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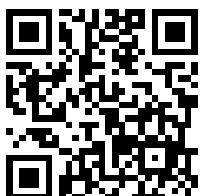
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**INTERNATIONAL
COMMERCIAL LAW.**

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INTERNATIONAL COMMERCIAL LAW.

BEING

THE PRINCIPLES OF MERCANTILE LAW

OF

THE FOLLOWING AND OTHER COUNTRIES, VIZ.:

ENGLAND, SCOTLAND, IRELAND,

BRITISH INDIA, BRITISH COLONIES,

AUSTRIA.	FRANCE.	NETHERLANDS.	SPAIN.
BELGIUM.	GERMANY.	NORWAY.	SWEDEN.
BRAZIL.	GREECE.	PORTUGAL.	SWITZERLAND.
BUENOS AIRES.	HANS TOWNS.	PRUSSIA.	UNITED STATES.
DENMARK.	ITALY.	RUSSIA.	WURTEMBURG.

BY LEONE LEVI, ESQ., F.S.A., F.S.S.,

OF LINCOLN'S INN, BARRISTER-AT-LAW;

PROFESSOR OF THE PRINCIPLES AND PRACTICE OF COMMERCE IN KING'S COLLEGE, LONDON;
DOCTOR OF POLITICAL ECONOMY, TUBINGEN;

ETC., ETC., ETC.

SECOND EDITION.

" You have here a work without any glory of affected novelty, dedicated only to use,
and submitted only to the censure of the learned, and chiefly to time."

BACON'S PREFACE ON THE ELEMENTS OF COMMON LAW IN ENGLAND.

VOL. I.

LONDON:

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1863.

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Rec. Apr. 17, 1897.

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RESPECTFULLY DEDICATED, BY PERMISSION,

TO

SIR ROUNDELL PALMER, Q.C., M.P.,

HER MAJESTY'S ATTORNEY-GENERAL.

b

P R E F A C E.

THE fundamental principles of right and equity which constitute the leading sources of Commercial Law are immutable in their essence and universal in their adaptation; yet amidst essential unity there is circumstantial variety. Owing to the wide extension of intercourse, and the wonderful progress of commerce, society is linked in such a multitudinous and intricate range of connections, that a vast variety of authoritative rules becomes necessary to meet the requirements of each nation. Whilst, therefore, the leading principles of Commercial Law are everywhere uniform, many are the municipal laws and local usages which control or modify them, and which it is necessary to know, in order to regulate aright the mercantile relations between different States.

It is the object of the present work to bring these fundamental principles of the Law Merchant, and the rules which have been superadded to them in different countries, into contact with each other, so that we may profit by each other's experience, and at the same time gather materials for the attainment of solid and permanent progress in mercantile legislation. The chief advantage of such a work is the ready access it affords to the existing laws of the principal countries of the world. Other works on Commercial Law, such as Smith's or Chitty's, are confined to the Law of England. In this the field is enlarged, and the laws of foreign countries are put side by side with our own, because commerce is essentially international, and we are deeply affected by the laws and procedure of other States. Hence the distinctive title of "International Commercial Law." The science of International Law has hitherto been limited to the political relations of states in time of peace and war, but recently not a few special

conventions relating to commerce have been formed, such as those relating to International Copyright, Trade-marks, and Public Companies. The portion, moreover, called Private International Law contains provisions intimately affecting the interests of merchants, whilst a great branch of International Law proper consists in settling the rights of commerce in time of peace and war, which forms the subject of our introductory chapter.

In the first edition of this work, the essential uniformity which exists in all the Codes and Laws of Commerce was pointed out. From the very first the Law Merchant has been held not so much a part of the municipal law of any state, as a part of the *Jus Gentium*, inasmuch as its chief provisions apply as well to foreign merchants as to natives : most of the usages and customs of trade have originated in a like manner in all countries, and many of the rights and duties accruing from the various mercantile transactions are founded on the dictates of natural law. What is technically called the Law Merchant is the body of laws enacted at different times by commercial nations (*a*). We know but little of the commercial laws of the Tyrians, Phoenicians, Carthaginians, and Assyrians. By tradition we learn that the Rhodian law acquired the highest rank, and we know that the Romans embodied that law in their legislation. Of Grecian laws we have but few distinct traces, beyond what we gather from the works of Demosthenes and other writers. The Roman law, as far as it applied to commerce and navigation (*b*), and indeed in all its branches, was itself a system of universal jurisprudence. The ordinances and statutes of the Mediterranean states, and of the Hans towns, especially the Consolato del Mare, the Roles or Jugemens d'Oleron, the Jugemens de Damme or Lois de Westcapelle, the Laws of Wisby, the Guidon de la Mer, and the Hanseatic Ordinances, are leading authorities in almost all mercantile countries. The famous Ordinances of Commerce and Navigation prepared by

(*a*) See Malyne's *Consuetudo vel Lex Mercatoria*, or the Ancient Law Merchant, London, 1656 : Molloy, *De Jure Maritimo*, London, 1682 ; Beawes, *Lex Mercatoria*, London, 1813 ; Pardessus, *Collection de Lois Maritimes anterieures au xviii. siecle*, Paris, 1828.

(*b*) Dig. lib. xvii. tit. ii., *Pro socio*; Dig. lib. xlvi. tit. viii., *Quæ in fraudem cre-*

ditorum; Dig. lib. ii. tit. xiv., *De pactis*; Dig. lib. xiv. tit. ii., *De Lege Rhodiade jactu*; Dig. lib. xlvi. tit. vii., *De obligat. et actione*; lib. xix. tit. i., *De actione emti et venditi*; lib. xiv. tit. i., *De exercit. actione*; lib. iv. tit. ix., *Nautæ, caupones, &c.*; lib. iii. tit. v., *De Negotiis Gestis, &c.*

Colbert, and commented upon by Valin, considerably expanded the bounds of commercial law at an early period; and finally, the Code of Commerce of Napoleon, did much to introduce certainty and uniformity in the mercantile legislation of Europe.

But the recent extension of commerce and communication within the different countries, and between all nations of the world, has thrown all these ordinances and codes far behind the wants of the age. The laws written and unwritten, express or customary, of such countries as the United Kingdom, France, and the United States, have acquired a wonderful development, refinement, and precision. In the United Kingdom especially, we have had commercial law judges, such as Lord Mansfield, Lord Holt, and a host of their successors, of wonderful sagacity and power of intellect, who have laid the basis of a beautiful and systematic fabric, whose depth and proportions will ever secure to Britain the gratitude and admiration of the civilised world. Whilst, however, we have gained in expansion and refinement, we have lost in uniformity, perspicuity, and compactness. We can scarcely say now that we have a common code to appeal to. Even as between England, Scotland, and Ireland, the commercial laws differ in some material points.

It is gratifying to find that, since the publication of the previous edition of this work, a considerable stimulus has been given to the assimilation of these laws. In 1853 a Royal Commission was appointed to inquire and ascertain how far the mercantile laws in the different parts of the United Kingdom of Great Britain and Ireland might be advantageously assimilated, and upon its report two Acts were passed, amending the laws on trade and commerce in the respective countries, for the purpose of introducing uniformity among them. Since then considerable progress in this direction has also been made in the Laws of Bankruptcy. But no steps have as yet been taken as regards any assimilation of the Laws of the British Colonies, either among themselves or with our own. The state of these laws certainly deserves the attention of the Legislature. For an explanation of some of these, as the law of the Cape of Good Hope, recourse must be had to such obsolete systems as the Roman Dutch Law, &c. And for the laws of other colonies, we must take the existing Laws of foreign countries, as modified by British tribunals. But even the current legislation is uncertain and inaccessible. No uni-

formity exists in the form of Colonial Laws; and whilst some subjects are regulated entirely by Colonial Ordinances, others are regulated partly by them and partly by Imperial Statutes.

It is to be hoped that the work of assimilation so well commenced may be pursued still further, and that, as we stretch our efforts to the British colonies, we may attempt to introduce some uniformity in the commercial laws of at least the principal mercantile nations. In the Law of Partnership a greater uniformity now obtains by our adoption of the principle of limited liability. The introduction into the English law of many principles of the Scotch law, which is founded on the Roman law, brought us nearer to the laws of Europe. And I am glad to find that the National Association for the Promotion of Social Science are endeavouring to bring about some assimilation in the principles which govern the adjustment of General Average in different countries. The desirability of such assimilation has been universally admitted; and it has become a great necessity. At a time when international intercourse is so extensive; when Banking, Railway, and other companies are formed with capital belonging to all nations; and when labourers from all quarters are flowing to the market, nothing can be more important than to render the laws which regulate commercial intercourse between nations, clear, uniform, and certain.

