collaterals or to strangers, 10 per cent.

When the whole amount passing to any one person mentioned in the first paragraph does not exceed $5,000, or to any other one person and does not exceed $200, there is no duty.

CHAPTER XXV.

INSOLVENT DEBTORS—ASSIGNMENTS.

855 Insolvent Debtors.

We have no Bankruptcy Act in Canada by which an insolvent debtor can be forced to make assignment for the benefit of his creditors, and which will give him a release from further prosecution. But all the Provinces and Newfoundland have enacted very fair and equitable insolvency laws, which prevent insolvent traders from either fraudulently disposing of their assets, or settling with certain creditors to the prejudice of others. They all force the debtor, however, either to leave the country or to do business in future in his wife's or some other person's name, except in Newfoundland.

There are two ways in which the effects, both personal property and real estate, of an insolvent debtor may be converted into cash and ratably distributed among the creditors, viz., under the "Creditors' Relief Act," or by *assignment*.

856 Voluntary Assignment.

A trader who finds himself in insolvent circumstances may voluntarily make an assignment of his estate for the general benefit of his creditors.

The assignment need not be in any precise form. It is sufficient to say, "All my personal property, real estate, credits and effects which may be seized and sold under execution," or similar words. The *statutory exemptions* from seizure under an execution are also reserved to the debtor who makes an assignment of his other property for the benefit of his creditors.

The assignment may be made to the sheriff of the county, or to an official assignee, or to any other resident of the Province which a majority of the creditors having a claim of $100 and upwards assent to.

In Saskatchewan by Chap. 19 of 1912-13, the assignment may only be made to a Trust Company authorized to carry on business as such in Saskatchewan, and empowered by Order-in-Council so to act.

In the N.-W. Territories the assignee must be a resident of the judicial district in which the assignor resides or carries on business.

The creditors may also make as many subsequent changes as they find necessary. An assignee may resign, so may an inspector, but a sheriff cannot refuse to complete the work of assignee of an insolvent, for that is part of his official duties, and in case of his death there would be no change, as his deputy or successor would complete the winding-up of the estate.

857 Forced Assignment.

In case a trader who is practically insolvent and yet refuses to make an assignment for the general benefit of creditors, and does not pay them, or satisfactorily secure them, he cannot be forced to make an assignment, except in Quebec and Newfoundland.

In Quebec any creditor having an unsecured claim overdue for $200 or upwards may demand the debtor to file with the court *judicial abandonment* of his estate for the benefit of his creditors, and if this is not done within two days (or the debt paid), and the abandonment actually made within four days the debtor may be arrested, and the goods seized.

If the assignment is made, the liquidation will be effected by a curator appointed by the court.

In Newfoundland either a debtor or a creditor may, by petition addressed to the Supreme Court or to a Supreme Court Judge, secure a judicial finding as to the debtor's real financial status, simply stating that the debtor is unable to pay his creditors 100 cents in the dollar. If the debtor is the petitioner he must attach to the petition a schedule of all his assets and liabilities. If it is by a creditor, he must also attach such schedule, if he is able, and if not he must give a statement of facts sufficient to satisfy the court or judge that an order for hearing should be made. After the hearing, if the debtor is declared insolvent, the estate may be vested in a trustee for distribution among the creditors, and after the estate is thus wound up the court or judge may give the debtor a *certificate of discharge*.

Two-thirds of the creditors in number and value may also agree, and upon confirmation by the judge, give the debtor a final discharge.

All the other Provinces have laws which regulate the form of assignments, but there is no power to make a person become an insolvent. But where a debtor is manifestly insolvent and yet refuses to make a general assignment, the same result is attained under The Creditors' Relief Act outlined in following section:

858 Creditors' Relief Act.

In the Small Debts Courts in all the Provinces and Newfoundland, such as the Division Court in Ontario, executions from them may be executed, and the money realized by the bailiff paid over to the creditor at once without regard to other creditors.

In Quebec, on executions from any of the courts the officer may pay over the money secured at once, unless some other creditor raises an objection, alleging that the defendant is insolvent, in which case the money must be ratably distributed as in the other Provinces stated below.

Under the provisions of The Creditors' Relief Act, priority among execution creditors has been abolished in all the Provinces (except as stated above for Quebec), when the execution issues from any of the higher Courts, and the insolvent's assets are distributed in one or the other of the ways described in the following two sub-sections:

1. If an insolvent trader refuses to make an assignment, an action may be brought by one creditor on behalf of himself and all other creditors of same class, when both the real and personal property may be sold under execution and the proceeds ratably distributed among the execution creditors and those who prove and file their claims within the time provided in each Province. The law-costs of a person suing in such case would be paid in full before any distribution would be made among the creditors; or under

2. The provisions of the "Creditors' Relief Act." As this Act is nearly identical in all the Provinces, the following will give the necessary steps to take under it:

In Ontario, when the sheriff levies money on an execution from a County or High Court, he is required to retain it for thirty days, and to enter the particulars of the execution in a book kept for that purpose, which is open for public inspection. All other creditors whose writs or certificates of execution are in his hands at that time, or are placed with him within one month from such entry, share ratably in the distribution of the money realized.

A creditor having a judgment from the Division Court may file with the sheriff a memorandum of his judgment and costs under the seal of the clerk of said court, which will entitle him to a share in the distribution.

Creditors who have not obtained judgment may file and prove their claims according to the provisions of the Act and share in the distribution.

In British Columbia the procedure is the same for money realized on writs from the Supreme and County Courts.

In Alberta, Saskatchewan and North-West Territories on executions from the Supreme or the District Court, and in the Yukon from the Territorial Court, the money must be retained by the sheriff for two months, and then ratably distributed among the creditors who have delivered their writs to him, unless the Judge orders a different time.

In Manitoba the sheriff holds the money three months, and then ratably distributes it among the execution creditors.

In New Brunswick where the Sheriff levies under an execution issued out of the Supreme Court, the Supreme Court in Equity or any County Court, it must be ratably divided as stated above.

In Nova Scotia, in both the Supreme and County Courts, if the sum levied by the sheriff is $100.00 or upwards, it must be retained as stated in this section and ratably distributed.

In Quebec, where another creditor opposes the payment of money recovered under an execution on the ground that the defendant is insolvent, the court holds the money levied and distributes it *pro rata* on all claims filed within fifteen days after notice is given in the official *Gazette*.

In all the Provinces, if the first seizure made by the sheriff is not sufficient to liquidate the claims proved against the insolvent estate, he may seize as much more as may be needed, or the whole estate if it is required to satisfy the legal claims and costs.

860 Advertising and Registering the Assignment.

In all the Provinces when an assignment is made it must be advertised in the official *Gazette* and in some local newspaper. The assignment must also be registered. If these public notices are not given within the time required,

both the assignor and the assignee are liable to heavy penalties, and for that reason it is safer to make the assignment to the *official assignee* or to a *sheriff*, or consult a solicitor.

The time required for advertising and registration at present is as follows:

In Ontario the notice of the assignment must be published at least once in the *Ontario Gazette* and not less than twice in a newspaper having a general circulation in the county in which the property is situate, and if it does not appear in the first number of the *Gazette* and in such other local newspaper issued after five days from the execution of the assignment, the assignor shall be liable for a penalty of $10.00 for each day that shall pass after the issue of such papers in which the notice should have appeared until it is published; and the assignee shall be liable to a similar penalty for each day that shall pass after the expiration of five days from the delivery of the *assignment* to him or of his assent thereto. Amendment of 1910.

A copy of the assignment together with an affidavit of a witness must be registered within five days after the execution of the assignment in the office of the Clerk of the County Court where the assignor resides, if a resident of the county, and if not a resident of the Province, then in the county where the property so assigned is situate.

In Manitoba.—Once in *Manitoba Gazette*, twice in local newspapers; registered in the office of County Court Clerk within ten days; penalty for default $25.00 per day.

In Alberta and Saskatchewan notice of the assignment must be published at least once in the official *Gazette*, and not less than twice in a local newspaper. A copy of the assignment must be registered within ten days from its execution in the office of the clerk of the registration district for chattel mortgages, where the assignor resides, if a resident of the Province, but if not a resident, then in the registration district where the property is situate. If there is real estate, then a copy must be filed within 15 days in the land titles office for the registration district in which the land is situate.

The penalty to the assignor for neglect to so advertise or to so register is $25 for each day of such neglect; and a similar penalty to the assignee if not advertised or registered within 10 days from the time the assignment was delivered to him or his assent thereto. One-half the fine goes to the party suing and the other for the benefit of the estate.

In British Columbia.—Once in *B. C. Gazette*, once in a local newspaper, first issue after 10 days from date of assignment, and to be registered within 21 days in County Court Register; penalty for default, $10.00 per day. The assignment of a stock company must also be registered in the office of the Registrar of Joint Stock Companies.

In Nova Scotia and New Brunswick—Once in the *Royal Gazette*, twice in local newspaper; registered within five days in office for registry of deeds; penalty for default, $25.00 per day.

In Prince Edward Island.—Twice in *Royal Gazette*, once in local newspaper; registered within five days; penalty for default, $5.00 per day.

861 Form of Notice to Creditors.

Notice is hereby given that....., of the town of..... in the County of..... (hardware merchant, or as the case may be), has made an assignment to me in trust for his creditors.

