A HANDY BOOK

OF

COMMERCIAL LAW,

FOR UPPER CANADA,

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TO

THE HON. P. M. VANKOUGHNET, D.C.L.

CHANCELLOR OF UPPER CANADA

THIS BOOK

IS

BY PERMISSION

RESPECTFULLY DEDICATED

BY

THE AUTHORS.

PREFACE.

Much inconvenience has been felt by Canadian readers of English books on Mercantile Law on two accounts: because the Common Law has been varied for England by statutes which are not in force here, and secondly, because it has been varied for Canada by statutes which have no counterpart in English legislation. The present work is an attempt to obviate this inconvenience. The arrangement of Smith's Compendium of Mercantile Law has, as will be apparent, been pretty closely followed, and the language of that author has in many cases been used. But the authors have departed from their model in several ways; some of the subjects have been entirely re-written in order to adapt the matter more directly and easily to the state of the Law in Upper Canada, and many portions have been omitted as treating of customs or statutes not having force here.

For the purpose of making the work more elementary, and in order to bring out more prominently the peculiarities of the Law of Upper Canada, many of the illustrations and many of the discussions on doubtful points

contained in Mr. Smith's work have been omitted, but the authors have spared no pains to avoid overlooking any special features of our Mercantile Law. The great variety of subjects touched upon in the following pages may have caused many inadvertent omissions, but the authors nevertheless hope that their labours may not be without use to the student and the practitioner, as well as to the non-professional reader.

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CHAPTER I.

In this chapter we have thrown together several topics, which from their peculiar character it would have been difficult to discuss elsewhere. In the first place, we have endeavoured to explain briefly the relations of the Common Law and Statute Law of England to the laws and statutes of this Province, to shew how far and in what cases, and subject to what exceptions, the law of England is the law of Upper Canada, and from what source is derived the authority of our Legislature to make new laws in matters relating to civil rights and the enjoyment of property.

In the next place we have given an outline, which it is hoped may be of practical use, of those proceedings which must be taken by persons either in Upper Canada, or any other part of the world, having occasion to seek legal remedies against debtors who have in any way become subject to the jurisdiction of Upper Canadian courts. We have also alluded to such of the statutes of Upper Canada as regulate the process, or affect the rights or remedies of such creditors, in the course of collecting the amounts due to them by such debtors.

1.—*Of the Laws in force in Upper Canada.*

By the treaty of Paris in 1763, Canada was ceded by the French to the British Government. The King immediately introduced by proclamation both the civil and criminal law of England. This created dissatisfaction among the French population, and in 1774 the British Statute, 14 Geo. III., c. 83, which is to be found in the beginning of the Consolidated Statutes of Canada, was passed, by which it was provided, that in all matters of controversy relating to civil rights and the enjoyment of property, and customs and usages, (except certain matters enumerated in the provisoes of the Act,) resort should be had to the laws of Canada, that is to say, to the French laws in force before the cession of Canada; subject, however, to such changes as might be introduced by the Governor and Legislative Council, to be appointed under the Act.

It would occupy too much space, in a work of this description, to enumerate and explain the various stages through which the country now called the Province of Upper Canada passed before the last change which united it in 1840 to the Province of Lower Canada. It will, for our present purposes, we hope, be sufficient to say, that since that year the two Provinces have been ruled by one Governor General as the representative of the Queen of Great Britain, and one legislature has made laws for both. It may be stated, that, beyond this amalgamation, except in a few particulars, some of which will hereafter be noticed, the two Provinces are, so far as the present

treatise is concerned, to be considered as distinct and separate colonies of Great Britain.

There have been various statutes passed declaring how far the laws of Great Britain shall be applicable to Upper Canada. Chapter 9 of the Con. Stat. U. C., however, being a consolidation of two earlier statutes of the Parliament of Upper Canada, contains a sufficiently explicit declaration on this point, to enable us to dispense with the recital of any other act. By section 1 it is enacted that in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the 15th day of October, 1792, as the rule for the decision of the same; and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof, in the several Courts of law and equity in Upper Canada, shall continue to be regulated by the rules of evidence established in England as they existed on that day and year, except so far as the said laws and rules have been since repealed, altered, varied, modified or affected, by any act of the Imperial Parliament still having force of law in Upper Canada, or by any act of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by the Consolidated Statutes relating to the Province of Canada or to Upper Canada exclusively; and, by section 2, that the statutes of Jeofails, of limitations, and for the amendment of the law, excepting those of mere local expediency, which, previous to the 17th day of January, 1822, had been enacted respecting the law of England and then continued in force,

shall be valid and effectual for the same purposes in Upper Canada, excepting so far as the same have since the said 17th of January 1822 been repealed or altered or affected in the manner mentioned in the first section of the Act.

The effect of this Act is, 1st. That all principles of the Common Law of England, as declared by the Courts of Common Law or Equity in England on the 15th day of October, 1792, or since then declared by those courts, are expressly and authoritatively applicable to Upper Canada. The decisions subsequent to the date apparently limited by the Act have authority here, because they are considered not to introduce new law, but to declare what the old law has always been. Any case, therefore, which decides any principle of the common law relating to Mercantile Law for England decides it for us. 2nd. That all the statutes (excepting those of mere local application, such as those relating to the maintenance of the poor, or respecting bankrupts,) which were in force in England on that date, are in force here, just as if they had been passed by the Legislature of Canada. 3rd. That the Statutes of Limitations which were in force in England prior to the 17th day of January, 1822, are similarly in force in Upper Canada. 4th. That since the 15th day of October, 1792, statutes passed by the Legislature of Great Britain may be in force here, if by their express terms they have authority here, or if their subject matter is of such general import, that it must naturally be inferred they were intended to regulate or modify our Pro-

vincial laws. 5th. That we must also take into account any alterations in the laws of England thus introduced, made since either of the above dates by any of the statutes passed by the separate Legislature of the late Province of Upper Canada, or by the Legislature of the Province of Canada.

In that part of our Province called Lower Canada, the principles of commercial law are derived from sources entirely different from those to which the laws of Upper Canada are to be traced. The principles and customs of the mercantile law of Lower Canada are, subject to the exceptions hereafter to be noticed, derived from the laws of France, which were in force in Canada at the time it was ceded to the British Government. By cap. 57 Con. Stat. Can., certain provisions have been enacted, which render the law of Lower Canada respecting promissory notes and bills of exchange in some respects uniform with that of Upper Canada. There have been a large number of statutes passed by the Legislature of Canada, which introduce the same provisions for one section as for the other, and so help to bring the laws of both into a certain degree of uniformity.

In most respects, however, Lower Canada is to be considered as a separate colony, and indeed as a foreign country. Thus the attorneys and solicitors of Upper Canada have no authority to institute proceedings in Lower Canada, and any claim which is to be preferred in the Lower Canadian courts must be placed in the hands of Lower Canadian lawyers. If a judgment is recovered even in the superior courts of Upper Canada, before execution can be had upon

it in Lower Canada the judgment must be sued upon in the Lower Canadian courts, and execution issued upon the judgment thus obtained, just as one would proceed in order to have resort against a party living in Great Britain, or in the United States, or any other foreign country, against whom a judgment has been recovered here. Again, the judges in Lower Canada do not judicially recognize or know the common law of Upper Canada in civil cases, and that law must be proved when it is necessary to bring it before the Lower Canadian courts, just as the law of the United States or of France would have to be proved in our courts. In the same way the law of Lower Canada must be proved in the courts of Upper Canada.

It is provided, however, by cap. 79 Con. Stat. Can., that our superior courts may issue subpœnas to be served upon persons being or residing in Lower Canada, and the Lower Canadian courts may issue subpœnas to be served upon persons being or residing in Upper Canada; disobedience to which will be punished by the courts in which the person disobeying such subpœna resides, upon receiving from the court from which the subpœna issued a certificate of default in obeying it.

2.—*Collection of debts by suit.*

If a creditor living in this Province has a claim against a debtor residing here, he can sue him at law in one of three classes of courts. If his claim be on an account or for a breach of contract or covenant,

and does not exceed one hundred dollars, he may recover the whole amount in a Division Court. If his claim exceed that sum, he can recover judgment for one hundred dollars in a Division Court, on condition of abandoning all his claim to the excess. If the amount of a debt be over one hundred dollars, and do not exceed two hundred dollars, it should be sued in one of the County Courts, and even where it amounts to four hundred dollars, the whole of it can be recovered in the County Courts, if the claim relate "to debt, covenant, or contract," and be liquidated, or ascertained in any way by the acts of the parties, or by the signature of the defendant; *e. g.*, if the defendant has struck a balance with the plaintiff, and admitted a certain sum to be due, or if the defendant has given his I. O. U., or his promissory note for the amount. If the amount be over two hundred dollars, and be not ascertained in this way, or in any event if it exceed four hundred dollars, the action must be brought in one of the Superior Courts.

In suits in the Division Courts, no costs are allowed to either party, save the disbursements for the fees allowed to the Division Court clerks, and the expenses of witnesses. In the County Courts and Superior Courts, the successful party is in general entitled to recover from the unsuccessful party the amount of his attorney's and counsel's costs as taxed by the proper officers in each court.

The creditor who desires to sue in a Division Court is restricted in his choice of a court by regulations, the effect of which, may be stated as follows:

The plaintiff may bring his action "in the court holden for the division in which the cause of action arose, or in which the defendant, or any one of several defendants resides or carries on business at the time the action is brought." So that the plaintiff, if a promissory note or I. O. U. is given him, or a debt is contracted, in a certain division, may always bring his action there, and if he finds that the defendant, or one of the defendants, is residing in any other division, he is at liberty to make choice of the latter.

Moreover, besides the court holden for the division in which any defendant, or any one of several defendants resides, the creditor may bring his suit in the Court of any adjoining division, in case such defendant or one of several defendants resides nearer to the place at which the court for the adjoining division is held, than to the place of the court for the division in which he resides.

The judges of the County Courts are in certain cases allowed to modify these rules by special order for the convenience of parties.

In the County Courts and Superior Courts no such restrictions are placed upon the choice of the place in which the action, if defended, is to be tried. All actions for the recovery of mercantile accounts and claims, or damages for breach of mercantile contracts, have been held to be transitory actions, and as such are not restricted to the courts having jurisdiction in any particular district, such as the County Court of any particular county, nor required, in the case of the suit being brought in a Superior

Court, to be tried at the assizes to be held for any particular county. The defendant in a contested suit in a Superior Court may sometimes, on the ground that the weight of convenience is in favour of a trial in a county other than that chosen by the plaintiff, have *the venue changed* as it is called, that is to say, have the trial come off in that other county. In any such action, moreover, the defendant may apply to have the venue changed to another county on the ground that the cause of action arose therein, but may be met by evidence on the part of the plaintiff that the weight of convenience is in favour of a trial in the county in which the venue has been originally laid.

The rules of evidence in these three classes of courts are strictly speaking the same, except that the important rule, that a party to a suit cannot be called as a witness in his own behalf, has been modified in its application to certain cases in the Division Courts. Thus, in cases where the plaintiff's claim does not exceed eight dollars, and the plaintiff has given evidence sufficient to satisfy the judge that the defendant has become indebted to such plaintiff, but has not evidence to establish the particular amount, the court may, in its discretion, examine the plaintiff on his oath or affirmation touching the items of such account, and give judgment thereon accordingly. The judge may similarly call the defendant to give evidence as to any payments or contra account or set-off not exceeding eight dollars. The judge may also receive the plaintiff's books as testimony, on being satisfied of their general correct-

ness, in cases where the demand does not exceed twenty dollars. He may also in similar circumstances receive the defendants books as testimony of a payment, or a set-off, not exceeding twenty dollars.

A power is given to the Judges of the Division Courts which is not possessed by those of other courts, of calling at their discretion whenever they consider it conducive to the ends of justice upon the defendant or the plaintiff for his evidence. And the judge may receive as testimony the affidavit or affirmation of any witness residing without the limits of the county in which he is acting as judge.

In the Division Courts, the summons by which the action is commenced must be served at least ten days before the Court day, if the defendant live within the division. If he reside without the division a greater number of days is allowed. The judge has power to order immediate execution, but generally orders payment in from seven to thirty days. Thus it will take from seventeen to forty days to obtain execution, even when the Court day happens to occur conveniently. In thinly populated divisions the Courts are held only once in six weeks or two months, but more frequently in the cities, so that considerable delay may be occasioned by the suitor being late for a court. If the defendant gives a confession in order to save costs, the plaintiff must nevertheless wait till the court day in order to get the judgment of the court in pursuance of the confession, and the direction of the judge as to the execution.

The sittings of the County Courts are held in every county four times in every year, commencing

on the second Tuesday in March, June, September and December in every year. The sittings of the County Court for the *City of Toronto*, commence on the *first* Tuesday in March, June, September and December, in every year. The assizes or sittings of the Superior Courts for the United Counties of York and Peel are held three times in every year, commencing on the Thursday next after the municipal elections in January, on the second Monday in April, and on the second Monday in October. The assizes for the city of Toronto are also held three times in every year, commencing a few days before, or immediately after the assizes for the United Counties of York and Peel. The assizes for the other counties are held twice in the year, once in the vacation between Hilary and Easter terms, that is, some time between the second Saturday after the first Monday in February and the third Monday in May; and once in the vacation between Trinity and Michaelmas terms, that is, some time between the second Saturday following the Monday next after the twenty-first day of August and the third Monday in November.

The time occupied in the collection of debts in the County Courts and Superior Courts may best be explained by a statement of two or three points of practice. Where a defendant resides within the jurisdiction of the court, final judgment may be entered on default of appearance, on the tenth day after service of a specially endorsed writ of summons. The writ of summons in actions on merchants' accounts and negotiable instruments, or bonds or covenants for the payment of money, can almost

always be specially endorsed. Execution can be issued on the ninth day after the last day for entering an appearance, or on the eighth day after the day on which the plaintiff has a right to enter judgment, reckoning in the day on which he first has that right. Thus, if a specially endorsed writ be served on a defendant within the jurisdiction on the *first* day of the month, execution may be obtained by the plaintiff on a judgment by default at ten o'clock on the morning of the *nineteenth*, and immediately placed in the sheriff's hands. It may often happen, however, that the defendant, in order to gain time, even in a case where he has no real defence, puts in an appearance to the writ, and a plea to the plaintiff's declaration. This proceeding has the effect of delaying the plaintiff's judgment, at the least until some day of the next assizes to which he can bring his case down to trial. If the next assizes commence so soon as the twenty-sixth day after the writ is served, the plaintiff will be liable to be delayed till the assizes following the next, if the defendant does not take any steps in his defence earlier than he is obliged to do. If the writ is served on the first of the month, it is possible to force the defendant to trial at the assizes commencing on the twenty-seventh, if no delay be caused by Sundays or holidays occurring in such a manner as to give the defendant an extra day to put in an appearance or to plead. The same reckoning will stand good for the County Courts.

The inconvenience and risk to which a creditor could thus be exposed by the defendant appearing

to the writ and pleading for the purpose of delay merely—a delay which in many cases had the effect of totally defeating the plaintiff's chance of collecting his claim by execution, by giving the defendant time to make away with his property—has been partially remedied as to suits in the Superior Courts, by a statute passed in the year 1860. The effect of that statute is, that in any suit brought in either of the Superior Courts, if it shall appear to the court or a judge that the action is brought to recover a claim liquidated or ascertained by the acts of the parties or the signature of the defendant, and that no difficult question of law or fact will arise upon the trial, the court or judge may order the case to be tried before he judge of the County Court of the county in which the proceedings are carried on, at the sittings thereof next after such order.

The sittings of the County Courts being held four times a year, a plaintiff by obtaining such an order is often enabled to get judgment and issue execution three or four months sooner than if he had to wait until the next assizes.

In actions on promissory notes or accounts, at the trial of which the defendant does not appear, or does not make any substantial defence, and out of which it seems that no questions of law can be raised to disturb the plaintiff's verdict, the judge of the assize or of the County Court may, and generally does, grant an order for immediate execution. The effect of this order in the County Courts, is to enable the plaintiff to enter judgment at once, and issue execution upon the judgment. In the Superior

Courts, the order for immediate execution only enables the plaintiff to enter judgment and issue execution thereon, on the sixth day after the verdict has been obtained. In cases of urgency, however, the judge, upon being satisfied that there is danger of the amount of the verdict being lost by delay, will make an order for execution to issue forthwith. If no order be granted, the plaintiff cannot enter judgment till the fifth day of the following term in actions brought in the Superior Courts, and the third day of the following term in actions brought in the County Courts. The term sittings of the Superior Courts are held four times in every year, and on each occasion last for two weeks. The County Court terms are also held four times in the year, and each sitting lasts for one week. If during the time thus allowed him, the defendant moves against the verdict, and his motion is entertained, the contest will usually be decided during the term in which the application is made, and if the decision is in favour of the plaintiff, he will be permitted to enter judgment as soon as the decision is pronounced, which will be in general within three weeks at the latest after the end of term.

The first step to be taken after entering judgment is the issuing of execution. This must in the first place be against the defendant's goods and chattels. The execution binds the goods from the time that the writ is placed in the Sheriff's hands. The following articles and chattels, however, cannot be seized or sold by the Sheriff, as they are expressly exempted by statute from seizure or sale, under any

writ issued out of any court whatever in this Province, namely: 1. The bed, bedding, and bedsteads in ordinary use by the debtor and his family. 2. The necessary and ordinary wearing apparel of the debtor and his family. 3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books; one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use. 4. 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 the sum of forty dollars. 5. One cow, four sheep, two hogs, and food therefor for thirty days. 6. Tools or implements of, or chattels ordinarily used in the debtor's occupation to the value of sixty dollars.

Among the obstacles that may be met, besides prior executions, is the claim of the landlord of the premises on which the goods are situated, for one year's arrears of rent which he may claim as against the *fi. fa.*, even although he has made no attempt to distrain before the delivery of the writ to the Sheriff. This claim for rent, however, can never be for more than one year's arrears. There may, perhaps, be a chattel mortgage on the goods. If the plaintiff thinks it possible to dispute the vali-

dity of this chattel mortgage he can do so on grounds that will be discussed below. If he does not dispute the validity of the incumbrance, he is not obliged to wait till the mortgagee sells, but can direct the Sheriff to sell subject to the mortgage. In the absence of any dispute as to the priority of the execution or the ownership of the goods, the Sheriff in eight days after seizing the goods may sell them. After the sale he deducts his own fees from the proceeds, and pays to the plaintiff's attorney the amount of the execution, or so much thereof as may have been realized. If the proceeds of the sale are insufficient to pay off the judgment, or if no goods belonging to the defendant can be found, the Sheriff returns the writ in accordance with the fact, and the plaintiff can then issue a writ against the lands of the defendant which will bind them from the date of its delivery to the Sheriff. No sale, however, can take place under the writ until one year from its receipt by the Sheriff. Before the lands can be sold they must be advertised for sale in the *Canada Gazette* for six weeks, and in some local paper, or by notice posted up in the Sheriff's office, or on the door of the Court House of the county in which the lands lie, for a period of three months before the sale. The lands may be advertised during the period of one year above mentioned so long as the sale is not to take place within the year. If there is a mortgage on the defendant's property the land can be sold subject to the mortgage. If the defendant happens to hold a mortgage on the property of somebody else, his interest cannot be seized and sold

as land; but the mortgage itself can be seized under an execution against goods, and the interest and principal, when it becomes due, collected by the sheriff, and applied in payment of the judgment. If the defendant is joint owner of land with another, his interest can be sold. Any estate, right, title or interest in land of the defendant which can be conveyed or assigned by him, may be seized and sold under an execution. If the plaintiff chooses, after the Sheriff has been unable to find any goods, to proceed to attach debts due to the defendant, he can do so in the following manner: Having ascertained, by examining the defendant on oath or by any other means, what debts are owing and accruing due to him, he can obtain an order attaching those debts. This order, when served upon the defendant's debtor, who thereafter is called the garnishee, prevents the payment of the debts to the defendant. If the garnishee does not dispute the debt, an order can be obtained directing him to pay over the amount to the plaintiff. This order can be enforced by execution. If the garnishee disputes his liability, an order will be made allowing the judgment creditor to proceed against the garnishee, according to the practice prescribed by the Common Law Procedure Act; and in case the liability of the garnishee is established, the judgment creditor will have the usual remedies by execution against him. If the plaintiff thinks that the defendant has fraudulently made away with any of his property, he can examine him "touching his estate and effects, and as to the property and means he had when the debt or liability which was the sub-

ject of the action in which judgment was obtained against him was incurred, and as to the property and means he still has of discharging the said judgment, and as to the disposal he may have made of any property since contracting such debt or incurring such liability." In case it appears from such examination that the debtor has concealed or made away with his property in order to defeat or defraud his creditors, the debtor may be committed to the common gaol for a period not exceeding twelve months. It is only in a very clear case, however, that this punishment will be inflicted. And in case the debtor, upon such examination, refuses to disclose his property, or his transactions respecting the same, or does not make satisfactory answers respecting the same, this would be considered such misconduct as would subject him to committal.

These are the steps to be taken in ordinary cases where the debtor resides within the jurisdiction of the courts of Upper Canada. But where the debtor resides out of the jurisdiction of our courts the question is, how we are to get at him. If the cause of action arose in Upper Canada, or in respect of the breach of a contract made therein, the defendant can be sued in our courts and judgment obtained against him according to the practice prescribed by the Common Law Procedure Act. And this can be done whether the defendant be a British subject or not. The proceedings are to be commenced against the British subject by service (or an attempt at service) upon the defendant of a writ of summons in a particular form given by the Act. When such

service has been made, or attempted to be made, upon the court or judge being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein, and that the writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of Upper Canada in order to defeat or delay his creditors, such court or judge may facilitate the plaintiff's proceedings by dispensing with some of the formalities required in ordinary cases, and prescribing such more easy means of notifying the defendant of the proceedings against him, such as by mailing copies of the proceedings to the defendant, or posting such copies in the office of the court in which the proceedings are being carried on, as the court or judge may think proper. The plaintiff is obliged, however, to prove his claim in the action either before a jury or by a reference to the master of the court to compute the amount, before he can obtain final judgment and issue execution thereon. When the plaintiff has obtained his judgment against the defendant he has the ordinary remedies by execution against all the property of the defendant which may be found in Upper Canada. The mode of proceeding against a defendant residing abroad who is not a British subject is the same as that just described, except that a *notice* of the issuing of the writ instead of a copy of the writ is to be served or reasonable efforts at service shewn.

If a debtor, who has been resident in Upper Canada, departs therefrom with intent to defraud his creditors, and shall at the time of his departure be possessed to his own use and benefit of any real or personal property, credits or effects in Upper Canada, a remedy is given to his creditors in the shape of a writ of attachment, by virtue of which the sheriff to whom any such writ is directed, is enabled to take possession of all such property and effects, and divide the proceeds thereof ratcably amongst all the creditors who shall within six months from the date of the first writ of attachment, place writs of attachment in his hands, and obtain judgment for their claims against the absconding debtor. But it is presumed that this remedy will be resorted to less frequently than formerly, in consequence of the provisions of the recent Insolvency Acts, of which mention will be made hereafter. A debtor departing from the country, under the circumstances above mentioned, commits an act of insolvency, and renders his estate liable to what is termed in those statutes, *compulsory liquidation*. And unless it happens that the absconding debtor has only one or two creditors—a case of very rare occurrence—proceedings are more likely to be taken against his estate under the Insolvency Acts than by the old writ of attachment. To do more than draw attention to the existence of that remedy, is, therefore, scarcely necessary. It is sufficient to say that the proceedings, after issue of the attachment, are very similar in their nature to those against a person residing out of the jurisdiction, except that in the

distribution of the proceeds of the estate, the attaching creditors share ratably without any priority or preference.

If a creditor has good reason to believe that his debtor is about to leave the country, with the intent and design to defraud him, upon making an affidavit as to the amount and nature of the debt, and also of his belief that the debtor is about to abscond, he can obtain a writ of capias, under which the debtor may be arrested and retained in custody until he gives bail. The bail must be by two sufficient freeholders or housekeepers, who bind themselves that if the defendant is condemned in the action at the suit of the plaintiff, he will satisfy the costs and the condemnation money, (*i. e.* the amount of the judgment,) or render himself to the custody of the sheriff of the county in which the action is brought, or that the bail shall do so for the defendant. When such bail has been put in and approved of, the plaintiff proceeds in his action in the same manner as in the ordinary suit commenced by writ of summons. When he has obtained judgment, he may either proceed by execution against the goods and lands of the defendant, or he may cause him to be arrested and confined until the judgment is paid. A debtor confined under this process, may obtain a discharge from custody upon application to a judge of the court from which the writ issued, under the provisions of cap. 26 Con. Stat. U. C., upon shewing that he is not worth twenty dollars, exclusive of his necessary wearing apparel, &c., but such a discharge does not operate as a satisfaction of the judgment, or to

deprive the plaintiff of his remedies against the debtor's goods or lands.

If the plaintiff, after recovering judgment in any of the courts, and in any of the ways above mentioned, ascertains that the defendant has property in Lower Canada, or in England, Ireland, Scotland, Wales, or any of the British Provinces, he may have recourse against such property by suing in the proper courts of any of these countries upon the judgment obtained here. This, in ordinary cases, is not very difficult or expensive, as it is only necessary, in the first instance, to prove the judgment of the court here in the technical manner prescribed by the rules of evidence of these countries, as regulated by Imperial statute 14 & 15 Vic. cap. 99; that is to say, by producing a copy of the judgment obtained in Canada, certified by the seal of the court, or the signature of the judge thereof if the court has no seal, in which case the judge must attach a statement to his signature that the court whereof he is judge has no seal, but no further proof is required of the seal or signature. In the United States, the same remedies are afforded, and the mode of proof of the judgment is almost the same. It very seldom occurs that the plaintiff is obliged to go into the merits of his case again, under any form of defence that may be raised. When a creditor who has obtained a judgment abroad, desires to enforce it here, he must bring an action on the judgment here. The proof of foreign judgments in our courts is much facilitated by Con. Stat. Can. cap. 80, sec. 1, as also the proof in Lower Canada of the judgments

of our Courts of Record by sec. 4 of the same act. The manner of proving a judgment under this statute is much the same as that under the Imperial statute of which we have just spoken.

The remedies of creditors under the laws of this Province are influenced very much by certain statutes peculiar to this Province; and modified and complicated by the recent Insolvent Acts, passed in 1864 and 1865.

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3.—*Acts respecting Fraudulent Preferences.*

An Act respecting mortgages and sales of personal property: Con. Stat. U. C. cap. 45. An Act respecting the relief of Insolvent Debtors: Con. Stat. U. C. cap. 26, ss. 17 & 18. These are some of the enactments which, prior to the Insolvent Acts, have affected the rights of creditors most seriously. Before any of these acts were passed, the law may be said to have stood as follows: A man in difficulties with his creditors might dispose of his land by giving a deed of it to a creditor, in satisfaction of a debt; or incumber it, by mortgaging it to one creditor to the amount of his debt, to the prejudice of the rest of his creditors; and if the transaction were reasonable and fair as between the two, the other creditors could not object. He could also hand over his goods and chattels, or a portion of them, to any creditor, in satisfaction of a debt, or mortgage them to him as security for a debt, to the exclusion of other creditors. Except so far as the recent Insolvent Acts are concerned, the law as to the disposal of real estate

remains the same; but preferential transfers of goods and chattels are restrained by sec. 18 of the Act for the relief of Insolvent Debtors above mentioned. Many disputes have arisen about the application of the provisions of this section to individual cases; so that all that we can say in general words on the subject is, that this section renders assignments of personal property made by a person in difficulties, with intent to defeat or delay creditors, or to prefer one creditor over another, void as against the creditors of such person.

It was formerly not unusual for a man to make a secret transfer of his goods and chattels by Bill of Sale, or privately to encumber them by way of mortgage to their full value, and to retain possession of them and obtain the commercial credit likely to be given to him on account of his being supposed to own them, to the great disappointment of creditors who might be disposed to resort to them for satisfaction of their claims. However, the Act respecting mortgages and sales of personal property has effectually put a stop to such clandestine transactions, by requiring that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels made in Upper Canada, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged," and "every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold," be recorded within five days after the execution of the instrument in the office of the

clerk of the County Court of the county or union of counties in which the mortgagor or bargainor resides at the time of the execution thereof, or if he be not resident in Upper Canada, then of the county or union of counties in which the goods are situated at that time. Besides an affidavit of the execution of the instrument, an affidavit is required from the person to whom the goods are mortgaged or sold, of the *bona fides* of the transaction. In order to preserve the validity of the instrument for a longer period than one year it is necessary to renew it by recording a true copy of the first instrument, together with a statement shewing the interest the person to whom it is made still has in the property comprised in it, and a full statement of the principal and interest due thereon, and an affidavit verifying these statements and asserting the *bona fides* of the transaction, in the office of the County Court where the original is recorded. And this must be done once in every year during which it is intended to keep the instrument on foot, within the last thirty days of the year.

The 17th section of the Act respecting the relief of insolvent debtors provides, that "in case any person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, voluntarily or by collusion with a creditor, gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, with intent to defeat or delay his creditors wholly or in part, or with intent thereby to give one or more of the creditors of such person a preference over his other creditors, or over any one

or more of such creditors, every such confession, *cognovit actionem*, or warrant of attorney to confess judgment, shall be deemed and taken to be null and void as against the creditors of the party giving the same, and shall be invalid and ineffectual to support any judgment or writ of execution." This enactment has checked the practice of giving confessions of judgments for fraudulent purposes ; but it has been decided that if a man is sued by two creditors, and chooses to let one obtain judgment by default of appearance, while he defends the action brought by the other, the latter cannot impeach the judgment obtained by the former, on the ground of fraudulent preference, if it has been obtained *bonâ fide*, and the writ of execution issued thereon delivered to the sheriff *to be executed*, and not merely for the fraudulent purpose of protecting the debtor against subsequent executions.

The advantage to be derived from a preferential judgment is now very trifling, as it is always in the power of the other creditors to put the debtor's estate into bankruptcy under the recent Insolvent Acts, and thus put themselves upon the same footing with the creditor who has obtained the judgment.

4—*Married Womens' Act.*

An Act respecting certain separate rights of property of Married Women, Con. Stat. U. C., cap. 73.

By section 1, it is enacted that every woman who has married since the 4th day of May, 1859, shall

and may notwithstanding her coverture, have, hold and enjoy all her real and personal property whether belonging to her before marriage, or acquired by her by inheritance, devise, bequest or gift, or as next of kin to an intestate, or in any other way, after marriage, free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture.

By section 2, that every woman who on or before the 4th day of May, 1859, married without any marriage contract or settlement, shall and may, from and after the said 4th day of May, 1859, notwithstanding her coverture, have, hold and enjoy all her real estate not then taken possession of by her husband, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th day of May, 1859, and from his control and disposition without her consent in as full and ample a manner as if she were sole and unmarried.

In order to explain the effect of these and other provisions of this Act, it may be better to state shortly what were, formerly, the relations of husband and wife with respect to the wife's property. If a man married a woman who was entitled, in her own right, to any freehold estate in a lot of land, the husband

at once obtained the right to collect the rents of the land, or such share of them as she was entitled to collect during her life at least, though he could not dispose of the land itself without getting her to join in the conveyance. If her estate in the land were an estate in fee simple, and she died without having given birth to a child, the land, and all right to its rents, passed away from her husband to her heirs. If she bore him a child, he became entitled, whether the child survived its mother or not, to enjoy the rents and profits of the land during his life, becoming what is called the tenant by the curtesy.