The late gifted and eminent Prince Consort, in a letter addressed to the author on the subject, which appeared in the first edition of this work, said, "It cannot be doubted that uniformity in the laws by which commerce is regulated in different countries would be, if it could be obtained, of immense advantage to commerce generally. The question would be as to the mode of attaining this uniformity. Nothing," His Royal Highness thinks, "would tend more to give public opinion a proper direction than such a publication as yours, where the legislative enactments of different countries upon the same subject would be found in juxtaposition, and where the ready means thus afforded for comparing their relative merits would infallibly lead to a certain degree of assimilation, the advantage and convenience of which would be made obvious. Or, should it not lead to this result, the publication would, at all events, afford to the mercantile world the means of knowing the points of difference in the various commercial codes on which it is most important for them to be correctly informed."

Many changes have taken place of late years in the laws of foreign countries. The German States have advanced a step further towards a common Commercial Legislation. Since the introduction of the Law on Bills of Exchange, an entire Code of Commercial Law has been prepared by a Commission appointed by the Diet, which has already been adopted by most of the States. But Hamburg, Bremen, Hanover, and Holstein have submitted the work for the consideration of a Special Commission. Unfortunately, the Law of Bankruptcy is not included in the Code; hence the existing laws founded upon ancient ordinances are everywhere imperfect and dissimilar. Some of the Scandinavian States have reformed their Laws of Bankruptcy. The Commercial Legislation of Italy is necessarily in a state of transition. Since the formation of the Italian kingdom, the Codes and Laws of Commerce existing in the different States have not been abrogated, but they are likely to merge into a Common Code as soon as the Government can enter into such a reform. In France there have been but few alterations in the Laws of Commerce. But the Code,—a model for brevity, lucidity, and comprehensiveness,—can scarcely be said to represent the state of the law in France at this moment. It needs revision and expansion, if it is to maintain its place in the mercantile legislation of Europe. Several States of South America have published new Codes of Commercial Law.

Some explanation must be given of the method pursued as regards the statement of the Foreign Laws. In order to avoid the reproduction of the entire law on the different subjects in each country, it was deemed necessary to insert only such provisions of the same as seemed either to be of greater importance for international purposes, or to exhibit greater divergence from our own or from the general laws. But in doing this the most careful attention has been bestowed on the preservation of the spirit and meaning of the original codes or laws. As stated in the first edition of this work, as regards Foreign Laws, much assistance has been derived from the “Concordance des Codes de Commerce” of M. Anthoine de St. Joseph; but many new laws have been enacted since the publication of that work. For the laws of the United Kingdom, I have been greatly indebted to such works as Smith’s Mercantile Law, Chitty and Byles on Bills of Exchange, Abbott and Maude and Pollock on Shipping, Lindley on

Partnership, Arnould on Insurance, Hazlitt and Roche on Bankruptcy, Addison on Contracts, Dr. Phillimore on International Law, and other authors, to all of whom I return my best thanks.

In the compilation of this work my chief aim has been to furnish a compendium of the most practical portion of the Laws relating to Commerce in this and other countries. In conclusion, I trust that in the more compact form in which this work is now published, it may become more extensively useful, and may continue to deserve the same amount of approbation which it was the fortune of the first edition to receive in this and other countries.

LEONE LEVI.

10, FARRAR BUILDINGS, TEMPLE,
30th October, 1863.

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INTRODUCTION.

RIGHTS OF COMMERCE IN TIME OF PEACE AND WAR.

IT is impossible to contemplate the wise distribution of the produce of the earth, and the variety of skill and industry of its multitudinous inhabitants, without being led to the conviction that it was the gracious design of Providence to constitute of the different communities or states into which mankind is divided one vast family and one entire commonwealth, supplying each other's wants and administering to each other's comforts. Mutual dependence is the very fulcrum of society. The world is not divided into departments, each possessing all that may be required for the existence and welfare of its own inhabitants. It was never meant that China and Japan should be segregated from the rest of mankind, or that the United States should be so self-sufficient as to be quite independent of Europe. The meteorological peculiarities of different countries cause a wonderful adaptation of climate and soil to numerous and varied productions. The physical and geological properties of the earth render some countries rich in mineral produce, and other countries totally destitute of it. And men widely differ among themselves in capacity for labour, genius, and skill. External circumstances act directly on the industrial and intellectual faculties of man. It is clearly, therefore, the teaching of nature that, instead of trying to force productions under uncongenial climes and physical difficulties, we should, in order to satisfy our wants and procure our comforts, seek those articles which are not obtainable within our borders in those countries where they are produced freely and almost spontaneously.

In other words, commerce is a law of nature, and the right of trading is a natural right (*a*). But it is only an imperfect Right of trading a natural

(*a*) Vattel, b. 1, ch. 8, § 88.

right,
but an im-
perfect right.

Treaties.

Customs legis-
lation not an
infringement
of the natural
right of
trading.

Consuls and
their duties
and im-
munities.

right, inasmuch as each nation is the sole judge of what is advantageous or disadvantageous to itself; and whether or not it be convenient for her to cultivate any branch of trade, or to open trading intercourse with any one country. Hence it is, that no nation has a right to compel another nation to enter into trading intercourse with herself, or to pass laws for the benefit of trading and traders. Yet the refusal of this natural right, whether as against one nation only, or as against all nations, would constitute an offence against International Law; and it was this refusal to trade, and the exclusion of British traders from her cities and towns, that led to the war with China. Treaties of commerce and navigation are, however, formed to perfect this imperfect right (*a*); whilst the municipal laws of most countries secure for foreign traders not only a safe asylum and perfect protection, but also those facilities for trading and other business which the natives themselves enjoy.

But though an arbitrary or total prohibition to trade with any country might be deemed a just cause of complaint, each nation is quite at liberty to settle its own financial policy, and to impose any import or export duties without regard to the effects of the same on the industry of other countries. For a considerable time the commercial policy of this and other countries, built as it was upon the most pernicious economical errors, nearly excluded altogether foreign products and manufactures. Happily, a better policy now obtains; and we have learnt at last that all customs duties, except for purposes of revenue, and these at the lowest possible limits, are injurious and vexatious. Truly the strength and advancement of empires in peace and wealth depend materially on their following the dictates of natural law, in permitting commerce to be free and untrammelled with all nations.

It is of the nature of commerce to draw private traders to most distant countries and often among communities where municipal laws are either imperfect or do not possess sufficient sway. To shield such merchants with the protection of the states to which they belong, it has been the practice of nations as far back as during the Italian republics of the

(a) Vattel, b. 1, ch. 8, § 93.

middle ages to appoint consuls, or officers, who shall vindicate their rights, and keep the home government informed of all facts bearing on the commercial interests of the country. The consul is not a political, but a commercial agent. The general duties of a British consul consist in protecting his countrymen in the lawful exercise of their trade, in quieting their differences, in obtaining redress of injuries done to them, failing which, to report the matter to the English ambassador at the court of that nation, and in forwarding to the secretary of state for foreign affairs an annual return of the trade carried on within his consulate. The consul must afford relief to British seamen or other subjects wrecked on the coast, and endeavour to procure them the means of returning to England. The consul may act, moreover, as a notary public, and he has many duties assigned to him by the laws of navigation. The consul, unlike the ambassador, is not exempt from the civil jurisdiction of the state to which he is accredited (*a*). In the East and China, the British consuls have also a jurisdiction over British subjects (*b*). A consulate is held to be the territory of the country which the consul represents, and therefore all deeds and acts done within it, or under the seal of the consulate, are held as done in England.

But commerce can only be carried on safely and advantageously in times of peace. When nations are at war with each other, all commerce is necessarily suspended between them; and it is almost impossible for any two nations of importance to be at war with each other without interfering materially with the general commerce of the world. At this moment two sections of the United States of America are at war with each other. No other nation has become party to the struggle, and yet the general commerce is seriously affected by it. An energetic and adventurous race, the Anglo-Saxon Americans have carried their trading and industry far and wide, not only through the American continent, but through Europe, Asia, Africa, and Oceania. With their produce they supplied the factories of the world, and

Effects of war
on commerce.

(*a*) *Phillimore's Intern. Law*, vol. ii. p. 241.

Jesty's Order in Council for the regulation of consular jurisdiction in the Ottoman territories. January, 1863.