A meeting of the said creditors will be held at my office at the Town of....., on (Wednesday) the..... day of....., 19...., at 2 o'clock p.m. (or as the case may be), to receive statement of affairs, appointment of inspectors, and for giving direction for the disposal of the assets, etc.

Creditors are requested to file their claims, duly verified, with me on or before the day of such meeting, after which date I shall proceed to distribute the assets of the estate, having regard only to those claims of which I shall then have received notice.

A. B., *Assignee.*

862 Filing Claims with Assignee.

Any person claiming to rank as a creditor in the estate assigned must furnish to the assignee particulars of his claims proved by affidavit and such vouchers as the nature of the claim admits of, and within the time named in the assignee's public notice.

A claim not yet due will also be included if proved.

A wife who advances money to her husband that was used in the business would rank as a creditor if he assigned. The husband, also if he advanced money to his wife, who was engaged in business in her own name and on her own account separate from him, would rank as a creditor if she assigned.

863 Priority of Claims.

The assignee is the agent for the insolvent, as much as he is for the creditors, and is bound by all the valid agreements and contracts respecting the goods to be distributed that bound the insolvent.

In distributing the assets of an insolvent the first thing to be paid is taxes, next one year's rent due the landlord, then mortgages, then a certain number of months' arrears of wages, and lastly general creditors.

In Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, N. W. Territories, New Brunswick and Nova Scotia, clerks and other employees have priority over general creditors for three months; P. E. Island, one month; Quebec, wages for servants one year, clerks three months.

In all the Provinces after receiving the amounts for which they have priority they then share *pro rata* with the general creditors for any balance that may be due.

In case the assignment is that of the lessee the landlord has a preference claim for rent for one year last previous to, and generally three months following the execution of such assignment, and thereafter as long as the assignee shall retain possession of the premises.

864 Fraud by Insolvent Traders.

Our Statutes do not discourage a trader deeply in debt from continuing in business, or from making a supreme effort to extricate himself in any just way. Self-respect, as well as business interests, requires that his pecuniary circumstances be not published to the world. An insolvent person need not disclose that fact to a creditor from whom he is purchasing goods, unless he is questioned as to his financial standing. If questioned he must either state the facts, or he must refuse to give information, thus leaving the other party free to either fill his order or reject it.

But if the insolvent person represents himself as solvent in order to obtain goods on credit, he is guilty of a fraudulent act. The seller, discovering it, may cancel the contract, or stop the goods in transit if they have been

shipped. Penalty for false replies that amount to fraud—three years' imprisonment.

865 Fraudulent Conveyances and Transfers.

Every gift or gratuitous contract, whether by deed or otherwise, made by a person at a time when he is unable to pay his debts in full or knows that he is on the eve of insolvency, is deemed to be made with the intent to defraud his creditors, and may be set aside. A deed of gift with natural love and affection for the consideration would be void.

Every conveyance or transfer of either personal or real property by a person who knows he is on the eve of insolvency with the intent to delay or defraud his creditors shall be void against such creditors, providing the other party knows his intention and acts in collusion with him. (Que. C. C. 1040.)

Every debtor in insolvent circumstances, or on the eve of insolvency, who voluntarily, or through force, gives a confession of judgment that has the effect of defeating or defrauding his creditors, or to give one or more a preference over others, is void and cannot be executed.

A large payment of money or a transfer of property by an insolvent to a creditor knowing his insolvency, is deemed to be made with the intent to defraud creditors, and such creditor may be compelled to restore the amount or thing received, or the value thereof, for the benefit of all the creditors. (C. C. 1036.)

A sale on credit to a person who knows of the vendor's insolvency is in general held as fraudulent against creditors, as the necessary effect is to hinder and delay them.

All transfers of property, or purchase on credit by relatives, at a time when the insolvency is notorious, furnishes evidence of fraud and collusion.

A son, or daughter, or wife of insolvent who purchases the estate or property must have some apparent means, or the transfer would be regarded as fraudulent. If the money is actually paid the transaction is regular.

A chattel mortgage to secure a creditor, or in settlement of a debt previously contracted, or to secure a surety, if given within sixty days of making an assignment, is void towards other creditors.

In Ontario, by amendment of 1910, if an assignment is made within sixty days after a transaction that has the effect of giving one creditor a preference over others, such transaction is presumed to be performed with that intent.

866 Fraudulent Intention.

Fraudulent intention is a material element in an action to set aside a transfer or conveyance as being fraudulent against creditors, and where this element does not exist the action cannot succeed. (Carr *v.* Corfield, 20, O. R. 218). It must be shown that the debtor intended to defraud his creditors or some one of them, also that the vendee or transferee knew his intention, and also that such transfer actually produced injury to the creditors, otherwise the action to set aside cannot succeed.

Where a conveyance is "voluntary," that is when it is made without valuable consideration, it is only necessary to show fraudulent intention on the part of the grantor in order to have it set aside (Oliver *v.* McLaughlin, 24 O. R., 41).

A suit to set aside a payment, or sale, or transfer, or conveyance of property must be taken within sixty days of such alleged fraudulent transac-

tion. After an assignment has been made for the general benefit of creditors, no one but the assignee can bring such action, unless the assignee refuses to do so in a particular case. A creditor may then obtain permission from the court to bring action in his own name and at his own risk.

In Quebec an action to set aside may be brought within one year from the time when the creditor obtains the knowledge of the fraudulent transaction.

867 Valid Conveyances and Transfers.

All sales in the regular course of business, whether on credit or for cash, by an insolvent before an assignment is actually made, are valid.

All *bona-fide* payments in the ordinary course of trade or calling to innocent parties for value are valid. Even a large payment to a creditor just previous to making an assignment cannot be set aside unless it can be shown that such creditor had a knowledge of the insolvent's affairs.

A conveyance of real estate by a person who is insolvent cannot be set aside where the purchaser in good faith bought and paid a fair consideration for the same. A purchaser cannot be held for what the vendor does with the money.

A chattel mortgage given before assignment by way of security for an actual *bona-fide* advance of money given at the time is valid, providing the money advanced bears a fair and reasonable relative value to the consideration given.

Purchase by a partner of a co-partner's interest, although he knows such partner to be embarrassed, is valid if he had no knowledge that such partner intended to defraud his creditors by such sale.

Even though a purchaser knows that the vendor is insolvent a sale cannot be set aside unless it can be shown that the purchaser knew that the sale was made with the intent to defraud creditors. There is no legitimate way a debtor can pay debts except through sales.

The fact that a man is liable upon notes or has a judgment against him or owes debts to any amount does not in any case debar him from selling his property to a *bona-fide* purchaser without notice. Even where a person sells his property with the intention of preventing his creditors from seizing it or from getting a lien or claim upon it, to a purchaser who pays the full price, the sale cannot be set aside, unless it can be clearly shown that the sale was a fraudulent device entered into by *both parties* for the purpose of defeating the creditors in general of the vendor, or the complainant in particular.

868 Bulk Sales of Goods.

By the Bulk Sales Act of British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Quebec, it is made the duty of the party purchasing a stock of goods in bulk out of the usual course of business of the vendor, before making settlement by either cash, promissory notes, or otherwise, to demand and receive from the vendor a written statement verified by a statutory declaration giving the names and addresses of all the creditors from whom such goods were purchased, and the amount still owing on them. If this is not done, and such creditors are not paid the purchase price of such goods towards the settlement of their claims, then such sale or transfer is deemed fraudulent and void towards any creditor prejudiced thereby.

In Manitoba and British Columbia the certified statement need only include the names and addresses of creditors whose claims exceed $50.

In Manitoba, Saskatchewan and British Columbia, if the actual cash paid for the goods is less than what is due such creditors, the purchaser must obtain the written consent to such sale of at least sixty per cent. in number and value, as shown in such verified written statement, otherwise the sale shall be deemed fraudulent respecting such creditors. In Alberta and Nova Scotia the written consent of fifty per cent. is sufficient.

In Quebec, provision is also made to obtain a release from creditors, who renounce their right under the Act.

In Manitoba, Saskatchewan, Alberta, British Columbia, Nova Scotia and Quebec, it is provided that after the purchaser procures such statutory declaration he fails to obtain the written consent to the sale, or a waiver of the provisions of the Act from such creditors he may pay the purchase money into the hands of a third party for rateable distribution among the creditors as under the Assignment Act. In Nova Scotia it may be paid to a trustee, in Alberta to an official assignee, in Manitoba to a trust company or official assignee, and Quebec to the Provincial Treasurer, on giving such creditors eight days notice.

Nova Scotia not only requires the statutory declaration as previously mentioned, but also that the agreement for the purchase of the goods in bulk must be in writing, which, together with an inventory of the goods sold must be filed within ten days after execution in the registration district in which the vendor resides, or where the goods are situated, if in a different registration district, and that no part of the purchase money be paid within thirty days after the execution of the agreement.

In Manitoba, Chap. 13 of 1914, provides that action to set aside a sale for not complying with the Bulk Sales Act must be commenced within sixty days of such sale, or from the date when the attacking party received notice of such sale.

The act applies to merchants, commission merchants, and manufacturers.