With regard to personal property in the wife's actual possession, that is, goods, chattels or money, the husband had a right to appropriate it all as soon as he was married to her, or as soon as it came into her possession if she received it after marriage, if his right was not restricted by any settlement or conveyance to her separate use. He might dispose of it in his lifetime or by his will. It was subject to his debts, and if he died intestate, the wife had no better claim to it than to any other of his effects.

With regard to such of the wife's personal property as consisted of *choses in action* that is, debts and effects, which could only be got into possession by an action at law, the husband's rights were somewhat different, and varied according as the proceedings against the persons liable to be sued were to be taken in the courts of law or in the Court of Chancery. If the property was of such a nature that it could be recovered by a suit in the courts of law, such as money due on promissory notes, bills

of exchange or bonds, the husband had a right during the lifetime of his wife, to recover it by action and appropriate it to his own use. He could also negotiate and endorse over in his own name any notes, cheques or bills payable to his wife's order. If he failed to sue and recover judgment for it, or should not have received the money in his lifetime, the wife was on his decease entitled to the chose in action, in the same manner as she was before marriage. But if she died before her husband had appropriated, or reduced the chose in action into his possession, it was necessary for him, before he could proceed to recover it, to take out letters of administration to his wife's estate, though as soon as he had done so, and recovered the property, it belonged absolutely to himself, subject however to his wife's debts.

If the property was of such a nature that it could not be recovered without resorting to the Court of Chancery, (of which kind legacies are an example,) and it became necessary to sue there for it, the husband's right to it was qualified by a rule of equity that the Court of Chancery would not assist, nor, if the wife should object, would allow the husband to recover or receive any property of the wife recoverable only in that Court, without his settling a due proportion of such property on his wife and children.

The right which the court thus conferred on the wife was called her *equity for a settlement.* If the husband could get possession of any property, or receive payment of any moneys of this sort, without resorting to the court, he was entitled to it absolutely, but the wife might at any time after the money was

payable, and before it was actually paid over to the husband, file a bill insisting upon her equity for a settlement, and the court would compel him to settle a suitable proportion upon her and her children. The usual terms which the Court of Chancery imposed were the settlement of one-half of the property on the wife; and in some cases even more has been so settled by the decree of the court.

Now this state of the law is modified by the Act under discussion in several important particulars. First of all with regard to real estate where the marriage has taken place after the 4th May, 1859, the husband has no right to receive the rents and profits of any of it. Where the marriage has taken place before that date, the husband has no right to collect the rents and profits of any real estate which was not at that date taken possession of by him, or which has been given to the wife since that date. The husband's right to the tenancy by the curtesy above mentioned is however expressly reserved by this Act.

With regard to personal property the effect of the Act is, that the husband cannot appropriate his wife's personal property or dispose of it, unless she consents to such disposal.

By section 16 of the Act the married woman is enabled to dispose of her real or personal property by will, whether such property was acquired before or after marriage, to, or among her child or children, issue of any marriage, and failing there being any issue, then to her husband or as she may see fit. The husband's right to the tenancy by the curtesy is however reserved. There must be two or more

witnesses to the will, neither of whom is the woman's husband.

Formerly the creditors of the husband had a right to seize whatever property of the wife the husband had a right to appropriate himself; and the creditors of the wife could look to the husband for payment of her debts. But the Act under consideration alters the law very materially.

As to the liability of the wife's property for her husband's debts, the law, as altered by the first and second sections of the Married Woman's Act, is, that the property of the wife is no longer liable for the debts of the husband, in case the marriage took place after the 4th May, 1859, or in case it took place before that date, for debts since contracted, unless such property had been then reduced into his possession.

Sections 1 and 2 of the Act are to be read in connection with section 19. The Act is intended to, and does only, affect property which has not been settled on the wife by any ante-nuptial settlement or contract; and where part only of the wife's property has been settled upon her on her marriage, the remainder of it, and all she may acquire after marriage, will be protected by the Act. The husband is only liable for his wife's debts contracted before marriage, in case he takes an interest in his wife's separate property under a marriage settlement, and then only to the extent of that interest.

This act, though containing many important provisions, has omitted to give the wife any power to render herself *legally* liable on a contract made by her during her coverture. Even before the Act, how-

ever, the married woman's separate property would be held liable *in equity* to satisfy a bond for the payment of money or a promissory note signed by her alone during her coverture. As there is nothing in the Act to affect this liability, she would still be liable to answer such a claim out of her property. As the wife would still, in order to avail herself of the protection afforded by the Act against the acts of her husband, be obliged to resort to the aid of the Court of Chancery, it seems that that court would retain its former jurisdiction for the purpose of enforcing contracts made by her during coverture.

As to the wife's equity for a settlement, the act under discussion has rendered the doctrine obsolete in Upper Canada by securing to her the whole of her property instead of that proportion which the Court of Chancery allowed to her.

5.—*Bankruptcy.*

Insolvent Acts of 1864 and 1865, 27 & 28 Vic. cap. 17: 29 Vic. cap. 18.

The means which the Bankrupt laws afford, and in many cases practically dictate, to the creditor, of seeking payment of his claim, are widely different from, and sometimes conflict with, those remedies by action, the nature and process of which we have endeavoured to explain.

The Bankrupt laws endeavour to secure an equal division of assets among creditors, while the ordinary process of actions at law merely enables creditors to compete in a general scramble for the property of the

debtor. The effect of the introduction of these laws into Upper Canada will be, that the common remedies of a creditor by action will only be pursued, either where there is a real dispute between him and his debtor as to the liability of the latter, or where there are no creditors to compete with the one who sues.

The way in which the Bankrupt Acts effect their object is by withdrawing the property of the debtor, not only from the possession or control of the debtor himself, but also from the power and out of the reach of his creditors, so far as the ordinary process of execution is concerned; by giving all the creditors an opportunity to come in and prove their debts; by winding up the affairs of the debtor's estate, and distributing ratably among all of the creditors the assets thus collected and realized. If more than sufficient is found to pay all the creditors in full, the surplus is returned to the debtor. But even where there is not enough to pay all the creditors in full, the debtor can usually obtain his discharge under the provisions of these acts; and he is not necessarily obliged to wait till his estate is completely wound up before applying for such discharge. In order to accomplish these objects, it is necessary that the estate of the debtor be transferred to the hands of some person willing to undertake the duties of adjusting and distributing it. This can be done by the voluntary act of the debtor, or be brought about by his creditors. The debtor may voluntarily make an assignment of his property, which will give all creditors a fair chance of sharing equally in it. Under the act of

1864, the creditor, before he could make a valid assignment of his property, was obliged to call a meeting by advertisement, in a prescribed form, giving at least two weeks' notice of his intention, and there being thus in every case a delay of a fortnight at least, a creditor who had commenced a suit might within that time obtain execution. If the creditors' *fi. fa.* was placed in the sheriff's hands any time, however short, before the execution of a deed of assignment, it would, under the provisions of that act, have a preference over the claims of creditors under the deed of assignment. The act of 1865 has, however, mended this matter in two important particulars. In the first place, the debtor can without giving any notice whatever to his creditors, or any one else, and without any preliminary formalities, make an assignment to any *official assignee* appointed under the act of 1864. In the second place it enacts, "that no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the insolvent, unless such writ of execution shall have issued, and been delivered to the sheriff at least thirty days before the execution of a deed of assignment," or the issue of a writ of attachment in bankruptcy. This provision will enable a debtor, by making an assignment to an "official assignee," to secure an equal distribution of his assets in every case in which he takes it into his head to do

so, before execution has actually issued against him.

If the creditor does not wish to avail himself of the opportunity of making an immediate assignment, he should call his creditors together by the advertisements and notices prescribed by the Act; and when the creditors are met together in pursuance of the notice, exhibit to them a schedule or list of his liabilities in the form prescribed by the act. This list must be sworn to by the insolvent. He must also give a statement of the amount and nature of his property; and he must produce all his books of account, and all other documents and vouchers, if required to do so by any creditor. At such meeting the creditors may name an assignee, who need not be an official assignee under the act. If a vote of the creditors is taken upon this step, each creditor represents in such vote only the amount of direct liabilities of the insolvent to him, and the amount of indirect liabilities of the insolvent to him, then actually overdue. Thus the choice of the assignee will depend on the creditors present, and the duly authorized agents of absent creditors, representing the majority in value of his liabilities (of the nature just mentioned). The insolvent then makes an assignment to the assignee thus chosen, by a deed, in a simple and concise form, given by the Act.

The effect of the assignment is "to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insol-

vent, and all his interest therein, whether in fee or otherwise, and also all his personal estate and movable and immovable property, debts, assets and effects which he has or may become entitled to at any time before his discharge is effected, except only such as are exempt from seizure and sale under execution, by virtue of the several statutes in such case made and provided."

It will be observed that property acquired since the assignment, and before the discharge, passes by the assignment.

Having traced the debtor's property into the hands of the assignee under a voluntary assignment, we will briefly describe the process of the compulsory liquidation under the Acts.

These Acts declare what acts or omissions on the part of a debtor shall render his estate subject to compulsory liquidation :

(*a*) If he absconds, or is immediately about to abscond, from the Province with intent to defraud, or defeat, or delay the remedy of, any creditor, or to avoid being arrested or served with legal process, or if being out of the Province he so remains with like intent, or if he conceals himself within the Province with like intent; or if, *being a trader*, he permits any execution issued against him under which any of his chattels, lands or property are seized, levied upon, or taken in execution, to remain unsatisfied till within forty-eight hours of the time fixed by the Sheriff, or other officer, for the sale thereof;

(*b*) Or if he secretes, or is immediately about to secrete, any part of his estate and effects with intent

to defraud his creditors, or defeat or delay their demands, or any of them;

(*c*) Or if he assigns, removes, or disposes of, or is about, or attempts to assign, remove, or dispose of any of his property with intent to defraud, defeat or delay his creditors, or any of them;

(*d*) Or if with such intent he has procured his money, goods, chattels, lands, or property, to be seized, levied on, or taken, under or by any process or execution, having operation where the debtor resides or has property, founded upon a demand provable under the Act, and for a sum exceeding $200, and if such process is in force and not discharged by payment, or in any manner provided for by law;

(*e*) Or if he has been actually imprisoned, or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of $200 or upwards, and still is so imprisoned or on the limits; or if, in case of such imprisonment, he has escaped from prison, or from custody, or from the limits;

(*f*) Or if he wilfully neglects or refuses to appear on any rule or order requiring his appearance, to be examined as to his debts, under any statute or law in that behalf;

(*g*) Or if he wilfully refuses or neglects to obey or comply with any such rule or order made for the payment of his debts or any of them;

(*h*) Or if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery, or any of the judges thereof, for payment of money;

(*i*) Or if he has made any general conveyance or

assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by the Acts.

In any of these cases he is deemed to have committed an act of Bankruptcy.

It is to be observed that, with one exception, the acts and omissions above enumerated apply to *debtors* generally. The exception is introduced by the recent Act to amend the Act of 1864, the third section of which declares it an act of bankruptcy on the part of a *trader* to allow an execution against his property to remain unsatisfied till within forty-eight hours of the time fixed for the sale thereof.

There is another case, provided for by the Statute of 1864, in which a distinction is made between *traders* and other debtors, and the creditors of *a trader* supplied with a further means of bringing about a compulsory liquidation of his estate. Sub-sec. 2 of sec. 3 of the Act of 1864 enacts, that "if *a trader* ceases to meet his commercial liabilities generally as they become due, any two or more creditors, for sums exceeding in the aggregate $500, may make a demand upon him requiring him to make an assignment of his estate and effects for the benefit of his creditors."

If the trader on whom such demand is made is in a position to show that the claims of the creditors making it do not together amount to $500, or that they have been procured in whole or in part for the purpose of enabling the creditors to take proceedings against him, or that the stoppage of payment was only temporary, and was not caused by fraud or

fraudulent intent, or by insufficiency of assets, he may, within five days from the service thereof, apply to the Judge, upon petition, to stay further proceedings under the demand. Upon his satisfying the judge of the truth of the allegations of the petition, he is entitled to have an order made staying the proceedings. But if, upon hearing the petition, the judge refuses to stay proceedings, or if while the petition is pending the debtor continues his trade, or proceeds with the collection of debts due him; or if he presents no such petition, and neglects during the five days to call a meeting of his creditors under the second section of the act (or, it is presumed, to make an assignment to an official assignee under sect. 2 of the recent act to amend the Act of 1864), or if, having called a meeting, he neglects to complete the assignment within three days after, or, if the meeting has been adjourned, then within three days after the adjournment, he commits an act of bankruptcy, and renders his estate liable to liquidation by compulsory process. The two last mentioned are the only cases in which any distinction is made between traders and ordinary debtors; and after the commission of the act of bankruptcy, the subsequent proceedings for compulsory liquidation against the estate of the insolvent are the same in every case, and are as follows.

When a debtor or trader has, by any of the above acts or omissions, rendered his estate subject to compulsory liquidation, any creditor to whom he is indebted in a sum not less than $200 may, within three months next after such act of insolvency, if the

debtor has not in the mean time made a voluntary assignment, upon proof of the act of bankruptcy, apply to the Judge of one of the County Courts for, and obtain a writ of attachment, in the form given by the Act of 1864, against the estate and effects of the insolvent, addressed to the sheriff of the county in which such writ issues. Concurrent writs may also be issued, if required, addressed to the sheriffs of other counties. By the writ the sheriff is required to seize and attach the estate and effects of the insolvent, and to summon him to appear before the court to answer the premises, within a certain time, according to the distance of the debtor's residence from the court out of which the writ issues.

Immediately upon the issue and delivery to him of the writ, the sheriff is to give notice thereof by advertisement. He is then, by himself or by his authorized agent or messenger, to seize and attach the estate and effects of the insolvent, wherever situate, "including his books of account, moneys, and securities for money, and all his office or business papers, documents and vouchers, of every kind and description," and return with the writ a report under oath of his action thereon. And, if the sheriff or his officer finds the insolvent's premises locked up or fastened, so that he cannot enter peaceably upon them, he is empowered to break into and enter upon them by force.

If an official assignee has been appointed under these Acts for the county in which the seizure has been made, the sheriff places in his custody the estate

and effects attached; and if no official assignee has been appointed, the sheriff is to appoint any "solvent and responsible person," who may be willing to assume the custody of the estate and effects. Such official assignee, or person appointed by the sheriff, is called the guardian under the writ, while thus in custody of the estate. It is his duty to make an inventory of the estate and effects, and also such a statement of the affairs of the insolvent as can be made from the books, accounts and papers attached, and to file the inventory in the court from which the writ issued, and produce the statement at the meeting of the creditors called for the appointment of an assignee.

The right is also given him, upon obtaining an order from the judge to that effect, to institute in his own name and in his capacity as such guardian, any proceedings that may be necessary for the protection of the estate.

A debtor may, perhaps, be able to satisfy the judge that the alleged act of bankruptcy was not, in fact, sufficient to render his estate subject to compulsory liquidation. If he can do this, he is entitled to have the attachment under the writ set aside, and his estate and effects restored to him. In order to give him an opportunity of so doing, he is allowed five days from the return day of the writ within which to present his petition for that purpose.

The grounds on which he may petition, and what he must prove in order to be relieved from the attachment, are fully set out in the original and amended acts.

Instead of petitioning to set aside the attachment,

he may, within the five days, make a voluntary assignment under the Acts to an official assignee, who may, upon such assignment, apply for and obtain from the judge, an order staying the proceedings under the attachment, the costs of the attachment coming out of the estate, and forming a first charge thereon.

Or the debtor may petition the judge to *suspend* further proceedings against him, and upon the debtor complying with certain specified requirements and obtaining the consent of the majority in number and three-fourths in value of the creditors for sums above $100, present at a meeting called by the judge to consider the petition, proceedings will be suspended for a period of three months.

Should the insolvent not take any of the above steps to relieve himself from the attachment, within the limited time, or, if having done so, his application is dismissed, the next proceeding by the creditors is the appointment of an assignee. For this purpose the judge, upon the application of the plaintiff in the attachment, or of any other creditor to whom the further prosecution of the proceedings has been entrusted, orders a meeting of the creditors to be held before him or any other judge, which meeting is called by advertisements and notices published and sent in the same manner as in the case of a voluntary assignment.

The creditors present at such meeting, and the duly authorised representatives of absent creditors, then propose some person as assignee, and, if they are unanimous in their choice, the judge appoints

the person so chosen to be the official assignee. If they are not unanimous, the judge may appoint either one of the persons proposed by the creditors, or one of the official assignees appointed under the Acts.

Upon the appointment of the assignee the guardian delivers to him the estate and effects attached and handed over to him by the Sheriff. The effect of his appointment is to vest in the assignee "the whole of the estate and effects of the insolvent as existing at the date of the issue of the writ, and which may accrue to him by any title whatsoever up to the time of his discharge under the Act, and whether seized or not seized under the writ of attachment, in the same manner and to the same extent, and with the same exceptions, as if a voluntary assignment of the estate of the insolvent had been at that date executed in his favour by the insolvent;" and by section 12 of the Act of 1865, the operation of the appointment is extended "to all the assets of the insolvent of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ." The effect of section 12 is to deprive the Sheriff of the custody of the goods in his possession if they have not been actually sold at the time of the appointment of the assignee, but not to deprive the execution or attaching creditor of any lien he would have independently of this section.

The other important changes in the law with respect to prior writs of execution, both in cases

of voluntary assignment and of compulsory liquidation, effected by the Act of 1865, have already been noticed in speaking of voluntary assignments, and we have seen that " no lien or privilege upon either the real or personal estate of the insolvent shall be created for the amount of any judgment debt or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ, the effects or estate of the insolvent, unless such writ of execution shall have issued and been delivered to the Sheriff, at least thirty days before the execution of a deed of assignment, or the issue of a writ of attachment under the Act."

By these equitable provisions, one great inducement on the part of the more pressing creditors to secure a judgment against the debtor is swept away, all the creditors are put upon the same footing, and one great design of the Acts, namely, that all the creditors of a person who is unable to pay his debts in full, should share his estate equally, more nearly effectuated.

We have now brought the subject of compulsory liquidation up to the point at which we left that of voluntary assignments, namely, the appointment of the assignee and the vesting in him of the insolvent's estate and effects. The proceedings from this point down to the discharge of the debtor are nearly similar in each case. The succeeding remarks therefore will be understood to apply generally to an estate in process of winding up under either of the modes prescribed by the Acts.

In order to make the assignee's title as complete as possible, the Act provides, in the case of an insolvent possessed of real estate, for the registration, in the Registry Office of the County in which the lands lie, of the deed of assignment or the order appointing the assignee, as the case may be.

We have thus seen in what manner the estate and effects of an insolvent come to the hands of his assignee, and also the title thereto which the assignee acquires by force of his appointment. We next proceed to speak of the assignee's rights and duties.

An assignee has, as before shown, vested in him the property and rights of the insolvent as existing at the date of the execution of the deed of assignment, or the issue of a writ of attachment, as the case may be. Hence the powers and rights which he acquires are of a very extensive character. He may, in his own name, as such assignee, sue for the recovery of all debts due the insolvent, and may take all proceedings, with respect to the estate, in regard to prosecuting or defending suits, which the insolvent might have taken, and may carry on or defend all suits, by or against the insolvent, which are pending at the time of his appointment, and have his name inserted in the proceedings in such suits, in the place of that of the insolvent. And, if the insolvent is a partner in an unincorporated trading company or co-partnership, the assignee has all the rights of action and remedies against the other partners, which the insolvent could have exercised against them after the dissolution of the firm, and he may immediately avail himself of these rights and remedies as if the

co-partnership or company had in fact expired by efflux of time.

Moreover, it is provided that "all powers vested in the insolvent, which he might legally execute for his own benefit, shall vest in and be executed by the assignee, in like manner and with the like effect, as they were vested in the insolvent and might have been executed by him." The benefit of such powers, when executed by the assignee, accrues to the estate, just as if the power had been executed by the insolvent for his own benefit, immediately before the assignment. But, as the assignee only represents the insolvent so far as the insolvent's own property is concerned, and not in matters of trust or confidence reposed in him for the benefit of others exclusively, no power vested in the insolvent, or property or effects held by him, as trustee or otherwise, for the benefit of others, vests in the assignee.

So far, then, as the above rights are concerned, the assignee may be said to stand in the insolvent's shoes. To such an extent, indeed, is he treated as standing in the same position as the insolvent did with regard to the estate, that, when suing for the recovery of debts due to the insolvent, he may be met with any defence which would have been available against the insolvent; and the Act of 1865 now carries this principle of representation to the length of allowing a person indebted to the insolvent, but having a counter claim against him, to set off his claim against that of the assignee when sued by him, as he could if he had been sued by the insolvent. Until the Act of 1865 came into operation, he could not have done this;

but he could have been compelled to pay the assignee the whole amount he owed the insolvent, and then he was only entitled to his distributive share of the insolvent's estate in payment of his claim against him.

The principal duties of the assignee are to wind up the estate and divide the proceeds equally amongst the creditors, taking the advice of the creditors, at any time he thinks proper to call them together for the purpose of obtaining it, upon any matter relating to these or any other objects connected with the estate, upon which he may deem it necessary to consult them.

In proceeding to wind up the estate, the assignee, besides being authorized to collect the debts and perform the other acts which we have mentioned, is also empowered to sell the bank and other stocks, and all movables belonging to the insolvent. But when about to dispose of the movables or simple personal property, the assignee, in case the insolvent held under a lease, may be met by a claim to which the Act gives a privilege beyond that of other claims. This is the landlord's lien for the rent of the premises upon which the goods are. Until recently, the landlord was permitted to claim as many as six years rent, and to distrain for the full amount if so much was due. By the Act of 1865, however, his privileged claim is restricted to one year's rent; so that he is only entitled to have that amount paid him in full, and, if more is due for arrears, he only ranks upon the estate with the other creditors for the residue.

When part of the insolvent's estate consists of leasehold property, the value of which is greater than the amount of rent paid for it, the assignee, upon making a report to the judge shewing his estimate of its value in excess of the rent, may obtain an order from the judge, under which he may sell the rights of the insolvent therein, subject to such conditions as may be imposed by the judge, and subject also to all the covenants contained in the lease. If the lease of the property is for a longer period than the year current at the time of the insolvency, and the property is not of greater value than the rent paid for it, the creditors may, within a certain time before the end of that year, authorize the assignee to retain the property for the use of the estate, or give directions for rendering it up and cancelling the lease at the end of the year, as they may think most expedient. In the latter case, however, the lessor of the premises is entitled to claim damages, if he sustains any, by such termination of the lease; and if damages are awarded him, he ranks for the amount upon the estate as an ordinary creditor.

The assignee may also sell the real estate of the insolvent, after due compliance with certain requisites as to advertising, and using other proper precautions to prevent the property from being sacrificed. Upon a sale of the lands being effected by him, the assignee is further authorized, if the creditors consent, to grant such terms of credit as he may deem proper for any part of the purchase money; and, if there is no prior incumbrance, to take back a mortgage from the purchaser for the payment thereof. It may

happen, that at the time the assignee comes into possession, the whole or part of the lands of the insolvent are under seizure or in process of sale under an execution against them. In such a case the assignee may either permit the sale to proceed—in which event the proceeds are to be paid over to him immediately after the sale is effected, for distribution according to the rank and priority of the claimants thereon—or he may apply to the judge for an order staying proceedings under the execution, and take the disposal of the lands into his own hands.

The purchaser from the assignee acquires the same title to the lands which the insolvent had at the date of the execution of the deed of assignment or issue of the writ of attachment, as the case may be. So that, if there are mortgages upon it prior to that date, it can of course only be sold subject to them. If, however, the prior incumbrances consist only of executions against the lands of the insolvent in the hands of the sheriff at the date of the assignment or issue of the writ of attachment, and the assignee has properly taken the disposal of the lands into his own hands, the purchaser from him will acquire the same title which he would if the sale were made by the sheriff, and the purchaser had bought from him.

If, having done his best to collect all the debts due the insolvent, the assignee finds that there yet remains uncollected a number of debts, the collection of which would be more expensive than profitable to the estate, he may with the consent of the creditors get an order from the judge permitting him to sell these debts by public auction in lots or separately according to their

amount. The purchaser at such sale of any such debts is empowered to sue for them in his own name, the only authority required to enable him to exercise such right being a bill of sale signed and delivered to him by the assignee. In order to obtain a full discovery of the insolvent's estate, the Act provides for his examination under oath as to his assets and liabilities, by the creditors or the assignee, at a meeting called for the purpose. While the assignee is thus engaged in disposing of the property and realizing the assets of the insolvent, he is also ascertaining the number of his creditors, the nature and amount of their claims, the manner in which they are secured, if at all, and the nature and amount of such security. The creditors are called upon by advertisement and mailed circulars to produce their claims within a period of two months from the date of the assignment or the appointment of the assignee. Within this time, each creditor must present a statement of his claim, shewing the nature and particulars thereof, and specifying what security, if any, he holds, and its value; all which must be verified by the affidavit of the creditor himself, or that of his agent or clerk, who has a knowledge of the matter. And provision has been made for the proof of as many as possible of the demands which form a charge upon the insolvent's estate. Not only all debts due and payable by the insolvent at the date of the execution of the assignment or issue of the writ of attachment, but also all debts due (*sic* in the Act), but not then actually payable, subject, however, to a rebate of interest, have the right to rank upon the estate.

And any person then being, as surety or otherwise, liable for a debt of the insolvent, is entitled, if he is subsequently obliged to pay the debt, to stand in the place of the creditor whom he has paid, if the creditor has proved the claim against the estate; and if the creditor has not proved, then the surety has the right to prove the claim, and rank upon the estate for the amount, as if he were the original creditor. Other provisions are introduced for the protection of persons whose claims depend upon any condition or contingency which does not happen previous to the declaration of a dividend. Clerks and others in the insolvent's employ in and about his business, to whom arrears are due, are entitled to receive three months' salary or wages in full. Costs of suits against the insolvent, if incurred previously to the assignment, are to be added to the original debts, to recover which the suits were brought, and rank upon the estate in the same manner; but no costs incurred after due notice of assignment, or issue of attachment, are allowed.

A creditor who holds a security from the insolvent or from his estate, is required to put a value upon it upon oath, and the assignee may, with the authority of the other creditors or in case they give him no directions regarding it, at his own discretion, allow the creditor to retain the security at his own valuation; or he may get an assignment of it from the creditor, at an advance of ten per cent upon the creditor's valuation, to be paid out of the estate so soon as the assignee realizes the security. In either case the creditor still ranks upon the estate for the

difference between the value at which the security is retained or assigned by him and the amount of his whole claim. Section 19, of the Act of 1865, seems to contemplate the case of a creditor, holding a security in the shape of a mortgage upon real estate or ships or shipping, taking from the assignee an assignment of the equity of redemption in discharge of his claim, in which case it is made a condition of the assignment that the property mortgaged shall only be assigned and delivered to the creditor subject to all previous mortgages, *hypothèques* and liens thereon holding rank and priority before his claim, and upon his assuming and binding himself to pay all such previous mortgages, *hypothèques*, and liens, and upon his securing such previous charges upon the property mortgaged in the same manner and to the same extent as the same were previously secured thereon; and thereafter the holders of such previous mortgages, *hypothèques* and liens, shall have no further recourse to or claim upon the estate of the insolvent. The effect of this enactment is to render a creditor who retains his security and takes an assignment of the equity of redemption under this section, personally liable for any deficiency in the payment of the prior encumbrances which may arise upon the sale of the property or otherwise, while at the same time it relieves the estate from any liability under such circumstances. The holders of the prior encumbrances are debarred from all remedy against the estate for any deficiency, and forced to look for payment to the creditor who has assumed the liability. An important change in the

rights of such prior encumbrancers may thus be effected, apparently without any consent on their part, or giving them any voice in the matter.

Having thus got in, sold and converted into money the estate and effects of the insolvent, and having also ascertained and fixed the amount of the claims thereon, the assignee next proceeds to divide the proceeds rateably amongst the creditors. A dividend sheet is from time to time prepared by him, and if no objection is made thereto within a certain time after notice given, the dividends so declared are paid over, and this process is continued until the estate is exhausted.

After declaring a final dividend, the assignee prepares and exhibits his final account; and then, after paying into a bank any unclaimed dividends, and producing a bank certificate of such deposit, may petition for and obtain his discharge from the office of assignee. If there is any surplus remaining after paying all claims in full with interest, the insolvent is entitled to have it paid over to him, by order of the judge upon petition to him, after due notice to all concerned.

The next step in the regular course of proceedings to be described, is the discharge of the insolvent, the main object contemplated by the Acts. It is not to be supposed, however, that a discharge cannot be obtained until all that has been heretofore described has been accomplished. The insolvent is not obliged to wait until the estate in the hands of the assignee has been finally wound up, and a last dividend declared and paid, before he can apply for a discharge

from all or the greater part of the liabilities he had contracted before his insolvency. On the contrary, in order that he may not be forced to wait until that period, before he can be put in a position to begin the world anew, the provisions of the act are such, that in no event need he delay longer than one year from the date of the assignment or issue of the attachment before applying for, and, if his conduct has been proper, obtaining his discharge, while under certain circumstances, to be presently alluded to, he may obtain it long before that time.

There are three modes of discharge provided by the Acts, viz., deed of composition and discharge, consent to discharge, and discharge by order of the judge. The distinction between the first and second modes does not appear very clearly from the Acts. The chief differences would seem to be that the first may be entered into at any time, either before, pending, or after proceedings under the Acts, and that it evidently contemplates some payment or dividend to the creditors; while the second cannot be obtained until after a voluntary assignment, or the commencement of proceedings for compulsory liquidation,* and is generally given in cases where, after an assignment or issue of attachment, the creditors are satisfied that the debtor has no property or effects, and that it would be useless to prolong the proceedings, though there appears to be no reason, other than the peculiar wording of the Acts, why it should not be

* See, however, judgment of Jones, Co. J., in *re William Perry*, U. C. L. J., Vol. 2, N.S. p. 75.

given in a case where there are assets. The proceedings to obtain confirmation are the same in either case.

If a debtor, possessed of property which will pay something to the creditors, is desirous of having his estate wound up and himself discharged from his present liabilities, he resorts to the first mode, namely, by deed of composition and discharge. A deed by which an arrangement is made for the payment of some composition or dividend to the creditors is made by the insolvent, and when it has been assented to by the majority in number of his creditors, whose claims amount to one hundred dollars or upwards, and who represent at least three-fourths of his liabilities, and has been confirmed by the judge, the discharge agreed to has the same effect as the ordinary discharge to be hereafter spoken of, and is as binding upon the remainder of the creditors as if they also had executed it. As before mentioned, "such a deed may be validly made either *before*, pending, or after proceedings upon an assignment, or for the compulsory liquidation of the estate of the insolvent."

The only difference seems to be, that if made pending such proceedings it must be deposited with the assignee, who gives notice of such deposit by advertisement. If no opposition is made to the composition and discharge within a stated period, the assignee then acts upon the deed according to its terms; but if opposition is made in the form provided, he cannot act upon it until it has been confirmed by the judge.