(*b*) *6 & 7 Vict. c. 94*. See *Her Ma-*

with their ships they competed with Britain, Holland, and all maritime nations. Now all is changed : their misfortune is the common misfortune of all nations ; and though other trades may be opened, and other industries may be commenced, this leading source of prosperity is for a time arrested. Commerce is the handmaid of peace. When war exists, attention is diverted from industrial to military pursuits, and no encouragement is afforded for the investment of capital. To supply the wants of the exchequer, taxes and tariffs are increased enormously. The principal marts of commerce are in danger of blockade. And the sea, instead of being the highway of peaceful industry, becomes the scene of blood and rapine. Nothing, indeed, is more fallacious than that war can be favourable to commerce. It may create an extraordinary demand of certain articles for military and naval purposes, and certain industries may be thereby temporarily benefited. But that is only a passing gleam of commercial activity. The permanent results are generally the destruction of property, the impoverishment of the masses, and the overturning of settled industries. Nor can any one nation benefit by the corresponding fall of another. At the present moment the United States are undergoing a trying crisis. Should we rejoice that our competitors are checked in their prosperous career? Are we likely to benefit from their fall? Far from it. The same community of interests exists between countries as obtains between different branches of trade. The commercial nations of the world form but one family, and each of them prospers or suffers just as all the other members of the same are advancing or declining.

Effect of war
on the trading
between bel-
ligerents.

Condition of
alien enemies
within the
territory.

The primary effect of war is to interrupt all trading between the belligerents. War essentially alters the rights of alien enemies, whether they reside in the country declaring war, or in their own country. In consequence of the principle of the law of nations, that when a sovereign declares war, against another sovereign, it is to be understood that the nation declares war against the other nation ; as soon as war is declared, all the subjects of the one necessarily become enemies to all the subjects of the other. And accordingly, wherever the enemy's subjects are found, whether in the country or elsewhere, they are regarded as alien

enemies. But the municipal law of civilised states provides for the safety and protection of alien enemies living in the country. By the ancient law of England (*a*) it was provided "that merchant strangers, in case of war between their prince and the king of England, shall have convenient warning by forty days, by proclamation, to avoid the realm ; and if they cannot do it by that time, by reason of some accident, they shall have forty days more, and in the meantime liberty to sell their merchandise. During these eighty days they have the king's protection." It is the practice, however, as regards traders, subjects of the enemy and domiciled in the country, to allow them to remain undisturbed. They came to this country in time of peace under the guarantee of public faith, and they have the right to expect, even in time of war, protection and liberty. The sovereign may order them to depart, but their fixed property, houses, lands, and factories, would remain theirs, although they should be obliged to leave the territory. Some writers on international law laid down that a state may confiscate debts due by its subjects to the enemy, but such a right cannot now be maintained (*b*) ; and although a sovereign might force a debtor to pay to him the debt due to the enemy, that would never discharge the debtor (*c*).

It is, however, widely different as regards alien enemies domiciled in their own country. As soon as war is declared, all commerce with the enemy is prohibited, and in that state all treaties, civil contracts, and rights of property are put an end to. No trading can be carried on with the public enemy, direct or indirect, and the property so employed is liable to confiscation (*d*). The prohibition to trade with the enemy is also extended to the prohibition of withdrawing goods purchased in the enemy's country, after the declaration of war, without a licence, or an order in council ; but provision is generally made, giving a specific time for such withdrawal. As a natural sequel to the interruption of intercourse and trading with the enemy, all contracts pending between the subjects of both nations are thereby avoided (*e*). If the performance of an

Effects of war
on commercial
contracts.

(*a*) 27 Edw. 3, c. 17.

(*c*) *Wolffe v. Oxholm*, 6 M. & S. 92.

(*b*) *Brown v. United States*, 8 Cranch,

(*d*) *The Hoop*, 1 Rob. Rep. 217.

140 ; *Furtado v. Rodgers*, 3 B. & P. 191 ;

(*e*) *Brown v. United States*, 8 Cranch.

Ware v. Hylton, 3 Dallas, 199.

136.

National character.

agreement has been rendered unlawful by the Government of the country, the contract is necessarily dissolved on both sides. It must also be kept in mind, as an important principle of international law, that it is not only the natural born subject of the enemy's country that acquires the disabilities consequent on the hostile character, but every person who is domiciled in the country, whatever may be his native or adopted country (*a*). The alien owner of the soil, the resident, and the merchant having a house of trade, are equally considered as having the national character of the enemy.

Right of capture.

Another important consequence of war on the belligerents themselves is, to subject the trader's property on land or at sea to the danger of capture, both belligerents claiming the right of destroying or capturing the public and private property of the enemy. And though this right is not often exercised as regards private property on land, at sea the right of capture is generally upheld. Such danger, however, is much lessened, now that, by the declaration respecting maritime law, signed by the plenipotentiaries of the Powers assembled in Congress at Paris in 1856, and to which all nations except the United States have given their adhesion, the right of privateering has been abolished, and the double principle was established, that "the neutral flag covers enemy's goods, with the exception of contraband of war;" and "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

Effects of war on the commerce of neutrals.

Conflict of rights.

As regards the commerce of neutrals, war operates most injuriously. The relation of belligerent and neutral is necessarily attended with great difficulty. Whilst the belligerents are intent upon each other's destruction, while each is labouring to reduce his adversary to a condition of isolation, destitute alike of internal resources and of external assistance, the neutral, founding his title on the law of nations, claims to pursue undisturbed his usual trade with either belligerent, whereby he effectively succours one or other of them. The aim of the belligerent is to keep such rights within the strictest limitation, and he appeals with freedom to ancient practice, and to the dicta of international jurists, showing that the belligerent will suffer

(*a*) *The Vigilantia*, 1 Rob. Rep. 1; *The Emden*, 1 Rob. Rep. 16.

nothing to interfere with his plans and designs. The neutral, on the other hand, seeks the farthest possible expansion of such rights ; he insists upon pursuing unmolested in time of war the trade which he was pursuing in time of peace, and confidently points to the altered state of public opinion on such subjects, and to the universal desire that any quarrel which might arise between countries shall not be allowed to interfere with the general commerce of the world. Belligerent rights are, in truth, imperfect rights. Although a belligerent has a full and perfect right to oppose the commerce of a neutral state, that does not destroy the right of the neutral state to carry it on. As between two equal, sovereign, and independent states, the full right of the one does not destroy the full right of the other. It is only where there are treaties of neutrality that such rights are perfected, and rendered mutually binding.

In what consists neutrality ? A neutral state is that which remains towards nations at war with each other in the same friendly relations as it stood whilst they were at peace. A neutral is one who takes no part whatever in the hostilities of other states on either side, who inclines neither way, and scrupulously abstains from succouring or favouring either party to the injury of the other. Neutrality, therefore, consists in abstinence and impartiality (*a*). A neutrality need not be declared. It is sufficiently shown by the state continuing in pacific and impartial intercourse with both belligerents. Nor does it make any difference whether it is in the habit of carrying on a greater amount of trade with one belligerent than with the other. All that is demanded of the neutral is, that it shall not depart from its usual trade. It must be remembered, however, that a neutral is not allowed, under cover of trading, to afford any assistance to the belligerent. The rights of neutrality will at once be forfeited if the neutral commit any act of hostility, whether covert or open.

The commerce ceases to be legal when the subject-matter consists of any article termed contraband of war. The moment a neutral brings to either belligerent such articles as he knows are bought specifically for carrying on the war, he becomes auxiliary to the hostile measures of the enemy, and forfeits

What is neutrality?

Contraband of war.

(*a*) *Phillimore*, v. iii. p. 201.

his right of protection. The articles usually included as contraband of war are cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, salt-petre, sulphur, cuirasses, pikes, swords, belts, and cartouche boxes. These articles are of a direct and immediate use in war, and are exclusively used for war purposes. But many articles commonly used in time of peace may, under certain circumstances, be held to be contraband. Horses have been considered as liable to capture; so naval stores; and even pitch and tar, though a relaxation has been made in favour of Sweden and other countries where such articles constitute the special produce of the claimant's country. Raw materials are less objectionable than manufactured goods. Hemp is more favourably considered than cordage, and iron than anchors and other instruments made out of it. As regards coals, the destination may determine whether it is contraband or not. If sent to ports where steam vessels are ordinarily calling to load, it would be only an article of commerce, but if sent to arsenals or great naval ports, it might be held to be contraband. The catalogue of contraband goods has undergone many variations from time to time; but now a general agreement exists among all nations.

Exceptional
articles.

The peculiar circumstances of certain wars may, however, render it necessary for a belligerent to demand that other articles shall be included in that category. But any extension of the list of contraband articles is certain to meet with opposition. It is universally known, for instance, that ship-building is one of our principal industries. One third, or more, of all the vessels which navigate the seas and oceans of the world are built in this country. The largest and best steam-packets, and a host of the most splendid mail-steamers, are all of British manufacture. Our makers of steam-engines receive orders from all parts of the world. Not a few states get their war-vessels built in our docks, and our shipbuilders execute their orders, little caring for what purpose such ships are intended. To prevent the building of ships of any description in this country, because they may be used as contraband of war, would be to inflict a serious injury on British industry. And if such was attempted, Britain would have a right to demand the same exemption as Sweden for her pitch and tar.