The following is the British Columbia statutory form of declaration:

DOMINION OF CANADA, PROVINCE OF B. C. To wit: } I, A. B., of , in the Province of B. C., do solemnly declare that I have sold, or agreed to sell, to C. D. my stock of goods, wares, and merchandise, situate at , for the sum of , and that attached hereto and marked "A" is a true and correct statement of the names and addresses of all my creditors from whom I have purchased said goods, wares, and merchandise, or any portion thereof, and the amounts due and owing, or which will become due or owing, to each of the said creditors in respect of the purchase of said goods, wares, or merchandise, and I have no creditors other than those mentioned in said statement who have any claims against me on account of my purchase of said goods, wares, or merchandise, and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

Declared before me at the of in the Province of B.C., this day of A.D. 19 } A. B.

E. F.,
A Commissioner, etc.

869 The Unpaid Vendor's Privileges.

In all the Provinces and Newfoundland, if the seller should learn that the purchaser is insolvent he may refuse to deliver any goods that have been purchased on credit. If the goods have been shipped they may be stopped *in transitu* if the bill of lading has not yet been delivered to the purchaser. Even if the bill of lading has been delivered to the purchaser the delivery of

the goods may still be prevented if they are still in the hands of the carrier or warehouseman, providing the bill of lading has not been transferred to an innocent purchaser for value, or pledged as security for a *bona-fide* advance of money from an innocent party. Such valid transfer of the bill of lading to an innocent third party for value extinguishes the unpaid vendor's lien on them, unless they were sold *under a lien* that did not permit the *title to pass* until payment had been made. See Conditional Sales.

After both the goods and the bill of lading have been delivered to the purchaser, then, in Newfoundland and all the Provinces except Quebec, the goods become a part of the estate of the insolvent, and the unpaid vendor can only rank with other creditors.

If, however, the seller discovers that the goods have been fraudulently purchased, with no intention of being paid for, he may then enter suit for their recovery even after they are in the debtor's warerooms, and if the fraud is proved the goods will then not become part of the estate.

In case of foreign shipments, as soon as the debtor receives the bill of lading and pays the duties they become part of the estate, even though they are placed by him in a bonded warehouse.

In Quebec, the unpaid vendor has a lien for thirty days on the goods, whether they are in the hands of the carrier or in the store or warerooms of the purchaser, unless they have actually been sold to a *bona-fide* purchaser, or pledged as security for money actually advanced by an innocent third party. Therefore goods that have recently been brought into the premises of an insolvent and not yet paid for, and being yet in bulk or in a form to be certainly identified, would not be held by the assignee as part of the estate of the insolvent.

870 Attaching Goods of Absconding Debtors.

The goods of a debtor moving out of the place, but not out of the country, cannot be stopped by a creditor except under an execution.

In case of a person being indebted to a sufficient sum, which varies in the different Provinces, and absconds from the Province, leaving effects liable to seizure under an execution, or attempts to remove such personal property out of the Province, or from one county to another, or keeps concealed to avoid service of process, the creditor, by making affidavit to that effect, may procure a warrant to attach such of the goods as are liable to seizure for debt. Care must be taken, however, not to seize the exemptions or to stop their removal or there would be a cause for damages.

In Ontario, if the debt is not less than $4.00 nor more than $100.00, the writ of attachment may be obtained from the Clerk of the Division Court, but over that amount from the Judge of the County Court. In Quebec attachment is allowed if the debt is $5.00 or upward.

In British Columbia, if the debt exceeds $100.00, the writ may issue from the County Court if within its jurisdiction; if not, then from the Supreme Court.

In Manitoba, if the debt is not less than $10.00 nor more than $250.00, the writ may issue from the County Court; over that from King's Bench. In case of absconding from the Province the debtor loses his exemptions unless the family has been left and are in need of such goods. Then the exemptions will be in the option of the Judge.

In Alberta, Saskatchewan, Yukon and the North-West Terri-

tories, if the amount of debt exceeds $50.00, a writ may issue and if absconding debtor leaves no wife or family no property is exempt.

In New Brunswick, for a sum of $40.00 and upwards, the writ may issue by a Judge of the Supreme Courtt, and also from County Court when the debt is within its jurisdiction.

In Nova Scotia, if the sum is $80.00 and upwards, the writ may issue from the Supreme Court, or the County Court if debt is from $20.00 to $400.00.

In Prince Edward Island, if debt is $33.00, and NEWFOUNDLAND if $20.00, the goods may be attached before judgment.

871 Arrest of Debtor.

The *fiction* is that no one in Canada can be arrested for debt, but it is only true because other names are used for the cause of arrest—fraud, absconding debtor, contempt of court, etc.

All the Provinces allow an absconding debtor to be arrested upon a *capias* and held for bail; also imprisonment for fraudulent assignments, obtaining goods under false pretences, and for contempt of court.

In Ontario, British Columbia and the Yukon, absconding debtor can only be arrested and held for bail by a person having a claim against him for $100.00 or upwards. In all cases an order may be made as soon as the suit is commenced and before judgment.

In Manitoba, Alberta, Saskatchewan and North-West Territories arrest is not allowed except the debtor is guilty of contempt of court. The goods may be attached.

In Quebec, if absconding from Quebec and Ontario, and debt is $50.00 or upward.

Persons who cannot be arrested for debt are clergymen, persons seventy years of age or over, and women, whether traders or not.

In New Brunswick, in liquidated claims, if over $20.00, writ for arrest may be obtained from the Supreme and County Courts before judgment, but for a sum *not certain* an order from a Judge must be obtained. No arrest after judgment except in the petty courts having jurisdiction under $80.00.

Nova Scotia's lowest sum allowing arrest is $20.00, when writ may issue from County Court, and from Supreme Court if debt is $80.00 and upwards.

In Prince Edward Island if debt is $33.00, writ may issue from the Supreme Court.

In Newfoundland, if debt is $50.00, absconding debtor may be arrested.

873 Assignment of Wages.

In Manitoba, Chap. 2 of 1909 provides that no assignment of or order for wages or salary to be earned in the future, given in consideration of a loan or advance of less than $200, shall be valid against the employer of the person making such assignment, unless the assignment has been accepted in writing by such employer, and afterwards filed in the office of the Clerk of the County Court in the division where such assignor lives if a resident, or where he works if not a resident of Manitoba. But this section does not apply if the assignment is to secure a debt contracted for necessaries, either already received or to be supplied in the future.

No such assignment of wages to be earned in the future shall be valid if made by a married man living with his wife unless the written consent of the wife is attached to such assignment.

No assignment of wages to be earned in the future given for a present loan shall be valid unless the amount lent or advanced thereon exceeds 95 per cent. of the amount of wages assigned.

CHAPTER XXVI.

SUITS AND ATTACHMENTS.

878 Entering Cases in Court.

Merchants and others who have accounts they find it necessary to sue, can enter their own cases in the Small Debts Courts of the different Provinces, or the Division Court of Ontario, as well as any solicitor would do for them.

The plaintiff, when entering action, must leave with the clerk, by post or otherwise, a simple statement in writing (with as many copies as there are defendants) of the cause of action. If an account, it may be in the usual form of an account; in the case of a note, a copy; and of any other written instrument, a concise statement of it giving its purport. Must also give his post-office address, and full name and post-office address of the defendant, and state if he is unmarried. Where a layman is thus entering the cases for suit, the Clerk of the Court will always give the information that may be needed. As a matter of fact, there is nothing to do but to put in the accounts as above stated, and pay the fee for the summons and service.

In Ontario, if the account is under $10.00, the cost right through to judgment will be only $1.25 for the Clerk's fees, or $1.75, including the bailiff's fees for service of summons, exclusive of his mileage.

When the amount exceeds $10.00, the cost increases according to the amount of the bill, but remains low in comparison to the higher Courts.

Actions may be taken in the Division Court in following cases:

1. All personal actions where the amount claimed does not exceed $60.00; and in personal actions up to $100.00 if the parties consent thereto in writing.

2. In liquidated money claims, that is, notes and written instruments, up to $200.00 and interest in addition to that amount.

3. In unliquidated claims and demands of debt as accounts, and for breach of contract, up to $100.00.

4. Absconding debtors, where claim is not less than $4.00 nor more than $200.00.

5. For replevin if value does not exceed $60.00.

879 Small Debts Courts.

The fees for the inferior, or Small Debts Courts in all the Provinces are about the same as those here given for Ontario, and the process for entering cases and for defence similar, therefore the following two sections, together with the preceding one, will give the general information desired.

If the debtor puts in a defence and the case comes to trial it would be better in the most of cases to employ a lawyer to conduct the case for experience is needed at court as well as knowledge, and besides the Judges look upon a layman there as somewhat of an intruder.

When any person is served with a summons they should not let the few Latin words in it scare them. The summons will always state the number of days in which a defence must be entered or judgment may be given by default. If the defendant has anything to gain by defending the suit, he has the right to set up any one or more of several pleas against the claim made against him.

In cases where the debt is outlawed and the defendant intends to take the benefit of the Statute of Limitations, he must state in his dispute note that the claim is barred by Statute as it is over six years old (or as the case may be), otherwise judgment will be given against him by some judges. The same must be observed in cases of illegal interest.

880 Statement of Defense.—"Dispute Note."

The statement of defense is called a "Dispute note," of which the following will serve as a guide to those unfamiliar with the forms. The name of the court and Province, of course, may be changed to suit. It may be sent by post or delivered personally to the clerk.