A consent to discharge has to be in writing and

signed by the same proportion of creditors as is necessary to render valid a deed of composition and discharge.

A consent so executed after a voluntary assignment or the issue of a writ of attachment, "absolutely frees and discharges the debtor from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and provable against his estate, which are mentioned or set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, or which appear by any claim subsequently furnished to the assignee, whether such debts be exigible or not at the time of his insolvency and whether direct or indirect; and if the holder of any negotiable paper is unknown to the insolvent, the insertion of the particulars of such paper in such statement of affairs, with the declaration that the holder thereof is unknown to him shall bring the debt represented by such paper and the holder thereof within the operation of this section." An unknown holder of a promissory note or a bill of exchange made or accepted by the insolvent is thus as completely bound by such a consent as if he were known, and had assented thereto.

When the insolvent has obtained a consent to his discharge or a deed of composition and discharge from the requisite proportion of his creditors, he

should, in order to bind the remainder to its effect, file the consent or discharge in the Court, and, after proper notice given, apply upon petition to the judge for its confirmation. Upon this application any creditor may appear and oppose the confirmation, upon the ground of fraud or fraudulent preference, or of fraud or evil practice in procuring the consent of the creditors, or of prevarication or false swearing on the part of the insolvent upon the examination as to his estate and effects, or upon other grounds stated in sub-section 6 of section 9 of the Act of 1864. Moreover if the insolvent do not within two months after obtaining such consent or deed apply to have the same confirmed, any creditor for two hundred dollars or over, may take proceedings to annul it on the same grounds as those upon which he could oppose its confirmation, and, if certain prescribed steps are not immediately taken by the insolvent, it will be annulled accordingly.

Upon hearing a petition either to confirm or annul the discharge, the judge has power to make an order either confirming the discharge absolutely, suspensively, or conditionally, or annulling it altogether. If the discharge is confirmed absolutely, such confirmation, if not reversed on appeal, "shall render the discharge thereby confirmed, final and conclusive." If only confirmed suspensively or conditionally, it is not final and conclusive until the period of suspension has expired, or the condition imposed is fulfilled. If the discharge is annulled altogether, the insolvent must obtain the consent of the proper proportion of creditors to a new discharge, or their sig-

natures to a new deed of composition, or have recourse to the third method of obtaining his discharge prescribed by the Acts.

When the insolvent has been unable, in the course of one year from the date of assignment or issue of the attachment, to obtain from the required proportion of creditors their consent to his discharge, or the execution of a deed of composition and discharge, he can then resort to the third mode of obtaining a discharge, provided by the Acts. After the expiration of the year, he may apply to the judge, upon petition (after due notice to all concerned), to grant him his discharge.

Upon this application, also, any creditor may appear and oppose the granting of the discharge upon any ground upon which he might oppose the confirmation of a discharge; and the judge, upon hearing the petition and all parties interested, may make an order either granting the discharge absolutely, suspensively, or conditionally, or refusing it absolutely, and the order so made is attended with the same results and has the same effect as an order confirming or annulling a deed of composition and discharge, or a consent to discharge.

In order to prevent the insolvent from making any bargain with any creditor by which the creditor is to receive any benefit to himself, or obtain any preferential advantage over other creditors as an inducement to sign a consent or execute a deed of composition and discharge, it is enacted that every discharge or composition obtained by any such means shall be null and void. And for the purpose

of deterring creditors from entering into any such arrangement or giving their consent in pursuance of any such agreement, a very stringent clause has been introduced into the late Act. Any creditor who takes or receives any sum or the promise of any sum of money as an inducement to sign a consent or execute a deed of composition and discharge, renders himself liable to a penalty of treble the sum so taken, received or promised, which may be recovered by the assignee for the benefit of the estate, by suit in any court.

The effect of a discharge obtained by any one of the three modes is to free the debtor from all liabilities whatsoever existing against him at the date of his insolvency of which he rendered any statement, or which otherwise became known to the assignee and the other creditors, with a few exceptions mentioned in the Act.

But it does not discharge any other person who is secondarily liable as drawer or endorser of negotiable paper, surety or otherwise, for any debts of the insolvent, from his obligation to pay them. Nor does it affect any mortgage, lien or collateral security held by any creditor as security for any debt. The relief given to a surety who pays the debt of the insolvent has been before spoken of.

The principal liabilities from which an insolvent is not freed by his discharge (unless he obtains the express consent of the creditor to such debts being discharged by it) are, any debt for enforcing payment of which imprisonment is permitted by the Acts, any debts due as damages for personal wrongs

or as a penalty for any offence of which he has been convicted, and any debts due as a balance of account due by him as assignee, tutor, curator, trustee, executor or public officer. And the holder of any debt due as a balance of account by the insolvent as incumbent of any of the positions of trust above mentioned, may take dividends thereon from the estate without being affected by any discharge obtained by the insolvent.

Enough has now been said to inform the general reader of the nature and intent of the Insolvent Act of 1864 and the Act amending it, and to point out to him the course of proceedings to be adopted under them, when it becomes necessary to call their provisions into action, both in the case where the debtor is willing to submit himself and his estate to these provisions, and where the creditors of a refractory or dishonest debtor are obliged to put them into operation against him.

Some of their provisions, such as the right of appeal in certain cases, from the decision of the judge or assignee, the security to be given by the assignee and the remuneration to be received by him, the rights of the creditors and the assignee in cases of fraudulent sales or gifts by, or payments to the insolvent either before or after the assignment or act of insolvency, and a few others, have not been noticed or only slightly touched upon.

Our aim has has been to sketch a brief and general outline of the Acts, and to draw attention to their most important features. What has been said will, it is trusted, sufficiently accomplish this object.

For further particulars we refer the reader to the Bankruptcy Acts themselves, and the excellent commentary on them by Mr. J. D. Edgar, of Toronto, Barrister-at-Law.

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7.—*Proceedings against representatives of deceased debtors.*

Another obstacle by which a creditor seeking to recover his claim is sometimes met, is the decease of the debtor.

After the occurrence of this event no proceedings can be commenced, nor can proceedings already commenced be continued, until after the appointment of a personal representative or representatives of the deceased, that is, some person or persons who will undertake the management of his estate.

If, however, the proceedings in the suit have gone so far before the debtor's decease, that execution against his goods or lands has been placed in the sheriff's hands, the sheriff can proceed to sell the property of the deceased debtor under the writ, without waiting until such appointment is made.

If the deceased has left a will appointing an executor or executors, some or all of them usually obtain probate of the will; and as soon as this has been done, the creditor can proceed for the amount of his claim against the estate of the deceased in the hands of his executors. If the debtor dies, leaving no will, or if, having left a will his executors decline to act, his next of kin, or some near relative, is appointed administrator of his estate, in which

case the remedies of the creditor against the estate in his hands are the same as against the executors where a will has been left and probate thereof obtained.

Should the next of kin and relatives of the deceased intestate all decline to administer, any creditor may be appointed administrator, with the same rights and powers to administer the estate as if he were next of kin.

It will at once be seen that in any of these cases, except where execution is in the Sheriff's hands as above mentioned, some delay must necessarily occur before the creditor can be put in a position to assert his claim against the estate of the deceased. If no proceedings have been taken up to the time of the decease, none can be had until after a reasonable time has elapsed, in order to give time to the executor, if the debtor has left a will, to obtain probate. If no will has been left, the commencement of proceedings is stayed until an administrator has been appointed.

As soon, however, as the executor has obtained probate or an administrator has been appointed, the remedies of the creditor can be pursued in nearly the same shape as they could have been against the deceased. Judgment can be obtained against the executor or administrator for the amount of the debt and costs to be levied upon the estate of the deceased in the hands of the representative to be administered. And should the executor or administrator put in pleas to the suit which are found by a jury to be false, if the estate is insufficient to pay the amount of the judgment, the executor or admin-

istrator so pleading is personally liable for the costs of the suit.

When the creditor obtains judgment for his debt and costs against the executor or administrator at such only, he can issue execution thereon against the goods and chattels of the deceased, under which they can be seized and sold as in ordinary actions. If the estate comprises no goods or chattels, or if they are insufficient to pay off the judgment, execution can then be issued against the lands of the deceased, although distributed and given away by his will to third parties, and they may be sold by the Sheriff as if they still formed part of the undisposed of estate of the deceased, unless they have been sold by the heirs or devisees to purchasers for value before the delivery of the execution against the lands to the Sheriff.

When the decease of the debtor takes place during the progress of a suit and before execution is placed in the Sheriff's hands, it must be revived against the personal representative, when one is appointed. This is done by entering among the records of the proceedings in the suit a suggestion of the death of the debtor and the appointment of the executor or administrator, and then serving him with a copy of the proceedings and suggestion, with a notice to the effect that unless he appears and makes defence judgment may be obtained against him. The effect of this proceeding is to make the executor or administrator (after due service upon him) a party to the suit in the place of the deceased, and all further proceedings are taken against him as if the suit had

been originally commenced against him. Judgment must be obtained in this manner, when the proceedings have not reached judgment before the decease. If the judgment has been obtained prior to the decease, it may be revived against the executor or administrator either by suggestion or by issue of a writ of revivor, and execution can then be issued in the same manner as when the proceedings are originally commenced after the decease, and against the executor or administrator.

Formerly, in case the assets in the hands of the executor or administrator were insufficient to pay all the debts in full, debts due by the deceased were paid according to their relative rank, each class being regarded according to the degree of importance attached to it by the law. Thus, debts due to the Crown stood before all others in priority, then came debts due by the deceased to his executor or administrator, who was permitted to retain the amount thereof out of the estate before paying any other except Crown debts, next came debts secured by judgments prior to the decease of the debtor, next debts secured by bonds or other sealed instruments, and lastly, the simple contract debts of the deceased, usually by far the most numerous class. These last consist of promissory notes, bills of exchange, debts for goods sold and delivered, and others of the same nature. A judgment debt would thus stand a much better chance of being paid, in case of a deficiency, than would the bond or simple contract debts. An Act passed during the last session of Parliament (29

Vic. cap. 28, sec. 28) has, however, made an important alteration with respect to this rule.

Henceforth, when a deficiency of assets occurs, the former preference of one debt or class of debts over others is not allowed, but the debts, of whatever nature, of a person dying on or after the 18th day of September, 1865, being the day on which the Act was passed, are all reduced to the same level.

In such a case, each creditor receives his fair distributive share, according to the amount of his debt, without regard to the fact of other creditors having judgments against the deceased, or being secured by bond or other sealed instrument, and the executor or administrator, and even the Crown itself, is put upon the same footing with respect to claims against the estate.

Upon a proper application being made to it, either by a creditor, or the executor or administrator, or a legatee of the deceased, the Court of Chancery may, and often does, take upon itself the administration of the estates of deceased debtors. When it does assume the administration, a different mode from those above pointed out, of obtaining payment of his claim, is to be pursued by the creditor. After a decree or order for the administration of the estate of a deceased debtor has been pronounced by the court, no subsequent judgment at law is of any avail, but other means of proving and realizing the claim are provided.

All claims upon the estate of the deceased have to be proved before the Master or other officer of the Court, the estate and effects of the deceased

are got in, sold and converted into money; and if there are sufficient assets for the purpose, all the claims are paid in full. In case of deficiency of assets of any person dying on or after the 18th day of September, 1865, all claims are abated in proportion, and all creditors are paid ratably without any preference or priority of debts of one rank or nature over those of another. But in administering the estate of a person who died before that day, the Court makes a distinction between what are called *legal* and what are called *equitable* assets. All property to which the executor or administrator is entitled by virtue of his office as such, and all property made liable by statute to the payment of debts, belong to the former class, and if there is a deficiency, the debts of the deceased are payable out of these assets according to the preferential rank and priority before mentioned.

Equitable assets consist of such property of the deceased as does not belong to the executor or adminministrator, by virtue of his office merely. Thus, lands devised to an executor in trust for the payment of debts are not legal but equitable assets, notwithstanding that they are in the hands of the executor, for he holds them, not in his capacity of executor, but as devisee in trust. Creditors of every sort were always entitled, in case of deficiency, to share ratably without preference in assets of this description.

The fact of there being a deficiency of assets, however, does not affect the position of a mortgagee of lands of the deceased, nor that of the holder of any lien which existed during the lifetime of the debtor,

on any of his real or personal estate. The mortgagee may demand payment in full of his claim under the mortgage, and in default proceed to foreclose or sell the lands, as he could have done during the lifetime of the debtor. And the holder of any such lien, as, for instance, a creditor who has obtained judgment and issued execution thereon, either against goods or lands, during the life-time of the debtor, may proceed to enforce the lien thus created as if the debtor were still alive.

CHAPTER II.

MERCANTILE PROPERTY.

Property may be divided into two classes, *real* and *personal*. The former, in its popular sense, means land and any thing belonging to or connected with land; and the latter, all property which is not land or connected with land. A circumstance which makes the distinction between these two classes important is, that, when the owner dies without having made a will, real property descends to the heirs, and personal property goes to the next of kin. In England, as formerly in Upper Canada, the lands of one who dies without making a will descend to the eldest son. In England, as well as in Upper Canada, the personal property of an intestate is distributed in certain proportions between his wife and children. At present, in Upper Canada, real estate is distributed amongst the representatives of the deceased intestate, nearly in the same proportion and among the same persons as personal property was and is still divided.

As it is still important, for many reasons, to preserve the distinction between real and personal property, it may be well to remark that, though land,

and houses and buildings upon land are real property, a man may have an interest in land that will not form part of his real estate. Thus if a man have a lease of land for 999, or any given number of, years, this valuable interest in land is personal property, and, if he die intestate, will go to his next of kin.

Personal property is divided into two classes, depending on the circumstances of *possession*. If you have a chattel such as a horse, or a piece of furniture, or a quantity of goods, in your actual possession, you have what is called a *chose in possession*, that is, a thing (from the French word *chose*, a thing) in possession. But if you have lent the horse, the piece of furniture, or the money, or if any of them have by any means got into the hands of another man, you have no chose in possession; you have only a right of action against the party in possession. This right of action is called, in legal phraseology, a *chose in action*.

Mercantile law has chiefly to do with personal property, but there are two classes of personal property with which merchants especially are concerned. These are goodwill and shipping, each of which will now be considered in its turn.

1.—*Goodwill.*

The goodwill of a business has not been long recognized by the Courts as having an actual existence, as a valuable mercantile property. A sort of *prestige* is attached to a well-known store or hotel, almost independently of the personal qualities of those

who have occupied it as a place of business, and becomes valuable on account of the usual tendency of customers to resort to the "old place." But the difficulty of ascertaining how far the attractions of the place were independent of the character of the occupier, prevented for a long time any distinct decision being arrived at by the Courts as to its existence as a species of property. It came up for adjudication in the Court of Chancery in a suit in which the accounts of a partnership, one of whose members was dead, were being taken. The question there was whether the survivors could continue the business, as a matter of course, deriving full benefit from the reputation or goodwill of the partnership without rendering any account of it, or whether they ought to pay a reasonable price to the representatives of the deceased for that part of the goodwill which had formerly been a source of profit to all the partners, but was then being used for the benefit of the survivors alone. The question was decided in favour of the claim of the representatives of the deceased partner. The Courts of Law and Equity have not recognized *goodwill* as a distinct species of property in connection with a professional practice or business, as so much depends on the personal qualities and reputation of the practitioner, that the *prestige*, which on his withdrawal remains attached to his place of business, is comparatively insignificant.

2.—*Shipping.*

The law of this Province affecting the ownership and transfer of that species of mercantile property called shipping is regulated by Con. Stat. Can. cap. 41. This statute is, in many respects, substantially the same as the English statutes on this subject. The object of the English statutes was the encouragement of British shipbuilders and the employment of British sailors as much as possible, in those routes of traffic over which the British Government had any control. The object of our statute seems principally to be the convenience and security of persons owning or purchasing vessels. The English Act requires a vessel to be navigated by a certain proportion of British seamen, but ours imposes no such condition. The Canadian statute imposes no penalty for neglect to register a vessel which ought to be registered thereunder, nor does it deny to such vessels, when not so registered, the privilege of freely navigating the inland waters of the Province, or withhold from their owners protection by the British Government of their rights as such owners.

The object of cap. 41 Con. Stat. Can., already referred to, is expressed in the preamble to be "the better securing the right of property in colonial vessels navigating the inland waters of this Province, and not registered as British vessels, under any act of the Imperial Parliament in that behalf, and in order to facilitate transfers of vessels, and to prevent the fraudulent assignment of the property of such

vessels." The privilege of registration under the Act is conferred only on vessels wholly built in Canada, and which wholly belong and continue wholly to belong to Her Majesty's subjects, and which are over fifteen tons burthen.

Every ship must be registered at the port to which she belongs. A ship is said to belong to some port at or near which some one or more of the owners (who shall make and subscribe the declaration required, previous to registry) resides. The collector of Her Majesty's customs, at any port in Canada, may make such registry.

In order to obtain registry, a declaration must be made to the collector of customs, to whom application is made to grant a certificate of ownership, by the owner, if there is only one; or, if there are two joint owners, by both of such joint owners, if both are resident within twenty miles of the place where such registry is required, or by one of such owners, if one or both be resident at a greater distance from such port or place; or if the number of such owners exceeds two, then by the greater part of the number of such owners, if the greater number of them be resident within twenty miles of such port or place (not in any case exceeding three of such owners, unless a greater number be desirous to join in making and subscribing the declaration); or by one of such owners, if all or all except one be resident at a greater distance.

The declaration contains the ship's name (which must not afterwards be changed, and must be painted on her stern, together with the port to which she

belongs, in white or yellow letters four inches long, on a black ground, and not afterwards obliterated or concealed); her port, master, and description; the names, descriptions and residences of the owners, with other circumstances tending to prove them subjects of Her Majesty; and denies that any foreigner is interested in the ship.

If the vessel belong to a corporation, the declaration is made by the secretary, or any director or manager; and if to a limited partnership, by any one of the general partners.

The applicant for registry must also produce an account under the builder's hand, and which the builder is required to give, of the ship's time and place of building, denomination and tonnage, together with the name of the first purchaser; he must also make declaration of her identity; but where, by reason of the death of the builder or other unavoidable cause, the builder's certificate cannot be produced, it may be dispensed with by the Governor of the Province, on application made to him.

The above requisites being complied with the ship is registered and a certificate of registry given to the applicant. This certificate contains the name, occupation and residence of every owner; the name of the ship; the place to which she belongs; her tonnage; the name of the master; the time and place of the building; the name and employment of the surveying officer; the number of decks and masts; the height, breadth, and depth between decks, if more than one, or depth of the hold if only

one deck; the dimensions and tonnage of engine room, if any; whether rigged with a standing or running bowsprit; the description of her stern; her build, whether carvel or clinker built; and kind of head, if any; and on the back are indorsed the names of the owners who cannot be more than thirty-two, with the number of sixty-fourth shares held by each.

All the above particulars are entered in a book which the registering officers are required to keep; every registry is numbered in succession, beginning from the commencement of each year, and an exact copy thereof transmitted forthwith to the Minister of Finance, or such other person as the Governor may appoint for that purpose.

If at any period the master be changed, the certificate must be delivered to the person authorized to register at the port where the change takes place, who is endorse the change on the certificate, and transmit notice of it to the proper officer of the port where the vessel received its certificate of ownership.

If any vessel after receiving certificate of ownership is in any manner altered so as not to correspond with all the particulars contained in such certificate, the owner of such vessel shall return the certificate to the collector of the port where it was granted, and the collector shall grant a certificate of ownership *de novo*. A penalty of eighty dollars is imposed upon the owner for neglecting to register *de novo* in this case.

Registration *de novo* will be allowed (though it is not required by the Act) in the case of the certificate

being lost, or in case, upon any change of property in the vessel, the owner desires to have a certificate of ownership *de novo*.

The transfer of a vessel from one person to another is effected by a bill of sale or other instrument in writing, which must recite the certificate or principal contents thereof, otherwise the transfer is invalid. But no bill of sale or transfer is valid for any purpose even against the vendor or transferor, until produced to the collector of the port where the vessel is registered, or about to be registered *de novo*, who is to enter in her last book of registry in the one case, or in the book of registry *de novo*, after all requisites for such registry *de novo* have been complied with, in the other case, the name, description and residence of the vendor and vendee, mortgagor and mortgagee, or each, if more than one, the number of shares transferred, and the date of the instrument and of the production of it; and is, except in case of registration *de novo*, when a new certificate is granted, and the old one given up to, to indorse on the ship's certificate of registry, when produced to him, the aforesaid particulars in a prescribed form, and give notice thereof to the Minister of Finance.

When the entry in the book of registry has been made, the bill of sale or other instrument becomes effectual to pass the property intended to be transferred, as against all persons whatever, except against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made on the certificate of registry in manner hereinafter mentioned. For, where the same property has been

transferred more than once, the several vendees and mortgagees take priority, not according to the time of entering their respective instruments in the book of registry, but according to the time when the indorsement is made on the certificate.

Thus, if the owner of a vessel fraudulently execute two bills of sale thereof to two different persons, and both cause their conveyances to be entered in the book of registry, but the second get into possession of the certificate and procure the indorsement to be made upon it, he and not the first vendee will have the legal title to the vessel. But it is further provided that, when any instrument of transfer has been entered in the book of registry, there must be a lapse of thirty days, or (if the vessel were absent from her port at the time of such entry) then thirty days from her arrival thereat, before any instrument purporting to be a transfer of the same ship or share from the same vendor or mortgagor to any other person can be entered; so, if a second instrument has been entered, a like period must elapse between its entry and that of a third; and wherever more than one have been entered, the officer is to endorse on the certificate the particulars of that one under which the person claims, who shall produce the certificate for that purpose within thirty days, after the entry of his instrument in the book, or of the ship's return to port, if she were absent at the time of such entry; and if no person produce the certificate within that time, then the officer is to endorse the particulars of that person's instrument who shall first produce the certificate for that purpose.

It is however provided that if the certificate be lost, mislaid, or detained, on proof of this by a vendee or mortgagee time may be granted either for its recovery, or for registry *de novo*, during which additional time no other transfer can be entered in the book of registry.

Thus it appears that in case of successive sales of the same property by the same person, each of the rival vendees has thirty days from the entry of his instrument, or next subsequent return of the ship to port, during which no one but himself can obtain a perfect title. But if he let that space of time go by, he will be in danger of having his claim defeated by an indorsement of the particulars of some other vendee's instrument on the certificate, unless indeed further time has been granted to him in the manner above pointed out.

To put an example. Suppose the owner of a share in a vessel absent from the port at which she is registered, fraudulently executes one bill of sale to A., and another to B.; A. causes his bill of sale to be entered in the book of registry at that port; his title is now perfect against the vendor, and against every one else except B.; and B. himself cannot procure his bill of sale to be even entered in the book of registry, the time not having elapsed which is given as we have shown to A., exclusively. The vessel returns to port, say on the first of October, A. allows that month to elapse without taking any step, on the thirty-first of October A.'s thirty days expire; and on the first of November B. procures his instrument to be entered in the book of regis-

try, but neglects to adopt any further means to secure his purchase. A. now obtains the certificate of registry from the master of the vessel, but cannot perfect his title by having the particulars of his bill of sale endorsed on it, until the second of December shall have arrived, the law appropriating the intermediate days to the exclusive use of B. On the second of December, however, A. produces the certificate to the Collector at the ship's port, has the endorsement made and his title then becomes perfect against all the world.

It is further provided, that if, after any bill of sale has been recorded at the port to which the vessel belongs, it be produced, with a notification upon it of such record, and along with it the certificate of registry, to the collector of any other port, the collector, if required, is to indorse on the certificate the transfer mentioned in the bill of sale, and give notice of his having done so to the collector of the port to which the vessel belongs, who will record it there as if he had made the indorsement himself, but mentioning the facts. However, before the collector of the other port can make the indorsement, he is to give notice of the requisition made to him to the collector of the port to which the vessel belongs, and ascertain from him whether any and what bills of sale have been entered in the book of registry; after which he is to proceed to indorse the certificate as if his port were that to which the vessel belonged.

Thus the person who would be entitled to have the indorsement made on the certificate, immediately on the return of an absent vessel to her port,

may have it made by anticipation during her absence.

The above considerations are applicable to every instance in which property in shipping is transferred, but there are one or two regulations peculiar to cases of mortgage.

When a transfer is made by way of mortgage, or to a trustee for the purpose of sale for the payment of debts, the nature of the transfer is to be expressed in the entry in the book, and indorsement on the certificate of registry, and the transferee is not deemed to have become, or the transferor to have ceased to be, the owner of the property transferred, except so far as may be necessary to make it available by sale or otherwise, for the payment of the debt it was transferred to secure. As the entire property does not pass to the mortgagee, there, of course, remains a portion in the mortgagor, which he can transfer to a second purchaser or mortgagee, in the manner prescribed by the Act.

In case a vessel is not registered, the wording of the statute seems to leave, in Upper Canada at least, the law of Upper Canada relating to the transfer of personal property therein, to apply to her as to any other personal property, which is the subject of sale, transfer or mortgage.

CHAPTER III.

MERCANTILE PERSONS.

1.—*Sole Traders.*

Mercantile persons may be sole traders, partners, or corporations; and any of these may stand to the others in the relation of principal to agent.

Various persons, however, are affected by particular disqualifications, which incapacitate them from engaging in commercial pursuits.

1. An alien, *i. e.*, a subject of a foreign power, was, and is still in Great Britain, subject to various disabilities in his control of property and right to carry on trade, even when his country was at peace with the latter. In the Province of Canada an alien is allowed to have full control over any property he may acquire, whether it be real or personal, and to make contracts and carry on business as freely as a British subject.

2. An infant is not allowed to bind himself by any ordinary mercantile contract, though he may enforce contracts made with him by adults. Though he may not bind himself he may, however, as agent, bind his principal. He may bind himself, when he comes of age, by ratifying contracts made during

infancy—if such ratification be evidenced by writing signed by him.

3. A married woman is subject to the same disabilities as an infant, with this further one, that she cannot ratify after the death of her husband contracts made during his life, any contract made by her being absolutely void and incapable of ratification.

A married woman may, however, as has been already explained, if she possesses property of her own, be held bound in equity to the amount or value of that property upon any contract made by her during coverture.

Subject to these exceptions, every person may assume the character and functions of a trader.

2.—*Partners.*

A partnership is an association of two or more persons in a common undertaking for the purpose of obtaining a common profit. The *community of profit* is the test which shows the relation of partnership. If A. and B. contribute capital to the purchase of goods with the intention merely of dividing the goods so purchased, there is no partnership, but if they go further and resell the goods for the purpose of dividing the proceeds, they are partners, for they are not mere joint owners of the goods, but they share the profits of their labour and capital between them.

Partnerships, no matter how extensive, may be formed by a mere verbal contract. Articles or deeds of partnership are frequently signed between persons

intending to become partners, but if by a tacit consent, shewn by the acts of the partners, some of the provisions of the formal instrument have been disregarded, these acts will, even as between the partners themselves, have the preference given to them, as shewing the mutual footing on which the partners have agreed to stand.

Partnerships may be formed for carrying on any lawful business, or any number of branches of business, and they may contain any number of partners. As between partners themselves, the liability of any partner may be limited in any special manner agreed upon. Except, however, in the case of partnerships formed under the Limited Partnership Act, to be hereafter noticed, each partner is considered liable to third parties for the whole of the partnership debts; and so far as common law suits and remedies at common law are concerned, any partner is liable to have execution issued against his separate property, in the first instance, for a partnership debt, while the partnership stock which he holds in common with his co-partners may be left untouched. This, of course, would work great injustice if the person thus compelled to pay had no recourse against his co-partners for the amount beyond his due share of the liabilities of the firm, which he has been obliged to disburse. He can, however, apply for relief to the Court of Chancery, which will take an account and enforce the payment of what is due to him by way of compensation from his co-partners.

When a creditor to whom a partner is separately and individually liable, seeks to enforce his claim

against the partnership property, he can only seize what is called the partner's *interest* in the partnership. This *interest* is not, as might be supposed, the half or third of the body of the partnership stock, according to the proportionate claim of the partner to the profits of the business; but the share to which the defendant is entitled, as between himself and his co-partners, of the surplus remaining after all the partnership debts have been paid off, and the partnership credits collected. The purchaser at the sheriff's sale under the execution is entitled to file a bill at once against the co-partners of the execution debtor, to have an account taken, and the amount of the share ascertained.

There are several ways in which a person may be connected with ordinary partnerships. If he is interested in the profits of the firm, and his connection with it is avowed, he is what is called an active partner, and is liable for all the engagements of the firm. He may lend his name to the firm without deriving any profit from it, or embarking any capital in it; he is then called a nominal partner, and is liable to the same extent as an active partner. A liability may also be incurred by a participation in the profits, although the circumstance of such participation may be unknown to the creditors. Thus, if a person place money in a partnership not formed under the Limited Partnership Act above mentioned, or leave it there on retiring, with a stipulation to have a compensation for it under whatever name, subject to abatement or enlargement as the profits fluctuate, he is then a dormant partner, and as long as he remains

unknown escapes all liability. But when any creditor becomes aware of the connection, he can charge him equally with the others, even though at the time of his contracting with the firm he did not know of it. If, however, a person leaves no money in the concern, but is to receive a compensation for his services or otherwise, a nice distinction is then drawn between taking a share of the profits as such, and taking a percentage upon, or a salary varying with, the profits. He who takes a share of the profits as such, is liable as a partner; but he who takes an equivalent in the shape of percentage or salary, though varying with the profits, escapes the liability.

What is called the partnership stock, that is the body of the commodities belonging to the firm as partners, and such sums of money as may be due to the partnership, does not necessarily belong to the partners in the proportion according to which each can claim participation in the profits. One partner may have a right to half the profits of a business, while he has no right whatever to the partnership stock. Participation in the profits therefore does not necessarily involve a property in the partnership stock.

Partnership is considered to place men in so confidential a relation that the utmost good faith will be required to be observed in the dealings of partners with each other. Thus if one partner acting on behalf of the firm stipulates with third parties for, and obtains, any private profit for himself, over and above what he has obtained for the firm, he will be considered to have earned it for his co-partners, and will be obliged to account to them for their proper share.

During the continuance of the partnership, one partner can very seldom bring an action at law against another, for any matter arising out of the partnership. The usual remedy is to be found in the Court of Chancery, which will decree a dissolution of the firm and a sale of the partnership stock, realize the partnership assets, take the accounts between the partners, and divide the proceeds in the proportion to which it considers each partner entitled.

But when one partner before the establishment of the partnership has advanced money to another, or has done work for him, an action at law may be maintained even though the advance may have been made, or the work done, for the purpose of forwarding the formation of the partnership. So also, if an account has been stated and a balance struck between them.

The Court of Chancery will, as we have before observed, when it takes the affairs of a firm into its hands, decree a dissolution of the firm, and a sale of the partnership effects, and order the proceeds to be divided among the partners, in the proportion to which they are entitled by the terms of the partnership contract. This proportion will be ascertained, not only from the balance on all those transactions which were complete at the time of the dissolution, but also from that found due on all those which have since been wound up. Thus, if any profits are made, or losses incurred, on any partnership transaction since the dissolution, they are taken into account as if they had been made or incurred at the time of the dissolution. Moreover, if the partnership is dis-

solved by the death of a partner, and the remaining partners continue to trade with the joint stock, the representatives of that partner, though not being members of the firm, which after the death necessarily ceased to exist, will, on the winding up of the partnership affairs, be entitled, not to the mere interest in the stock which has not yet been disengaged from the stock of the former business, but to a proportionate share of the profits for the time that the capital of the deceased has been exposed to the same risk of bankruptcy and insolvency as the stock of the remaining partners.