Neutral vessels also are liable to confiscation if they are found to carry on board military persons or the enemy's despatches, the consequences of carrying such being often infinitely more injurious than any quantity of contraband articles.

It must be observed that there is great difference between carrying contraband articles to the belligerents, and allowing either of them to buy such articles in the neutral territory. It is not the sale of an article, or the building of a ship in the country, that constitutes contraband, but it is the carrying of the same to a belligerent. Nor is the Government responsible for what private traders may do, inasmuch as it is not the practice of nations to prohibit their own subjects from trafficking in articles contraband of war. They are warned not to engage in such trade. If they do so, they do it at the risk of having their ships and cargoes captured (*a*). In some cases war vessels sent by a neutral on sale to a belligerent state have been seized as contraband of war. But to obtain the condemnation of such a vessel as contraband no doubt must exist, not only as to the character of the vessel as a war vessel, but also as to the purpose for which it was intended to be sold (*b*). As commerce in arms, ammunition, or other articles of contraband of war is lawful during peace, it continues to be so during war as between neutral nations. The prohibition extends only as between neutral and belligerent.

The way to ascertain whether a neutral has committed a breach of neutrality is by considering not whether certain acts are injurious to the belligerent, but whether in doing them the neutral has stepped out of his impartiality in favour of either. The general law is summed up by Vattel as follows: "Generally, we may say, no act on the part of a nation which falls within the exercise of her rights, and is done solely with a view to her own good without partiality—without a design of favouring one power to the prejudice of another—no act of that kind can, in general, be considered as contrary to neutrality; nor does it become such, except on particular occasions, when it cannot take

Military persons and despatches.

Difference between carrying contraband articles and selling them within the territory.

How to test a breach of neutrality.

(*a*) Wheaton's Intern. Law, 6 Ed. 571; Kent's Comment. vol. i. p. 145; 8 Ed. 11; see Earl Russell's despatch to Mr. Adams on the Alabama, 19 Dec., 1862. The Santissima Trinidad, 7

Wheat. 340; Ortolan, *Règles internationales*, vol. ii. p. 156—159; Bynkershoek, Q. J. P. ii. cap. 22.

(*b*) The Brutus, 5 Rob. 531. The Neptune, 5 Rob. 409.

place without injury to one of the parties, who has then a particular right to oppose it" (a).

Foreign Enlistment Act.

In order to avoid mixing ourselves in the quarrels of other nations, and to prevent either belligerent from carrying on the war in neutral ground, or from using our resources in the promotion of the war, the Foreign Enlistment Act (b) has been enacted, which makes it illegal for any of Her Majesty's subjects to take or accept any military commission or otherwise enter into the military service or enlist or engage to serve in foreign service, and for any person to fit out or equip in Her Majesty's dominions vessels for warlike purposes without Her Majesty's licence. The restriction as to ships therefore extends not only to natural-born subjects, but to any person within any part of the United Kingdom, or in any part of Her Majesty's dominions beyond the sea, whilst the offence consists in the equipping, furnishing, fitting-out, or arming of any ship, or procuring or attempting or assisting the same, with intent or in order that such ship or vessel shall be employed in the service of any foreign state as a transport or store-ship, or with intent to cruise or commit hostilities against any state with whom Her Majesty is not at war. In order therefore to obtain a conviction under this Act, it must be proved, first, that the vessel is equipped, furnished, fitted-out, or armed; and, second, that there is an intention to employ her in the service of a foreign state for hostile purposes against any power at peace with us.

Right of search.

As a consequence of this prohibition to carry contraband articles, neutrals' ships are subject to the right of visit and search. The right of visiting and searching merchant ships upon the high seas,—whatever be the ships, whatever be the cargoes, whatever be the destination,—is a right of the lawfully commissioned cruisers of belligerent nations; for it does not appear what the ship, or the cargo, or the destination is, till she is visited and searched; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. The custom is, that when a cruiser meets a vessel, he fires a gun, which is a signal for the merchant vessel to stop and to submit to the search. If the vessel

(a) Vattel, b. iii. ch. vii.

(b) 59 Geo. 3, c. 69.

summoned does not stop, the belligerent cruiser has the right to pursue her and to force her. And should the master of such vessel resist the right, both the ship and all the property are at once subject to confiscation. The cruising ship has a right to send on board the merchant ship for her papers; and if she be found to carry contraband goods or military officers to any port of the enemy, the cruiser must bring the same before the Court of Prizes, for a more deliberate inquiry than could be conducted at sea. The right of search is regulated by treaties and by regulations issued by the belligerent powers.

Another limitation to the right of neutrals in time of war is the prohibition to trade with blockaded ports. A blockade is a sort of circumvallation round a place, by which all foreign connections and correspondence, in as far as human force can effect it, are entirely cut off. In the words of the Paris declaration, "blockades to be binding must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy." In the very nature of a complete blockade it is implied that the besieging force can apply its power to every point of the blockaded state. If it cannot do so, it is no blockade of that quarter where the power cannot be brought to bear (*a*). The blockade would be considered as legally existing, although the winds did occasionally blow off the blockading squadron; such an accidental change would not even suspend a blockade (*b*). If, however, the squadron be driven off by a superior force, a new course of events would arise, which might introduce a presumption in favour of the restoration of freedom of commerce (*c*). The raising of the former blockade by a superior force is a total defeasance of the blockade and of its operations.

To constitute a breach of blockade, three facts must be established. First, the existence of an actual blockade; secondly, the knowledge of the party attempting the breach; thirdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. We have already seen what constitutes an effective blockade. The knowledge of the party is presumed when a notification has been

Right of blockade.

Breach of blockade.

Knowledge of the party.

(*a*) The Betsey, 1 Rob. 93; The Frederick Molke, 1 Rob. 86; The Nancy, 1 Acton, 57. (*b*) The Columbia, 1 Rob. 156; The Hoffnung, 6 Rob. 116.

(*c*) The Hoffnung, 6 Rob. 116.

INTRODUCTION.

made to the foreign government, the effect of which is to include all the individuals of that nation, it being the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. A neutral master can never be heard to aver, against a notification of blockade, that he was ignorant of it. If he was really ignorant of the blockade, it may be a subject of representation to his own government, but that can be no plea in the courts of the belligerent. A notification binds only the country to which it is addressed, yet in a reasonable time it must affect neighbouring states with knowledge. If a notification be made to the principal states of Europe, the time will come when it will affect the rest. But there may be ignorance as to the continuation of the blockade. When it is one of simple fact only, it ceases with the fact itself; but where it is accompanied by public notification, the blockade is supposed to exist till it has been publicly repealed.

Difference
between a
blockade by
notification
and a blockade
by simple fact.

What consti-
tutes a breach
of blockade.

The mere intention or an attempt to commit it is sufficient to establish the breach of blockade, and the violation on the part of the master is, as to the penal consequences, considered as the act of the owners. Sailing in ballast to a blockaded place would be a breach of blockade. Nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port. Want of provision is not a sufficient ground. A blockade is as much violated by a vessel passing outwards as inwards, its intention being to suspend the entire commerce of the place. The only latitude allowed to a neutral vessel is to sail with a cargo which she may have taken on board before the blockade began. A neutral may withdraw in ballast (*a*). But if, after having withdrawn in ballast, she be found loading a cargo by means of lighters, she would be subject to confiscation. A breach of blockade subjects the vessel and all the property on board it to confiscation; but as the master is only the agent of the owners of the ship, the cargo would be restored, if it can be proved that the owners were not parties to the breach, and that when the cargo was shipped they were ignorant of the blockade (*b*).

(*a*) The Comet, 1 Edw. 32; The Juno, 2 Rob. 119.

(*b*) The Columbia, 1 Rob. 154; The

Vrow Judith, 1 Rob. 150; The Imina, 3 Rob. 169; The Rosalie and Betty, 2 Rob. 343.

The ship which violates a blockade may be confiscated on her return, and if she be taken in any part of the voyage, she is taken *in delicto*, and is subject to confiscation. The offence is not extinguished till the vessel has reached her own port (*a*). In all cases, however, whether of breach of blockade or of contraband of war, it is the duty of the cruiser to take the ship to a Court of Prizes for adjudication. Captors have a right to seize, but subject to the duty of bringing the vessel to adjudication.