No. .....
In the (No.) Division Court of the County of .....
Between (give name), Plaintiff, and (give name), Defendant.
Take notice, I dispute the Plaintiff's claim in this case. (Here specify the grounds of defence, statutory or otherwise.)
Dated this ..... day of ....., A.D. 19.....
(Signature.)

To the Clerk of the said Court,
and to the said Plaintiff.

In setting out the grounds of defence state them briefly and distinctly, using a separate paragraph for each separate defense you intend to make, if more than one, as follows:

1. That the plaintiff owes you a debt, which you claim should be set off against it; or,

2. That you have performed your part of the contract; or,

3. That you have offered to perform it, but that the other party refused to accept it; or,

4. That you have a counter-claim as an offset to part or to the whole claim of the other; or,

5. That the claim had become outlawed, as it was more than six years old; or

6. That you were under twenty-one years of age when the debt claimed was contracted; or,

7. That you do not owe the debt claimed; or,

That performance was impossible: (1) through the acts of God, as lightning, tornadoes, inundations, or death; (2) By public enemies, as an invading army.

881 Place of Suit—Venue.

In case of trial for breach of contract the place where the contract is made is where the suit will be tried, unless the contract fixes some other place.

Contracts made by letter have for their place where the letter of acceptance was signed, hence there the suit should be.

In regard to real estate, the place of contract is where the property is situate.

A promissory note not made payable at any definite place would be sued where it was dated; but if payable at some other place, then that would be place of suit.

Goods ordered or sold from store or warehouse and taken by purchaser or shipped from there, would generally have that place for place of suit. Goods delivered by traveller to the retail dealer, the place of suit would be there.

In cases where a traveller or the manufacturer calls on the retail trader and secures orders for goods, that will be the place of suit. (See "Change of Venue.")

882 Change of Venue.

It has been a common practice among manufacturing and sales firms to insert a clause in the written agreement providing that in case suit had to be entered to enforce payment, the action may be tried in a Court other than the one having jurisdiction where the purchaser lived.

In Ontario amendment of 1907 enacted, "no proviso condition, stipulation, agreement or statement which provides for the place of trial of any action, shall be of any force or effect under the following conditions:

1. If in the Division Court action, the defendant within the time allowed for disputing the plaintiff's claim, files with the clerk of the court out of which the summons issued a notice disputing the jurisdiction of such court, and an affidavit by such defendant or his agent that in his belief there is a good defence to the action on the merits; and further stating the Division Court wherein the cause of action arose and the defendant resides.

2. If in any other court than a Division Court, the defendant makes motion to change the venue or place of trial according to the practice of such court.

But Section 85 of the Division Courts Act of Ontario says: "The action may be entered and tried in the court nearest to the residence of the defendant, irrespective of the place where the cause of action arose," and the same permissive power is given the courts in all the Provinces.

883 Debtor Being Out of the Province.

In cases where judgment has been secured before the debtor leaves the Province and goes to some other Province or to another country, the plaintiff may procure an "exemplification" of the judgment from the court in which it is entered and bring suit upon it in the proper court in the Province or state in which the defendant resides.

But in cases where judgment has not been recovered before the debtor left the Province, two courses are open to the creditor:

1. If the debt is payable at the place where the creditor resides or carries on business, he may sue in the county court in Ontario or corresponding court in the other Provinces, and the writ can be served on the defendant in the Province where he resides or in the State or other country to which he has moved if he is a British subject. If the debtor is not a British

subject, the court would then on application issue a "notice" instead of a writ and that would be served in the foreign country. After securing judgment, if the debtor had no assets in Canada with which to satisfy the claim the court would issue an "exemplification" of the judgment and suit could be brought upon it in the foreign country; or,

2. Suit may be brought at once in the proper court in the foreign country or in England, but the expense in proving the claim would generally make this impracticable, for unless the debt were in the form of a promissory note or similar contract, witnesses to prove the claim would have to attend court or a commission be appointed to take evidence there.

Goods consigned for sale on commission to a person in another Province, or in another country and the consignee making default in settlement, the consignor may bring action in the courts where the consignee resides and compel him to render an account, and to pay over the net proceeds, and to return the unsold portion if all had not been disposed of.

885 Garnishment—Attachment of Debts.

All the Provinces, and Newfoundland, allow money due a debtor while yet in the hands of a third party to be *attached* or garnisheed.

Garnishment attaches to *money* due (not to property, as promissory notes, etc.), and the money must be presently due; that is, it cannot be garnisheed in advance.

The following salaries, emoluments and moneys are exempt from garnishment:

Salaries of officials under Dominion Government, salaries of judges, pensions, and teachers' superannuation allowances, and money deposited in Post Office Savings Bank are exempt from garnishment by creditors, or seizure in case of insolvency; so are pensions, alimony, etc., and trust money whether deposited in a Bank or Loan or Trust Company.

According to a judgment delivered by Judge Morson, April 29th, 1903, in Toronto, the salary of an alderman cannot be garnisheed for debt because it is not a debt by the city due the alderman within the meaning of the Act, but merely a statutory obligation arising out of the city by-laws to pay the remuneration, hence not garnishable. No doubt the same will hold good in all the Provinces, for such interpretation is manifestly in the public interest.

All the Provinces, and Newfoundland also, exempt a certain amount due wage-earners, unless the debt is for board and lodging.

Money due a mechanic as contract price of work done instead of for wages is not exempt.

In Ontario garnishee order may issue either before or after judgment from Clerk of the Division Court, but money in the hands of a third party due a mechanic, workman, laborer, servant, clerk or employee for wages, which includes the permanent employees of the Provincial Government, cannot be garnisheed unless the sum due the mechanic, etc., exceeds $25.00, and then only to the extent of the excess. In case, however, where the debt was contracted for board or lodging, and in the opinion of the Judge the exemption of $25.00 is not necessary for the maintenance of the debtor's family, then the amount to be secured by the garnishee will be in the option of the Judge.

A single man with no one depending on him for support has no amount reserved to him by law against garnishment. Neither have other classes of people who are not wage-earners.

The garnishee summons costs $2.00 on sums up to $10.00, right through to judgment; from $10.00 to $20.00 it will run up to $4.00, and similar amounts in the other Provinces.

By amendment of 1909, chap. 48, sec. 5, it is provided that a creditor who attaches a debt shall be deemed to do so for the benefit of all the creditors, and payment of such debt shall be to the sheriff of the county in which the garnishee resides, for distribution under the Creditors' Relief Act.

This section does not apply to the debts attached by proceedings in a Division Court, unless before the amount recovered has been actually paid over to the creditor an execution against the property of such debtor is placed in the hands of the sheriff of such county.

In Manitoba summons may issue either before or after judgment. Amount reserved wage-earners, except Provincial civil servants, is $25.00.

In Saskatchewan, Alberta and the Territories garnishee order may issue from Clerk of the Supreme Court, either before or after judgment. Amount reserved wage-earners, including permanent employees of the Government, is $25.00.

In Alberta money due by the Government to any civil servant may be attached or garnisheed by serving a notice of the claim on the treasurer or deputy-treasurer, giving the name and address of the employee and the nature of the employment. If the claim is not a judgment, the creditor must also serve a copy of such notice on the employee, together with a memorandum requiring the employee, if he wishes to dispute the claim, to file a dispute note with the deputy-treasurer within twenty days from date of service.

In the Yukon the wages due a mechanic, workman, clerk or other employee, including permanent employees of the Government, to the amount of $75, is exempt, except for board and lodging.

In Nova Scotia order may issue after judgment. Amount reserved wage-earners, whether married or single, is $40.00.

In New Brunswick order issues after judgment. Amount reserved wage-earners is $20.00.

In P. E. Island order may issue either before or after judgment. Amount reserved wage-earners is one-half of the wages due.

In British Columbia garnishee order may issue both before and after judgment from either the County or Supreme Court or Small Debts Court, according to jurisdiction.

Amount reserved from the Small Debts Courts to wage-earners is $40.00 per month for a married man or one on whom others are depending and $20.00 for a single man with no one depending on him.

When garnishee order issues from the County or Supreme Court, the amount reserved wage-earners is $40.00 per month. Chap. 52, sec. 107, R. S. of B. C.

The exemption does not apply if the debt is for board or lodging and the Judge or Magistrate does not deem such sum necessary for the support of the debtor and his family.

The salaries of Provincial civil servants are not liable to garnishment.

In Quebec, if the amount claimed exceeds $5.00, may be attached before or after judgment. For wages and salaries exempt from attachment see list of "Exemptions from Seizure," sub-sections III. to IX.

887 Judgment.

Judgment is the decree of a court delivered after a case has been decided. In Ontario and nearly all the Provinces executions may issue any time after judgment within six years without an order from the court, but after that an order from a Judge is necessary. (For time when judgments outlaw see "Statute of Limitations.")

888 Execution.

If the judgment or amount of damage is not paid within the time specified in the judgment, an execution may be obtained to seize and sell the debtor's property to recover the amount of the judgment and costs. The laws of each Province, however, exempt from seizure under an execution sufficient property to enable the debtor to continue his regular vocation. (See "Exemptions.")

Priority among execution creditors has been abolished in all the Provinces, except as to executions from the Small Debts Courts.

In Ontario executions from the Division Court do not issue until fifteen days after judgment unless the Judge orders differently, and do not bind goods until after actual seizure.