It has been doubted whether the Court of Chancery will order an account to be taken between partners, at the request of a partner who does not wish to have the partnership dissolved, but merely to have a division of the profits. But there is no doubt that it will often interfere to put a stop to fraudulent behaviour; for instance, if one partner excludes his co-partners from access to the books of the firm and refuses to give an account, with a view of forcing them to ask for a dissolution, the court will grant an injunction to compel the delinquent to relinquish his hold on the books, and will itself take an account so far as is necessary for the immediate purpose of carrying on the business of the firm.

When the relation of partners has been established between two or more persons, each incurs liability for the acts of the other, in the ordinary course of business. One partner may buy, sell, or pledge goods, draw, accept, or indorse bills of exchange or promissory notes, give guarantees, receive moneys, and

release or compound debts in the name, or on the account, of the firm in the ordinary course of business. Each partner is also liable for the fraud of his co-partner in any matter relating to the business of the co-partnership. Any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor who may not have notice of it.

In fact the only restrictions upon the power of a partner to render his firm liable for his acts and dealings on their account are the following:—

1. The transaction by which the firm is to be bound must be within the ordinary scope of the partnership business. Thus, if one of the partners of a firm carrying on business as grocers merely, were to contract to supply to any third party, a quantity of dry goods, the firm would not be held bound to carry out the contract without proof of express authority having been given to the contracting partner to enter into it, such transaction not being within the ordinary scope of a grocery business.

2. The party dealing with the firm must not, at the time the obligation is contracted, be aware that the contracting partner is acting in bad faith. If he is directly aware of this, or if it can be proved that he had knowledge of circumstances that ought to have put him on his guard, then the firm will not be bound, but only that partner who made the contract. The co-partners may, however, after discovering the fraud, enforce the contract against the third party, for the

rule is, that fraud in a contract releases only the party against whom it has been practised.

3. One partner cannot bind the firm by executing a deed on their behalf, unless he have express authority by deed for that purpose, not even though the contract of partnership were under seal, if it do not contain a specific power to that effect, nor though the others afterwards acknowledge his authority, and if he execute such instruments he will himself be bound though they will not. This rule, however, applies only where the deed is in the nature of a grant, for there may be cases in which the deed may bind the interest of the firm as a writing. It would seem also that one partner can execute a valid release by deed in the name of the firm.

4. In the case of a business strictly mercantile, the authority to each partner to circulate negotiable instruments on behalf of the firm will be implied from the nature of the business. In other cases this authority will not be implied unless it is proved that the constitution and particular purposes of the firm are such as to render it necessary in their individual case, or that, though not necessary, it is in other similar cases usual. Thus a farmer or a solicitor carrying on business in partnership with another would not be liable on a bill of exchange or promissory note drawn or made by his partner in the name of the partnership, for bill transactions form no part of the ordinary business of farmers or solicitors.

A partnership may be dissolved at *any time* by the mutual consent of *all* the partners; also at any time by the voluntary withdrawal of one or more of the

partners, but the seceding partner will become liable to the rest for any damage done by his withdrawal, if he withdraws in violation of his contract.

A partnership may also be dissolved by the expiration of the time agreed upon in the partnership contract for the duration of the partnership; by completion of the particular transaction, for the sake of which the partnership was entered into; by insolvency of the partnership and sale of its effects; by insolvency of one of the partners, and sale under execution of his interest in the partnership stock; by the death of any one partner; or, if an unmarried woman is a partner, by her marriage. If there has been no express limit assigned to the continuance of the partnership, and none can be implied from the nature of the partnership business, any partner may retire from the business whenever he chooses, the partnership being a partnership at will.

Courts of equity, moreover, will interfere to dissolve a partnership when the conduct of one partner is so grossly improper, fraudulent, or vicious, as to interfere directly and materially with the business of the firm. But they will only interfere in a clear and strong case, and where an injury to the *partnership business* is proved.

No dissolution can take place without the partnership being dissolved as to all the members. If the death of C., or any other cause, removes him from the firm of "A., B. & C.," A. and B. are released from all obligation to remain in partnership, unless there was originally an express contract, that on the removal of one partner, the remaining partners should

carry on the business together; and if A. and B. wish to continue together in business, they must form a new partnership.

After the dissolution of the firm, each partner has power to collect outstanding debts and give receipts therefor in the name of the firm, but cannot of course bind the firm by entering into any new contracts in its behalf.

When partners can, after a dissolution, agree upon any amicable arrangement by which, for instance, one takes the whole stock at a valuation, and agrees to become responsible for all the debts of the firm, and continue the former business in his own name, there will of course be no difficulty, as far as the partners themselves are concerned, in winding up the affairs of the firm. Or if, in the original articles of agreement, there was provision made for this or some other mode of settlement in case of dissolution, the mode of winding up will be ready for the emergency, and will be binding upon all the parties. If an arbitration is the mode fixed upon for the settlement of difficulties, and the arbitrators are actually named in the articles of partnership, there will be no difficulty in enforcing the agreement to refer to arbitration. However, even if no arbitrator is named in the agreement, and one of the partners refuses to name an arbitrator, secs. 168, 169, and 170 of the Common Law Procedure Act of Uppér Canada make provision for the appointment of an arbitrator, whose award will be as binding on all parties as if the appointment had been made by consent. In the absence of any such provisions for settling disputes, and in case

the partners cannot come to terms, then the only way to wind up the partnership is to sell out stock, and credits, and goodwill to the highest bidder.

When the dissolution is caused by the death of one of the partners, the case is not more difficult than when all the partners of a dissolved firm are alive. The personal representatives of the deceased have the same rights on behalf of the deceased partner, as he could have had on his own behalf, and, to the extent of the property they hold in their hands as such representatives, whether partnership property or the separate estate of the deceased, they are liable for his debts of every description. It seems, however, that the separate creditors of the deceased partner will first be paid in full out of his separate estate before its application to any of the debts of the partnership. The surviving partners are the proper persons to sue for credits due to the partnership, and will be trustees of the share of the deceased partner for his executors or administrators.

It must not be inferred, however, from what has been said above about one partner undertaking to pay debts of a dissolved firm, that any such arrangement between the partners will prevent creditors from holding the other partners liable. Its only effect will be to render the partner so contracting to assume the debts, liable to reimburse the other partners to the extent of any sum they may have been compelled to pay on account of the partnership, by his failure to perform his promise: in other words, no arrangement between the partners themselves can

compel creditors to exchange the security of a firm for that of a single partner.

When a partner, on withdrawing from a firm, wishes to avoid liability for future acts of his co-partners, he should give notice of his withdrawal to the public in general by advertising in the Canada Gazette and one of the advertising newspapers of the place where the partnership business has been carried on; and to those who have actually dealt with the firm, he should send circulars announcing the withdrawal. These precautionary measures are not absolutely necessary, as it will do to prove knowledge of the withdrawal of the partner by circumstantial evidence, but the sending of circulars is the surest way of notifying customers, and the advertising in the papers saves the trouble of proving actual knowledge on the part of the public, as on proof of the advertisement the public will be presumed to have read it. But even after notice thus carefully given, if the retiring partner allow his name to remain in the partnership title, he will continue to be liable. Dissolution by death of a partner, however, need not be advertised, as the death of the partner is supposed to be notice to the public.

By cap. 60 Con. Stat. Can. intituled an Act respecting Limited Partnerships, provision is made for the formation of partnerships, consisting of one or more persons who are to be called General Partners, and of one or more persons who contribute in actual cash payments a specific sum as capital to the common stock, who are to be called Special Partners. The general partners are to be liable as partners in

ordinary partnerships, but special partners are not to be liable for any debts of the partnership beyond the amount contributed by them to the capital. The general partners only, are to transact the business of and sign for the firm, though the special partners have a right to examine into, and advise as to, the management of the business. The business of the firm is to be conducted under a name or firm in which the names of the general partners only, or some or one of them, shall be used; and if the name of any special partner is used in the firm, with his knowledge, he is to be deemed a general partner.

The persons desirous of forming the partnership are to make and severally sign a certificate, which shall contain the name or firm under which the partnership is to be conducted; the general nature of the business intended to be transacted; the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their usual places of residence; the amount of capital stock which each special partner has contributed; the period at which the partnership has commenced, and the period at which it will terminate. The certificate, when signed by all partners and certified by a Notary Public is, in Upper Canada, to be filed in the office of the Clerk of the County Court of the County in which the principal place of business of the partnership is situate. Any false statement in this certificate will render all the persons interested in the partnership liable as general partners.

Every renewal or continuance of such a partner-

ship, beyond the time originally fixed for its duration, must be certified, filed and recorded, in the manner required for its original formation; and every partnership, otherwise renewed or continued, is to be deemed a general partnership.

The failure to register any alteration of the particulars contained in the original certificate will have the effect of making all the partners liable as general partners.

It will thus appear that the liability of the special partner may be increased in a variety of ways. In return for this liability and for the cash contribution required to be made by the Act, he is entitled to receive annually lawful interest on the sum so contributed by him, if the payment of such interest does not reduce the original amount of the capital; and if, after the payment of such interest, any profits remain to be divided, he may also receive his portion of such profits. But if it appears, that by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the deficient capital, with interest.

In case of the insolvency or bankruptcy of the partnership, no special partner shall under any circumstances be allowed to claim as a creditor, until the claims of all the other creditors of the partnership have been satisfied.

The general partners are liable to account, both in law and in equity, to each other, and to the special partners, for their management of the concern, in like manner as other partners.

3. *Corporations and Joint Stock Companies.*

A corporation aggregate consists of a certain number of persons who, by the sanction of a charter from the Crown, or of an act of Parliament, are allowed to transact business and hold property as if they formed but one person.

The great peculiarity of corporations is, that the successive deaths of all the original members of the corporation will not affect its existence, as long as new members are added in sufficient numbers to keep up the number required by its charter, or the act of Parliament under which it was formed, if any number is thereby prescribed.

Corporations have the privilege of suing and being sued by their corporate name. They signify their assent to a contract by means of their common seal. Formerly the doctrine prevailed that a contract was not binding on a corporation unless it was under the seal of the corporation. This doctrine, however, has been modified to a considerable extent by the decisions of the courts. It has been held that various frequent and trifling contracts, such as the hiring of servants, might be entered into by a corporation, so as to bind the corporation, even although the corporate seal were not affixed to the contract. And it has been further decided that where a contract with a corporation has been so far performed that the corporation has got the benefit of the consideration of its promise, then the corporation will be held bound, even at law, to its promise, although that promise be not under seal.

Again, it must be remembered that although the common seal is the most usual and the most essential requisite in binding contracts made by corporations, the presence of the corporate seal is not generally all that is required to bind a corporation. The charters of corporations, or the general acts passed for the purpose of regulating the affairs of corporations formed under their provisions, or the by-laws of corporations, prescribe the manner in which stock is to be transferred, and the business managed, and specify the officers by whom the contracts of the corporation are to be signed; and any one transacting business with a corporation should take care that the proper persons sign any documents by which the corporation is to be bound.

Joint stock companies are, at common law, but partnerships on a large scale. Unless specially assisted by an act of Parliament, therefore, one member of such a company could not sue or be sued at law by the company; and every member of the company was liable individually for the whole of the debts of the company, just as an ordinary partner. Various statutes have been passed in this Province, in some respects similar to certain Imperial statutes, which greatly facilitate the incorporation of joint stock companies for various purposes. These statutes dispense with the necessity of a special act of Parliament, by supplying a constitution, framed in general terms, under which companies can be incorporated on complying with certain prescribed forms. For instance, cap. 63 of Con. Stat. Can., provides that "Any five or more persons who desire to form a

company for carrying on any kind of manufacturing, ship-building, mining, mechanical or chemical business, or for the erection of any building or buildings to be used in whole or in part for a mechanics' institute, or for a public reading or lecture room, or for agricultural or horticultural fairs or exhibitions, or for educational, library or religious purposes, or for a public hotel, or for baths and bath-houses, or for the opening or using of salt or mineral springs, or for carrying on any fishery or fisheries in this Province, or in the Gulf of St. Lawrence, and for the building and equipping of any vessels required for such fishery or fisheries, shall, on making and signing a certain statement or declaration in writing, setting forth the corporate name, object, amount of capital stock of the company, and other particulars, and registering the same with the formalities required by the act, become a corporate company."

The corporate company thus formed may in their corporate name purchase, hold and convey any real or personal estate, or movable or immovable property necessary to enable the company to carry on its operations but must not mortgage the same.

The Act regulates the constitution of the company in certain fundamental particulars, and gives power to the trustees of the company to make by-laws.

It provides that the company shall have power to enforce payment of calls by action. As to the liability of stockholders, it enacts that they (except in the case of fishery companies) shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of the capital

stock of the company has been paid in, and a certificate to that effect registered in a prescribed manner; after which no stockholder is liable beyond the amount of his share or shares in the capital stock of the company, for anything except for debts due to the labourers, servants and apprentices of the company.

No suit, however, is to be brought against any stockholder, unless commenced within two years after he shall have ceased to be a stockholder, nor until an execution against the company has been returned unsatisfied in whole or in part.

The trustees of the company are made liable personally in certain cases for the debts of the company. The above enactment is, by 29 Vic. cap. 21, made applicable to companies established for boring and working petroleum wells.

In order to understand the meaning of this and similar enactments, it must be borne in mind that as soon as any company is incorporated under any one of them, the company is at once in a position to sue and be sued by its corporate name, and may so sue and be sued by any of its members; and moreover, that, except so far as the act under which the company is incorporated alters the position of the members of the company, none of the members are personally liable for its debts. It is true that, without any special provision in the Act, a creditor of the company might, indirectly, through a receiver, or by garnishing process, get at any money due by a member to the company for the balance unpaid on his shares; but beyond this the creditors of the com-

pany would have no recourse against individual members. In order to ascertain how far a member of any joint stock company is liable for the debts of the company, the first thing to be considered is whether it has been incorporated. If it is a corporation, then, in order to fix any liability on its members beyond that of paying up what remains due on stock, that liability must be imposed by express enactment.

The formation of joint stock companies, and the liabilities of their members, are regulated for Great Britain and Ireland by Imperial Statute, 25 & 26 Vic., cap. 89, repealing and consolidating all the former statutes upon this subject. The liability of the members of a company formed under this Act, may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association, to contribute to the assets of the company, in the event of its being wound up. In the former case the company is said to be limited by shares, and in the latter by guarantee. But no banking company, claiming to issue notes in the United Kingdom, shall be entitled to limited liability in respect of such issue.

4.—*Principal and Agent.*

An agent is one authorised to do some act or acts on behalf of another, who is called his principal. He who has power to do any particular act may in almost all cases appoint another person to do it for him. No one, however, who is not capable of doing an act of himself can give authority to another to do it for him. But the converse of this limitation is by no means true, for many persons who cannot act for themselves can transact business for others, and make contracts which will bind their principals. For instance, infants and married women, though subject to all the disabilities mentioned in a previous section, can act as agents for other persons and bind them by their contracts made as agents.

An agency may be created by verbal authority for all ordinary mercantile purposes. Letters of attorney, and sealed powers of attorney, are often used, but they are not necessary to constitute the agency, and are merely convenient as an evidence of authority, to satisfy the minds of those dealing with the agent. There is one case, however, in which a formal instrument is required, not merely to prove, but for the purpose of granting authority. An agent cannot bind his principal by a deed under seal unless he is authorised to do so by an instrument under seal, and as the only way in which land can be conveyed is by a sealed deed, an agent who is required to convey land must be appointed by a power of attorney formally sealed. In some cases also, which will be mentioned in the section on contracts of sale, the Statute

of Frauds has required that where a man makes certain contracts for another, he must have a written authority from the latter to do so.

Not only will it be sufficient in all ordinary mercantile transactions not affected by the Statute of Frauds to prove that a mere verbal authority was given to the agent, but in certain cases this authority will be implied from the behaviour of the principal. If, for instance, any one knows that another person is holding himself out as his agent, and does not interfere with him, but allows him to go on transacting business in his name, he will not be allowed to dispute the agency and say that no express authority was given. The authority will here be implied from the acts of the principal. If one person sanctions and ratifies contracts entered into by another for him, the law will imply an authority to go on making such contracts, and the agency will be presumed to continue until the principal gives notice that he intends to withdraw his authority. Thus, if an agent buy goods for his principal on credit, and the principal pay the amount so charged against him without objection, the creditor will be justified in supposing that the agent has a general authority to buy on credit, and will be safe in supplying further goods to the agent on the credit of the principal, since the circumstance of the previous ratification of the agent's conduct is an evidence of authority to the agent so to bind his principal.

Agencies may be classified in several ways. An agency is called *general* when the agent is employed to act for his principal in all the transactions of a

particular line of business. But where the agent is authorised to act as such in some particular transaction only, the agency is called *particular*.

The authority of the agent may be *limited* by certain instructions as to the conduct he is to pursue, or *unlimited*, *i. e.*, leaving his conduct to his own discretion. But this discretion should not be exercised at random, for, in the absence of specific instructions, it is his duty to pursue the accustomed course of that business in which he is employed, or, if prevented by some unforeseen obstruction, at all events to give due notice to his principal.

The difference between a *factor* and a *broker* is, that the former has both the authority to sell, and the possession of the goods he is employed to sell, whereas the broker has only the bare authority to sell, and, as a broker, never has the custody of the goods.

When we wish to ascertain the full extent of an agent's authority, we may first look at any acts of his principal which seemed to confer a general authority to act for that principal. If the conduct of the principal has been such as clearly to lead to the belief that his agent has authority to act for him as a general agent, then we may be safe, without asking for further evidence, in concluding that the agent has such authority, as the principal will be precluded by his conduct from disputing the fact. But if we have no such evidence as this, and are compelled to resort to such formal evidences of authority as the agent may have in his possession, we must examine them carefully, as the courts will

interpret them with rigour. It is to be observed, however, that the authority to do any particular thing will include, without express mention, a power to use all necessary and proper means of carrying out and completing the transaction. An agent, for instance, who is employed to get a note discounted, may, unless expressly forbidden, endorse his principal's name on that bill, and bind him by such endorsement.

It is the duty of the agent strictly to adhere to the instructions of his principal, and if, in consequence of his exceeding his authority, the principal goes free in any transaction, then third persons can hold the agent liable for the damages they have sustained by his exceeding his authority.

Moreover, if any loss happen to the principal on account of a deviation by the agent from his instructions, the agent will be liable; though a ratification of the deviation by the principal, either before or after the damage has occurred, will exonerate the agent. If the agent makes an extra profit by the deviation, that profit will belong to the principal.

An agent who is remunerated for his services is required to possess and to exercise ordinary skill and care in executing the trust reposed in him, and will be liable in damages to his principal for any loss the latter may suffer through any want of either on his part. An unremunerated agent will be responsible only for damage occasioned by gross negligence or gross incompetency on his part.

In matters of agency, as in partnership transactions, the utmost good faith must be observed, and Courts

of Equity will not allow an agent to put himself into a position where he may be unduly exposed to temptation. If an agent employed to sell goods for his principal purchases them himself, or when employed to purchase any specific article for his principal purchases it for himself, the principal, on discovering the facts may in the first case, either repudiate the transaction or hold the agent to his bargain; and in the second case, will be entitled to have the agent declared a trustee of the property for him, and to take the benefit of the purchase himself. So also, in any agency transaction whatever, if the agent stipulate privately for and obtain any extra profit for himself, he will be obliged to account for it to his principal.

The principal will be entitled to interest on his monies lying in the hands of his agent, where the agent has actually received such interest. But the agent will not be liable to pay interest on money lying dead in his hands, unless it was his duty to have put it out at interest.

It is the agent's duty to keep accounts between himself and his principal of what is due to him for his commission. If he neglects to do this, so that no items can be proved, he can recover no compensation for his services.

A factor is bound to keep the goods intrusted to him for sale, with the same care that a prudent man would keep his own. He is not liable in case of robbery, fire, or other accidental damage, happening without his default, unless previous to such damage he had committed some improper act, had it not been for which the property might have escaped, for

then he will be answerable, and will not be allowed to say that perhaps it might not have escaped even had he acted rightly, for it is a rule of law that no man shall qualify his own wrong. Where goods are consigned to a factor it is his duty to insure them, or at least make every usual exertion to insure them at the request of his principal, if in the course of their previous dealings he have been used to do so; or even though he may not have been used, if he have effects in hand enough to cover the expenses of insurance, or if the bill of lading contain a requisition to insure, for by accepting the goods under it he agrees to such requisition. In any of these cases if he neglects to make the fit insurance, he will be responsible for damage which would have been covered thereby; and where it is the duty of an agent to insure, it is his duty also to give notice to his principal in case of his being unable to effect an insurance.

Sometimes a factor for an additional premium beyond the usual commission when he sells goods on credit, becomes bound to warrant the solvency of the purchaser. The agency is then called a *del credere* agency. It was at one time thought that a *del credere* agent was not merely a surety, responsible only in case of the default of a purchaser, but that he was liable to his principal in the first instance, but that doctrine has been questioned and at last overturned by subsequent authorities, which have settled that he is but a surety. If indeed the factor after a sale remit his own note or acceptance to his principal, for the amount of the proceeds, he will be

liable on that, whether employed as a *del credere* agent or not, and whether the vendee be or be not solvent, for by giving such an instrument he lulls all the suspicions of his employer, and causes him to dismiss all care about the solvency of the purchaser.

The principal is liable to third persons for any damage done by the negligent conduct of his agent, while about his principal's business; but if the damage be done wilfully, the agent alone will be liable. For instance, if A's servant, B, while driving along the street, carrying parcels for A, negligently runs his waggon against another waggon and injures it, A will be responsible. But if B wilfully drives against the other waggon, A will not be liable, as the principal is not liable for the wilful trespass of his agent, when committed without his knowledge or assent. Neither, of course, would the principal be liable if the agent's act, though merely negligent, was not done during the course of the business of his agency; as for instance, if the servant had taken his master's waggon out without leave, and had been driving about for his own amusement, when the negligent act was committed.

It has been decided that it is only to strangers that a principal can become liable for the carelessness of an agent, and consequently, that an agent cannot hold his principal liable for the carelessness of another agent employed in the same general business. This decides a point frequently arising in actions against railroad companies by their employees. But it has been said, that if an injury arises to one servant, from the incompetency or want of ordinary

skill in a fellow-servant, while both are engaged about their master's business, then the master will be liable.

It is a well known rule of evidence, that a man's own admissions about any transaction may always be used against him, as evidence of the fact admitted. In the same way, a man may become liable through the admissions or statements of an agent, in the same way as by his own. There is this difference, however, between the two cases. The principal's admissions, no matter when made, will be evidence against him; but the agent's admissions, in order to be of any use as evidence, must have been made, not only during the course of his employment as agent, but also during the transaction of the business to which the admissions relate.

The reason of the restriction is this, that while the statements of an agent made under the above circumstances are admitted as evidence from necessity, there being seldom in actions against a principal any other evidence within reach and while it is not likely that an agent will make false statements against the interest of his principal concerning any transaction, while actually engaged in it, it would be exposing the principal to too great a risk if, after the conclusion of the transactions in question or after the dismissal of his agent, the unsworn statements of the latter, perhaps carelessly or even maliciously made, should be considered as conclusive against the principal as that person's own admissions.

Again, notice to the agent is notice to the principal. Very often in Courts of Common Law and in

Courts of Equity, one of the parties to a suit will endeavour to prove that his opponent was aware of certain facts, or, in legal phraseology, *had notice* of certain facts, the knowledge of which will affect the right of the latter to a verdict or to equitable relief. For instance, if a man buys a promissory note before it is due, and knows nothing of any suspicious circumstances connected with it, he will be entitled to recover the whole face of the note, but if in a suit brought by him on the note the maker of the note can prove that the note was stolen from him by the person who sold it to the plaintiff, and that the plaintiff knew enough to make him suspect that this was the case, then the plaintiff can recover nothing, because he *had notice* of the circumstances. Let us suppose that the plaintiff did not buy the note himself, and did not know anything of the history of the note, but that his agent bought the note for him, and was aware of the suspiciousness of the transaction, but told his principal nothing about it. On proof of this knowledge on the part of the agent the principal will be prevented from recovering, by the rule of law which says, that notice to the agent is notice to the principal.

If an agent contract with third persons without letting them know who his principal is, the agent will be personally liable to them for the performance of the contract. Moreover, if these persons subsequently ascertain who the principal is, they may proceed against him instead, if they choose. If B., the agent of A., sells goods to C. without disclosing the fact of his being an agent, and C. has at the time

of purchase a claim against B., the principal may, it is true, sue C. for payment, but he will be compelled to stand in the same position that B. would have been in if he had sued; for instance, A, will be compelled to allow C. to set off B.'s debt to C. against his claim.

We may as well notice in this place the position and powers of a factor, who, as has been mentioned, is an agent entrusted with the possession of the goods he is authorized to sell. A factor has, as a matter of course, full power to sell goods in the ordinary course of business, so as to give a good title to a *bonâ fide* purchaser against his principal. Thus if A. be entrusted by B. with a number of ploughs to peddle through the country for him as his agent, though A. may after selling all the ploughs appropriate the money to his own use, B. will have no remedy against the purchasers, who have now a good title to what they have bought, but his remedy will be against the agent alone. But formerly, before the passing of the Act now contained in chapter 59 Con. Stat. Can., agents employed to sell had no implied authority to pledge. In the case above mentioned, for instance, the factor could not have given a valid pledge of any of his principal's merchandize in order to raise money for travelling expenses or to meet any pressing emergency, without express authority from the latter, and consequently few persons would advance money to an agent on a security which might turn out worthless. This restriction was felt to be a great inconvenience both to principals and agents, to obviate which the Act above mentioned was passed.

This Act provides in effect that factors or agents entrusted with the possession of goods or of the documents used in the ordinary course of business as evidence of title to goods, such as Bills of Lading, Warehouse-keepers' certificates, &c., shall be deemed to have authority, not only to sell, but to pledge the goods, either directly or by a deposit of the documents of title representing them, to any person who though he knows that the vendor or pledgor is only an agent, has no express knowledge that the agent is violating his instructions. The pledge however must be for a contemporaneous advance, and a pledge made in consideration of a previous debt due by the agent will be void. Thus if a factor were to pledge part of his principal's goods for a tavern bill previously incurred, the landlord could not retain the goods against the principal; but the landlord would be perfectly safe in taking the goods as a security for a present advance made by him to the agent.

This Act, though it secures the rights of third parties against the principal, even in cases where the agent may be transgressing his principal's orders in making a sale or pledge, does not prevent the principal from recovering against the agent, any damage he may sustain through the agent's improper conduct; and it provides an additional safeguard against fraud on the part of the agent, by making a breach of trust by the agent punishable, in certain cases, by fine and imprisonment, or both. For further important particulars, too numerous to mention now, the reader will do well to look at the Act it-elf.

Payment to an agent in the course of his employment, is payment to the principal. But if, for example, a man comes to pay a mortgage debt due to a merchant, and hands the money to a clerk in the merchant's counting-house, the collection of mortgage money not being a mercantile transaction, the payment is not made to the clerk in the course of his employment. If, therefore, the clerk absconds with the money, the merchant can insist on the amount being paid to him over again.

An agent, contracting as such for a known and responsible employer, incurs no personal liability to third parties. But if he contract without disclosing the fact that he is an agent, or, even while he professes to be an agent, without disclosing the name of his principal, he will be personally liable for the fulfilment of the contract, though the persons with whom he has contracted, on ascertaining who the principal is, may, if they choose, proceed against the principal instead. Moreover, if an agent exceeds his authority in entering into a bargain, and it happens that in consequence of his want of authority the principal is not bound, the agent may be made to answer for any damages which those who have contracted with him have suffered on account of the contract having fallen through.

If an agent commit, through negligence or wilful malice, any injury to the person or property of third parties, he will be always liable, though, as we have seen above, the principal is only sometimes so.

If a party who has paid money to an agent for the use of his principal becomes entitled to recall it, he

may, upon notice to the agent, recall it, provided the the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent since the payment to him before such notice. The mere fact that the agent has passed such money in account with his principal, or that he has made a rest in his accounts without any new credit being given to the principal, will not of itself be sufficient to entitle the agent to retain the money, when the party entitled to recall it demands it.

But if a new credit has been given to the principal since the payment, or if bills have been accepted, or if advances have been made on the footing of it, the payment cannot be recalled.

In signing any document for a principal, the agent should take care to express that he does it for the principal, or that the principal does it through him. The ordinary form of signing, where the principal's name is put first, is "James Smith, per (*i.e.* through or by) John Brown;" or, "James Smith, per pro. (*i e.* per procuration) John Brown;" and when the agents name is put first, "John Brown, for James Smith."

The relations between principal and agent, which, as we have seen, are in a great measure governed during their continuance by the same rules as regulate the mutual rights of the different members of a partnership, are dissolved by almost precisely similar causes.

An agency may be terminated: 1st. By the expiration of the time limited at its original creation.

2nd. By completion of the particular business for which the agency was created, if that business has any natural termination. 3rd. The bankruptcy of the principal operates as a revocation of the authority of his agent touching any rights of property of which he is divested by the bankruptcy, for the bankrupt thereby ceases to be the owner, and consequently is incapable of personally passing any title to it, and the act of his agent cannot have any higher validity. But as to other rights and property which do not pass by the bankruptcy, but remain personally in the bankrupt, as, for example, the rights in property which he holds as trustee or as guardian or as executor, the authority of his agent will not be suspended or revoked by his bankruptcy. 4th. If the principal, a single woman, marries, the husband does not become the principal, but the agency is terminated. 5th. By insanity of the principal properly declared by the Court of Chancery. 6th. By the insanity of the agent. 7th. By the death of the principal. In the case of an agency coupled with an interest, the agent, it is true, on the death of the principal, ceases to be his agent, but he may be considered the agent of his representatives for the purposes of enjoying the interest with which his power is coupled. 8th. By revocation by the principal. In cases where the person appointed agent receives at the same time a right to collect money in the course, and by virtue of the agency for his own benefit, as, for instance, where a power of attorney accompanies the assignment of a chose in action, or where any valuable interest in real or personal property is accompanied

by a power necessary to the enjoyment of the interest, the power of revocation cannot be exercised, unless the right to do so has been reserved to the principal by the original contract creating the agency.

But if the authority given to the agent is merely a naked power, that is to say, one which though it may entitle the agent to remuneration in the shape of commission, does not confer any of the advantages above mentioned, and if there is no time limited by the original agreement between the parties, and no natural limit to the duration of the agency indicated by the nature of its business, then the authority may be revoked by the principal at any time. 9th. By renunciation on the part of the agent. Very nearly the same principles affect the agent's right to renounce as those that govern the principal's right to revoke. But in all cases where the agent renounces his agency, he ought to give notice thereof to the principal, for if he does not, and damage is thereby sustained, it may, perhaps, if the omission be fraudulent give rise to a claim for damages, even though it be a case of gratuitous agency.