By the law of nations the adjudication of all prizes vests in the admiralty court, which is constituted a Court of Prizes, or a tribunal of nations (*b*), and from that court an appeal lies to the Privy Council. It is the object of the prize court to suspend the property till condemnation, to punish every sort of misbehaviour in the captor, to restore the property instantly, if, upon the most summary examination, there does not appear a sufficient ground of seizure, and to condemn finally if the goods really are prize, after having given all parties a fair opportunity of being heard. The Court of Prizes is a court of the law of nations, and it is the duty of the judge in a prize court to administer the law of nations, or that law which is common to all countries, and founded on principles of universal obligation. The principal sources of the law of nations are natural and divine law, the reason of the thing, customs and conventions. Considerable authority moreover attaches to the works of learned authors on the subject, such as Grotius, "De Jure Belli et Pacis," Puffendorfius, "De Jure Naturæ et Gentium," Bynkershoek, "Quæstiones Juris Publici," "Wolfius Opera," Marten's "Précis du Droit des Gens," Vattel's "Droit des Gens," Wheaton's "Elements of International Law," Dr. Phillimore's "International Law," &c.

The science of international law has, in late years, made rapid progress. The relations between nations are now maintained by means of permanent legations. The sea is universally admitted as absolutely free. The navigation of the principal rivers is no longer intercepted by dues. By the conferences of Paris of 1856 the vexatious questions of privateers, blockades,

Progress of
international
law.

(*a*) The Welvaart van Pillan, 2 Rob. Rob. 153.
128; The Juffrow Maria Shraeder, 3 (*b*) The Recovery, 6 Rob. 348.

and rights of neutrals, were definitively settled. And many nations, previously out of the influence of international law, have placed themselves under its protection. These are, doubtless, sources of satisfaction, and they are the harbingers, we trust, of still further progress and improvement. Nations are becoming more and more bound to each other by ties of interest, friendship, and family relationship. The great transactions of nations, the mightiest works of human skill and energy, are becoming international in their origin, operation, and ownership. Periodical exhibitions are organised for the display of the works of art and industry, and for the encouragement and development of mechanical skill and genius, open without distinction to artists and artizans of all nations. And by the introduction of freedom of trade, the abolition of the navigation laws, the cheapening of the postage of letters, the extension of railways, and the establishment of land and sub-marine telegraphs, commercial and social intercommunication has acquired an unprecedented extension. These are material manifestations of the great progress of mankind in civilisation and science, and even in love and well-doing. Let us hope that the occasional clouds which still hang over our horizon will one after another dissipate, and that the benignant rays of religion, knowledge, commerce, and peace, may be allowed to shine in all the splendour of a permanent meridian.

PRINCIPLES

OF

BRITISH AND FOREIGN COMMERCIAL LAW.

CHAPTER I.

SECTION I.

SOURCES OF COMMERCIAL LAW.

BRITISH COMMERCIAL LAW is a system of principles and rules, partly of common and partly of statute law, which define the rights and duties of individuals engaged in commerce. Such principles and rules are in a great measure derived from the customs of merchants, some of which are of a universal character, and some of a purely local nature. Those customs of trade which are innocent in themselves and which prevail throughout the country, are held to be part of the law of the land, and are judicially noticed without proof; those of a purely local nature must be proved (*a*).

That a local custom of trade may be rendered compulsory, it must be the result of a general and prevailing course of business, proved by instances, and supported by the evidence of the general opinion of merchants. It must, moreover, be fair, proper, and reasonable, as well as sufficiently definite and certain (*b*). When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of Justice are bound to know and recognise (*c*). An

- (*a*) *Benson v. Chapman*, 8 C. B. 911; *Cuthbert v. Cumming*, 11 Exch. 267. *Broom's Common Law*, p. 19.
(*b*) *Cunningham v. Fonblanque*, 6 C. & P. 44; *Valcezio v. Wheeler, Loftt*, 631; *Camden v. Cowley*, 1 W. B. 417; *Hall v. Benson*, 7 C. & P. 158.
405; *Paxton v. Courtney*, 2 Fost. & Finlay, 131.
(*c*) *Brandao v. Barnett*, 3 C. B. 519, 530; *Jones v. Peppercorne*, 28 L. J. Ch. 158.

usage which is not general is not binding upon persons not acquainted with it (*a*).

Authority of laws and ordinances of foreign states.

The codes, laws, and ordinances of other states, ancient or modern, are received with great respect by the Courts, not as containing any authority in themselves in this country, but as evidences of the general law merchant. Where these are contradicted by judicial decisions they cease to have any value, but on points which have not been decided they are worthy of great consideration. The ordinances and laws more generally quoted are the Rhodian Law, or the *Jus Navale Rhodiorum*, the *Consolato del Mare*, the Laws of Oléron, the Hanseatic Ordinances, the *Guidon de la Mer*, the *Ordonnances de la Marine et du Commerce* of Louis XIV. by Colbert, and more especially the modern Foreign Civil Codes and Codes of Commerce (*b*).

Authority of commentaries on foreign laws.

Commentaries on such ordinances and laws, such as Valin on the *Ordonnance de la Marine*, Emerigon on Insurance, the works of Pothier and Pardessus, those of Story and Kent on American law, are also treated with great respect in the British Courts (*c*).

SECTION II.

COMMERCIAL LAWS OF THE BRITISH EMPIRE.

State of commercial laws.

The commercial law of England does not stretch its influence over the various states, colonies, and dependencies which form the British Empire. Within the United Kingdom itself Scotland and England have never realised perfect unity of legislation; and though the Anglo-Saxon family has carried its own common laws wherever it has planted itself, not a few vast dominions have been added to the Empire which have been allowed to retain as their substantive law the law which they possessed at the time of their conquest, modified only by English jurisprudence and practice. Still, as compared with other branches of municipal law, the commercial laws of the British

(*a*) *Sweeting v. Pearce*, 29 L. J. C. P. 265; *Scott v. Irving*, 1 B. & Ad. 605; *Partridge v. The Bank of England*, 9 Q. B. 396.

(*b*) *Morgan v. The Insurance Company of North America*, 4 Dallas, 424; *Gould v. Oliver*, 4 Bingham, N. C. 134. (*c*) *Cox v. Troy*, 5 B. & Ald. 481.

Empire exhibit but few points of discrepancy. Resulting as we have already seen from general customs of trade, and embodying those principles which are conformable to the dictates of natural equity and justice, such laws are, at least in the main, alike in every portion of the Empire.

UNITED KINGDOM.

England and Wales.—The commercial laws of England and Wales are identical. When Wales was united to England by a Statute of Henry VIII., it was prescribed that the law of England and no other shall be used in Wales.

Laws of England and Wales identical.

Ireland.—In Ireland also the English commercial law is generally in force, the Irish nation having received the English law at the Council of Lismore; but there are not a few points of difference between the commercial laws of England and Ireland, arising from the existence of some laws of the Irish Parliament never repealed by the British, as well as from the method still pursued of legislating separately for the different portions of the United Kingdom.

Laws in Ireland and England different on some points.

Scotland.—The commercial law of England, as far as it forms part of the municipal law, has no force in Scotland. The Treaty of Union of 1706 expressly provided that the laws of Scotland shall remain in force, and that laws relating to private rights are not to be altered but for the evident utility of the people of Scotland. Two statutes(a) have been recently enacted assimilating various points of commercial law in England, Ireland, and Scotland.

Municipal law of Scotland different from that of England and Ireland.

Isle of Man, Jersey, Guernsey, &c.—The Commercial law of England is not in force in the Isle of Man, the island not being governed by the English law, though by several recent statutes she has been made part of the United Kingdom. The Islands of Jersey, Guernsey, Sark, and Alderney, formerly parts of the Duchy of Normandy, are governed by the common law of the Duchy of Normandy, the principal authority for which is "Le Grand Coustumier." In all these places, however, the English law is always received, if not with the authority of law, with the respect due to the universality of its character and to the judgments of English tribunals.

Le Grand Coustumier in Jersey, &c.

(a) 19 & 20 Vict. c. 97; 19 & 20 Vict. c. 60.

COLONIES AND DEPENDENCIES.

State of commercial laws in British colonies.

The British colonies and dependencies may be divided into two classes ; those which were found and colonised by British subjects, and those which were conquered by, capitulated, or ceded to the British Government.

Colonies acquired by discovery and occupation.

In colonies found and colonised by British subjects or acquired by discovery and occupation, the law of England came at once into force as far as it was applicable to the condition of the infant colonies, but Acts of Parliament made in the United Kingdom after their acquisition, without naming the colonies, are not binding upon them. The laws of such colonies are therefore the common law of England, certain parts of the statutes of the United Kingdom, and the enactments of their own legislatures. To this class belong Barbadoes, Bahamas, Bermuda, Antigua, Jamaica, Tortola, New Brunswick, St. Christopher's and Nevis, British Columbia, Anguilla, Dominica, Granada, St. Vincent, Tobago, and Upper Canada in America ; Sierra Leone in Africa ; also Western and Southern Australia, New South Wales, and Van Diemen's Land.

Colonies acquired by conquest.