In the County and High Courts executions may issue immediately upon judgment, and bind both goods and lands from the date of delivery of execution to the sheriff, and any transfer or mortgage made thereafter and before seizure would be void; but

Executions require to be renewed every three years. If not kept in force by renewals, after six years an order from the court is necessary to issue a new execution.

In Alberta, Saskatchewan and the North-West Territories they may issue immediately after judgment, and expire in two years unless renewed. They bind the goods from the time the writ is delivered to the sheriff, except those transferred to a *bona-fide* purchaser for value without notice.

In Manitoba, in the King's Bench, may issue forthwith after judgment, or any time within six years, without an order from a Judge, but after six years must be obtained. They bind goods from the date of receipt by the sheriff as against the debtor or purchaser with notice, and from date of seizure as against a purchaser for value without notice, and must be renewed every two years.

In County Court executions may issue six days after judgment, or forthwith on Judge's order. They remain in force twelve months and bind *goods only*, and only after seizure. They may be renewed, and also may be exchanged for a King's Bench execution after being returned as uncollectible by a County Court bailiff.

Priority among execution creditors is abolished if the execution is $50.00 or over.

In British Columbia executions against goods issue forthwith after judgment in the Supreme Court, and have priority from the time they are delivered to the sheriff.

Chap. 26 of 1908 consolidates and amends the former Acts on Judgment. Immediately upon any judgment for $100 or more from the County or Supreme Court being recovered, a certificate of such judgment, duly signed and sealed by the court official, may be registered in any or all the land registry offices in the Province, and from the time of such registration, bind all the lands of the judgment debtor in such districts, and the judgment creditor may, if he wish, proceed at once under such lien.

Such lien shall cease in two years after registration, unless renewed before the two years expire.

Fee for registering a certificate of judgment is $2.00, for renewal $1.00, and for cancellation 50c.

Judgments recovered under the Creditors' Relief Act may be registered in same way against land.

Money realized under this Act shall be deemed to be money levied under execution within the meaning of the Creditors' Relief Act.

In Quebec executions both against goods and lands cannot issue sooner than fifteen days after judgment, except in cases where attachment is permitted.

Executions against movables are under the control of Court bailiffs, while those against immovables are under the control of sheriffs.

In New Brunswick, Nova Scotia and Prince Edward Island executions from the County Court may issue ten days after judgment, and in the Supreme Court, may issue forthwith, unless an appeal is pending, and any time thereafter for twenty years. They bind goods and chattels of the debtor from the time they are given to the sheriff against all persons except *bona-fide* purchasers, and remain in force one year, but may be renewed before the year expires.

In Newfoundland in the District Courts executions may issue immediately after judgment; in Supreme Court, in cases for payment of money or recovery of land, may issue forthwith, but in all other cases in 14 days. Must be renewed every year.

889 Executions Binding Lands.

In all the Provinces executions may bind the lands of the judgment debtor. Executions from the lower courts issued against *goods only* cannot be filed against lands until an attempt to recover against the goods has failed, and the execution been returned marked "No goods."

Executions from the higher courts in all the Provinces bind both goods and lands, but the sheriff cannot proceed against the lands until the delay fixed by statute in each Province has expired; but if the debt is not paid by that time he may then commence proceedings to sell the land. If there be a mortgage on the land he can sell the mortgagor's equity in the lands; but if there are two or more mortgages registered against the lands, he cannot then sell the mortgagor's equity until he has obtained an order from the Court of Chancery.

In Ontario all executions issued from the County and High Courts bind both goods and lands from the date of delivery of execution to the sheriff. Land, however, cannot be sold before one year from time the writ

is delivered to the sheriff. In the Division Court, executions of $40.00 and upward may issue directed to the sheriff, in which case they also bind lands of the debtor the same as those from the High and County Courts. Division Court judgments of $40.00 and upwards in cases where the execution has been returned marked "No goods," and all issuing from the County and High Courts may be recorded in the Land Titles Office, the same as other instruments affecting land.

The Act says the sheriff shall not send certificates of execution to the Land Titles Office unless upon written request of the plaintiff or his solicitor. Lands against which an execution has been recorded cannot be sold until one year after the writ of execution has been filed, and then only by giving three months' notice of sale. These entries in the Land Titles Office must be renewed every four years in order to continue to bind the land.

In British Columbia judgments registered in any registration district, that Registrar is required to forward notice in writing to all other Registrars in the Province, and from the delivery of such notice the judgment binds all the property of the judgment debtor in the Province. Priority of registration creates priority of claim. To be kept good they must be renewed every two years.

When an assignment or cancellation of a judgment is registered, notice is also sent by the Registrar to all the other Registrars of the Province. Fee for registering a certificate of judgment is $2.00, and for a cancellation 50c.

In Manitoba lands are bound by the registration of a certificate of judgment from the King's Bench Court, in the registration district in which the land is situate. A certificate of judgment may be registered in all the Registry Offices and Land Titles Offices in the Province, and bind all the lands of the debtor from the time of such registration except those exempt from seizure. Certificates not registered in a Land Titles Office do not bind the lands registered under the Real Property Act. They must be renewed every two years.

Executions issued from the County Court for a sum exceeding $40.00 may be recorded in the Land Titles Office. They must be renewed every two years.

Executions from the County Court may be exchanged for a King's Bench execution after being returned as uncollectible by the County Court Bailiff, and then may be registered against the land.

In Alberta, Yukon and the North-West Territories if not less than $50.00 remain unpaid on the judgment, a writ may be issued against the lands of the debtor. They bind from the time of the receipt of the writ by the Sheriff, but the land cannot be sold within less than twelve months thereafter.

The writ against lands must not be executed before the execution against goods has been returned marked *nulla bona* in whole or in part.

In Saskatchewan a writ of execution in the hands of the sheriff does not bind the lands until delivered to the registrar. To be kept in force the writ must be renewed every two years.

In Nova Scotia judgments from the Supreme and County Court may be recorded against lands, and execution may issue any time within six years without an order from the court.

In New Brunswick a memorial of judgment issued from the Supreme or County Court when registered binds the lands of the debtor in that county. They must be renewed every five years to be kept in force.

In Prince Edward Island judgments issuing from the Supreme Court bind lands of the judgment debtor from time of entry of judgment, providing a minute of judgment has been filed with the Prothonotary, but lands cannot be sold until six months' notice of sale has been advertised by the Sheriff. Supreme Court executions may issue any time within ten years, but after ten years or the death of either party, judgment must be revived.

892 Judgment Summons.

In case there is not property found with which to satisfy the judgment claim, most of the Provinces permit the creditor in suits before the small debts or inferior courts to have the debtor summoned before the court to be examined on oath as to the disposition he may have made of his property. Every such summons should be obeyed, for the person not making his appearance, at such time as directed in his summons, before the court, may be imprisoned for *contempt of court*.

After such hearing before the Judge, the latter may order a weekly or monthly payment, and if the sum is not paid the debtor may be imprisoned for contempt of court. If circumstances should arise afterwards by which this amount cannot be paid, the debtor should go to a lawyer and have a statement prepared to bring the matter before the Judge to have his first order set aside or changed.

Generally no other judgment will be enforced against a debtor while he is paying off in this way one judgment.

The judgment debtor being summoned to appear before the Judge to be examined is like any other witness, and if he demands it, must be paid both mileage and his day's fees.

In Ontario judgment summons only issue out of the Division Court; cost of summons and hearing the case is $2.50.

The Division Court Act provides that in case of mortgages where the principal or interest is sued for in the Division Court the judgment summons process cannot be invoked.

The Ontario Act is further amended by taking from the Judge the authority to commit to gaol for non-payment of the sum ordered to be paid altogether, or by installments, if it can be shown that such payments would have deprived the debtor or his family of the means of living. The Act now virtually allows commitment to gaol only in cases where there is some element of fraud. Commitment may then be for 40 days, instead of 30, as previously limited.

Quebec, Prince Edward Island, Alberta, Saskatchewan, Yukon and North-West Territories do not use the judgment summons process except for examination.

In Manitoba the limit of imprisonment is forty days, in British Columbia, twenty days.

In all the Provinces and in every court the Judge has power to commit to prison any debtor (or even a witness) who refuses to answer the questions, or to produce papers and books required by the court, or for a fraudulent disposition of his goods.

894 Exemptions From Seizure.

EXEMPTIONS FROM SEIZURE. All the Provinces reserve a reasonable amount of property exempt from seizure under any execution, and distress by mortgage for arrears of interest, and from landlord's warrant in some of the Provinces.

Where the debtor has more of any kind of property or articles than are exempt he is entitled to make choice of the part he wishes to retain. The bailiff or officer making the seizure has no legal authority to interfere in the selection.

All the chattels so exempt from seizure as against a debtor, after his death, or in case he should abscond, leaving his family behind, the widow, or family, should there be no widow, are entitled to.

Tenants in signing a lease for property should be careful that it does not contain an agreement to waive their right to the exemptions the Statutes reserve from seizure, in those Provinces which allow such exemptions.

In Ontario the following chattels are exempt from seizure under any writ, or for any distress by landlord, or mortgagee for arrears of interest or for landlord's tax:

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, one 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 teacups, twelve saucers, one sugar basin, one milk jug, one teapot, twelve spoons, two pails, one washtub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels, one weaving loom in domestic use, one sewing machine and attachments, thirty volumes of books, one axe, one saw, one gun, six traps and such fishing nets as are in common use. The articles in this subdivision not exceeding in value $150.00.