CHAPTER IV.

MERCANTILE CONTRACTS.

1.—*Bills of Exchange and Promissory Notes.*

A bill of exchange is a written order from one person to another, desiring him to pay to a third person, or to the order of a third person, or to the bearer of the order, a certain sum of money unconditionally.

It may be inferred from the above definition that the bill is a written instrument, and that it orders the payment of money. An order to give goods to a certain value is not a bill of exchange. The payment, moreover, must not be required upon a condition, or upon a contingency that may or may not happen. The order may be to pay on demand, at sight, or a certain time after date, or even on the death of a particular person, for that event is supposed certain to happen, but not upon the marriage of a particular person. An instrument, however, which does not comply with this definition is not on that account void, but it will merely want certain qualities to be hereafter mentioned which render bills of exchange particularly valuable as instruments of commerce.

Before the invention of bills of exchange, when a merchant was the debtor or creditor of another merchant at a distance, payment was generally attended by the inconvenience and risk of transporting the money from one place to another. But wherever commerce became active the necessity of the case introduced these instruments. If A. a merchant in Toronto owes C. a merchant in London, England, a thousand dollars, he never thinks of sending the money in specie, as he has several ways open to him of avoiding the inconvenience. He can, for instance, purchase a bill of exchange directed to some person or banking house near the residence of his creditor, directing payment of the amount of the debt to the creditor, and so framed that it will be of no use to any one till received and endorsed by the creditor; or he can adopt the ruder contrivance, which was the germ of the more artificial contrivances of modern days. He can single out some one in London who happens to be a debtor to himself, and order him to pay this money or part of it over to C. The difference between this expedient and the modern practice of purchasing exchange is that, instead of being dependent on the chance of having a debtor living close by his creditor, the person desiring to make the payment can buy himself a debtor in any foreign country by purchasing a draft upon some banking house carrying on business there.

When A., in the example above given, determines to hand over B.'s debt in payment of his liability to C., he draws an instrument in something like the following form:

$1000 Toronto, July 1st, 1864.

Three months after date pay to C. or order the sum of one thousand dollars, for value received, and charge the same to my account.

A.

To B.

This instrument, called a bill of exchange, is transmitted to C., who applies to B. to know whether he is willing to comply with this request. If B. is willing to do so, he signifies his assent by accepting the bill. A. is called the drawer because he draws upon B., B. is called the drawee because he is drawn upon, and after he accepts he is called the acceptor. C. is called the payee because the money is directed to be paid to him. C. is also called the holder as long as he retains possession of the bill. There is another party to bills of exchange, called the endorser, whose position cannot be well defined till we come to the subject of negotiability; but we may mention that he derives his name from his writing his name across the back of the bill. By the act of indorsing he becomes a party to the bill. If C., after obtaining B.'s acceptance, does not wish to wait till the bill becomes due, he sells it and hands it to the purchaser with his name written across the back. C. is then called the indorser, and the purchaser becomes the holder. In the same way, if the purchaser writes his name across the back and transfers the note, he becomes the indorser, and the transferee becomes the holder. The bill can thus pass through any number of hands.

The acceptor is considered the principal debtor, and the person primarily liable to pay the bill when it

becomes due. All prior parties are liable to be sued by the holder in case the bill is not paid, but as among themselves they are liable in the following order. If the acceptor does not pay, and the drawer pays, the drawer can recover what he has paid from the acceptor. If the payee (having become an indorsee as above explained) pays, he can recover from the drawer and acceptor; and if a second indorser pays, he can recover from the first indorser, drawer and acceptor, and so on, the rule being that subsequent parties can recover against prior ones, the promise of each party to the instrument being considered as made to all subsequent holders.

The distinction between a foreign and an inland bill of exchange has been accurately ascertained in England on account of the wording of the stamp laws, which exempted foreign bills from stamp duties When an unstamped bill was offered in evidence, in any court in England, and its admissibility was disputed on account of the absence of a stamp, the objection might be answered by showing that it was a foreign bill. The results of the decisions which arose on these objections, and in certain other ways, may be thus stated: Inland bills of exchange are such as are both drawn and payable in England, Wales, or Berwick-on-Tweed, or drawn and payable in Ireland, or drawn and payable in Scotland. Foreign bills, as distinguished from inland bills, are such as are drawn, or payable, or both, abroad, or drawn in one realm of the United Kingdom and payable in another. Bills drawn in England and payable in Scotland or Ireland, or *vice versâ*, are

foreign bills, for they were so before the Union between the countries, and the Union does not make them inland bills. But bills drawn and payable in Scotland, or drawn and payable in Ireland, are inland bills within Imperial Stat. 1 & 2 Geo. IV. cap. 78, to which an acceptance in writing is necessary.

Another circumstance which rendered the distinction important was that, in order to charge the drawer, the dishonour of a foreign bill must be attested by a protest. The reason why a protest, though not absolutely necessary in the case of inland bills and notes, or even in the case of foreign promissory notes, was required in the case of foreign bills of exchange, was that by the law of most foreign nations a protest was essential in case of dishonour of any bill, and the protest was required for the sake of uniformity in international transactions.

With regard to the stamp duties payable in Canada, the distinction between inland and foreign bills above pointed out is not important, for our statute 27 & 28 Vic. cap. 4, sec. 1, imposes the duty only upon promissory notes, drafts, or bills of exchange, *made, drawn or accepted, in this Province*. The explicit wording of the statute will save the necessity of referring to the above mentioned distinctions on any question as to whether bills ought, under our act, to bear a stamp.

As to the necessity of a protest on bills of exchange, however, the analogies furnished by the English cases will be a guide to us here. In accordance with those cases, it is submitted that we should treat as foreign bills, bills drawn and payable in any

foreign country, bills drawn in Canada and payable in any other country or colony, and *vice versâ*; and that even bills drawn in Upper Canada and payable in Lower Canada, and *vice versâ*, should be considered as foreign bills; for granting that before the Union such bills would have been foreign, the Act of Union did not make them inland bills. Bills drawn and payable in Lower Canada would on the same principle be considered in Upper Canada, and bills drawn and payable in Upper Canada would in Lower Canada be considered to be foreign bills.

A promissory note is a written promise to pay a certain sum of money unconditionally. The promise must be in writing, must be to pay a certain sum of money, not other things than money, as goods or lands, and must be unconditional. Like a bill of exchange, it may be payable on demand, or at a certain time after date, or on the happening of an event which, though uncertain as to its time of occurrence, is yet certain to happen.

If a promissory note be drawn and signed as follows:

$400 Toronto, July 1st, 1864.

Three months after date, I promise to pay to C. or order four hundred dollars, at the Bank of Toronto, in Toronto, for value received.

B.

B. is called the maker, and is the principal debtor on the instrument, being in the same position as the acceptor of a bill of exchange. C. is called the payee, and, while he holds the note, the holder; and if he indorses and delivers it over to D. he becomes

the indorser, and D. the holder. D. may likewise indorse and transfer, and so on, *ad infinitum*. The same rule as to liability prevails here as with the parties to bills of exchange, prior parties being liable to subsequent parties. The order of priority is as follows: Maker, first indorser, second indorser, and so on.

Before we go further, a few technical points as to the transfer of bills and notes had better be explained. Where an ordinary book debt is assigned the assignee can sue on it, but at law it must be sued in the name of the original creditor, and no matter through how many hands the debt passes, the name of that creditor, or in case of his decease in the meantime, of his personal representative, must be used.

When bills of exchange and promissory notes, drawn in negotiable form, are properly transferred, the transferee has the right to sue on them in his own name. If the bill or note is by its terms payable to bearer, it may be transferred by mere delivery through any number of hands, and the holder for the time being may sue on it in his own name. If payable to "the order of C." or to "C. or order," C. must indorse it when he transfers it; and in case he indorses by simply writing his name across the back of it, then the person receiving it, or any one to whom that person delivers it, may sue in his own name. This peculiarity, distinguishing bill and notes from other choses in action, is called "negotiability." If however a bill or note is expressed as "payable to C." merely, no mode of transfer can make it nego-

tiable, and it must always be sued in the name of C. The indorsement spoken of heretofore is the indorsement in blank, effected by merely writing the name across the back of the instrument; but if the indorser write above his name the words "pay to the order of D.," the indorsement is called an indorsement in full. The instrument then ceases to be negotiable until D. indorses; and if he indorses in blank, then it will pass by delivery.

A restrictive indorsement is one which puts an end to the negotiability of the instrument for ever. For instance, if the indorser's name is accompanied by the words "pay to C. only," C. can never transfer to another party the right to sue on the instrument in the name of that other party. It has been decided however that an indorsement with the words "pay to C.," will not deprive C. of the power of transferring such a right by his indorsement. As we have just seen, however, these words have a different effect when appearing in the body of the instrument.

Either of these modes of indorsement makes the indorser liable as a party, and sometimes, in order to prevent this, where an indorsement is required merely for the purpose of transfer, the words "without recourse" are added before or after the name. The effect of these words is to protect the indorser using them from all liability as such.

Simple contracts, that is, contracts not under seal, require a consideration to support them; and bills and notes are contracts within this rule.

If B. makes a promissory note for $100 to C., and there is no consideration for the giving of the

note, B. can set up the absence of consideration as a defence to C.'s action on the note. In the same way, the acceptor of a bill of exchange can set up this defence as against the drawer. But there is a difference, which is however merely a matter of evidence, between an action on bills and notes and an action on other contracts. In the latter the consideration must be proved to exist, by the plaintiff, and he cannot recover unless he proves it. In the former, the consideration is presumed to exist until the defendant proves its absence, and the plaintiff will recover on mere proof of the signing of the instrument by the defendant. The defence of want of consideration can always be set up between immediate parties to a bill or note, that is to say, in the case of a bill of exchange, by the acceptor against the drawer, by the drawer against the payee, by the payee on being sued as an indorser, against his immediate indorsee; and, in the case of a promissory note, by the maker against the payee, by the payee on being sued as an indorser against his immediate indorsee, and so on. But between remote parties, that is for instance between acceptor and payee, between drawer and indorsee, between first indorser and second or third indorsee, this defence is subject to the following restriction. It cannot be set up by one remote party against another who received the note before it was due and gave value for it, and was ignorant at the time of receiving it of the fact that the former had received no consideration for becoming a party to the instrument. For the security of trade, the custom of merchants, sanctioned by the decisions of the courts

of law, protects against this defence any one giving value for a note before it is due, without knowledge of defect in his right to recover against the parties to it. It must be borne in mind, however, that to give this protection all three circumstances are required; the receiving before due, valuable consideration, and absence of notice. But if the bill or note has been received when over due, the person receiving it is liable to all the defences that might be set up against the person from whom he got it. It must, however, be understood that he is entitled to all the rights of that person. Thus, if D. receives an over due promissory note from C., an indorsee, against whom any particular defence can be raised, then the same defence can be set up against D. Thus, if C.'s right were defective on account of his having received the note with notice of the maker A. not having received any consideration for his promise, then A. could resist payment to D., just as he could have resisted payment to C. But if C. had received the note for value before due and without notice, then D. would still stand in C.'s place, and A. could not dispute D's claim any more than he could have done that of C. In applying this rule, it is sometimes necessary to retrace several steps in the history of the instrument. Thus if the note passes from C. whose right is perfect against A. and B., previous parties, after due through successive indorsers to F., F.'s right is that of E., whose right is that of D., whose right is by the rule in question identical with that of C. and F. thus stands in C.'s place.

These rules affecting the position of holders receiving bills and notes before due, and those receiving them overdue respectively, apply not only to the particular ground of defence we have mentioned, but to all defences that in an action on such an instrument can be raised by one who has actually become a party thereto. These defences are fraud, payment, tender, and others. But defences arising out of merely collateral matters, such as that of set-off, for instance, against a former holder, cannot be raised against subsequent holders.

It has been already stated that the promise implied by signature, as party to a bill or note, is considered as made to all subsequent parties, so that any party who takes up a note, either voluntarily or by compulsion, has recourse against all those whose names are prior to his on the instrument. This will hold good in all those cases where negotiable paper, given as payment or security by the acceptor or maker, is transferred by way of sale from one holder to another, without any contract being made between the different parties, other than that to be inferred from the signature as drawer or indorsers. But special circumstances and special stipulations between parties will often vary their liability to one another. Thus, an absence of consideration for the first indorser's signature may prevent his indorsee from recovering against him. Or a first indorser and a second indorser may have become parties as co-sureties, and then the second endorser, after having taken up the note, may be prevented, by proof of this special relation, from recovering more than one surety is enti-

tled to for contribution from another. The presumption will however be as against the first indorser that he is liable for the whole amount paid by the other, until he proves the existence of the relation of co-suretyship. Frequent exceptions to this order of liability occur in the case of accommodation paper. Suppose that A., wishing to raise a sum of money, gets B. to sign a note payable to the order of A., and then, having indorsed it, discounts it, and takes it up when it falls due. *Primâ facie* he has a right to recover against B., who is a prior party to the note; but B. can set up the defence that he (B.) was a party to the note merely for the accommodation of A., and did not in fact contract to pay A. the amount of the note.

In the following cases however there is no protection afforded to persons receiving a bill or note before due for value and without notice, that is, where a note is "utterly void" under the statute 9 Anne, cap. 14, on account of its being given for money lost by gaming or betting on the sides of persons so gaming, or for money knowingly lent for such gaming or betting, or lent at the time and place of such play to any person then gaming or betting, or who shall, during the play, play or bet, or for ransom or money lent in order to ransom. In these cases no subsequent holder, no matter under what circumstances he may have received the instrument, can have any recourse against the party who signs, accepts or indorses, a bill or note for the purposes above mentioned. This statute remains in force here,

though altered as to England by subsequent statutes of the Imperial Parliament.

As to gaming securities, it was never any objection to an action against the indorser that the bill or note was made on a gaming consideration; for though the statute directed that they should be void to all intents and purposes, that meant only so far as was necessary to further the purposes of the act, and to exempt an indorser from suit might assist a winner whom the statute meant to punish, not to protect.

By certain statutes consolidated in cap. 58 Con. Stat. Can., bills of exchange and promissory notes on which is reserved more than a certain rate of interest are in certain cases declared to be "utterly void," but this enactment is modified as to Upper Canada by the statute cap. 42 Con. Stat. U.C., sec. 8, which declares that "no bill of exchange or promissory note, although given for a usurious consideration or upon a usurious contract, shall be void in the hands of an indorsee (or, if a note transferable by delivery, in the hands of a person who acquired the same as bearer) for valuable consideration, unless such indorsee or bearer had at the time of discounting or paying such consideration for the same, actual knowledge that such bill of exchange or promissory note was originally given for a usurious consideration or upon a usurious contract."

There are certain technical formalities required to be observed by the holders of negotiable instruments in order to secure or maintain their rights against the different parties thereto.

1. Presentment of bills of exchange for acceptance.

If A. draws on B. by a bill of exchange, and delivers the bill to C. for value, A. undertakes to pay the bill if B. either refuses to accept on presentment for acceptance, or after acceptance refuses or neglects to pay. If the bill is drawn payable at sight, or a certain time after sight, or on demand, C. must present the bill to B. for acceptance within a reasonable time, otherwise the drawer and indorsers will be discharged, for an unreasonable delay might either change the state of accounts between A. and B. to such an extent as to render B. unwilling to accept, or might change B.'s financial position so far as to render his acceptance worthless, and thus prejudice the drawer by depriving him of the benefit of his recourse against B. What is a reasonable time differs with the circumstances of each particular case, and the question of reasonableness is in case of dispute left to the jury to decide.

In estimating what shall be considered a reasonable time, among the circumstances to be taken into account are the distance of the holder from the place of presentment, and the facilities of communication between the holder and the drawee. Moreover, where the bill has been constantly in circulation since it passed out of the hands of the drawer, a considerable period will be allowed for presentment.

But where the bill is drawn payable on a certain day or a certain time after date, the holder is not obliged to present for acceptance until the day for payment arrives; though the usual course is to present for acceptance as soon as possible, as the bill will be

more marketable with the additional security of the acceptor's liability. The drawee is not bound to accept unless he has made some binding contract with the drawer to do so, but as soon as he accepts he becomes liable as the principal debtor on the bill. If he refuses to accept, the holder must give notice of non-acceptance to the drawer in the same manner as notice of nonpayment is required to be given. The drawer will then be liable to pay the amount of the bill at once. The object of this notice is to enable the drawer to withdraw at once from the hands of the drawee any funds he has left with him.

If there are indorsers on the bill at the time that acceptance is refused, they too must be notified, and when so notified are liable as well as the drawer to have immediate payment enforced.

By cap. 42, Con. Stat. U. C., it is enacted, that "no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless such acceptance is in writing on the bill; or if there be more than one part to such bill, then on one of the said parts." Acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto, though this word is not necessary. In fact any writing on the bill from which an intention to accept can be inferred, will be a binding acceptance. Thus, if a drawee merely writes his name upon the face of the bill, without the word "accepted," or if he writes "accepted," "presented," or "seen," or the day of the month, on the bill, this will *primâ facie* amount to an acceptance.

The acceptance may be either absolute or conditional. The holder is entitled to require from the drawee an absolute engagement to pay in money according to the tenor and effect of the bill, unencumbered with any conditions or qualifications. A general acceptance, without any express words to restrain it, will be such an absolute acceptance. A conditional acceptance may be an acceptance as to part of the amount, or as to part or the whole upon a condition, as for instance, an acceptance "when the acceptor shall receive funds from the drawer." The holder not being bound to receive a conditional acceptance, is entitled, when he finds that he cannot obtain a general acceptance, to give notice of dishonor, and to hold liable the drawer and indorsers.

Sometimes, when the drawee has refused to accept either absolutely or with such conditions (if any) as the holder is prepared to agree to, a person not a party to the bill will accept for the honor of some party. This is called an acceptance supra protest, and is effected by writing "accepted supra protest for the honor of ——." This aceeptance is so called because, where the form of protesting is actually gone through, the acceptance is given after the protest; but as this form is necessary only in the case of what are called foreign bills, it would seem that this acceptance can be given after a refusal to accept where there is no protest.

The effect of such an acceptance is, that the acceptor becomes liable to all the parties to the bill subsequent to the one for whose honor he accepted; and if he pays the bill, he can look to that party, and all

parties prior to that party, for repayment. When this acceptance is given, however, it becomes the duty of the holder, when the bill becomes due, to present the same to the drawee for payment, and give notice to the acceptor supra protest of the nonpayment of the bill. This ceremony of giving notice of non-payment need not be given to an ordinary acceptor, and need only be given to the acceptor supra protest because he stands in the position of an endorser.

2. Presentment for payment and notice of dishonor.

The most important formalities, besides that of presentment for acceptance, are presentment for payment and notice of dishonor. When a bill or note is payable in a certain number of months, calendar months are meant. By the custom of merchants, three days of grace are, in this Province, in Great Britain, and in the United States, allowed on bills and notes payable a certain time after date or after sight. Thus, if a bill, according to its terms, would fall due on Monday, it actually matures on the following Thursday, and presentment, if necessary, must be made on the latter, not on the former day, and presentment on the former day is of no use. Days of grace are not allowed on bills and notes payable on demand, and it is as yet undecided whether they are allowed when the instrument is payable at sight. In Great Britain and the United States, when the last day of grace falls upon a Sunday, or upon any of certain holidays, it is payable on the day preceding; but in Upper Canada and in Lower Canada, in such case, the bill is payable on the following day.

By Con. Stat. U. C. cap. 42, sec. 20, the following days are made holidays for the purpose of postponing the maturity of a bill or note: Sunday, Christmas Day, Good Friday, Easter Monday, Ash Wednesday, any day set apart by Royal proclamation for fasting or thanksgiving, the birth-day of the reigning Sovereign, and the first day of January.

But in order to preserve the remedy of the holder against parties other than the acceptor of the bill and the maker of the note, presentment for payment must be made, no matter how the instrument is expressed to be payable, on the day when the note falls due, at the place where the instrument is payable, if any place of payment is mentioned therein, or to the acceptor or maker. If the bill or note is made payable at a particular house, presentment to any inmate will suffice; or if the house is shut up, it will be enough to present it at the house door. If drawn or made payable at a particular place, and if the holder takes the bill with him to the town, and makes inquiries for the acceptor or maker (as the case may be), and cannot find him, that is a sufficient presentment. If drawn or made payable at a bank, and the bank are the holders of the instrument, on the day it falls due, no formal presentment is necessary, as the circumstances are held to amount to a presentment.

With regard to presentment for payment, in order to avoid confusion on the subject, we may first consider the cases in which this form must be complied with, in order to secure the holder's claim against the acceptor of a bill or the maker of a promissory note. These parties, as we have seen, stand in the relation

of principal debtors on the bill or note respectively. When an ordinary book debt is due, a demand or the rendering of an account is not in strictness necessary in order to entitle the creditor to sue. Similarly, if A makes a promissory note, payable in three months, without specifying any place of payment, when the note falls due it is A's duty to find out the holder, and not that of the holder to make any demand upon A; and the holder may at once, in case of non-payment, commence an action against the maker. Even if a particular place of payment is specified, it is not necessary, in Upper Canada, in order to charge the acceptor or maker, to present at that place, unless the words "and not otherwise or elsewhere" are used. In Lower Canada, however, presentment at the place specified is necessary, in order to charge the maker or acceptor, without the presence of the above words. It is somewhat remarkable that even where a note is made payable on demand, a demand is not necessary, the commencement of an action being considered a sufficient demand. If, however, a bill or note is made payable a certain time after demand, the demand must be regularly made in order to fix the date of maturity. If no particular place is mentioned, presentment may be made to the acceptor or maker personally, wherever he can be found. But there is a sufficient presentment if payment be demanded of a clerk or other agent at the acceptor's or maker's customary place of business, or of any grown-up person at his residence. If he has shut up his house and absconded, and cannot be found, presentment is excused, because it cannot be made, and

the bill or note may be treated as dishonored. But if he has merely removed to a different residence and can be discovered, the bill must be presented in the regular way. If he be dead, presentment must be made to one of his executors or administrators, if he have any; and if he have not, then at his last place of residence. The bankruptcy or insolvency of the acceptor or maker is not of itself an excuse for an omission to present, nor is a declaration made by him before the day of maturity of the bill that he will not pay it. If, however, a bill of exchange is merely an accommodation bill, and the acceptor had no funds of the drawer in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honored by the acceptor, then an omission to present to the acceptor and notify the drawer will not let the drawer go free, as the omission could have done him no harm. But an endorser of a bill stands on a different footing, and no proof of knowledge on his part that the bill would not be paid by the acceptor at maturity will dispense with presentment and notice to him.

When the bill or note has been duly presented and remains unpaid, the holder should immediately give notice of the presentment and non-payment to all those parties to the instrument whom he intends to hold liable upon it. This notice may be verbal or in writing; at all events it must be such as to convey the intelligence, directly or indirectly, that the bill or note has been presented for payment, and that it has not been paid. A statement that it remains unpaid

at the time of giving the notice, will not be sufficient. But the statement that it has been "dishonored" will be sufficient, as it has been decided that this word implies presentment for payment as well as non-payment. The notice must give sufficient information to identify the instrument, but a trifling error of description will not vitiate the notice, as long as it has not been sufficient to mislead. The time and manner of giving the notice vary with the circumstances of the case, and the distance at which the parties to be notified live from the party who is required to give the notice. If both live in the same city or village, the notice must be given by the holder in time to reach the other in the course of the day following. The notice is therefore, in this case, generally sent by a messenger, and given or left at the place of business of the drawer or indorser during business hours, or at his residence; and if he is not in, a verbal message may be given to any grown-up person on the premises. If the house is shut up, and the party sent to give notice puts a written notice through or under the door, that will suffice. When both live in the same city or village, the notice is not generally sent by mail, as the holder will then have to prove that the notice reached its destination in time. When both parties do not live in the same city or village, the notice is generally sent by post, in which case the notice will have to be posted in time for some mail leaving on the day following the dishonor. All that the holder will then have to prove is, that the notice was posted in time, and it will make no difference if the notice has actually

miscarried. If the holder chooses to send the notice by a messenger, then he will have to prove that the notice arrived as soon as it would have done by the regular mail. If there is no regular mail, then the notice must be sent by the ordinary means of conveyance by stage or ship. There are thus two modes of proving the service of the notice of dishonor. One is to prove the receipt of it by the party who ought to receive it; the other, to prove that it has been sent.

As only those who are notified of the dishonor become liable to pay, the holder might, if he were the only person authorized to give this notice, at any time intentionally deprive some of the parties of their remedy against prior parties, by refraining to give any notice to the latter. But in fact each party to the instrument, after receiving notice, is allowed the same time for securing his rights by giving notice to any or all parties prior to himself, as the holder has to give the notices required of him. Thus, if A be the acceptor, and B, C and D be the subsequent parties to a bill, and E the holder, and E notifies D only, who receives notice on Monday, D, who may not know whether the others have received notice, need not, if C resides at a distance, send off his notice to C until the mail leaves on Tuesday; and supposing that C, having received no prior notice from E, receives D's notice on Friday, he has, if B resides at a distance, until the closing of the mail on Saturday to send notice to B. D. will then have recourse against C, and C against B; and moreover these notices will enure to the benefit of all parties and the

holder, so that the holder will be entitled to recover against C by virtue of the notice given by D, and D against B, by virtue of the notice given by C.

Where notices are sent by mail, the rule is to direct to the post office nearest the place of residence of the party to be notified. If the holder or any of the parties desiring to give notice cannot, after making proper and reasonable exertions, ascertain the residence of the party to be notified, the failure to give notice will be excused, so long as the inability to give it continues; but notice must be given promptly, as soon as the necessary information is received. It is a safe and convenient practice for the holder, when he knows the address of some of the parties required to be notified, and is ignorant of that of others, to enclose to the former, with their own notices, notices for such of the latter as are prior to them, with the addresses in blank, and with a request to forward them to the proper post office.

When notice of non-acceptance of a bill is to be given, the same rules are to be observed as to the time and manner of giving the notice, as those laid down as to notice of non-payment.

These are the rules applicable to those cases where the holder of the instrument or his agent presents it and gives notice of dishonor or non-acceptance, without employing the services of a Notary Public. It is not necessary to employ the services of this officer in any case except where a foreign bill is dishonored. When a foreign bill is dishonored here, a Notary Public must be employed to protest it; and a notice of the fact of the bill having been protested, not

merely of its having been dishonored (*i. e.*, presented and not paid), must be sent to the drawer if he reside abroad. It is not necessary that this notice of the protest and dishonor should be sent by the Notary, but it may be sent by the holder or his agent. But in this Province it is customary for the Notary, who protests also, to send the notice. The statutes (Con. Stat. U. C. cap. 42, and Con. Stat. Can. cap. 57) have introduced so many variations from the English law, and have, by the character of their provisions, rendered the employment of Notaries so much more common among mercantile men, that it will be worth while to give, at some length, the substance of these Acts, so far as they relate to our present subject. These statutes do not render the employment of a Notary necessary in any cases where it was not formerly necessary; and it is still necessary to employ one in the case of a foreign bill only, and not even in the case of a foreign promissory note; but by allowing the notary's charges for protesting and giving notice of protest and dishonor of any bill or note, they have rendered the employment of a Notary almost a matter of course among business men.

A Notary Public in this Province is an officer appointed under a commission signed by the Governor-General, as Her Majesty's representative, and empowered by that commission, among other things, to protest bills and notes. Before protesting for non-payment or non-acceptance, the Notary must, in person or by his clerk, present the bill or note for payment or acceptance. As far as the place at which or the person to whom the presentment is to be made

is concerned, he must observe the same rules as any other person. But he must present a bill or note for payment at some time after three o'clock on the last day of grace. He may of course present it before that hour, for the purpose of ascertaining if the drawer or acceptor really means to pay; but in any case he must present again after three o'clock before he makes his protest. The protest is a formal declaration, signed by the Notary and sealed with his seal, setting forth the facts of presentment and of non-payment, or non-acceptance (as the case may be), and protesting as well against all the parties to the bill as against all whom it may concern, for all interest, damages, costs, charges and expenses arising from the non-payment or non-acceptance of the bill or note. It also states when and how the notice of protest and dishonor or non-acceptance has been served. The bill or note, or a copy thereof, is annexed to the protest. After the Notary has made presentment, and payment or acceptance has been refused, he usually notes the bill or note by making a memorandum across the face of it to this effect:

Protested for non-payment (or non-acceptance) this 1st day of June, A.D. 1865.
Fees, $1 35. A. B., *N. P.*

The formal protest bears date on the day of presentment, but need not be drawn up till it is required to be used as evidence. When the holder or an ordinary agent of the holder sends the notice by mail, he is obliged to send it by some mail going out on the day following the dishonor; but a Notary Public is

allowed by the statute (Con. Stat. U. C. cap. 42) the whole of the following day till twelve o'clock at midnight to mail the notice of dishonor and protest. The Notary, moreover, may always send the notice *by mail*, and in every case the service of the notice is sufficiently proved by evidence that the notice was duly mailed; whereas in some cases, as we have seen, where an ordinary person sends a notice, proof of the mailing is not sufficient, but the notice must be proved to have actually reached its destination in time.

But the greatest convenience resulting from the employment of a Notary is in the matter of evidence. Where the notice has to be proved at a trial, and it has been given by an unofficial person, that person must attend court and prove on oath either that the notice reached its destination, or that it was duly mailed, as the law may require; but cap. 57, Con. Stat. Can., dispenses with the attendance of the Notary to prove the sending of any notice by him, by enacting that the production of the protest shall be *primâ facie* evidence of the allegations and facts therein contained, among which, of course, is the sending of the notice of dishonor or non-acceptance and of protest.

The effect of a neglect to present regularly for payment and give notice of dishonor to a drawer or indorser is, as we have seen, to release that party from all liability. But if the drawer or indorser, after the bill or note becomes due, and being aware of the omission, promise to pay, or admit that he is liable to pay, or actually pay part, this will be evi-

dence from which a jury will be allowed to infer that he has waived the objection of want of notice; and the waiver of notice, however proved, will place him in the same position as if he had received due notice. So if the drawer or indorser, before the bill becomes due, distinctly state to the holder that he does not wish notice to be given to him, the failure to give notice will not release him.

The acceptor stands to the holder of the bill in the relation of the principal debtor, and the drawer and indorsers are sureties for the acceptor. Any binding agreement, therefore, which the holder makes with the acceptor, to give him further time for payment, or to release him, or an actual release to him, operates as a release to all subsequent parties, if made or given without their consent. The indorsers are sureties for the drawer, and an agreement of the sort just mentioned, in favor of the drawer, will release the indorsers. The general rule is, that the giving of further time, or a release, to any party, releases all parties subsequent to that party. This rule applies to promissory notes, the maker of a note standing in the place of the acceptor of a bill; but if any subsequent party have given his consent to the proceeding, then he will not be discharged. It has been decided, moreover, that if, at the time of making an agreement to discharge or give time, there be a stipulation between the holder and the principal that the surety shall not be released, then the surety will still be liable, although not a party to the agreement above mentioned, and not even aware of it. However, if the surety, after such discharge of the principal, is

compelled to pay the amount of the bill or note, he can recover it again from the principal, although that principal has long before ceased to be liable to the holder. It must be understood, however, that the mere forbearance to sue, or an agreement not to sue, which fails to be binding on account of the absence of consideration, will not prejudice the rights of the holder.