Colonies which were conquered by, or capitulated, or ceded to Britain became by right of conquest subject to the law of England ; nevertheless, until such law is imposed upon them they are allowed to retain their own laws in all matters which are not contrary to our religion, or which enact anything which is *malum in se*. In this class are included British Guiana, the Cape of Good Hope, and Ceylon, capitulated by the Dutch ; Trinidad, capitulated by the Spaniards ; St. Lucia, Lower Canada, and Mauritius, ceded by the French ; Malta ; and the Great Indian Empire. The laws of these colonies are as follow :—

The Roman-Dutch law in British Guiana.

British Guiana.—The law in force in this colony, as guaranteed by the articles of capitulation when she surrendered to Her Majesty's arms, is the Roman-Dutch law, or the old law of Holland and the Roman law *in subsidium*.

Spanish law in Trinidad.

Trinidad.—The law in force here is the law of Spain, not the modern code, but the ancient law founded on the Fueno Real, the Pardidos, the Recopitacion, and the ordinance of Bilboa. The ancient Spanish law and the Roman law, as its auxiliary in cases where the former is defective, may be con-

sidered as the common law of the colony, and is binding in all cases not otherwise especially provided for by English laws and statutes.

St. Lucia.—The ancient law of France as it existed prior to the promulgation of the Code Napoléon is in force here. The old laws proceed from two different sources or authorities. Those which emanated from the government at home, viz., the Code Novi of 1685, the Edict of 1786, and the Local Ordinances. The English law is constantly referred to by the Courts of Justice.

Lower Canada.—The laws of this colony are the Acts of the British Government which extend to the colonies and the laws of France as they existed at the conquest of Canada in 1759.

Mauritius.—This colony has received four of the five codes of France, viz., the Civil Code, the Code of Civil Procedure, the Code of Commerce, and the Code of Criminal Instruction. But the principles of English jurisprudence are continually engrafted on the French law.

Malta.—A Civil and a Commercial Code have recently been enacted in Malta.

British India.—The Mohammedan law is in force in all the countries which were subject to the Mogul Emperors. The Hindoo law is in force in all the territories which were never brought under that subjection. The Parsees are subject to the English law as far as it is applicable to them, and the Portuguese and other European races are subject to their respective European laws. The British population, or Anglo-Indians, are subject to the common law of England and to the laws and ordinances of the Legislative Council of India.

SECTION III.

COMMERCIAL LAWS OF FOREIGN COUNTRIES.

France.—The commercial laws of France consist of the Code of Commerce of 1808, modified by subsequent laws, of such provisions of the civil and other codes as are applicable to trade, of the principles of common law, and of the usages of trade. The Code Napoléon abolished the Roman law, and all customs, statutes, and regulations previously in force upon subjects treated

Old French
law in St.
Lucia.

English and
French laws
in Lower
Canada.

French Codes
in Mauritius.

Civil and Com-
mercial Codes
in Malta.

Mohammedan
and Hindoo
laws in force.

by the code. It was enacted in Guiana, Bourbon, Guadaloupe, Martinique, and the French establishments in India, in St. Pierre and in Algeria, but in this latter colony the Mussulman law is still applied to the Mohammedan population.

Laws in the United States founded on British laws.

United States of America.—The United States of America being originally founded by British subjects, who constituted the North American Colonies, have their commercial laws based on the law of England. But with the declaration of independence, and with the enormous increase in commerce and prosperity, the general laws of the country acquired enormous proportions, whilst each State has found it necessary to establish special laws and statutes, which have modified the original laws, and in many cases substituted other laws in their stead. English laws are not valid as such in the United States, but they must be sanctioned by legislative enactment, or introduced by a court as an exposition of principles common to the two nations. Each State has a separate commercial legislation, but the decisions of the different Courts are held in great and almost equal authority over all the States.

New German code.

Germany.—A code of commercial law has just been completed for the whole of Germany, by a commission appointed by the Diet. Although the same has not yet the force of law, as it must be first enacted by each state, we insert it with confidence, since it has already received the sanction of the commercial classes generally. The German common law is composed of rules taken from the ancient German customs, and from compilations of local customs, canon law, Roman law, and special laws. In States where the law is codified, the German common law serves to interpret the codes, and to regulate the points not treated by them, and in States which have no code it is applied in all cases as a basis of the local and general law of the empire.

Austrian laws of commerce.

Austria.—The commercial legislation of Austria is traced to the time of Maria Theresa, who, in 1756, published an ordinance on matters connected with commerce. The law of bankruptcy is equally due to the care of Maria Theresa, although it was not promulgated before the reign of Joseph II. The maritime legislation of Austria dates 1774. The *Editto Politico di Navigazione Mercantile Austriaca* embraces the most extensive provisions as regards captains and seamen. But Austria has adopted the new commercial code just prepared for

Germany, and therefore in all matters provided for by that code, the old Austrian laws cease to have any force.

Belgium.—The French Code of Commerce is in force in Belgium, with some modifications. A new bankruptcy law was enacted in April, 1851.

Bolivia.—A code of civil law is in force in Bolivia, promulgated in 1843.

Brazil.—A code of commerce was passed in Brazil in 1850.

Buenos Ayres.—A code of commerce was published in this country in 1859.

Denmark.—In Denmark the code of Christian V., published in 1683, is still in force, with some later regulations on maritime law, and other ordinances and customs on Bills of Exchange and other branches of law.

Greece.—The French Code of Commerce has been adopted by a Royal declaration, in 1835. No civil code has as yet been promulgated. A commission was issued in 1835, but it discontinued its labours.

Haiti.—In Hayti the commercial and civil codes were enacted in 1825 and 1826, founded on the model of the French codes.

Italy.—Previous to the recent union of all Italian States into the Kingdom of Italy, several codes were in force in this country. Sardinia had codes published in 1838. The Two Sicilies had distinct codes. The Lombardo-Venetian kingdom preserved the French commercial code, and other States had special laws on all branches of trade. During the last two years a fusion of all laws has been determined upon ; and a commission has been appointed for that purpose. But until a new legislation takes place the existing laws of the different States continue in force.

Louisiana.—In 1824 the legislation of Louisiana adopted a civil code, which was framed upon the model of the French code.

Netherlands.—A commercial and a civil code was published in the Netherlands in 1838.

Norway.—There is the same legislation in Norway as in Denmark. An ancient Danish law on bills of exchange is still in force.

Mexico.—The ordinance of Bilboa, which at one time governed Spain, is still in force in Mexico.

Belgian code
similar to the
French.

Bolivian code
of civil law.

Brazilian code
of commerce.
Buenos Ayres
code of com-
merce.

Danish laws.

Greek code of
commerce.

Louisiana
code.

Dutch civil
and commer-
cial codes.

Norwegian
laws.

Ordinance of
Bilboa in
Mexico.

Polish laws.

Poland.—Prussian Poland, or Posen, is governed by the Prussian Landrecht. Austrian Poland, or Galicia, by the Austrian code. But Russian Poland, or the Duchy of Warsaw, is not subject to the Swod. The Code Napoléon was enacted there in 1808, and though it has been subjected to many changes, it is still the basis of the law of the country.

Portuguese code of commerce.

Portugal.—A code of commerce was published in Portugal in 1833. No civil code has as yet been enacted.

Russian code.

Russia.—A general code, called the Swod, was published in Russia, and rendered executory from the 1st of January, 1826. As early as 1700, Peter the Great conceived the idea of collecting all the ukases published since the code of 1649, but it was reserved to Nicholas to complete this important undertaking. The commercial part, forming the eleventh volume, occupies an important place ; it includes more than two thousand articles, and contains very remarkable provisions, showing the customs and usages of the inhabitants of this vast empire.

Servian civil code.

Servia.—The civil code was published in Belgrade in 1844.

Spanish code of commerce.
Swedish laws.

Spain.—A code of commerce was enacted in Spain in 1830.

Sweden.—Sweden has a civil code, many ordinances on bills of exchange and maritime law, and a law on bankruptcy, enacted in 1830.

Swiss laws.

Switzerland.—Each Canton has its own special regulations. In *Geneva* the French Code of Commerce is in force, since 1857. In *Vaud* the French code is generally received as written reason. A law on bills of exchange was passed on the 4th June, 1829. At *Berne* and *Friburg*, the German common law is generally observed, but the law on bills of exchange, of the Canton of Vaud, is also in force at Friburg. At *Neufchâtel*, a code of commerce was published in 1843. At *Basle* there are many laws of commerce. There is an ordinance on bankruptcy of 1719, modified by several more recent laws. There are two ordinances on brokers, of 1801 and 1817, and an ordinance on bills of exchange, of the 14th December, 1808. At *Soleure*, the common law of Germany is received, and the ordinance of Basle, on bills of exchange. At *Lucerne*, the common law of Germany prevails, but the civil code contains many regulations affecting commercial law. A law was published on the 11th October, 1832, on the register of mercantile firms, and the ordinance of St. Gall, on bills of exchange, is in force here. At *St. Gall*, the

common law of Germany prevails, besides an ordinance of the 18th June, 1784, on bills of exchange, and a law of 11th October, 1832, on the register of partnerships. At *Tessin*, the civil code contains a title on bills of exchange, and for other matters the common law is followed. *Zug* has a law on bankruptcy, of 18th May, 1818, and the common law. *Schwitz*, *Glaris*, *Appenzell*, *Schaffhausen*, and other Swiss Cantons, follow, generally, the common law of Germany.