4. All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the debtor and his family for thirty days and not exceeding in value the sum of $40.00.

5. One cow, six sheep, four hogs and twelve hens, in all not exceeding in value $100.00, 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 $100.00.

7. Bees reared and kept in hives to the extent of fifteen hives.

The debtor may, in lieu of keeping the tools and implements mentioned in Section 6, elect to receive the proceeds of their sale in cash up to $100.00, in which case the officer executing the writ would pay over to the debtor $100.00 if those goods sold for that much, and this amount the creditor could not seize.

None of the articles enumerated in subsections 3, 4, 5, 6 and 7 are exempt from seizure in satisfaction of a debt contracted for that identical article.

For tenants renting by the month see "Monthly Tenant."

In Manitoba the following articles are exempt from seizure under an execution or for arrears of interest or principal upon a mortgage, but not against distress for rent:

(*a*) The bed and bedding in common use for the debtor and his family, and also his household furnishings, not exceeding in value $500.00.

(*b*) The necessary and ordinary wearing apparel of the debtor and his family, and necessary fuel for six months.

(*c*) Twelve volumes of books, the books of a professional man, one axe, one saw, one gun, six traps.

(*d*) The necessary food for the debtor and his family for eleven months if such food is in possession at time of seizure.

(*e*) Six cows, three oxen or three horses or mules over four years of age, ten sheep, ten pigs, fifty fowls, and food for the same for eleven months. The horses to be exempt must be such as are used by the debtor in earning his living.

(*f*) The tools, agricultural implements and necessaries used by the debtor in the practice of his trade, profession or occupation to the value of $500.00.

(*g*) The articles and furniture necessary to the performance of religious service.

(*h*) The land upon which the debtor or his family actually resides or cultivates, either wholly or in part, or which he uses for grazing or other purposes, to the extent of 160 acres.

(*i*) The house, barns, stables and fences on the debtor's farm.

(*j*) All the necessary seeds of various varieties, or roots, for the proper seeding and cultivation of eighty acres.

(*k*) The actual residence or home of any person other than a farmer, providing the same does not exceed the value of $1,500.00. If it is worth more it may be sold providing $1,500.00 out of the proceeds is paid over to the debtor.

None of the property in this list is exempt if the debt is for the same article.

The exemptions do not hold against debts due municipalities for seed grain.

Every agreement, even in writing and under seal, whereby a person waives or abandons his right or privilege of exemption, is absolutely null and void by Statute.

Growing crops cannot be seized and sold until they are harvested.

In British Columbia the following property is exempt from seizure under an execution or distress for arrears of interest or principal on a mortgage on the real property, but not for a distress for rent:

The homestead so registered, according to the laws of the Province, if not exceeding in value $2,500.00, is absolutely exempt from seizure or sale by any process at law or equity.

If it exceeds in value $2,500.00 then the excess only is subject to seizure and sale.

Personal property to the value of $500.00 is exempt. None of such property is exempt if the debt was contracted for that identical article.

The fee for the registration of land as a "homestead" is $5.00. This does not include the registering of the title, but simply the homestead.

In Alberta, Saskatchewan and the North-West Territories the following property is exempt from seizure under an execution, or for arrears of interest, or principal, upon a mortgage, but not against distress for rent:—

1. The necessary and ordinary clothing of the debtor and his family.

2. The furniture and household furnishings belonging to the debtor and his family to the value of $500.00.

3. The necessary food for the defendant's family during six months, which may include grain and flour, or vegetables and meat, either prepared for use or on foot.

4. Six cows, three oxen, horses or mules, or any three of them, six sheep, three pigs, and fifty domestic fowls, besides the animals the defendant may have chosen to keep for food purposes, and food for the same for the months of November, December, January, February, March and April, or for such of those months as may follow the date of seizure, providing such seizure be made between the 1st of August and the 30th day of April next ensuing.

5. The harness necessary for three animals, one wagon or two carts, one mower or cradle and scythe, one breaking plow, one cross plow, one set harrows, one horse rake, one sewing machine, one reaper or binder, one set sleighs and one seed drill.

6. The books of a professional man.

7. The tools and necessary instruments used by the defendant in the practice of his trade or profession to the value of $200.00.

8. Seed grain sufficient to seed all his land under cultivation, not exceeding 80 acres at the rate of two bushels per acre, defendant to have choice of seed, and fourteen bushels of potatoes.

9. The homestead of the defendant, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or encumbrance thereon.

10. The house and buildings occupied by the defendant and also the lot or lots on which the same are situate to the extent of $1,500.00.

No article is exempt from seizure, except for the food, clothing and bedding of the defendant and his family, if the debt is for that specific article.

In the Yukon Territory the following goods are exempt from seizure under an execution, or for arrears of interest or principal upon a mortgage, notwithstanding any agreement in the mortgage to the contrary:

1. The necessary and ordinary clothing of the debtor and his family.

2. Furniture, household furnishings, dairy utensils, swine and poultry to the extent of $500.

3. The necessary food for the family of the debtor during six months, which may include grain and flour, or vegetables, and meat, either prepared for food or on foot.

4. The books of a professional man.

5. The tools and necessary implements to the extent of $500, used by the debtor in the practice of his trade or profession.

6. The house and buildings occupied by the debtor, and also the lot or lots on which the same are situate, to the extent of $1,500.00.

No article mentioned above (except food, clothing and bedding) shall be exempt from seizure if the judgment is for such article.

The exemptions do not hold good if the debtor has absconded from the Territory, leaving no wife or family behind.

In New Brunswick the exemptions from seizure under execution are the following:

The wearing apparel, bedding, kitchen utensils, and tools of trade or calling to the value of $100.00.

In Nova Scotia the following articles are exempt from seizure under any writ of execution:

1. The necessary wearing apparel, beds, bedding and bedsteads of the debtor and his family.

2. One stove and pipes therefor, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs, six knives, six forks, six plates, six teacups, six saucers, one shovel, one table, six chairs, one milk jug, one teapot, six spoons, one spinning wheel and one weaving loom, if in ordinary domestic use, 10 volumes of religious books, one water bucket, one axe, one saw, and such fishing nets as are in common use, the value of such not to exceed $20.00.

3. All necessary fuel, meat, fish, flour and vegetables actually provided for family use and not more than sufficient for the ordinary consumption of the debtor and his family for thirty days and not exceeding in value $40.00.

4. One cow, two sheep and one hog, and food therefor for thirty days.

5. Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of $30.00.

None of the articles enumerated in sections 2, 3, 4 and 5 are exempt from seizure in satisfaction of a debt contracted for that identical article.

In Prince Edward Island the following articles are exempt from seizure under an execution:

1. The necessary wearing apparel and bedding for the debtor and his family.

2. The tools and implements of trade of the debtor.

3. One cook stove, one cow, not exceeding in all $50.00.

4. $16.00 in money.

In Quebec the following articles are exempt from seizure under an execution:

I.—(1) The bed, bedding and bedsteads in use by the debtor and family.

(2) The ordinary wearing apparel of the debtor and his family.

(3) Two stoves and their pipes, one pot-hook and its accessories, one pair of andirons, one pair tongs and one shovel.

(4) All cooking utensils, knives, forks, spoons and crockery in use by the family, two tables, two cupboards or dressers, one lamp, one mirror,

one washing stand with its toilet accessories, two trunks or valises, two carpets or matting covering the floors, one clock, one sofa and twelve chairs, total not to exceed $50.00.

(5) All spinning wheels and weaving looms intended for domestic use, one axe, one saw, one gun, six traps, such fishing nets, lines and seines as are in common use, one tub, one washing machine, two pails, three flat-irons, one blacking brush, one scrubbing brush, one broom.

(6) Fifty volumes of books, and all drawings and paintings executed by the debtor or the members of his family for their use.

(7) Fuel and food sufficient for the debtor and his family for three months.

(8) One span of plow horses, or one yoke of oxen; one horse, one summer vehicle and one winter vehicle, and the harness used by a carter or driver for earning his livelihood; one cow, two pigs, four sheep and the wool from such sheep, the cloth manufactured from such wool, and hay and other fodder for food for such animals, and the following agricultural implements: One plow, one harrow, one working sleigh, one tumbril, one hay-cart with its wheels, and the harness necessary for farming purposes.

(9) Books relating to the profession, art or trade of the debtor to the value of $200.00.

(10) Tools and implements used in trade to the value of $200.00.

(11) Bees to the extent of fifteen hives.

Things mentioned in paragraphs 4, 5, 6, 7, 8, 9 and 10 are not exempt if the suit is to recover their price, or when they have been given in pawn.

II. The following are also exempt from seizure under executions or attachment for debt:

(1) Consecrated vessels and things used in the religious worship.

(2) Family portraits.

(3) Immovables declared by the donor or testator or by law to be exempt, and sums of money and objects given or bequeathed upon the condition of being exempt from seizure.

(4) All boats, nets and fishing tackle belonging to a fisherman, except for their purchase price, but cannot be seized even for that between 1st May and 1st November.

III. Also the following salaries and allowances are exempt from garnishment or seizure for debt:

(1) Alimony allowances granted by court or given as alimony are exempt, except for alimentary debts.