A promissory note, made by two or more makers, may be either joint or several. A note made by more than one person, and beginning "we promise," &c., is a joint note; but if it begins with "I promise," it is several as well as joint. A joint and several note generally expresses that the makers "jointly and severally promise." One important consequence of the distinction is, that in an action on a note which is merely joint, all the makers must be made defendants; but where it is joint and several, one or more of the makers may be sued without joining the rest. The respective promises of the maker, acceptor, drawer, and of each indorser, are distinct promises, and each may be sued alone, as if he were the maker of a separate note. Formerly, if the holder desired to sue more than one of the parties (not being joint makers) to a bill or note, he was obliged to bring separate actions; but by Con. Stat. U. C. cap. 42, he is allowed to bring one action against all; and if he brings separate suits, he will not—except in certain cases, mentioned in the Act, in which he is specially authorized to bring separate actions—be allowed more than the costs taxed in one suit, and the actual disbursements in the others. The Act further pro-

vides, that when an action is thus consolidated, the mere fact of one party to the note being a defendant in the action, shall not prevent a co-defendant from calling him as a witness, if such co-defendant would have been entitled to his testimony, had he not been a party to the suit or individually named in the record.

A cheque is in form a bill of exchange:

$100. Toronto, January 5th, 1864.

Bank of British North America: Pay to C. or order (or bearer), the sum of one hundred dollars.

To the Manager. A.

Cheques are used, it is hardly necessary to state, by persons who have money deposited in a Bank to their credit, for the purpose of drawing out the money or part of it for themselves or for others. They are usually in the above form, and in that shape are payable on demand. We have already seen that a drawee is not, merely because he may be indebted to the drawer, bound to accept a bill of exchange directed to him; but bankers, who receive funds for the purpose of being drawn by cheque, are bound by an implied contract to honor cheques of a customer, as long as there are funds belonging to him in their hands to meet them with. When a cheque is presented, the banker does not formally accept before paying. The marking the cheque with the initials of the book-keeper or otherwise, which is called marking it "good," is, however, an acceptance, of which any holder may avail himself, provided the mark amount to a writing under cap. 42, Con. Stat. U. C. sec. 7.

When a cheque is made payable to order, it must, of course, as in the case of a bill or a note so payable, be endorsed by the payee before it is presented for payment or transferred.

Delay in presentiug a cheque for payment will not release the drawer, unless actual injury has resulted thereby; as for instance, through the insolvency of the banker. But the holder has the whole of the day, during banking hours, after the cheque is received, in which to present for payment; and if the bank fail within that time, the drawer will be responsible. If a cheque is received after banking hours, the day on which it is received is not reckoned against the holder, and he is allowed, for the purpose of presentment, the whole of the second day after receiving it. Sometimes, before presentment, a cheque passes through several hands, being usually in such case indorsed by each holder as he transfers it. As between the holder and the drawer, the time for presentment is not extended by this circulation; but as between the holder and the person who indorsed last, the holder will be allowed the whole of the next day to present, and the insolvency of the banker within that time will not prevent him from recovering from that indorser, though under the circumstances the drawer may have been released by the delay.

When the holder, at the time of receiving the cheque, is at a distance from the bank at which it is made payable, such distance will be taken into consideration in determining whether the cheque has been presented within a reasonable time.

The omission to give notice of dishonor will not discharge the drawer of a cheque, as it will the drawer of a bill of exchange, unless some special damage is proved to have resulted therefrom. But it will always be prudent to give such notice, and the holder will be safe if he follow the rules relating to bills and notes on this point. It is, however, clearly necessary to give notice of dishonor to the indorsers of the cheque.

If a banker pay a forged cheque, he will have to sustain the loss occasioned by the forgery, unless the carelessness of the drawer has facilitated the deception. In a case, for instance, where the drawer left sufficient space in front of the amount mentioned in the cheque to allow of words being inserted there without interlineation, and words were inserted increasing the sum payable, and the banker paid the cheque as altered, the drawer was made to bear the loss.

If a cheque in a negotiable state be stolen or lost, and presented by the thief or finder, the banker paying it will not be responsible, unless payment has been stopped, or he has knowledge of any circumstances which ought to have put him on his guard.

There is a custom prevalent in England, of writing across the face of a cheque the name of a banker. The cheque is then called a crossed cheque. The effect of this proceeding is to insure the presentment of the cheque through some banker, and thus lessen the chance of presentment being made by a wrongful holder. But the crossing of a cheque with the name of a particular banker, has been held not to prevent

its being presented by another banker, but only to require that it shall be presented by some banker, and not by a private individual. This custom, however, does not seem to have been adopted among business men in Upper Canada.

When interest is not reserved in a bill or note, none is payable till after the instrument falls due. Interest then runs at six per cent. from maturity. When interest is expressly made payable upon the face of the instrument, it carries interest from its date, and not merely from its maturity. Where interest at any higher rate than six per cent. is reserved, the interest runs on at this rate until payment, or until judgment is recovered upon it, when interest at six per cent. runs on the whole amount of principal and interest due at the time of signing judgment, and on the taxed costs of obtaining the judgment.

The law of the Province of Canada respecting the amount of interest that may be received on money is contained in cap. 58, Con. Stat. Can., intituled, "An Act respecting Interest." The effect of this Act, so far as it is of practical importance to us, may be stated as follows: Since the 15th day of August, 1858, all persons, except those especially excepted by the Act, may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which may be agreed upon. The persons who have not this privilege are certain Banks, and those corporations or associations of persons not being Banks, authorized by law, before the 16th day of August, 1858, to lend or borrow money.

As to Banks, it is provided that no Bank incorporated by any act of the Legislature of this Province, or of the late Provinces of Upper and Lower Canada, or by royal charter, or established or thereafter to be established under the Act respecting Banks and Freedom of Banking, is to stipulate for, take, reserve or exact a higher rate of discount or interest than seven per cent. per annum. They may, however, receive and *take in advance* any rate not exceeding seven per cent. And such Banks are allowed to pay any rate of interest whatsoever on money deposited with them.

Any Bank, in discounting at one of its offices paper payable at another, may receive or retain, in addition to the discount, the followiag rates, according to the time the paper has to run, that is to say: under thirty days, one-eighth of one per cent.; thirty days and over, but under sixty days, one-fourth of one per cent.; sixty days and over, but under ninety days, three-eighths of one per cent.; ninety days and over, one-half of one per cent. Where the paper discounted is payable at some place within the Province different from that at which it is discounted, and not at any of the offices of the Bank which discounts it, the additional charge allowed beyond the discount is one-half per cent., no matter what time the paper has to run.

It will be perceived that the Banks are enabled, by the additional charges permitted to be made by them under the Act, to add a considerable per centage to the amount retained by them on a discount. Thus if seven per cent. discount be charged on a note

which has thirty days to run, and the additional per centage of one-fourth per cent. be charged on account of its being payable at another office of the same Bank, an amount equal to three per centum per annum will be added to the discount.

Where the paper is payable at a different office from that at which it is discounted, for the sake of the convenience of the party obtaining the discount, or for any other *bonâ fide* reason, then there can be no doubt that the additional charge will be justified by the statute. But it may and does often happen that where a person obtains large discounts at a particular Bank, he agrees with the Bank, in order to recompense it for the accommodation, to present paper for discount, on which an additional charge may be collected in the manner above mentioned. The illegality of transactions based on an express agreement of this sort, seems to be clear; but when it only appears that the borrower has voluntarily made his paper payable at a place different from that at which it is discounted, in order to induce a Bank to negotiate it for him, this, it seems, will not be of itself sufficient evidence of a usurious contract.

As to corporations, or companies, or associations of persons authorized by law to lend or borrow money, the law may be said to stand as follows: The Act under consideration does not authorize them to stipulate for or retain an unlimited rate of interest, or even the discount or additional charges allowed to be received by the Banks. They can therefore lawfully receive only such interest as they are authorized to receive by some special legislative authority. This

may be more or less than the ordinary rate of six per cent.; but whatever it is, the fact of their having been specially authorized by law to lend or borrow money deprives them of the liberty allowed by the Act to ordinary persons. It is presumed that any corporation or company, or association of persons, which was not, before the 15th day of August, 1858, authorized by law to lend or borrow money, may be considered a person within the third section of the Act, and be allowed to receive an unlimited rate of interest. As to what corporations are to be considered corporations authorized to lend or borrow money within the meaning of the Act, we may refer to the language of Richards, C. J., in the case of *The Corporation of North Gwillimbury* v. *Moore et al.* "We are of opinion that the legislature, in the different enactments on the subject, did not intend to restrict corporations not incorporated for the business of lending money, but only allowed by law to lend money which they might have to invest, from charging more than six or seven per cent. for money. In fact, as to these latter corporations, we are of opinion that the legislature did not intend to impose any greater restrictions on them than on any other persons. The reasons which would make it necessary to limit the amount of interest to be charged by corporations which were engaged in the business of lending money, do not, in our judgment, apply to municipal corporations."

By the statute 27 & 28 Vic., cap. 4, and by 29 Vic., cap. 4, amending the former Act, duties payable by means of stamps, have been imposed on certain

instruments. On every promissory note, draft, or bill of exchange "made, drawn, or accepted in this Province," is imposed a duty according to the following scale:

On every bill of exchange, draft, or promissory note, not exceeding in amount $25, a duty of one cent. If the amount is over $25 and under $50 a duty of two cents. If over $50 and *not more than* $100, a duty of three cents. If over $100 and less than $200 a duty of six cents; and so on, the duty increasing after this point at the rate of three cents for each additional $100 or fractional part of $100.

If the draft or bill of exchange be for $100 or over, and be executed in duplicate, a duty is imposed on each part or duplicate, of two cents for each additional $100 or fraction of $100. If executed in more than two parts, then a duty is payable of one cent on each part instead of two cents.

The later of the two Acts above mentioned, in imposing for the first time a duty on bills, drafts and notes under $100 in amount, does not say anything about a special rate to be paid on bills and drafts when executed in sets. The effect of this omission will, we presume, be that, instead of the reduced rate payable on the various members of the set when the instrument is of an amount equal to or over $100, the same duty will be payable in case of instruments under $100, on each one of the set, as on an independent instrument.

Any interest made payable at the maturity of the instrument is to be reckoned as part of the amount thereof for the purpose of estimating the duty.

"Every bill, draft, order or instrument for the payment of any sum of money by a bill or promissory note, whether such payment be required to be made to the bearer or to order,—every document usually termed a letter of credit, or whereby any person is entitled to have credit with or receive from or draw upon any person for any sum of money,—and every receipt for money, given by any bank or person, which shall entitle the person paying such money, or the bearer of such receipt, to receive the like sum from any third person," is to be deemed to be a bill of exchange or draft chargeable with duty under the Act.

The following instruments are specially exempted from payment of duty:—Every bill, draft or order, drawn by any officer of Her Majesty's commissariat, or by any other officer in Her Majesty's Imperial or Provincial service, in his official capacity, or any acceptance or endorsement by any such officer, on a bill of exchange drawn out of Canada, or any draft of or on any bank, payable to the order of any such officer in his official capacity, or any note payable on demand to bearer, issued by any chartered bank of Canada, or by any bank issuing such note under the Act, cap. 55 Con. Stat. Can., any cheque upon any chartered bank, or licensed banker, or on any savings bank, if the same shall be payable on demand, any post-office money order, and any municipal debenture, or coupon of such debenture."

The duty is to be paid by affixing to the instrument an adhesive stamp, or stamps, of the kind prescribed by the Act, to the value of the duty.

The stamp, or stamps, ought to be affixed, in the case of any promissory note, draft, or bill of exchange made or drawn in Canada by the maker or drawer, and in the case of a draft or bill of exchange drawn out of Canada, by the acceptor thereof, or the first person who endorses it in Canada; and such maker or drawer, acceptor or first endorser, failing to affix such stamp or stamps at the time of making, drawing, accepting or indorsing such instrument, or affixing stamps of insufficient amount, is liable to a penalty of one hundred dollars.

The stamp is to be cancelled by writing or stamping thereon the date at which it is affixed, and the stamp is held *primâ facie* to have been affixed at the date stamped or written thereon. If no date is affixed the stamp will be of no avail.

Any person who pays or becomes the holder of any instrument which ought to have been stamped, and which has not been stamped, or which has not been sufficiently stamped, may give the instrument validity by affixing, at the time of his paying or becoming a party thereto, stamps to double the amount of the duty, or of the deficiency.

Under the Act of 1864 not only was a penalty imposed on persons drawing or making bills, drafts or notes in Canada, or accepting in Canada bills or drafts drawn out of Canada, of a certain amount, without affixing the proper stamps, but by section 9 a penalty was imposed on any person who in Canada should make, draw, accept, indorse, sign, become a party to or pay any promissory note, draft, or bill of exchange *chargeable with duty under*

the Act, before the duty or double duty had been paid, and the instrument could only be rendered valid by the payment of double duty by a *subsequent party*, or by a person *who paid the instrument*. By the Act of 1865, amending the former Act, it is provided that no party or holder shall incur any penalty by reason of the duty not having been paid at the proper time and by the proper parties, provided that at the time the instrument came into his hands, it had affixed to it stamps to the amount of the duty apparently payable on it, that he had no knowledge that they were not affixed at the proper time and by the proper parties, and that he pays such duty as soon as he acquires such knowledge. As to the validity of the instrument, it is provided by the same Act that any holder may pay the double duty and give the instrument validity without becoming a party to the instrument. The amendments thus introduced, it will be seen, provide for the case that may frequently occur of a person taking an instrument apparently regular under the stamp laws, but which, nevertheless, might not have been stamped at the proper time. The hardship of making innocent holders or purchasers responsible for such irregularities is removed by the amendment. Again, in order to enable a person who received an instrument not properly stamped without knowledge of the irregularity, to make the instrument valid he would have been obliged to adopt some such device as indorsing the instrument to some one else, and getting that person to indorse it back to him in order that he might become a party under the wording of

the ninth section. But by the later Act this proceeding is rendered unnecessary.

Under the Act of 1864 the law seems to have stood as follows, as to the manner of cancelling stamps: they might be cancelled by writing some material part of the instrument, or part of the signature of the person whose duty it was to affix the stamp or the initials of that person on them. In the 9th section of the Act, it was strangely provided that in suing for the penalty mentioned in the section, the fact that no part of the signature of the party charged with neglecting to affix the proper stamp was written thereupon should be *primâ facie* evidence that such party did not affix such stamp, as required by the Act. The effect of this provision would seem to have been that although the stamp might have some material part of the instrument written over it, or have the initials of the proper party written upon it, yet if part of that party's signature were not written upon it, the presumption would be that the stamp was not affixed as required by the Act, and witnesses would have to be called to prove the actual circumstance of the affixing of the stamp. But since the first day of October, 1865, all that is necessary is that the proper party shall write or stamp the date of affixing upon the stamp, and the stamp will be held *primâ facie* to have been properly affixed at the date stamped or written thereon.

A bill or note, or other instrument required to be stamped, not duly stamped, is "invalid and of no effect in law or in equity, and the acceptance or pay

ment or protest thereof shall be of no effect." On the authority of the case of *Baxter* v. *Baynes*, 1 U. C. L. J. N. S., p. 148, it would seem that the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact. Whether, supposing this defence not to have been raised by the pleadings, but some plea rendering necessary the proof of the signature to have been put in, the admission of the unstamped or deficiently stamped note as evidence could be objected to at the trial, has not yet been decided. Under the Imperial Act, relating to stamps on bills and notes, this objection can be taken, under the peculiar wording of the Act which says "that unless the paper on which the bill or note be written be stamped with a proper duty or a higher duty, it shall not be pleaded or *given in evidence* in any court, or admitted to be good, useful, or available in law or in equity." But even under this Act, if an unstamped bill is read in evidence before an objection has been taken to it, the objection cannot be afterward taken either at the trial or by motion for a new trial.

If then the English courts, in default of the objection being taken at the proper time under the Imperial Act, feel justified in concluding that the instrument, though not bearing a stamp, is available and valid, it may reasonably be inferred that our courts, by which it has been decided that the objection ought to be taken by plea, will, on the same principle, after the proper opportunity for such objection has passed without being taken advantage of, presume that the instrument has been regularly

stamped, even though the absence of the stamp is presented to its notice on a subsequent occasion, for example, by objection to its admissibility as evidence at the trial.

Where payment of a negotiable instrument is demanded, the person of whom payment is required ought, in order to protect himself against the claims of any person into whose hands it may have fallen, to require the instrument to be given up. Formerly, when the instrument had been lost, the person entitled to demand payment could not enforce payment at law, provided the fact of the loss had been specially pleaded, but Con. Stat. U. C., c. 42, s. 33, provides that when an action at law is brought upon any negotiable instrument which has been lost, the court or a judge of the court in which such action is brought may, upon proper indemnity being given to the defendant against the claims of any other person upon him in respect of such instrument, prevent the defendant from setting up the loss as a defence to the action.

The Statute of Limitations runs on a bill or note payable a certain time after date, from the last day of grace. Thus, if the last day of grace be the 3rd January, 1864, the claim of the holder will be barred at the expiration of the second day of January, 1870. An action cannot be brought on the 3rd January, 1870, the last day of grace being reckoned against the holder, because at some time during that day he could have commenced an action, he will not be allowed any portion of the sixth anniversary, on

account of his not having a right to sue in the earlier portion of the day on which the note fell due.

If a bill or note be made payable on demand, the six years will be reckoned from the date of the instrument, because the holder had a right to sue upon it as soon as it was made, as we have already seen. But if a bill be made payable at sight, the statute runs from the time of presentment; and if a bill or note be payable a certain time after demand or after sight, then it does not commence to run till demand of payment has been made, and the time mentioned, together with the days of grace, has elapsed, after such demand.

But if, at the time the right to sue on the bill or note accrues, the person liable is out of Upper Canada, the holder will have six years from the time of his return to bring an action against him. It must be remembered, however, that if the person to be sued is in Upper Canada at the time the right of action accrues, his subsequent absence will not extend the time for commencing an action. The operation of the statute can be obviated by issuing a writ and keeping it renewed. Formerly, the absence of the creditor from Upper Canada was an excuse for extending the time for bringing his action, but by statute 25 Vic. c. 20, the law has been changed in this respect, and such absence will not prevent the statute from running.

2. *Guaranty and Suretyship.*

A guaranty is a contract by a person to answer for the payment of some debt or the performance of some duty by some other person who is himself in the first instance still liable. The person who contracts to answer for another in this way is called the surety, and the person for whose default he becomes liable is called the principal.

The effect of such a contract is not in itself to render the surety immediately liable to pay or perform anything. The time for payment or performance by the principal must arrive, and his default must be ascertained according to the terms of the contract on which he is liable; and then, when default is made, the surety becomes liable to make it good.

In every case of guaranty where any act has to be done by the creditor or person having the claim against the principal, in order to fix the liability and ascertain the default of the principal, that act must be performed before the surety becomes liable. As for instance, if the contract be to deliver on demand a quantity of goods, the demand is as necessary to bind the surety as it is to ascertain the default of the principal. There is a sort of quasi suretyship, however, which must be carefully distinguished from the contract already defined. If B. goes into A.'s shop with C., and, in order to procure him a credit which he would not otherwise obtain, agrees to pay for goods to be supplied to C., in case C. makes default in payment, this will be a genuine contract of surety-

ship, for C. is still liable to pay for the goods. But if B. were to direct the shopkeeper to send the goods to C., but to charge them to him (B.), there would be no contract of suretyship, and B. would be the principal and only debtor. The distinction between these two contracts is important, in connection with the interpretation of the Statute of Frauds. The fourth section of that statute enacts, that "no action shall be brought whereby to charge any defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This section has been held to apply only to a promise to answer for a debt, default or miscarriage of another, for which that other still continues liable. The former of the two contracts above mentioned falls within the statute, and will require to be evidenced in the manner required by it; but the latter does not, and the contract can be proved without any written evidence. In order to prove contracts falling within this section, there must be some memorandum of the agreement sufficient to show the nature of the promise entered into. It was long ago decided that the memorandum must not only show the character of the promise, but must also show the consideration for that promise. Thus, the words, "I agree to be responsible for C.'s liability to you," although signed by B., would not be a sufficient memorandum.

This decision was based on the meaning of the word "agreement," a memorandum of which, it was considered, should contain not only the promise of the surety, but also the consideration proceeding from the other side, and supporting the promise. A great deal of learning, on the application of this principle, is to be found in the English reports, which has been rendered inapplicable to the law of Upper Canada by a recent Provincial statute (26 Vic. cap. 45), which declares that no promise to answer for another shall be deemed invalid to support an action on it, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document. This enactment, however, leaves the Statute of Frauds in full force as to all the other requisites of a guaranty.

The signature required by the Statute of Frauds is that of the party to be charged, or his agent; so that it is no objection to the memorandum given in evidence, that it is not signed by the party seeking to enforce the contract. Moreover, the signature of the agent will be sufficient to bind the principal; and it is not necessary, in giving proof of the agent's authority, to produce written instructions, or a formal appointment in writing.

It must be remembered, however, that although the memorandum now required in our Courts need not express any consideration for the promise sued upon, nevertheless a consideration for the promise must be proved, as in actions upon other promises. The consideration supporting promises of this sort is generally of a peculiar character. Thus, in the

example above given, where B. becomes surety for C. for the price of goods, although B. does not receive the goods, and may receive nothing from C. for undertaking such a responsibility, there is yet a consideration to support the promise. A. parts with the goods, and suffers a loss or inconvenience, which is sufficient to support the promise. But if, after C. had bought the goods on his own credit, B. had then gone to A. and promised to become responsible for C.'s default, without A.'s suffering any further inconvenience—such as agreeing to give further time for payment, or reducing the amount of his claim, or the like—then B. would not have been liable, even though he had signed a memorandum as required by the statute.

If by the terms of a contract a person makes himself liable for the debt of another by substituting himself for and procuring the release of that other person, then the contract is not within the statute, and need not be evidenced by writing.

When the contract of suretyship has been entered into with the knowledge and consent of the principal, and the surety has been obliged to make good the obligation of the principal, the surety is not supposed to have made a gift of the money to the principal, but has a right to recover from him what he has paid for him, with interest. This is his right to what is called *reimbursement*. As soon as the obligation accrues, or the debt becomes due, the surety may make good the default, and immediately sue for reimbursement. He is not obliged to wait till an action is brought. But on the other hand, he has

no right to accelerate his remedy against the principal debtor by paying the debt before it is due; and if he does so, he will have no right to reimbursement. Nor can he claim anything from the principal until he has actually paid the money; and if by a compromise he settles a claim in full by payment of part, he can only recover what he has actually paid.

If the creditor holds any collateral securities from the debtor, such as mortgages or the promissory notes of third parties, the surety, on payment of the debt, will be entitled to a transfer of such securities for his own benefit. Moreover, by statute 26 Vic. cap. 45, every surety who pays a debt is now entitled to have assigned to him every judgment, specialty, or other security which shall be held by the creditor in respect of such debt, whether such judgment, specialty or other security shall or shall not be deemed at law to be satisfied by the payment of the debt; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, the name of the creditor in any action to obtain from the principal debtor indemnification for his loss; and the payment made by the surety shall not be pleadable in bar of any action or other proceeding by him.

As soon as the debt or obligation becomes due, the creditor may proceed to recover the amount by suing either the principal, or the sureties, or all simultaneously. He is not obliged to sue the principal first. Where sureties are jointly and severally liable, and not merely jointly liable, the creditor may proceed to recover the whole amount from any one surety. The surety

who has been obliged to pay may, as we have seen, bring an action against the principal for reimbursement. When there are several co-sureties, each surety, as between himself and his co-sureties, is presumed, in the absence of any special stipulation, to be liable for an equal proportion of the debt; and any surety who has paid more than his proportion either of the whole debt or of the part which remains due from his principal, may bring an action against each of his co-sureties for a ratable proportion of the excess. This is the surety's right to *contribution*. Thus, if A., B. and C. are co-sureties for a debt of three hundred dollars, and A., on default being made by the principal, pays the three hundred dollars, he can immediately sue B. for one hundred dollars, and C. for one hundred dollars. If he has only been obliged to pay one hundred dollars, and the balance of the debt remains unpaid, he has so far only paid his proportion; but if the principal were to pay the residue, then, as the whole of the possible liability of the three has been ascertained, he may immediately sue B. and C. for thirty-three dollars and thirty-three cents each. In the Common Law Courts A can sue only for the ratable proportion above mentioned; and even if B., for instance, became insolvent, he could not recover any more from C. on that account. But by proceeding in equity, and proving the fact of B.'s insolvency, he could recover the same amount from C. that he could have done if C had been the only co-surety liable with him. And the remedies given by statute 26 Vic. cap. 45, above mentioned, to a surety against his principal, upon payment of the

debt, are extended to co-sureties; thus enabling a surety who has paid the debt to obtain from his co-sureties indemnification for his loss; provided that no co-surety shall be entitled to recover from any other co-surety by the means aforesaid more than the just proportion to which, as between those parties themselves, such last mentioned person shall be justly liable.

The surety, as we have seen, has no right to accelerate his remedy against the principal by paying off the principal's debt before it falls due, and from this restriction arises one of the greatest risks of the surety. While the debt is accruing due, the surety may be aware that the principal is gradually becoming embarrassed, and will be insolvent at the time payment is called for; yet he is not allowed to pay at once the amount which will one day be demanded, and which he may then be obliged to pay without any hope of reimbursement. The law will not allow the creditor, without the consent of the surety, to increase this risk by postponing the day of the maturity of the debt, or by making a binding contract not to sue. If the creditor enters into any such contract without the consent of the surety, the latter is at once discharged from all liability. However, as this result follows, not because such a contract gives an unfair indulgence to the debtor, but because it would postpone the right of the surety to pay, it has been decided that the creditor may, without the consent of the surety, bind himself not to claim the amount of his debt from the principal, if at the same time he expressly reserves his right to pro-

ceed against the surety. The reason of this decision, it is presumed, is that the reservation of the creditor's right to sue the surety is a reservation of the surety's right to pay and sue for reimbursement. If, without such reservation or consent, the creditor releases the principal debtor, the surety will be discharged; but a release of the surety will not discharge the principal.

If any contract be voidable by the principal on the ground of fraud practised upon him by the party contracting with him, the same defence that the principal could have set up is also open to the surety.

If the creditor and principal join in deceiving the surety as to the nature of the liability he is undertaking, or as to any circumstances which might influence him in deciding whether to enter into the contract or not, the surety can set up this misrepresentation as a defence to any action brought against him on his contract. "If, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud."

In entering into a contract of suretyship, persons should be careful, when they intend to become responsible in one isolated transaction merely, not to enter by mistake into what is called a continuing or [illegible] guaranty. The language of the following

guaranties has been considered to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business, not to exceed one hundred pounds." "I undertake to be answerable to the extent of one hundred pounds for any tallow supplied by you to A. B." It is quite possible that many persons should carelessly sign contracts similar to these, without having the remotest intention to become liable for more than one debt of the amount specified; yet it has been clearly held that the surety in such cases might lawfully be called upon to satisfy any debts not exceeding the amount thus specified, which the party on whose behalf the guaranty is given may from time to time contract The following guaranties have, on the other hand, been held to limit the liability of the surety to one solitary transaction: "I hereby undertake to be answerable to K. for the amount of five sacks of flour, to be delivered to W. P., payable in one month." "I hereby agree to be answerable for the payment of fifty pounds for L. L., in case he does not pay for the gin he receives from you." But in all cases it will be better to take the advice of a learned English judge, and, whenever it is is intended to limit the liability to one transaction, to take care to insert in the contract an express stipulation to that effect.

Attempts were at one time made to evade the provisions of the statute requiring guaranties to be in writing, by bringing actions against persons who had made verbal promises on the nature of guaranties without entering into any written contract of gua-

ranty, to recover damages for loss or injury caused by an alleged wilful misrepresentation. In order to remedy this mischief, the statute commonly called Lord Tenterden's Act was passed in England; and similar provisions are to be found in cap. 44, Con. Stat. U. C. sec. 10, which enacts: "No action shall be brought, whereby to charge any person, upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain money, goods or credit thereupon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

3. *Contracts with Common Carriers.*

There is a certain class of persons who do not usually enter into a special agreement for the conveyance of goods, but hold themselves out as ready to transport merchandise or passengers between certain points on certain terms, which they make known to the public by advertisement or otherwise. These are called common carriers; and in consequence of the nature of the offer they make to the public, their duty is to carry the goods of all persons offering to pay their hire, unless, indeed, their conveyances or vessels be full, or the goods are of a kind that he is unaccustomed, or has never undertaken, or is unable to carry. To the class of common carriers belong the proprietors of stages, canal boatmen, barge owners, ferrymen, owners or masters of ships engaged generally in the

transportation of goods for hire, and other persons or companies owning similar instruments of public conveyance. Railway Companies are common carriers with regard to the goods they *profess to convey*, unless the Act constituting them limit their liability. The responsibility incurred by the common carrier is a very heavy one, and renders him, in the absence of express stipulations, responsible for all losses occasioned by any cause except the act of God, such as a tempest, or that of the Queen's enemies, that is to say, of a people or nation at war with Great Britain. Thus, he is liable for a loss occasioned by an accidental fire, or by a robbery. There is this distinction, however, to be observed between common carriers by sea and common carriers by land, that in case of loss by piracy the former are not responsible, whereas in case of robbery on land the carrier is bound to make good the loss. The reason of this is, the greater possibility of collusion in the case of the latter than in that of the former. The common carrier by water has, moreover, always been exempt from responsibility for losses occasioned by the perils and dangers of the sea and of navigation. The responsibility of the owners of sea-going British ships has been lightened, as will be hereafter explained in speaking of contracts of affreightment, by an Imperial statute (17 & 18 Vic. cap. 104), which applies to Canada.

Common carriers have been in the habit, on account of the strictness of the common law in this respect, of stipulating for an extraordinary premium in case of the risk becoming unusual on account of the peculiar character or great value of the goods

carried. This is generally done by advertising in the newspapers or sticking up notices near the offices of the carriers containing a statement of the premium required on certain classes of goods. If goods mentioned in such advertisements or notices are shipped as ordinary goods, and the carrier can prove by reasonably strong evidence that the shipper saw or was aware of this notice, and if the misconduct of the shipper, in so concealing the true value of the goods, led to their loss, by inducing the carrier to be less careful of them, the latter will not be liable. But if such misconduct on the part of the shipper was not conducive to the loss, the carrier will be liable at any rate for the apparent value of the goods at the time of shipping. But these notices only exonerate the carrier from liability for loss or damage occurring without fault on his part; for if he be guilty of wilful misconduct or gross negligence, he is chargeable with the damage occasioned thereby, and his notice is not permitted to limit his responsibility. This was formerly the law in England, as it still is in Upper Canada, but the Imperial Statute 11 Geo. IV. and 1 Wm. IV. cap. 68, has altered it as to England in the case of carriers *by land*. Protection is thereby afforded such carriers against loss or damage occurring to certain goods or classes of goods, enumerated in the statute, exceeding £10 in value, unless the shipper at the time of delivery to the carrier notifies him of their value and nature, and consents to pay an increased rate for their carriage.