Turkey.—There exists no special law applicable to matters of Turkish laws of commerce, in Turkey. The collection of the highest authority is that which was compiled by order of Solyman II., from 1520 to 1566, entitled *Multeka Ehbar*. This collection contains a book on commercial matters, though the laws embraced in it refer rather to principles bearing upon civil contracts, and adapted to Mussulman manners, than to commercial rights, properly so called. A commercial code, on the model of that of France, has been formed, but has not yet been issued.

Wallachia and Moldavia.—The French Code of Commerce has been published in these States, in 1841, with some modifications. Wallachian and Moldavian codes.

CHAPTER II.

SECTION I.

OF TRADING AND TRADERS.

INTRODUC-
TORY OBSER-
VATIONS ON
TRADING.

Rights of
trader in Eng-
land.

BRITISH laws have, from a very early period, been framed with a view to the encouragement of trade and the protection of traders. During the reign of Athelstan, any merchant who made three voyages upon his own account beyond the British Channel, or narrow sea, was entitled to the privileges of a Thane. By Magna Charta, whilst all other subjects could be restrained from departing from the realm, and from living out of the realm, if the king thought fit, merchants, unless publicly prohibited, had safe and sure conduct to depart, come, and carry away, buy and sell, without any manner of evil tolls ; and by the common law, also, merchants were allowed to pass the seas without licence. These principles of British jurisprudence, being sanctioned by public opinion, have been strengthened and developed to the widest possible extent ; and now merchants enjoy the utmost freedom of trade, and are capable of filling the highest public position (a).

Rights of
traders in an-
cient times.

The liberality shown by British legislation at all times towards trading is the more remarkable, when we consider that in other countries the recognition of the rights of traders has been but gradual. The Romans despised the arts and commerce, and deemed the plough and the sword the only honourable professions among them. Industrial pursuits were only carried on by slaves, or liberated slaves. Trade was an occupation unworthy of a Roman citizen ; and a special law, the Flaminian Law, prohibited patricians to engage in trade. Later on, the prejudice against trading somewhat abated, and many high personages, anxious to realise the profits which trading produced,

(a) Wilkins' Anglo Sax. Law, Leg. Rich. II. c. 2 ; Magna Charta, c. 30 ;
Judicia Civitatis, Lond. p. 71 ; 5 Molloy, vii. 16.

engaged in it, though they entrusted their interest in the hands of other persons.

During the Middle Ages commerce was held in much higher reputation in Europe. In the south the Italian traders had a commanding influence. The noble families of Florence, like the princely House of Medici, whose public magnificence and private benevolence in the encouragement of religion, science, and art were nowhere equalled, owed their rank and power entirely to successful trading operations. In the north, the Hanse merchants did much to elevate the status of traders, whilst the Dutch republic was ruled by merchants. France was tardy in appreciating the benefits of commerce till, under Louis XIV., the great Colbert established laws for the encouragement of trade. Thus by degrees the trading profession has everywhere been recognised as one of great utility to the state; and there is scarcely a country at the present time which does not favour trade and welcome the merchant, from whatever quarter he may arrive.

Rights of
traders in mid-
dle ages and
more recent
periods.

BRITISH LAW.

A trader is one who makes trading his habitual profession (a). Under the general designation of traders are included merchants, bankers, manufacturers, brokers, shipowners, underwriters, warehousemen, and all persons who, either for themselves or as agents for others, seek their living by buying and selling, or by buying and letting for hire, and by the workmanship of goods or commodities. But the distinction between traders and non-traders as to liability to the bankrupt law has been abolished by the recent Act, 24 & 25 Vict. c. 134. In

Definition of a
trader.

(a) Trader. A man who carries on trade with foreign countries; in popular language, any trader who deals in the purchase and sale of goods. The etymological derivation of the word "trade" is a way, a course trodden and re-trodden, a regular or habitual course or practice, employment, occupation in merchandise or common intercourse for buying and selling, or bartering (Webster's and Richardson's Dictionaries). Hence occasional acts of trade are not sufficient to constitute a person a trader. To attain that character a person must *habitually* give himself to it. The opening of a warehouse, the setting up of a firm, or even the taking of a patent for the business, are only strong presumptions of trading; but no one is a trader unless he exercises the business of trading. Nor is it the simple buying and selling that constitutes a trading. A farmer selling his produce is not a trader; nor a person purchasing articles for personal use. To constitute a trading, there must be a purchase with a view to resell with profit.

Scotland traders and non-traders are alike subject to the Bankruptcy law. In Ireland, however, the Bankruptcy Act, 20 & 21 Vict. c. 60, applies to traders only.

FOREIGN LAWS.

Definition of
an act of
trade.

France.—The French code defines an act of trade to be all purchases of produce and merchandise to be re-sold, whether in the natural state or after having manufactured it, or put in use, or used for the purpose of letting it to hire ; every undertaking of manufacture, commission, or carriage by land or by water ; every enterprise of agency, business, sale by auction ; public spectacles ; every operation of exchange, banking, and brokerage ; every obligation between merchants, traders, and bankers ; and as between all persons bills of exchange and remittances of money from place to place (a).

What is a
commercial
transaction.

Germany.—By the German code commercial transactions are described to be the purchase, or acquisition by any other means, of goods or other moveables, of public stocks, shares, or other circulating instruments, for the purpose of selling them again, either in their original state or manufactured, or otherwise worked up ; any undertaking to furnish such articles ; all business of insurance, of transport of goods, and carriage of persons by sea and land ; all manufacturing contracts, banking, and other monetary transactions, commission and forwarding agency, publishing, printing, and book trading (b).

Who is a
trader.

Buenos Ayres.—Every person who makes a profession of buying and selling goods, or who buys goods to get them manufactured for the purpose of selling them again, is a trader. Merchants are also those who engage in speculations abroad or in inland trade. The law deems an act of trade the purchase of anything with a view to sell it again, or for using it in the same state as it is bought ; all operations of exchange and banking ; all negotiations in bills of exchange, foreign or inland, or of any other circulating instruments ; orders for the manufacture, deposit, or conveyance of goods by sea or land ; affreightments of ships, and all operations of shipping, and also agreements respecting salaries of clerks and other persons employed in trade (c).

(a) *Code de Commerce*, §§ 632 and 633.

(b) *German Code*, §§ 271 and 272.
(c) *Buenos Ayres Code*, §§ 2—7.

Netherlands.—Commercial operations include commission business ; all matters relating to bills of exchange ; all business of bankers, brokers, and other agents of trade ; and all contracts relating to shipping, including salvage, average, &c. (a).

Russia.—Commerce is divided into foreign and inland, wholesale and retail, town and country. Commercial operations include the construction, purchase, refitting, freighting of ships ; purchase, sale, carriage, and warehousing of goods ; banking, custom-house agencies ; all enterprises arising out of contracts for supplying the crown ; and all undertakings in connection with shops, buildings, hotels, and baths (b).

SECTION II.

OF THE RIGHT TO TRADE.

BRITISH LAW.

Every man may become a trader unless subject to peculiar or personal disqualifications (c). Trading is a civil right of which no one can be deprived. It is illegal for the Crown to grant exclusive rights of selling and dealing, except by letters patent as regards new and original inventions (d) ; and contracts which create or tend to create or secure monopolies are also void (e). This right of every individual to trade is subject to limitations only where the trade is of an obnoxious nature, or where the exclusive right thereon has been secured to other persons by patent or copyright.

For the exercise of some industries an excise licence or a stamped licence is requisite. Such industries are auctioneers, brewers, coffee and tea dealers, paper makers, spirit distillers, rectifiers, and dealers and retailers, tobacco manufacturers and dealers, wine dealers and retailers, attorneys, bankers, conveyancers, pawnbrokers, plate dealers, &c. (f).

Clergymen holding any spiritual employment cannot engage in trade, under penalty of forfeiting the goods. They may,

(a) Dutch Code, §§ 3, 4 and 5.

Monopolies, 11 Co. 6.

(b) Russian Code, §§ 1 to 3.

(c) 3 Inst. 181.