(2) Pay and pensions of persons in army and navy.

(3) Emoluments and salaries of ecclesiastics and ministers of worship.

(4) Salary of professors, tutors and school teachers.

IV. Salaries of public officers, except those employed under provincial government, which are seizable for:

(1) One-fifth of every monthly salary not exceeding $1,000.00 per annum.

(2) One-fourth where the salary exceeds $1,000.00 but does not exceed $2,000.00.

(3) One-third where it exceeds $2,000.00 per year.

V. Salaries of city and town clerks, assessors and other municipal employees in same proportion as preceding subsection IV.

VI. All other salaries and wages are exempt in following proportions:

(1) Four-fifths when salary does not exceed $3.00 per day.

(2) Three-fourths when exceeding $3.00 but do not exceed $6.00.

(3) Two-thirds when they exceed $6.00 per day.

VII. Books of account, titles of debts, and other papers when in the possession of the debtor, except debentures, promissory notes, bank notes, shares in corporations and other instruments payable to bearer or order.

VIII. All pensions granted by financial or other institutions, as retiring funds or pensions established among the employees.

IX. Four-fifths of the salary or earnings of members of the corporations of pilots for and below the harbor of Quebec.

In Newfoundland the exemptions from attachment or execution or distress by landlord:

1. Goods of lodgers and boarders.

2. The common law exemptions, as fixtures, wild animals, goods delivered to a person in the way of trade, things in actual use, and goods in custody of the law.

3. The tools and implements of trade, fishing skiff or punt, the necessary cooking apparatus, bedding and wearing apparel of himself and family.

895 Arbitration.

The arbitration laws of all the Provinces make full provision for settling disputes and differences between individuals by arbitration. As every business man is familiar with the routine followed in arbitrating between municipalities, and in cases of expropriating land by corporations and for public use, the following is submitted for the benefit of those who are wise enough to try to "keep out of court," or to stop a long and expensive trial even after it may have started.

Any case may be referred to arbitration by the Judge with the consent of *both parties.*

In cases of mere account, where it is not a question of law, the Judge is empowered to stop a case and refer it to arbitration without the consent of the parties to the action.

It is also provided that the parties may concur in stating the questions of law arising in the matter in the form of a Special Case for the opinion of the court, and the parties may enter into an agreement in writing binding themselves to accept the judgment of the court.

The statement of the special case must be signed by the parties and filed in clerk's office, and copies furnished to the Judge.

Such judgment, when rendered, may be entered, and execution may issue as in regular suits. The usual appeal is also allowed.

In all cases of dispute betwen two or more parties, they may agree to leave it to arbitration, and a writing signed to that effect will bind all concerned. The case may be left to one arbitrator, or each party may appoint one and those two choose a third or umpire. If either arbitrator should subsequently refuse to act, or should die, the party who appointed him may choose another.

The award must be in writing, and be signed by the arbitrator in cases having but one or two arbitrators, or by a *majority* where there are three arbitrators, and such award, filed in the clerk's office, will bind the same as a judgment of a Court.

Doubtless in the majority of cases, if litigants would state all the facts fairly to their solicitor and pay him a reasonable fee for a written opinion or counsel, and then act upon it, it would be more satisfactory even than arbitration.

896 Agreement to Refer to Arbitration.

Memorandum of agreement made this ..... day of ....., in the year of our Lord one thousand nine hundred and ...; between A. B., of the ..... of ....., in the ..... of ....., Province of ....., (state his occupation), of the first part; and C. D., of the ..... of ....., in the County of ....., and Province of ..... (state occupation), of the second part.

Whereas certain disputes and differences having arisen between the parties hereto, and it is desirable to refer the same to arbitration, as hereinafter mentioned;

Now, therefore, it is hereby agreed by and between the parties hereto to refer, and the parties hereto do hereby refer, all matters in difference between them in respect to (here state the subject matter in dispute which is to be referred) to the award, order, arbitrament, final end and determination of E. F., of the ..... of ....., in the County of ....., and Province of ....., and G. H., of the ..... of ....., in the County of ....., and Province of ....., and such other as the said E. F. and G. H. shall, by endorsation hereon, under their hand and seal appoint, so that they, the said arbitrators, or any two of them, may make and publish their award of and concerning the matters herein referred, ready to be delivered to the parties hereto, or either of them, on or before the ..... day of ....., in the year of our Lord one thousand nine hundred and ....., or such further day as the said arbitrators, or any two of them, may from time to time enlarge the time for making their award by writing under their hand and endorsed hereon. And it is further agreed that the said arbitrators, or any two of them, may by their said award, order and determine what they shall think fit to be done by the parties hereto respecting the said matters in difference; and that the costs of the said reference and award shall be in the discretion of the said arbitrators, or any two of them, and they may award by whom, to whom and in what manner they shall be paid.

And it is hereby further agreed that the said arbitrators, or any two of them, may examine the said parties, or either of them, and that the witnesses in the reference and the said parties, if examined, shall be examined under oath; and that the said parties respectively shall produc before the said arbitrators all books, deeds, papers, documents and writings in their, or either of their, custody, power or control relating to the matters referred, and that they shall respectively do all other acts, matters and things to enable the said arbitrators, or any two of them, to make their award.

And it is further agreed that the said arbitrators, or any two of them, may proceed in the said reference *ex parte*, if either of the said parties refuse or neglect to attend before them, after having received due notice, and without reasonable excuse.

And each of the said parties hereto agrees with the other to stand to, abide by, obey, perform, fulfil and keep the said award so to be made and published as aforesaid.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered, in presence of X. Y.

A. B. [L.S.]
C. D. [L.S.]

898 Affidavit of Arbitrators.

Every arbitrator, before proceeding to try the matter of the arbitration, should take and prescribe to an oath similar to the following before a Justice of the Peace:—

"I (A. B.), do swear (or affirm) that I will well and truly try the matters referred to me by the parties and a true and impartial award make in the premises, according to the evidence and my skill and knowledge. So help me God."

CHAPTER XXVII.

COPYRIGHT—TRADE MARK—PATENT RIGHT.

900 Canadian Copyright.

In Canada a copyright may be obtained by the author or publisher of any book, picture, drawing, map, chart, etc., which holds for 28 years from the date of copyright, and renewal for 14 years by author, the widow or children. The fee is $1 for registration and 50 cents for a certificate of registration, which is forwarded to the author. Three copies of the work must be forwarded to the Department of Agriculture, except in case of a painting, sculpture, etc., in which case a written description will do instead of three copies.

Every article copyrighted must contain a notice of the copyright. Any person who inserts such notice without having a copyright is liable to a penalty of $300. An infringement of a copyright incurs a heavy penalty and the confiscation of the works. To secure a copyright write to

The Honorable the Minister of Agriculture
(Copyright Branch), Ottawa,

who will forward a copy of the Copyright Act and full information so that any person of ordinary intelligence may do all the correspondence. No postage is required, as the letters go free.

In Newfoundland only two copies are required, and correspondence is with the Colonial Secretary, St. John's. Fee, $1.

901 Imperial Copyright.

The Imperial Copyright protection is available for Canadians as well as for those living in the United Kingdom. By securing a copyright in Britain, the owner would have protection in all the British Dominions.

A copyright of a work published after the author's death endures for 42 years after its first publication; and if published during the lifetime of its author, the copyright endures during such lifetime and seven years longer. If the author should die before the end of the 42 years from first publication it will still last for the full 42 years.

903 Application Form for Canadian Copyright.

I, of the of , in the (Province of) , hereby declare that I am lawfully entitled to the copyright of the book entitled " ," and that the said book has been printed in Canada; and I hereby request you to register the copyright of the said book in my name in accordance with the provisions of the Copyright Act.

I hereby forward three copies of the said book.

Signed at , the day of , 19 , in the presence of the two undersigned witnesses.

(Signatures.)

To the Minister of Agriculture,
Ottawa.

905 Trade Mark.

A *general* trade mark, such as "Pure Gold," which a merchant or manufacturer uses to distinguish his goods of various kinds from those of others, may be registered for $30. There is no limit to its duration.

A *specific* trade mark, which is only used for one kind of goods, as "B.B.B." (Burdock Blood Bitters), may be registered for $25, and stands for 25 years, and renewable for $20.

Industrial designs, as letter heads, labels, etc., may be registered for $5, which secures it exclusively for 5 years, and an extension of 5 years, $2. A copy of the Act may be obtained from the Minister of Agriculture (Trade Mark Branch).

906 Patent Right.

Nearly any article or machine that is new and useful may be patented. For full information write to *The Commissioner of Patents, Ottawa, Canada,* who will forward a copy of the Act.

The fees for the various periods are as follows: 18 years, $60; 12 years, $40; 6 years, $20; fee for a further term of 12 years $40; for 6 years, $20. Fees for lodging a *caveat*, $5; to register a judgment, $4; to register an assignment, $2; attaching a disclaimer to a patent, $2.