A question frequently arises, whether carriers who have received a parcel to be taken to a point beyond

that to which their ordinary means of conveyance extend, are liable as carriers for loss beyond that point, or are to be considered as agents for the purpose of carrying to the end of their tract, and employing fresh agents at its termination to complete the journey. The Courts both in England and Upper Canada seem inclined to consider them as carriers throughout.

With regard to the remuneration to which the common carrier is entitled, it is clear he must carry for a reasonable amount; and if he insists on receiving more before carrying the goods, or before parting with them, an action for money had and received will lie against him for the excess.

The common carrier has the right to demand payment of his charges before commencing the journey; but if he once commences it, he cannot demand payment until the journey is completed. When the journey is over, he can detain the goods carried until his freight is paid, and can at the same time bring an action for its recovery.

4. *Contracts of Affreightment.*

Contracts of affreightment are those contracts which have for their subject matter the conveyance of goods in vessels. They are divided into two classes; contracts made by charter party, and contracts for conveyance of goods in a general ship. The charter party secures for a certain sum a right to occupy the whole or a specific part of a ship; whereas the contract for conveyance in a general

ship only secures safe conveyance for a certain quantity of goods, at a certain rate of freight. Where a merchant charters a certain portion of a ship, he sometimes agrees to put on board a certain quantity of merchandise, and to pay a certain rate of freight upon it. A violation of this agreement, which of course would diminish the total amount of freight to be received by the ship-owner, would subject the merchant to an action for damages.

A charter party generally contains, among other particulars, certain covenants as to the seaworthiness of the vessel, and an enumeration of the perils for losses occasioned by which the ship-owner is not to become responsible. These are, in Upper Canada, generally, "acts of the Queen's enemies, fire, the dangers and accidents of the seas, rivers and navigation, and all other unavoidable dangers and accidents," or to the same effect. As to the covenant for seaworthiness, this is always implied when there is no mention of the matter in the charter party. The meaning of the word "seaworthiness" will be explained hereafter, in the chapter on Insurance. If there is no restriction as to perils in the charter party, the ship-owner is responsible to the same extent as the common carrier; that is to say, he is responsible for all perils, except those occasioned by the act of God, by the Queen's enemies, and the dangers and perils of the sea and of navigation.

However, this their common law liability is usually narrowed by their own express stipulations in the charter party or bill of lading, and has also been qualified, so far as the owners of sea going ships are

concerned, by Imperial Statute 17 & 18 Vic., cap. 104, part IX. of which, it is declared by the statute, shall apply to the whole of Her Majesty's dominions. By sec. 503, one of the sections of part IX., it is provided that no owner of any sea-going ship or share therein shall be liable to make good, to any extent whatever, any loss or damage that may happen without his actual fault or privity, of any goods, merchandise, or other things whatsoever, taken in or put on board any such ship, by reason of any fire happening on board such ship, or of any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board any such ship, by reason of any robbery, embezzlement, or making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipment, inserted in his bills of lading, or otherwise declared in writing to the master or owner, the true nature and value of such articles. By sec. 504, another section of the same part, so far as it relates to goods, it is enacted, that no owner of any sea-going ship or share therein shall be answerable in damages where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board such ship, to an extent beyond the value of his ship, and the freight due or to grow due in respect of it during the voyage which, at the time of the happening of the event, is in prosecution or contracted for. The protection thus afforded is confined to ships recognized as British by the Act.

When the master and owner of a ship engage with separate merchants to convey their goods to the place

of her destination, the contract is said to be for conveyance in a general ship. When the goods of a merchant are put on board a general ship, the master draws out a bill of lading, in something like the following form:

Shipped in good order and condition, by A. B., merchant, on account of C. D., merchant, and consigned to E. F., broker, in and upon the good brigantine Dart, whereof G. H. is master for this present voyage, and now lying at Wyatt's wharf, in the city of Toronto, viz.: 40,000 feet of lumber, being marked and numbered as per margin; to be delivered in the like good order and condition at the port of Oswego (the act of God, the Queen's enemies, fire, and all and every dangers and accidents of the seas, rivers and navigation, of whatsoever nature and kind, excepted); he or they paying freight for said goods at the rate of ——, and shipper's charges.

In witness whereof the master or purser of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the rest to stand void.

Dated Toronto, this 25th day of May, 1865.

Several parts of this document are made out, two and sometimes three of which are given to the shipper. The shipper commonly sends one or two to his consignee, that is, one on board the ship with the goods, one by the post, and one he retains for his own security. The master must also take care to have a part made out for his own use.

The bill of lading operates as a receipt for the goods, and a memorandum of the terms of the contract for their conveyance between the merchant and the ship-owner, and, in the hands of the consignee or his assigns, as an evidence of title to the goods.

One great peculiarity of the bill of lading is, that it is to a certain extent negotiable, like a promissory note or bill of exchange. It is, by the custom of merchants, recognized and sanctioned by the common law, a negotiable instrument; and the indorsement and delivery of it to third parties, who have given credit to such bill of lading, and have bought the goods mentioned therein in ignorance of the state of accounts between the shipper and his immediate purchaser, transfer the property to the indorsee as absolutely and effectually as if the goods themselves had been manually delivered. But although the bill of lading is thus negotiable, its indorsement transfers no more than the property in the goods. It does not transfer the contract between the original parties to it, and therefore the assignee of such an instrument cannot maintain an action founded upon that contract.

There are certain terms used in connection with this subject, such as "primage," "demurrage," "average," "general average," and "salvage," which it may be well to explain. Primage is a small customary payment to the master for his care and trouble. Demurrage is the amount claimed by the ship-owner for damages occasioned by the delay of the shipper. If the shipper agrees to have his goods ready for loading on a certain day, but does not do so, and the vessel is delayed in consequence, the ship-owner can claim demurrage. The shipper will be responsible even though the delay is occasioned by the crowded state of the docks, or by some unforeseen impediment, not at all attributable to his

fault. But the delay must be for the purpose of loading or unloading; and therefore if the ship, after being laden, is obliged to wait in harbor on account of ice or tempestuous weather, the shipper, will of course, not be chargeable. Under the term "average" are included several petty charges, such as towage, beaconage, &c. By "general average" is meant that contribution which the owners of the ship and of the cargo are required to make when any part of either is voluntarily thrown overboard or destroyed, for the purpose of saving the rest. It is to be observed that the loss or sacrifice must be a voluntary one. Thus, in a storm at sea, where part of the cargo is thrown overboard to lighten the vessel, the owner of the part lost is compensated by a general average. But if, for instance, the captain of a vessel, in carrying on sail to avoid capture by an enemy, were to lose a mast or a spar, as the loss was not voluntary, but accidental, there would be no compensation of this sort given, though it would be given if the mast or spar were cut away and abandoned for the preservation of the ship. The general average is ascertained by computing the value of the ship and the cargo, including what is lost, and then calling for contribution from the owners according to the value of their property, not forgetting to charge the owner of the property lost with his share, for otherwise he would be the only one among the owners who suffered no loss.

Salvage is a charge made by persons who have rescued property from the perils of the sea, or the hands of enemies, without having been bound by

any contract or obligation to do so. Whoever thus rescues a ship or goods, is entitled to claim a certain proportion, depending upon the value of the thing saved, the degree of danger of loss, and the amount of labour and skill employed in saving it. It cannot be claimed by any one who is bound by any contract to assist in preserving the thing saved. Thus, the officers or seamen of a ship that is wrecked, cannot claim any reward for saving ship or cargo. The peculiarities of this claim are, firstly, that it is made by persons who volunteer their services; and, secondly, that if their services are ineffectual, they can claim nothing.

Certain circumstances may arise, after parties have entered into a contract for the carrying of goods, that will release them from their engagements. Thus, if hostilities break out between the country to which the ship belongs, and that to which she is bound, or if the exportation of the goods of which the cargo is to consist be prohibited, the contract of affreightment is dissolved.

5. *Bottomry and Respondentia.*

Bottomry is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest on the ship terminating her voyage successfully, and binds or hypothecates the ship for the performance of his contract. If the loan be not upon

the vessel, but on the goods or merchandize laden on board of her, it is called respondentia.

During the course of long voyages it may become necessary to raise money for the purposes of the ship, and this may happen in ports where the ship-owner is unknown. The custom of merchants has sanctioned the use of bottomry and respondentia bonds, by which the vessel or cargo may be hypothecated by the master of the ship under certain circumstances. The circumstances necessary to make such bonds valid are these: the money must be absolutely required for the purpose of enabling the vessel to continue her voyage; there must be no means of raising the money in time, on the credit of the ship-owner. If these conditions are present, the bottomry bond gives to the lender a lien on the vessel, and the respondentia bond a lien on the cargo. If bottomry bonds are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment, because the last loan furnishes the means of preserving the ship, and without it the former lenders would have entirely lost their security. As the repayment of the loan depends upon the safe arrival in port of the ship, this description of loan was always, on account of the unusual risk attending it, exempt from the operation of the Usury laws. This peculiarity, however, has, since the last Provincial Act respecting interest, ceased to be noteworthy

6. *Insurance.*

Insurance is a contract by which one party, in consideration of a premium, agrees to indemnify another party against a particular event. A policy of insurance is the instrument in which this contract is set forth. The party who undertakes to indemnify is called the insurer, and, having subscribed the policy, the underwriter. The party indemnified is called the insured or assured. When the value of the property assured, as between the assured and the underwriter, is expressed on the face of the policy, the policy is called a *valued* policy. When it is not so expressed, but is left to be estimated in case of loss, the policy is called an *open* policy.

The subject matter of insurance is very extensive, since any description of interest may be insured against any species of danger, save only where the contract would be opposed to the common law or to some statute (*e. g.* 9 Anne, cap. 6, sec. 57, which forbids insurance on marrages, births, christenings, and service).

At common law any individual, partnership or corporation, might have become insurers. The business of insurance is mostly carried on by companies, the large capital required for the proper carrying on of such a business placing it out of the reach of single individuals. Any person may, in this Province, be insured, whether he be a British subject or an alien.

The three principal species of insurance are, first, maritime insurance; second, insurance on lives; third, insurance against loss by fire.

I. Maritime Insurance.

Maritime insurance takes place when a merchant gives a premium to others to assure his ship or goods from one port to another. At common law, an interest on the part of the insured in the subject matter of insurance, was not absolutely requisite, and might have been dispensed with by a policy containing the words "interest" or "no interest;" though in the absence of such words it was understood to exist and must have been proved. However, by 19 Geo. II. cap. 37, sec. 1, it is enacted, that "no insurance shall be made by any person, bodies corporate or politic, on any ship belonging to His Majesty or any of his subjects, or any goods, merchandise or effects laden or to be laden on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and that every such assurance shall be void."

The effect of this statute is to require that the assured shall have some interest in the property on which the insurance is effected. There are many sorts of interest that are insurable. For instance, not only may a merchant vessel itself be insured, or a part-owner's share of it, but any interest in it by way of mortgage or hypothecation (as the obligee's interest under a bottomry bond); also goods, or the special property therein that the common carrier has; a lien on goods, or the commission expected to be derived from the sale of goods by one who is not the owner, but only entrusted with the care of them for the purpose of sale. The ship owner may insure the freight

he expects for the carriage of a cargo; or if he is the owner of the goods to be carried, as well as of the vessel, he may insure the extra profit which he would derive from carrying his own goods in his own vessel. But in order to recover on a policy upon freight, the assured must show that but for the intervention of a peril insured against, some freight would have been earned, by showing either that some goods were put on board or that there was some contract for doing so.

The underwriter cannot, by virtue of the interest he acquires in the goods insured, protect himself by reassurance. This re-assurance is rendered illegal by the Imperial act 19 Geo. II. cap. 37, sec. 4, in all except the three following cases, viz., the insolvency, the bankruptcy, or the death of the insurer.

If the voyage insured is one prohibited by law, or the goods are intended for carrying on an illegal commerce, the policy will be unavailable.

The form of marine policy given by Mr. Smith, in his Compendium of Mercantile Law, as that usually adopted by British insurers, has been adopted as the model for those used by the various insurance companies in Upper Canada. This form runs as follows:

In the name of God. Amen.

A. B., as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all, doth make assurance and cause himself and them and every of them to be insured, lost or not lost, at and from ———. Upon any kind of goods and merchandises, and also upon the body tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the ———; whereof is master, under God, for this present voyage, E. T., or

whosoever else shall go for master in the same ship, or by whatsoever other name or names the same ship or the master thereof is as shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship ——, upon the said ship, &c. ——, and so shall continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at ———, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports and places whatsoever —— without prejudice to this insurance. The said ship and goods and merchandises, &c., for so much as concerns the assureds by agreement between the assureds and assurers in this policy are and shall be valued at ———. Touching the adventures and perils which we the assurers are contented to bear, and to take upon us in this voyage: they are of the seas, men of war, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and peoples, of what nation, condition or quality whatsoever, barratry of the masters and mariners, and of all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants and assigns, to sue, labour and travel for, in, and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard-street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the assurers are contented, and do hereby promise and bind

ourselves, each one for his own part, our heirs, executors and goods, to the assureds, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured ——— at and after the rate of ———.

In witness whereof we the assurers have subscribed our names and sums assured in *London*.

N. B.—Corn, fish, salt, fruit, flour and seed, are warranted free from average unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides and skins, are warranted free from average under 5*l.* per cent. And all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded.

The principal parts of the policy are, as may be seen, 1st, the name of the insured or his agent; 2nd, that of the ship; 3rd, the subject matter of insurance; 4th, the voyage insured or duration of policy; 5th, the perils insured against; 6th, the date and subscription; 7th, the memorandum; 8th, the warranties.

Let us consider the more important of these parts in their order, premising, however, that when the insurance is on a voyage from one port to another, without reference to time, as in the above form, the policy is called a voyage policy; but when it is from one fixed period to another, such as from the 1st April to the 20th November, 1865, or for three, six or twelve months, and so forth, the policy is a time policy. Vessels navigating the Canadian lakes are usually insured by policies of the latter class.

The voyage insured.—The voyage must be accurately described, the description comprehending the times and places at which the risk is to begin and

end. The insertion of the words "at and from the ship's loading port," has the effect of making the insurer answerable for any misfortune which may happen while she remains there, as, if she be burnt or lost there, or detained there by an embargo. When these words are used it is implied that the ship is either there at the time or shortly will be there, in default of which the underwriter is discharged; and if she be not there when the policy is made, she must, in order that the risk may attach, arrive there in good physical safety.

A voyage to A., B. and C. means a voyage to all or any of them, with this reserve, that if the ship go to more places than one, she must visit them in the order in which they are mentioned in the policy.

The voyage, as far as the underwriter's risk is concerned, is generally limited to determine when the ship has been moored twenty-four hours "in good safety." The words "good safety" are material; for instance, though she arrive in port and remain there more than twenty-four hours, yet if she arrive a mere wreck, and afterwards founder, she cannot be said to have been moored an instant in good safety, and the underwriter will not be discharged. If the words "good safety" be not used, the risk terminates at the end of the limited time, whatever be the condition of the vessel.

The risk on goods is generally limited to continue until they shall be "discharged and safely landed." This landing must, however, be accomplished with reasonable expedition; a day would be in the nature of a deviation, and would discharge the underwriter.

But, as the policy protects the goods till landed, the underwriter is liable, though the loss happen after a transhipment into shallops, lighters or launches, such transhipment being in the usual course of the voyage. But it is otherwise, if the assured tranship them into another vessel, or send his own lighter and take the goods into his own custody.

The perils insured against.—The perils against which the insurer guarantees are described to be, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and peoples, of what nation, condition or quality whatsoever; barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come, to the hurt or detriment or damage of the said —— or any part thereof." When the words "lost or not lost" are inserted, they render the underwriter liable in respect of loss by any of the above perils, though the ship be lost at the time of insurance, a circumstance which, but for these words, would avoid the policy. It is sometimes the practice to restrain these words by warranting the vessel to be well on a particular day; yet even then, if she were well on any part of that day, though she be lost before the policy be effected, the underwriter will be liable. Indeed, if the assured knew at the time of making the insurance that the ship was lost, that fraud avoids the policy.

Let us now examine the extent of the above words, and see what losses will be covered by them.

Perils of the sea.—These words mean losses occasioned strictly by sea damage, *e. g.*, by stress of weather, winds and waves, lightning and tempest, rocks and sands, &c. A loss occasioned by the ship insured being run down, is one of the perils of the sea; so is a loss of animals occasioned by the agitation of the ship in a storm.

Fire.—How the fire was occasioned is immaterial; whether by a common accident, or lightning, or an act done in duty to the state. But if goods be put on board in a damaged condition, and are in consequence liable to effervesce and generate the fire by which they are consumed, the underwriters are not liable.

Enemies.—This word is used in contra-distinction to "pirates, rovers, thieves," afterwards mentioned, a capture by whom is an act of depredation, whereas one by enemies is an act done *jure belli.*

Pirates, rovers and thieves.—A pirate is one who commits on the high seas those acts of robbery and depredation which if committed on land would have been felonies.

Jettison is a throwing of goods overboard for any just and reasonable cause, as, for example, to prevent them being captured by an enemy.

Arrests, detainments, &c.—One of the most usual species of detainment is an embargo, which is an arrest laid on a ship or merchandise by public authority, or a prohibition of state commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes to exclude them from entering our ports.

Barratry by the master and mariners.—Barratry is derived from an Italian word, which signifies to cheat. In policies it includes every species of fraud or knavery in the master or mariners, by which the owners are injured. Thus, barratry may be committed by a wilful deviation in fraud of the owner, by smuggling, by running away with the ship, by sinking or deserting her, or by delaying the voyage with a criminal intent. If, by reason of these or other similar acts, the subject matter of insurance is detained, lost or forfeited, the insured will be entitled to recover for loss by barratry.

Other perils.—These general words may be useful where the loss, though one against which the insured ought to be indemnified, does not fall within any of the other classes mentioned in the policy. Thus, where the crew of a British ship, believing the ship insured to be an enemy, fired upon her and sunk her, this was held to be a loss by "other perils."

The memorandum at the end of the policy above recited, is inserted to protect the underwriter from liability for small averages, *i. e.*, partial losses, which might be claimed in respect of certain perishable commodities. This memorandum protects the underwriter from making good any partial loss whatever upon the class of articles first enumerated, and any loss under five per cent. on the class secondly specified; unless in either case the loss were incurred in consequence of a general average, or the ship be stranded.

Where a ship takes the ground under any unusual circumstances of time and place, and not in the usual

course of navigation and management, such an event is considered a stranding. When this stranding occurs during the continuance of the risk, the underwriter becomes liable for partial losses, however small, although not occasioned by the stranding.

Warranties.—A warranty in a policy of insurance is a condition or contingency; and unless that be performed, there is not any contract. It is perfectly immaterial for what purpose it was introduced; but, being once inserted, the contract does not exist unless it be *literally* complied with; and in this respect it differs from a representation, which it is sufficient to perform substantially. Warranties are either express, that is, appearing in the body or margin, or at the bottom of the policy, or in some writing which is by reference incorporated with it; or *implied*, that is, understood to exist in every policy, unless expressly negatived. The most usual express warranties are five in number, and refer to,

1st, The time of sailing.—When a ship is warranted to sail on a particular day, that means that she must have all her preparations for her voyage complete, and be completely unmoored, and start upon her voyage on that day. If she be afterwards detained in another part of the same river or territory beyond that day, by stress of weather or an embargo for instance, that will not violate the warranty; but if she is prevented from starting at all on that day by any cause whatever, even by stress of weather, the warranty will be broken. Where the warranty is to *depart* from a particular place, it is necessary

that the vessel should be out of port on the day specified.

2nd, Safety of the ship on a particular day.—When the ship is safe at any time in the day specified, the warranty is complied with.

3rd, To depart with convoy.—This is a warranty usual in time of war. A convoy is a naval force, under the command of a person appointed by the government of the country to which the vessel insured belongs. The meaning of the warranty is, that the vessel shall not only *depart* with convoy, but *keep with it* during the whole voyage, except in cases of absolute impossibility, such as being driven by a tempest to some foreign port, where no convoy can be had.

4th. In war time it is also usual to warrant the subject of insurance to be *neutral property*, which only means that it shall be neutral at the commencement of the risk.

5th, Freedom from seizure in port of discharge.—A clause is sometimes inserted to exempt the underwriter from responsibility in case of *confiscation*, *seizure* or *capture* in port. The word "port" will, it seems, be held to include any place where the vessel was intended to be discharged; but if the vessel, when seized, be neither within the *caput portûs*, nor within that part of the haven where ships usually unload, the underwriter is not discharged by the warranty.

Implied warranties are,

1st, Not to deviate.—A deviation from the proper course and track of the voyage insured, discharges

the underwriter, not *ab initio*, but from the time of the deviation; so that he is liable for any damage which had previously accrued, but is freed from subsequent responsibility. A deviation happens when there is a wilful and unnecessary departure from the due course of the voyage, for any, even the shortest time. Thus, if the master touch at a port for a purpose unconnected with the voyage; or at a port not in the due course of the voyage, though only a few leagues out of the way; or at one at which it is not usual to touch, although the ship must pass it; or stay an unusual time; or if, when there are several tracks, he select one in particular, for a purpose foreign to the voyage, instead of that which is safest and most eligible; all these are deviations. A deviation will be excused by necessity or some imperative obligation, *e. g.*, to take in provisions to save the crew from starving, or to procure repairs for the safety of the ship.

2nd, Seaworthiness.—It is a condition implied in every policy that the ship shall be seaworthy when the voyage commences. This condition does not attach till her sailing; and therefore if she be insured at and from a port, she is protected while in the port, though in want of repairs. The assured is bound then to have her properly equipped with sails and anchors, with a sufficient crew, and a master of competent skill and ability to navigate her when she sails, at the commencement of the voyage; and if she sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board.

3rd, That the assured will use reasonable diligence to guard against the risks covered by the policy.—If a loss happen on account of the assured not being provided with documents according to her national character, this warranty will be violated.

If a loss occurs it will be either total or partial.

Total loss.—A loss may be either total *per se*, or rendered so by abandonment. A total loss of the former description takes place when no part of the subject matter exists in the hands or for the benefit of the assured, or in such a state as to be fit for any useful purpose. Thus, the loss will be total *per se*, not only if the ship insured be consumed by fire, or destroyed by perils of the sea, or by some other means cease to exist in specie, but also in case of seizure, detention, barratry and so forth, if the dominion of the seizors continue. When the loss is not total *per se*, the right to abandon depends on its amount. The general rule is, that the insured may abandon in every case, and claim for a total loss, when, by the occurrence of any of the misfortunes or perils insured against, the subject matter of the insurance is so injured or deteriorated as to render any further dealing with it, in the mode contemplated at the time the policy was effected, worthless.

When the insured are entitled to abandon, and think proper (for they are in no case obliged) to do so, they must give notice of abandonment within a reasonable time, since it would be unjust to allow them to take the chance of making the best of the accident for themselves, and only abandon to the underwriter when they found that did not answer.

The time for abandonment will depend upon, amongst other things, the facilities for giving the notice. Thus, where the ship was surveyed at Kinsale on December 14th, notice of abandonment given in London on January 6th was held too late, the ordinary course of communication being four or five days. The abandonment must be of the whole thing insured, and unconditional. The notice need not be in writing, unless expressly required to be so by the policy. The effect of an abandonment is to divest the property of the thing abandoned out of the insured, and vest it in the insurer. But the insurers, of course, only receive the balance which may remain after deducting the necessary expenses incurred by the insured in the preservation of the property abandoned to them.

Partial loss.—A partial loss is where a part only of the subject matter of insurance meets with an injury. Under some circumstances, a loss which was once total may become partial, as where a ship is captured and subsequently escapes or is recaptured. With respect to the mode in which the sum to be paid by the underwriter on account of a partial loss, is calculated: if the damage was suffered by the ship, and has been repaired by the owner, he will not be allowed the full cost of repairing, but one-third is deducted in consideration of the benefit which he derives from new materials in lieu of old: if by the goods, the mode adopted is to ascertain the difference between the gross proceeds of the goods on their arrival at their destined port, and what would have been their gross proceeds had they not been injured;

and then, as what would have been their gross proceeds if sound is to their gross proceeds when damaged, so is their original value to a fourth quantity; which fourth quantity being subtracted from their original value, will give the sum to be paid by the underwriters. Thus, suppose the original value was $400; that the cargo, had it arrived safe at the end of its voyage, would have fetched $800, but in its damaged state will fetch only $600; then as 800 : 600 : : 400 : to the sum required, which will therefore amount to $300. Subtracting $300 from $400, the original value, we obtain $100, the estimated loss which must be made good by the underwriter. The mode of ascertaining the original value of the goods in the case of an open policy, is to take the invoice price at the loading port, and add to that the premium of insurance and commission, these both being charges to which the insured has actually been put on account of the goods, in order to send them on the voyage. When the policy is a valued one, the parties have themselves agreed on the original value of the goods, and the standard is therefore adopted which they have fixed in the policy.

II. Insurance against fire.

By this contract the insurer, in consideration of a certain sum of money, paid either in gross or at stated intervals, undertakes to indemnify the assured against damage by fire during a limited period of time.

Insurable interest.—Mere wager policies against fire are prohibited by statute 13 Geo. III. cap. 48 sec. 1, under the general words prohibiting insurance

on the lives of persons, "or any other event or events whatever, wherein the persons for whose use such policies shall be made shall have no interest, or by way of gaming or wagering." A mortgagor and a mortgagee of any property may insure it against fire by virtue of their respective interests; also the owner of property for sale under commission, as well as the commission merchant to whom it is intrusted. Where a person is merely interested in the rent of buildings, he may insure that rent from loss by fire.

There is the same distinction in the construction and effect of representations and warranties in fire as in marine insurance.

When a risk is proposed to the insurer, inquiries are made as to the character, materials and situation of the building to be insured, and of those surrounding it, or as to the nature, quality and situation of the goods, as the case may be. The description which constitutes the answers to these inquiries is usually referred to in the policy, and expressly stated therein to be a part of the policy. If stated to be a part of the policy, the description will be considered to be in the nature of an express warranty, and will be interpreted as such. The mere reference to it in the policy will not of itself make it a warranty. There are generally a large number of conditions and stipulations endorsed on the back of the policy, and if these are referred to as part of the policy, they will be construed as warranties.

A misrepresentation or concealment of material facts is as fatal to this as to any other contract of insurance. "In all insurances, whether on ships,

houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the insured; and the proper question is, whether any particular circumstance was in fact material, not whether the party believed it to be so."

It is necessary to be extremely accurate in describing the nature of the property intended to be insured, in order that it may not fall without the scope of the policy. An insurance on "household furniture, linen and wearing apparel," will not include linen drapery bought on speculation; nor will an insurance on the "interest in an inn" include the profits of the publican's trade. But though the most appropriate phrase be not employed, yet if the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material.

Special conditions.—Among the special conditions inserted in policies, a common one is that prohibiting the use of camphene. This has been held, in a recent American case, to mean that it shall not be used for lighting purposes; and the use of it in a printing establishment, for the purpose of cleaning type, has, accordingly, been considered not to be a breach of this condition.

It is also usually stipulated that in case of a subsequent insurance being effected, without notice being given to the first insurers, or without their consent being obtained, the former policy shall become void. The object of this is to prevent the assured being induced, by excessive insurance, to become negligent of his property, or even being tempted to destroy it.

Another stipulation is, that the assured, at the time of effecting an insurance, shall give notice to the underwriters of any previous insurance on the same property.

In the absence of any special conditions, the insurer is obliged to make good such losses as arise from fire caused by accident, by lightning, or even negligence. As to losses caused by lightning, they must be the result of a conflagration produced thereby; and the destruction of a building by the concussion caused by lightning, will not be within the risks covered by the policy.

Liability of several insurers on the same property. Where there are several insurances on the same property, the liability of the insurers is somewhat like that of sureties. For instance, in the case of a partial loss, any one of the insurers is liable to be called upon for the whole amount thereof if his policy be sufficient to cover it, and can then sue the other insurers, whether prior or subsequent, for contribution. However, the necessity for this circuitous mode of procedure is sometimes obviated by a clause inserted in the policy, that if another insurance is effected, and a loss occurs, the insured shall not receive on this policy any greater proportion of the damage sustained than the amount then insured shall bear to the whole amount insured upon the same property.

Hazardous and extra-hazardous goods. — When there is an insurance upon goods, there is generally a list of goods appended to the policy, classified under the heads of "hazardous" and "extra-hazardous."

One effect of this classification is to throw all goods not specially named in the list into the class of goods which are not hazardous. There is also a stipulation in policies upon houses, that hazardous and extra-hazardous goods shall not be stored or kept on the premises. This condition has been held not to be violated by a mere casual deposit of the articles, nor by their temporary introduction for the purpose of making repairs.

Assignment of policy.—It is necessary that the insured should have an interest in the property protected, and in case of loss he will only be able, as we have seen, to recover to the extent of that interest; and there is this peculiarity incidental to the contract of insurance against fire, viz., that it is not assignable, except with the consent of the insurer; so that if the insurer sells the property, and parts with all his interest therein before the loss happens, there is an end of the policy, unless it is assigned to the purchaser with the assent of the insurer. After the loss occurs, however, the liability of the insurers is fixed, and the claim of the assured against them may be sold and transferred like any debt, without the consent of the insurers; and even where the policy contains a clause avoiding it in case of assignment without consent, it has been held that such clause has no application to an assignment made after the loss has occurred.

Loss, and proceedings thereon.—The fire policy is usually an open one. It provides that the insurers are to make good the loss or damage, to be estimated according to the actual value of the property at the

time the loss occurred. It is, however, allowable for the parties to fix a value upon the property beforehand, and they will then be bound by such valuation. Thus, if 200 hogsheads of sugar are valued at the time of assurance at $20,000, and 100 are burned, the insurers are bound to pay $10,000, if that sum does not exceed the amount of insurance. The distinction, as to adjustment or loss, between fire and marine insurances, is well laid down in an American case (*Trull* v. *The Roxbury Mutual Fire Insurance Company*, 3 Cushing, 263, 267, 268): "In fire policies the assured recover the whole loss, if within the amount insured, without regard to the proportion between the amount insured and the value of the property at risk; whereas in marine policies, the insurer pays only such a proportion of the actual loss as the sum insured bears to the property at risk. For instance, if on fire policies the sum insured be $2000 on property worth $10,000, and the assured sustains an actual loss on the whole, he recovers the whole $2000. But in a like case on a marine policy, he would recover one-fifth only, or $400, being the proportion which the sum insured bears to the value at risk, the assured himself bearing the other four-fifths of the risk." In fire insurance there is no such thing as abandonment, unless with the express consent of the insurer. It is usual, moreover, in fire policies, to provide that the insurers may make good the loss either by cash payment or by repairs and restitution.

In order to deter evil-disposed persons from wilfully setting their own premises on fire, for the pur-

pose of obtaining the insurance money, the Imperial statute 14 Geo. III. cap. 78, which would seem to be in force in Upper Canada, enables the offices, at the request of any person interested in a building burnt down or damaged, or upon any suspicion of fraud, to cause the insurance money to be laid out in repairs, unless the party insured, within sixty days after his claim has been adjusted, gives security that the money shall be so expended, or unless the money be at that time disposed of to the satisfaction of all parties.