In Newfoundland the fee is $25 and the period 14 years. Address *The Colonial Secretary.*

907 Canadian Oath of Allegiance.

Our oath of allegiance is so broad and reasonable that any person of intelligence and honor who expects to reside a number of years in Canada can conscientiously subscribe to it and enjoy all the rights of British subjects and vote at all our elections. It may be taken before a J.P. or other officer specially commissioned:

"I, A.B., do sincerely promise and swear (*or, being a person allowed by law in civil cases to affirm*, do affirm) that I will be faithful and bear true allegiance to His Majesty, King George V. (*or reigning sovereign for the time being*) as lawful Sovereign of the United Kingdom of Great Britain and Ireland, of the British possessions beyond the seas, and of this Dominion of Canada, dependent on and belonging to the said Kingdom, and that I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever which shall be made against his person, crown and dignity, and that I will do my utmost endeavor to disclose and make known to His Majesty, His heirs or successors, all treasons or traitorous conspiracies and attempts which I shall know to be against Him or any of them; and all this I do swear (or affirm) without any equivocation, mental evasion or secret reservation, so help me God.

Sworn (or affirmed) before me, etc.,

J.P., etc. (Signature.)

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Amendments for Digest, 1915

IN ALL THE PROVINCES.

430. The mortgagor's equity of redemption is barred by the Statute of Limitations in the various Provinces: In Ontario and Manitoba ten years after the mortgagee takes possession, or the last written acknowledgment of the mortgagor's right; in Alberta, Saskatchewan, North-West Territories and the Yukon, twelve years; in British Columbia, Nova Scotia, Prince Edward Island and Newfoundland, twenty years, and Quebec thirty years. It is the same as for ownership by possession as given in section 365. See 361.

ONTARIO.

850. Chapter 7 of 1915 amends the Succession Duties Act as follows: It now applies to estates exceeding $5,000 in value instead of $10,000 as formerly;

Formerly property left to any one person not exceeding $500 was exempt, now it is reduced to $300;

Formerly property given absolutely more than three years before the death of the donor to a child, son-in-law, daughter-in-law or parent not exceeding $20,000 was exempt, now the *aggregate* of such property must not exceed $20,000;

Formerly property passing to parents, grandparents, wife, husband, child, daughter-in-law or son-in-law not exceeding $50,000 was exempt, now it is $25,000;

Where it exceeds $25,000 but does not exceed $50,000 it is one per cent.; from $50,000 to $75,000 it is two per cent., but from that up there is no change made.

681. The Workmen's Compensation Act has also received numerous amendments by chapters 24 and 25 of 1915. Parties specially interested can procure copies from the "Workmen's Compensation Board."

845. The last sentence of subsection (*h*) of 1910 edition, and subsection (*a*) of 1915 edition should read, "If no grandparents, then the surviving uncles and aunts of deceased take all, sharing equally," and nothing to children of deceased uncles and aunts.

QUEBEC.

706. If the certificate is not filed within the 60-day limit the penalty incurred is a fine not exceeding $100, instead of $200, as stated in this section, Chap. 72 of 1915.

365. Uninterrupted possession of immovable property for 30 years gives a valid title.

845. Chap. 74, of 1915, made some changes in Descent of Property: If the deceased leaves both a consort and issue, the surviving consort takes one-third and the children two-thirds.

If no children, but a consort, parents, and brothers, sisters, nieces and nephews in the first degree, then one-third goes to the surviving consort, one-third to the parents, and a third to said collaterals.

If no issue, or brothers or sisters or nieces or nephews but a consort and parents, then one-half to surviving consort, and one-half to parents.

If no issue, or parents, but brothers, sisters, nieces and nephews, then one-half to surviving consort and remaining half to the collaterals.

If no issue, parents, or said collaterals, the surviving consort takes all.

If no consort, then all to the children.

For surviving consorts to share as above they are required to abandon their rights in any community of property, marriage settlement, or separate interest in any insurance policy by the deceased.

NEW BRUNSWICK.

681. Notice of accident must be given within two months after the accident, and action to recover compensation commenced within twelve months after the death of the employee.

NOVA SCOTIA.

786. Chap. 2, of 1915, provides that where the contract price exceeds $15,000, the amount to be retained is 15% instead of 20% as formerly.

795. The action may now be enforced in the County Court, whether the amount is over $800, or not; and when the amount is over $100, appeal may be had to the Supreme Court.

MANITOBA.

889. Chapter 10, 1915, provides that no proceedings to realize on a registered judgment shall be taken until one year from such registration.

345. Judgments draw five per cent. interest, not six.

623. Against an execution the landlord has a preference claim of three months if the rent is payable quarterly, or less frequently, and for one year if payable yearly.

424. Chapter 13, of 1915, provides that no proceedings for sale of land for arrears of interest or principal under a mortgage shall take place until there has been default for one year.

706. By amendment of 1915, the certificate of Partnership must not only be registered, but a copy of the certificate must also be published in the *Manitoba Gazette*. This applies both to the formation of a Partnership and for a Dissolution.

547. A married woman may now by will or otherwise dispose of her real and personal property in any manner she may desire. This corrects earlier editions of this book up to 1913.

ALBERTA.

423. Chapter 3, of 1915, enacts that unless the mortgage provides otherwise, that default in payment of interest, or of principal, for one calendar month, or the non-observance of a covenant, the mortgagee may forthwith give notice that he will enter into possession, or sell, if default continues two calendar months longer. If attempt to sell proves abortive, the mortgage may be foreclosed if default continues six months.

555. Amendment of 1915, chapter 4, empowers a married woman to file a caveat in the Land Titles office, forbidding any transfer, or encumbrance, or lease of the Homestead, by her husband. No fee is charged for filing such caveat. The husband thereafter cannot deal in any of those ways with the Homestead until the wife withdraws the caveat, or upon a Judge's order.

789. Chapter 2, of 1915, provides that the Lien may be filed within 35 days, instead of 31, as formerly.

790. Instead of a Lien expiring 30 days after filing, unless action in the meantime has been taken to enforce it, now an interested party may require the Registrar to serve official notice on the lien-holder that unless he take legal proceedings to enforce the lien, it will be cancelled at the expiration of 60 days from the service of such notice.

654 By chapter 2, of 1915, every member of the Legislature is declared to be *ex-officio* a commissioner for taking affidavits within the Province.

ALBERTA AND N. W. TERRITORIES.

681. Chapter 48, of 1915, provides that action to recover compensation for the death of an employee must be commenced within twelve months after the death.

738. The Government fees for registering a joint stock company are: For companies divided into shares whose capital does not exceed $20,000, the fee is $50; when exceeding $20,000, an additional fee of $5 for every $5,000 above $20,000 up to $100,000; for every $10,000 above $100,000 up to $500,000 a fee of $3 is added; and for every $100,000 thereafter a fee of $20 is required.

For companies not having its capital divided into shares, where the number of members does not exceed ten, the fee is $50; where the number exceeds ten but does not exceed one hundred, the fee is $80; where the number exceeds one hundred, but is not stated to be unlimited, an additional fee of $5 for every additional fifty members is required; where the number of members is stated to be unlimited the fee is $200.

SASKATCHEWAN.

429. Chapter 20, of 1914, provides that in case of default in any payment, or in observing any covenant in a mortgage by reason of which the whole principal becomes due and payable, the mortgagor may, notwithstanding such provision, prior to sale or foreclosure, make such payment, or observe such covenant, together with the costs, and be relieved of such consequences. The same applies in case of agreement for sale of land.

858. Chapter 14, 1914, provides that when an article otherwise exempt from seizure, is seized and sold under execution, for the price of such article, no part of the proceeds is subject to distribution among other creditors.

511. The Farm Implement Act of 1915, requires that all vendors of large implements, like threshing machines or engines, and small implements, as plows, binders, etc., to be offered for sale within the Province, to file each year, with the Minister of Agriculture, a list of such implements, giving a description of them, their retail price, both for cash and on credit, and the rate of interest charged; also a list of repairs, where they are for sale within the Province, and the cash selling price.

Statutory forms of contracts for the sale of such machinery are also provided, and all other forms declared to be invalid. The forms include a warranty by the vendor, both as to material and workmanship, and if any part breaks during the first season through defective material or workmanship, the vendor must replace it free of charge. Second-hand machinery has no statutory warranty.

Payments made to any agent of the company, in Saskatchewan, are valid, unless the company has notified the purchaser of the name of the agent to whom payments should be made.

The vendor may retain a lien on the implement by means of a lien note for any unpaid price, but such lien note must comply with the regulations of this Act as well as the Conditional Sales Act.

555. The Homestead Act, of 1915, provides that for homesteads either in city, town or country, upon which the family resides, cannot be sold or mortgaged by the husband without the written consent of the wife being obtained. She may also file a caveat protecting her interest in the homestead.

894. By amendment of 1915, to the Exemptions Act, four draught animals are exempt from seizure, instead of three as formerly.

Also the articles now exempt from seizure under execution cannot in future be sold under a mortgage if the owner desires to retain them under the Exemptions Act.

BRITISH COLUMBIA.

765. By amendment of 1915, any person appointed liquidator in a voluntary winding-up, must, within twenty-one days after his appointment, file with the Registrar, a notice of his appointment.

725. The Agricultural Act, chapter 2, 1915, provides for the incorporation of Associations, either with or without share capital. Exsting companes may come under the new Act. It provides regulations for agricultural credits for every purpose, as for purchase of land, buildings, stock, drainage, irrigation, etc. Interested parties may procure a copy of the Act from the King's Printer, Victoria, B.C.

29 OF APPENDIX. The owner of property sold for taxes has only one year in which to redeem it, instead of two years, as stated in this section. Chap. 52, of 1914.