III. Insurance upon lives.

Insurance upon a life is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity, on the death of the person whose life is insured. If the insurance be for the whole life, he undertakes to make the payment whenever the death happens; if otherwise, he undertakes to make it in case the death should happen within a certain period, for which period the insurance is said to be made.

Insurable interests. — Insurance upon lives in which the assured has no interest, or which are made by way of gaming or wagering, are declared void by the Imperial Statute 14 Geo. III. cap. 48. Every man, however, is considered to have a sufficient interest in his own life to enable him to insure it. A creditor has an insurable interest in the life of his debtor to the extent of the debt, and a trustee may insure in respect of the interest of which he is

trustee. When a life policy has been assigned, it is not necessary that the assignee should have had any interest, or have paid any consideration for the assignment, for he stands upon the rights of the party who effected the insurance, and the statute 14 Geo. III. cap. 48, only applies to the original parties, not to the assignees.

Insurances under 29 *Vic. cap.* 17.—Until recently, where a person in insolvent circumstances insured his life, or kept up an insurance thereupon in favour of his wife or children, it was considered that the withdrawal by him from his estate of the funds necessary to pay the premiums on such insurance was a fraud upon creditors, and that the creditors could, in case of the debtor's death, lay claim to a sufficient portion of the insurance money to cover the amount of the premiums so improperly paid in fraud of their rights. The legislature of this Province have, however, by the above mentioned Act, deprived creditors of any such right, by providing, (in sec. 5,) that upon the death of the person whose life is insured by any policy made or endorsed under the Act, the insurance money due upon the policy shall be payable *according to the terms of the policy*, free from the claims of any creditor or creditors whomsoever.

It is to be noted, that in order that the policy may be within the protection of the Act, the premiums must be payable by *annual, quarterly*, or *monthly* payments (sec. 2).

Special conditions.—If there be no special condition in the policy, the insurer is liable to all risks; but it is usually stipulated that the policy shall be

void if the assured die upon the seas, or travel beyond certain limits, or die by suicide or by the hands of justice, or be at the time of the insurance afflicted with any disease tending to shorten life. The leaning of the English Courts seems to be, that whether or not the words "by suicide," or the words "by his own hands," are used, any act of self-destruction by the assured will avoid the policy, and it is immaterial whether he was at the time sane or not.

Fraud and misrepresentation.—Any fraudulent concealment or misrepresentation, or non-communication of material facts known to the assured, will avoid the policy. It is the duty of the assured to disclose all material facts within his knowledge; and if the fact suppressed be material, it matters not whether the party did or did not believe it to be so, its materiality being a question for the jury. Where one person insures the life of another, the party whose life is insured, if applied to for information, is, in giving it, impliedly the agent of the party insured, who is therefore bound by his statements, and must suffer if they are false, though he himself was not acquainted with the life insured.

7. *Contracts of Apprenticeship, and of Hiring and Service.*

The contract of apprenticeship is a bargain for instruction, to be bestowed by one person on another, who in return agrees to give up his whole time and services to his instructor, and very frequently also to bestow upon him a pecuniary recompense. The con-

tract is usually effected by deed, that formality being required by Statute 5 Eliz. cap. 4. By the Provincial Act respecting Master and Servant (Con. Stat. U. C. cap. 75, sec. 2), the duration of the contract is restricted to nine years at the longest. By the common law the master is allowed to administer, in case of misconduct, such reasonable corporal punishment to his apprentice as a parent may give to his child, or a schoolmaster to his pupil. The Act respecting Apprentices and Minors (Con. Stat U. C. cap. 76) contains some important provisions and regulations respecting the contract of apprentice-ship, and the rights and remedies of master and apprentice against each other:

The first section of this Act provides that when a minor, over the age of sixteen years, who has no parent or legal guardian, or who does not reside with his parent or guardian, enters into an engagement, written or verbal, to perform any service or work, he shall be liable upon the same, and shall have the benefit thereof, as if he had been of legal age.

Section 2 provides that a parent, guardian or other person having the care or charge of a minor under the age of fourteen years, may, with the consent of the minor, put and bind him as an apprentice, by indenture, to any master-mechanic, farmer or other person carrying on a trade or calling, for a term not to extend beyond the minority of the apprentice.

Section 3 provides that when the father of an infant child abandons and leaves the child with the mother, the mother, with the approbation of two justices of the peace, may bind the child as an apprentice to any person mentioned in the last sec-

tion, until the child attains the age of twenty-one years in the case of a male, and eighteen in the case of a female; and an indenture to that effect, under the hand and seal of the mother, and countersigned by such justices, shall be valid; but no child having attained the age of fourteen years shall be so apprenticed unless he or she consents.

Section 4 provides for the apprenticeship of orphans or minors, who have been deserted by their parents or guardians.

Section 5 provides that if the master of an apprentice dies, the apprentice shall by act of law be transferred to the person, if any, who continues the establishment of the deceased; and such person shall hold the apprentice upon the same terms as the deceased, if alive, would have done.

Section 6 provides that a master may transfer his apprentice to any person who is competent to receive or take an apprentice, and who carries on the same kind of business.

The consent of the apprentice to the assignment is not here mentioned, and this section seems to introduce a change into the common law, according to which an apprentice could not be assigned without his consent.

For refusing the apprentice necessary provisions, or for misusage, cruelty or ill-treatment, the master may be fined by any justice, mayor or police magistrate; and for disobedience or other improper conduct, the apprentice may be imprisoned in the common gaol or house of correction for not more than one month (secs. 9 & 10).

Any person knowingly harboring or employing an absconding apprentice, becomes liable to pay the full value of the apprentice's labour (sec. 14).

In the cases provided for by the above mentioned sections 2, 3 & 4, an instrument under seal seems to be required; but section 1 seems to permit a minor, under the circumstances therein mentioned, to enter into an engagement to perform any service or work, which, whether written or verbal, shall be binding on him. This section does not seem to refer to contracts of apprenticeship, but to contracts for the performance of any service or labour; and therefore, notwithstanding the wording of this section, it is probably still necessary in all cases that contracts of apprenticeship should be by indenture under seal.

A great part of the law respecting the relation of master and servant has already been treated of under the head of "Principal and Agent;" for every servant is, in executing the duties required from him by his contract of service, his master's agent. A few remarks on the contract by which this relation is created, and an account of the changes in the law introduced by Con. Stat. U. C., cap. 75, intituled, "An Act respecting Master and Servant," are therefore all that is here necessary.

When the hiring is under a special agreement, the terms of that agreement must of course be observed. If there be no special agreement, but the hiring is a general one, without mention of time, it is considered to be for a year certain. If the servant continue in employment beyond that year, a contract for a second year is implied, and so on. Indeed in case of menial

or domestic servants, the contract is by general custom dissoluble by a month's warning, or payment of a month's wages. And though a hiring in general words is *primâ facie* presumed to be for a year, even though the master and servant may have thought that they could separate within the year; and though the circumstance of the servant's leaving in the middle of a year, or having previously served for a shorter time than a year, will not prevent the usual interpretation from taking place; yet this presumption, arising from the use of general words, is capable of being rebutted. Thus, a general hiring at weekly wages is but a weekly hiring, if there be no other circumstance whence the duration of the contract can be collected, *e. g.*, a hiring at *so much per week*, "for so long a time as the master shall want a servant," or "for so long a time as the master and servant shall agree," are weekly hirings. But, if there be any circumstance to show that a yearly hiring was intended, a reservation of wages payable at shorter intervals will not control it; as, where the contract was to serve "at the rate of four shillings a week," the parties having liberty to part at a month's notice from either, this was held to be a hiring for a year; for the mention of a month showed that the stipulation for a weekly payment of wages was not intended to limit the duration of the contract. But an indefinite hiring by piece work, or a hiring to do a certain quantity of work, cannot be considered a yearly hiring.

It follows from what is above stated, that if a master dismiss his servant (hired generally) without

cause, the latter will have a right to wages up to the expiration of the year; while, on the other hand, if the servant quit his master causelessly, he will be entitled to no wages: nor will he be so entitled if dismissed before the expiration of his term of service for misconduct.

The master will be justified in taking this step by any exhibition of moral turpitude on the part of the servant, *e. g.*, an assault on a maid servant, or the persuasion of an apprentice to elope; by a refusal to obey his lawful orders, or the servant's unwarrantable absence from his duty, even though involuntary; as, if he subject himself to imprisonment. Though it is otherwise if the absence be warrantable, *e. g.*, for the purpose of having a severe hurt remedied. And a mere temporary absence without leave, involving no immoral purpose, appears not to be a sufficient ground for his dismissal; especially if the master's business be not seriously impeded. When a clerk claimed to be a partner, and to transact business as such, his master was held justified in immediately dismissing him from his service.

As it would be found expensive and oppressive if disputes between master and servant were always to be settled by means of an action at law, summary jurisdiction was at an early period given in England to justices of the peace, to adjudicate upon certain matters of dispute between masters and servants. The statute which grants and regulates this summary jurisdiction of magistrates in Upper Canada, is cap. 75, Con. Stat. U. C., intituled, "An Act respecting Master and Servant."

By section 3 of that Act it is provided, that all agreements or bargains, verbal or written, between masters and journeyman or skilled labourers in any trade, calling or craft, or between masters and servants or labourers, for the performance of any duties or service of whatsoever nature, shall, whether the performance has been entered into or not, be binding on each party for the due fulfilment thereof; but a verbal agreement shall not exceed the term of one year.

The fourth section of the Statute of Frauds enacts, amongst other things, that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action is brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Section 3 of the Act above mentioned seems to provide for cases of agreement not exceeding the term of one year, but which are to commence at a future period, and would therefore be within the provisions of the fourth section of the Statute of Frauds.

It will be noted that a contract for service which is not to be performed within the year must, according to the decisions, be evidenced by a writing or writings, in which must appear not only the promise to serve, but the consideration for the promise.

By section 4 it is enacted, that if, after any such engagement as is mentioned in section 3 is entered

into, *and during the period of such engagement*, whether such employment has been commenced or not, the person who thereby undertook to perform any service or work, refuses to go to work, or (without permission or discharge) leaves the employ of the party whom he has engaged to serve, or refuses to obey the lawful commands of the person under whose direction such services are to be performed, or neglects the service or injures the property of his employer, the offender shall (upon the complaint of such employer or any person in charge under him) be liable to punishment for such offence, as prescribed by the Act.

Section 5 renders tavern-keepers and other persons liable to punishment for inducing servants to confederate for demanding extravagant or high wages; and section 6 provides that no tavern-keeper or boarding-house-keeper shall keep labourers' wearing apparel in pledge for more than six dollars.

Section 7 provides that any one or more justices of the peace may receive the complaints, on oath, of parties complaining of any contravention of the preceding sections of the Act, and may cause all parties concerned to appear before him or them, and shall hear and determine the complaint in a summary and expeditious manner, and punish parties found guilty of the offence alleged, by fine or imprisonment, allowing such costs as may be legal and just.

On the peculiar wording of section 4, "and during the period of such engagement," it was decided that all complaints under this section must be brought before the term of the engagement had expired; and

the words contained in the seventh section, "may receive the complaint, upon oath, of parties complaining," gave rise to a doubt whether the magistrate could, in his discretion, examine the defendant on oath. Accordingly, the Act 29 Vic., cap. 33, was passed, by the first section of which the jurisdiction of magistrates is extended to complaints brought within one month after the termination of the engagement for service; and by section 2 magistrates are required to take the evidence of the defendant, if tendered, as well as that of the complainant. A summary remedy is also given by section 12 of the Act respecting Master and Servant, to the servant or labourer against his master, in case of misusage, refusal of necessary provisions, cruelty, ill-treatment, or non-payment of wages.

It is to be observed that the punishment imposed upon servants and tavern-keepers for offences against the provisions of sections 4 and 5 of the Act respectively, is a fine or imprisonment; and where the fine is not paid, the defendant may be imprisoned. But section 12, under which the Master may be directed to pay wages and costs, only empowers the magistrate to issue a distress in default of payment, but not to imprison.

It is not deemed necessary to devote a section to the subject of contracts with seamen, as there is no special legislation affecting mariners navigating the Canadian lakes. If any such mariner or sailor has a claim for wages, he may enforce it in Upper Canada under the Act respecting Master and Servant, or bring an action to recover the wages in the ordinary

courts. Disputes between master mariners and their seamen may in general be settled under the provisions of the above mentioned Act, as the relation of master and servant has been held to exist between such persons.

8. *Contracts of Sale.*

A sale is a transmutation of property from one man to another, in consideration of a money price. It differs from barter or exchange in this respect, that exchange is, correctly speaking, a transmutation of property from one man to another for a consideration not given in money, but in some other sort of commodity.

Where a man has in himself the property in goods, the general rule is that he may dispose of them by sale to whomsoever and however he pleases; provided that the circumstances of such disposal are not such as to bring it within the scope of section 18 of the Act for the relief of Insolvent Debtors, or that of the Insolvent Acts of 1861 and 1865; and provided that judgment has not been obtained against him, and the writ of execution actually delivered to the sheriff, for then the goods are bound to answer the debt from the time of the delivery of the writ to the sheriff. Even in this latter case, as the property remains in him, he may dispose of them subject to the sheriff's right to seize. By the law of England, sales of goods made in certain privileged places in England called markets overt, by persons who have no property in the goods, but only the possession of them, confer a

good title on the purchaser; but it seems to be generally considered that the law of market overt does not apply to this Province, and consequently a sale of goods by a person who has no right to sell is in no case valid against the rightful owner. And a person whose goods have been stolen may recover them or their value by action from an innocent vendee, though he has taken no steps to prosecute the thief.

A sale of goods must be either by deed or parol. When the sale is made by deed, the instrument is called a bill of sale, and the property in the goods passes by the delivery of the instrument out of the vendor into the vendee. Other writings, not under seal, do not of themselves convey the property, but are merely evidence of parol sales and contracts of sale, by virtue of which the property passes.

By Imperial Statute 29 Car. II. cap. 3, commonly called the Statute of Frauds, which is in force in Upper Canada, and by cap. 44, Con. Stat. U. C., certain contracts for the sale of goods are required to be evidenced by writing. Before we come to them it may be well to point out what was necessary, before these statutes came into force, to effect a valid sale of goods. By the common law, if A made an offer to B to pay him a certain price for his goods, and B accepted his offer unconditionally, the bargain was complete; and A, if he tendered the stipulated price, might, on B's refusal to deliver the goods, have brought an action of trover for them. In the same way, if A refused to pay the price on the goods being offered to him, B might have brought an action against A for the price. But if A and B separated without

further words, after concluding a bargain, which, like this, contemplated a present and immediate completion of the sale, and a transfer of the goods and the price respectively, such separation would have been considered as equivalent to mutual consent to rescind the contract. This, of course, would not have been the case if anything were given in part payment, or part of the goods were delivered by way of earnest: nor would any such inference have been drawn from their separation if the bargain was not by its terms intended to be performed at once, but at some future time.

Thus the parties were, according to the common law, personally bound by their contract to each other as soon as words of agreement had passed between them.

Such was the common law respecting all sales of personal property, and such is still the law respecting sales of goods under the value of £10 sterling ($48.60), with this addition, that, by the fourth section of the Statute of Frauds, no action can be maintained on any agreement for the sale of them that is not to be performed within the space of one year from the making thereof, unless the agreement be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It has been decided, however, that an agreement is valid though not in writing, if it possibly could be performed within the year.

With respect to contracts for the sale of goods of the value of £10 sterling and upwards, they, besides being within the section of the Statute of Frauds

just commented upon, are also governed by the seventeenth section, which enacts that no contract for the sale of any goods, wares and merchandise, for the price of £10 [sterling] or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. We will consider one by one the parts of this important section.

No contract for the sale of any goods, wares and merchandises. — A distinction was formerly taken between cases in which the thing contracted for was in existence and capable of delivery at the time of the contract, and cases in which it was necessary that something should be done in order to render it capable of delivery. The former cases were universally allowed to be within the Act; but the decisions on the question whether the latter were so, were not very consistent. However, by sec. 11, cap. 44, Con. Stat. U. C., following Imperial statute 9 Geo. IV. cap. 14, sec. 7, it is enacted that the seventeenth section of the Statute of Frauds shall extend to all contracts for the sale of goods to the value of $40 and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

It is to be observed that while, in order that the contract for the sale of goods may come within the seventeenth section of the Statute of Frauds, it is necessary that the goods which are the subject of the contract should be of the value of £10 sterling or upwards, sec. 11, cap. 44, Con. Stat. U. C., applies to contracts for the sale of goods of the value of $10 and upwards. A contract for the sale of stock, or shares in a canal company, or similar public undertaking, is not within the seventeenth section of the Statute of Frauds, nor is a contract to procure goods and carry them. Sales by auction, however, are within this section.

Except the buyer shall accept part of the goods so sold, and actually receive the same.—There are two sorts of acceptance recognized by the Courts under this section, an *actual* and a *constructive* acceptance. An actual delivery of the whole of the goods into the possession of the purchaser, is easily recognized when it occurs; but in many cases, where the nature, weight, size or situation of the goods would render the actual delivery inconvenient, a symbolical delivery and acceptance has been allowed. For instance, the delivery of the key of the warehouse in which the goods are lodged, or of some other of the *indicia* of property, such as the bill of lading, has been held a sufficient delivery. So also a sufficient delivery may be in some cases inferred from the vendee's dealing, and the vendor's suffering him to deal, with goods as his own property. A transfer of a horse, by order of the vendee, from the vendor's sale stable into another of his stables, has been held sufficient. Where a

hogshead of wine in the warehouse of the London Dock Company was verbally sold, and a delivery order given to the vendee, the acceptance of the delivery order by the vendee was held to be no acceptance of the wine, and to be incomplete until the London Dock Company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee. But where the acceptance of *part* of the goods only is relied on, it seems that the acceptance of a sample which is a part of the goods intended to be sold, and diminishes by an amount, however small, the quantity of the goods remaining to be delivered, is a sufficient acceptance under the statute to bind the bargain as to the whole.

Where two or more classes of goods are jointly ordered, acceptance of one is an acceptance of the other. Thus, where a person goes into a shop and buys various different articles at the same time, such a person does not make as many different contracts as there are articles purchased, but one contract for the whole; and the acceptance and receipt of any one of the articles so purchased, will take the contract as to all of them out of the operation of the statute. But where growing crops were put up to auction in several lots, and separately knocked down to a bidder at separate prices, it was held that there was a distinct contract of sale as to each lot.

It is decided that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties, which may amount to an acceptance.

Or give something in earnest to bind the bargain, or in part payment.—If a purchaser of goods draw the edge of a shilling over the hand of the vendor, and return the money into his own pocket, which in the north of England is called "striking a bargain," that will not be sufficient. A contemporaneous agreement that a smaller debt due from the vendor shall go in part payment of the goods when delivered, is not a part payment within the provision.

Or that some note or memorandum of the bargain be made.—The terms of the bargain may be collected from various instruments, and need not necessarily be contained in one. Thus, a series of letters relating to a bargain, and terminated by a letter expressing the assent of one of the parties to the contract, would be sufficient evidence against that party to satisfy the statute. The contract must stand as it appears in the written contract, as no alteration can be made in it by word of mouth, though it may be altogether rescinded by a parol agreement to that effect.

And signed by the parties to be charged.—The appearance of the vendor's name, printed in a bill of parcels, is, it seems, a sufficient signature to bind him. If the note commences with "I, A. B., agree to sell," that is a sufficient signature by A. B., though it is otherwise where a signature at the end of the instrument was manifestly intended in order to its completion; as, where it concluded "as witness our hands." And as the statute only requires the signature of the parties to be charged, a memorandum signed by the vendor has been held sufficient to bind

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him, though it was not signed by the vendee, against whom, therefore, the contract could not have been enforced.

Or their agents thereunto lawfully authorized.—The authority need not be in writing, and a subsequent recognition by the principal is sufficient evidence of its having been given. But it has been held that one of the contracting parties cannot be the agent of the other for this purpose. An auctioneer, however, is in general considered, as the agent of both parties, to bind them by signing for them; and if the auctioneer, or auctioneer's clerk, write down the purchaser's name in the sale-book, opposite the lot for which he is the highest bidder, that is a sufficient signature within the Act.

But the contract has also, in some cases, the further effect, besides that of binding the parties, of transferring the property in the goods to the person purchasing, and that in the price to the person selling; so that the goods, though in the possession of the vendor, are nevertheless at the risk of the purchaser. This effect takes place where a contract is made with a view to immediate completion, and the price of the goods is tendered, or in whole or in part paid, or the goods, on the other hand, are offered to the purchaser, or a part, even the smallest portion, delivered to him. Again, where a contract is made, the completion of which is postponed by agreement till a future day, and the goods purchased are in the possession of the vendor, and nothing is required to be done in the way of preparation or of selecting them, or setting them apart before delivery to the

purchaser, the goods are, immediately after the making of the contract, held by the vendor at the risk of the purchaser; but in cases where the property in the goods has passed, the vendor may still have a right to retain the goods by virtue of his lien for the purchase money. If the bargain is for ready money, the vendor is not obliged to part with the goods till the price is paid. If, however, credit is given for the price, and the vendor has contracted to deliver the goods either immediately or at some day before the expiration of the credit, he has no right to detain the goods. A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or by the giving of security; and if security is agreed to be given, the lien will exist until the security is given.

The vendor must deliver the goods as soon as the vendee has performed all the conditions precedent on his part, and may, if he refuse to do so, be sued either specially for non-performance of his contract, or in trover for the goods themselves. If it be generally mentioned that the vendor shall send the goods, that means within a reasonable time; and what time is, under the circumstances, reasonable, is a question of evidence. If a particular day for delivery be specified, an actual tender of the goods to the purchaser, *if he be at his warehouse*, at any hour of the day which will allow him before midnight to examine, weigh and receive them, will be good, in the absence of any special custom; but the purchaser is not bound to remain at his warehouse after a reasonable time before sunset to allow of the examination. In

the absence of special stipulation, the condition precedent on the vendee's part is readiness to pay the price; and of this readiness to pay, a demand of the goods is *primâ facie* evidence. But where the goods are sold on credit, the vendor may be compelled to deliver up the goods without payment or tender of the price. And where goods are not sold on credit, and the vendor, without insisting on payment beforehand, has done that which amounts to a delivery of the goods, *e. g.*, has made a symbolical transfer of property which by its nature is unfit to be delivered otherwise—as, for instance, by giving up to the vendee the key of the warehouse where it is deposited, or giving a delivery order to the wharfinger in whose possession it is, to which order the wharfinger has signified his assent, or where he has done any act which would determine his right to stop in transitu—he cannot take advantage of the circumstance that the goods are not gone entirely beyond his control, to retract his act of delivery, and detain the goods until the price is paid.

If an article is bespoken to answer a particular purpose, a warranty is implied that it will answer such purpose. In every contract to supply manufactured goods, a warranty is implied that they shall be of a merchantable quality. But where goods are sold by sample, though the vendor is bound by his express contract to furnish something corresponding with the sample, no warranty as to their being merchantable is implied. Every affirmation at the time of sale of personal chattels is an *express warranty*, provided it appear to have been so intended; but a warranty

after the sale is void, for want of consideration. Where the sale is by a written contract, however, no oral allegation can possibly operate as a warranty, for the writing is the only evidence of the contract. The vendee of a specific chattel, delivered with a warranty, has no right to return it, though he may use the breach of that warranty as evidence in reduction of the vendor's claim for compensation, or may bring an action thereon against him. But if an article is ordered from a manufacturer, who engages that it shall be of a certain quality, or fit for a certain purpose, and the article is never completely accepted by the party ordering it, the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give the article a fair trial. And where goods are purchased by sample, the purchaser may return them, if not in accordance with the sample, within a reasonable time for examination and comparison. It is to be observed, moreover, that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and both parties must be held to have understood that the warranty was made, saving those manifest defects contemplated by the parties.

If the vendee refuse to accept the goods, the vendor, having performed all conditions precedent on his part, may sue him either specially upon his contract, or, if the property have passed to the vendee, for goods bargained and sold; in which latter form of action he will recover his entire price, while in the special form he will recover but the amount of damage

sustained by him. If the goods are to be delivered at a stipulated place, the vendor, before suing for the price, must tender them there, unless, indeed, the vendee have refused or put it out of his own power to complete the contract. If there be no stipulated place, it is the vendee's business to fetch them. Where the goods are to be forwarded by a carrier, the vendor must enter them so that the carrier may be responsible for their value if lost.

As fraud vitiates every contract, it will be a sufficient excuse for the vendee's non-performance of his part, that the vendor was guilty of fraud, as by employing puffers at an auction to enhance the price, without giving notice of his intention to do so; though there will be a difference if the intent were not to enhance the price generally, but only to prevent the goods from going at an under value. And it is clear that an employment of any one to bid vitiates a sale advertised to be "without reserve." Fraud in one party gives the other party a right to rescind the contract; but if a vendee, after discovering the imposition, choose to lie by and treat the property as his own, he will be considered as having elected to confirm the transaction, and that even though he has discovered a new incident in the fraud, for that does not give him a new right to rescind, but merely strengthens the evidence of the vendor's dishonesty.

Either party may of course excuse himself from the performance of his contract by showing that it is illegal: in other words, any illegality either in the promise sought to be enforced, or in the consideration supporting the promise, is a ground for avoiding the

contract. But where both the consideration and the matter to be performed are legal, the plaintiff will not be prevented from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part. Thus, a rectifier in England having, contrary to statute 6 Geo. IV. cap. 8, sold spirits without a permit expressing their true strength, was allowed to maintain an action for the price.

By sec. 8, cap. 104, Con. Stat. U. C., "all sales and purchases, and all contracts and agreements for sale or purchase, of any real or personal property whatsoever, made by any person or persons on the Lord's Day, shall be utterly null and void." It will be observed that this enactment is more sweeping than the English act, which has been held only to render illegal and void sales made in the course of the ordinary calling of the vendor. Thus, where in England a man sold a horse on Sunday, the sale was upheld on the ground that the sale was not within the vendor's ordinary calling. But such a sale would be clearly void by our statute.

Contracts of sale may also be held void for illegality, independently of any statute, on account of immorality; as, a contract for the sale of obscene or libellous prints.

It is not necessary that an act forbidding any contract should declare it to be illegal, nor does it matter what the object of the statute may be; nor if an act or contract is prohibited merely by the imposition of a penalty, is any one allowed to sustain the legality of the contract by declaring himself ready to pay the penalty.

CHAPTER V.

MERCANTILE REMEDIES.

1. *Stoppage in Transitu.*

When goods are consigned on credit by one merchant to another, it sometimes happens that the consignee becomes bankrupt or insolvent, while the goods are on their way to him and before they are delivered. In such case, as it would be hard that the goods of the consignor should be applied in payment of the debts of the consignee, the former is allowed by law to resume possession of them if he can succeed in doing so while they are on their way. This resumption is called stoppage *in transitu.*

One who is a mere surety for the price of goods consigned has not, as such surety, the right to stop *in transitu.* If a person abroad, who, in pursuance of orders sent him by a merchant here, purchases goods on his own credit of others whose names are unknown to the merchant, and charges a commission on the price, he will have a right to stop *in transitu,* if the merchant fails while they are on their journey. So also will a person who consigns goods to be sold on the joint account of himself and the consignee.

As to the period during which goods may be thus stopped, the general rule is that they are *in transitu* so long as they remain in the possession of the

carrier, as such, whether by land or water, even although such carrier may have been appointed by the consignee himself; and also while they are in any place of deposit connected with the transmission and delivery of them, and until they come into the actual or constructive possession of the consignee. Thus, if goods be landed at a sea-port town, and there deposited with a wharfinger appointed by the consignee to forward them thence by land to his own residence, they are subject to the consignor's right of stoppage while in the hands of the wharfinger. But the transit is completely at an end when the goods arrive at an agent's who is to keep them till he receives the further orders of the vendee.

When the possession of goods has been resumed by the vendor under his right of stoppage *in transitu* he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession, but according to the better opinion, the contract for sale is not thereby rescinded.

The right to stop *in transitu* may be defeated, however, by the assignment of the bill of lading of the goods by the consignee, made for a valuable consideration and without notice to the assignee that the goods were not paid for.

A consignor who is desirous and who has a right to stop the goods *in transitu* is not obliged to make an actual seizure of them while upon their road; it is sufficient to give notice to the carrier in whose hands they are, on the delivery of which notice it becomes that person's duty to retain the goods, so that if he afterwards by mistake deliver them to the

vendee, the vendor may bring trover for them, even against the vendee's assignees, if he himself have become bankrupt; and the carrier who after the receipt of such a notice delivers goods to the vendee is guilty of a tortious act, for which he may, of course, be held responsible.

2. *Lien.*

A lien is a right to retain property until a debt due to the person retaining has been satisfied. It is not incompatible with a right in the party retaining it to sue for the same debt. *Particular* liens are where persons claim to retain the goods in respect of which the debt arises, and these are favoured by the law. *General* liens are claimed in respect of a general balance of account, and these are to be taken strictly. Where a lien exists it is available although the debt for which the party retaining claims to hold the goods be of more than six years' standing, and the remedy by action at law barred, in consequence, by the Statute of Limitations.

The doctrine of lien originated in certain principles of the common law, by which a party who was compelled to receive the goods of another was also entitled to retain them for his indemnity; thus carriers and inn-keepers have by the common law a lien on the goods entrusted to their charge; the rescuer of goods from perils of the sea has a lien for salvage; and it is a principle that where an individual has bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him he has a lien on it for his charges, thus a miller and shipwright have each a lien; so has a

trainer for the expenses of keeping and training a a race-horse. Such is the description of a lien at common law. Whenever one of any other kind is sought to be established, the claim to it is not to be deduced from the principles of the common law, but founded on the agreement of the parties either expressed *or to be inferred from usage*, and will fail if some such contract be not shown to have existed.

With respect to liens by special agreement, the question whether one has or has not been created, depends on the special terms of each individual contract. The mere existence of a special agreement as to price or other particulars will not of itself exclude the right of lien, but if any of the terms of the agreement are inconsistent with that right, it will be excluded. Thus an agreement stipulating for payment in a particular manner, and out of a particular fund, might be held inconsistent with a right of lien.

As express liens depend upon express contract, so implied liens depend upon the implied contract which may or may not be inferred from usage. The usage whence such an agreement may be inferred is either the common usage of trade, or that of the parties themselves in their previous dealings with each other. Of this description are most general liens, none of which existed at common law, but all depend upon the agreements of the parties themselves either expressed, or to be inferred from their previous dealings, or from the usage of trade and the decisions of the courts of law thereon. It has been settled that an attorney has a lien for his general balance on

the papers of his client, which came to his hands in the course of his professional employment, but this right is only co-extensive with his client's interest in the papers. A factor has a lien upon all goods in his hands for the balance of his general account, and even on the price of those with the possession of which he has parted. As a lien is a right to retain possession, it follows that where there is no possession there can be no lien. It also follows that where the possession of the goods has once been abandoned the lien is gone. The rule concerning possession is so strict, that if a party having possession of goods cause them to be taken in execution at his own suit and purchase them, he so alters the nature of the possession that his lien is destroyed, though the goods may have never left his premises. And if when the goods are demanded from him, he claim to retain them on some different ground, and make no mention of his lien, he will be considered as having waived it.

If a security be taken for a debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone. But a mere right of set-off to an amount equal to that for which the lien is claimed does not destroy it.

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