(c) 11 Co. Dig. 864 Trade A. 1.

(f) 57 Geo. III. c. 99.

(d) 21 Jac. I. c. 3. The case of

What are commercial operations.

Branches of trading.

Right to trade.

Monopolies unlawful.

Exceptions to the rights of trading.

Excise licences.

however, be members of partnerships of more than six persons (a).

FOREIGN LAWS.

Right of
trading in
France.

France.—Before 1789 industrial professions were subjected to regulations which made them accessible to a limited number only. Since then, however, a general freedom of industry has been introduced, and every person is allowed to engage in whatever trade or profession he pleases. But magistrates, advocates, solicitors, and ministers of religion, brokers, consuls, public functionaries, and members of the civil service and military profession, cannot engage in trade. Although such functionaries are prohibited from trading, if they do engage in it, they acquire the character of traders, and are subjected to all the consequences flowing from it. The state has the right to prevent the establishment of industries injurious to public order, health, and security. A special permission is necessary for the foundation of such establishments, which is only granted under certain conditions. Certain industries, such as the manufacture of tobacco and gunpowder, are in France monopolies of the state. Other industries, such as book-selling and printing, can only be carried on with the licence of the Government.

Obnoxious
industries.

State mono-
polies.

Freedom of in-
dustry in the
United States.

Who cannot
trade.

Right of
trading.

Monopoly of
corporations.

Right of
trading.

United States of America.—The same rights and freedom to trade exists in America as in the United Kingdom.

Brazil.—The President and commanders and all officers of the army and navy, magistrates, judges, clergymen, and bankrupts without certificate, are prohibited from trading (b).

Buenos Ayres.—Every person who has the free administration of his property is able to be a trader. Any one who is unable to contract is also incapacitated from trading (c).

Denmark.—Trade is monopolised by corporations, but foreign traders have full liberty to trade.

Italy.—The right of trading is recognised throughout Italy.

Portugal.—Every one has a right to engage in trade (d).

(a) 1 Vict. c. 10.

(b) Brazil Code, §§ 2 and 3.

(c) Buenos Ayres Code, §§ 8 and 9.

(d) Portuguese Code, § 13.

SECTION III.

RESTRAINTS OF TRADE BY VOLUNTARY AGREEMENT.

All kinds of restrictions of trade, whether voluntary or involuntary, have always been treated in this country with great suspicion. Not only is it illegal and against the policy of the common law to concede to particular persons the monopoly or the sole exercise of any known trade, but care is taken to give every encouragement to trade and honest industry, and to secure in every possible way the liberty of the subject. Hence it is that though a man may, upon a valuable consideration, by his own consent and for his own profit, give over his trade and part with it to another in a particular place, the law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, is void. This principle was established as early as during the reign of Henry V., when a weaver, in a moment of passion against his trade, gave a bond to carry it on no more. The case having been brought before the court, Mr. Justice Hall, in a violent burst of indignation, exclaimed that the obligation was void, inasmuch as the condition was against law.

INTRODUC-
TORY OBSER-
VATIONS.

In the leading case on the subject, *Mitchell v. Reynolds*, 1 P. W. 190, reported in the first volume of Smith's Leading Cases, p. 203, the reasons of the prohibition of such voluntary restraints are stated to be:—The evil which may arise from them to the party himself by the loss of his livelihood and the subsistence of his family; and to the public by depriving it of a useful member. Also the great abuses these voluntary restraints are liable to; as, for instance, from corporations who were formerly labouring for exclusive advantages in trade, and to reduce it in as few hands as possible; as likewise from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves; and, lastly, that in many instances they can be of no use to the obligee, which holds in all cases of general restraints throughout England; for what does it signify for a tradesman in London what another does in Newcastle?

Leading case.
*Mitchell v.
Reynolds.*

and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other. Nevertheless, instances may occur where such contracts may be useful and beneficial; for example, an old man, finding himself under such circumstances either of body or of mind as that he is likely to be a loser by continuing his trade, might deem it better for him to part with it for a consideration, that by selling his custom he may procure to himself a livelihood, than risk losing it altogether by trading any longer.

Late changes
in the law.

Since the early cases on the subject, the law on contracts for restraints of trade has been somewhat altered. It was formerly held that the contract was void unless the consideration was adequate to the restriction; but in *Hitchcock v. Coker*, 1 A. & E. 138, it was held, that the Court had no judicial perception of the ratio of the consideration to the restriction, and that provided there be a legal consideration of value, the contract must be enforced without reference to the quantum of that value. Still the reasonableness of the restriction as to the area of exclusion, in relation to the trade or occupation of the contracting parties, is rigorously watched. If the restriction far exceeds reasonable limits, it would not be enforced (*Benwell v. Inns*, 24 Beav. 307), though a general restriction as to time will not of itself constitute a sufficient ground to avoid it. And though in the old cases such contracts were presumed *prima facie* to be bad, now they are valid unless the restriction imposed is greater than the interest of the plaintiff requires.

BRITISH LAW.

Agreement for partial restraint of trade lawful. An agreement for a *partial* and *reasonable* restraint of trade upon an adequate consideration is binding (a); but where the restraint is larger and wider than the protection of the party with whom the contract is made can possibly require, it is considered as unreasonable in law, and the contract which would enforce it would be void (b).

Agreement for general and An agreement for restraint of trade not limited as to space, or not confined to any particular district or locality, would be

- (a) *Rannie v. Irvine*, 7 Man. & G. 976.
- (b) *Mitchell v. Reynolds*, 1 Smith's Lead. Cas. 171; 2 Com. Dig. "Trade;" *Ward v. Byrne*, 5 M. & W. 548; *Nobles v. Bates*, 7 Cowen, 207; *Mal-*
- Ian v. May*, 11 M. & W. 653; *Tallis v. Tallis*, 1 E. & B. 391; *Elves v. Croft*, 10 C. B. 241; *Young v. Timmins*, 1 Tyrw. 226; *Benwell v. Inns*, 24 Beav. 307; *Mumford v. Gething*, 7 C. B., N. S. 305.

void (*a*) ; but a general restriction as to time would not of itself unlimited restraint void.
avoid the contract (*b*).

That an agreement for restraint of trade may be valid, it must set forth the cause or consideration for the restraint, and the circumstances which rendered such a restraint reasonable ; and it is for the Court, and not for the jury, to determine the reasonableness or unreasonableness of the contract (*c*). Condition to the validity of the agreement.

All contracts for mutually abstaining from trade, or taking away the freedom of action on the part of the individual to carry on trade, are void (*d*). Agreement for mutual abstaining from trade void.

Agreements for the sale of patents of invention and secrets of trade are not void, though unlimited as to time and space (*e*). Agreement for sale of patents valid.

FOREIGN LAWS.

France.—A contract for restraint of trade would be invalid under the section 1131 of the Civil Code, which avoids all obligations either based on an unlawful consideration or contrary to public order. Whatever is contrary to what the Legislature holds as a public good is illegal. Contracts against the public good void.

United States of America.—All contracts which restrain the exercise of a man's talent in trade are detrimental to the commonwealth, and therefore void (*f*). A contract prohibiting the pursuit of any trade or employment throughout the State of New York would be regarded as a contract in total restraint of trade within the rule of the common law. Contracts detrimental to the commonwealth void.

SECTION IV.

RESTRAINTS OF TRADE FOR WANT OF UNDERSTANDING.

MINORS.

In the primitive state of society men were divided into impuberces and puberes, a distinction based on the physical phenomena of man, the acquisition of the power of speech and procreation ; speech being the condition of personal liability ; procreation the essential condition of marriage. To this INTRODUCTORY OBSERVATIONS.

- (*a*) *Hitchcock v. Coker*, 6 Ad. & E. 47 ; *Thompson v. Harvey*, 1 Show. 2 ; *Com. Dig.*, "Trade ;" *Gunmakers' Company v. Fell*, Willes, 389.
- (*b*) *Archer v. Marsh*, 8 Ad. & E. 959.
- (*c*) *Mallan v. May*, 11 M. & W. 653 ; *Hutton v Parker*, 7 Dowl. P. C. 739.
- (*d*) *Hilton v. Eckersley*, 6 E. & B. 47. In Scotland a contract of service and wages even for life has been held valid. 1 Ersk. 762 ; Bell. Com. 34, 6th ed.
- (*e*) *Bryson v. Whitehead*, 1 Sim. & Stu. 74.
- (*f*) *Nobles v. Bates*, 7 Cowen, 201 ; *Story on Contracts*, 551.

Roman law on
puberes and
impuberes.

material distinction another was added by jurisprudence, founded on the moral rather than on the physical development of man. The period of impuberty was divided into two periods—the first ending with the acquisition of speech, and called infancy ; the second ending with the attainment of puberty. And the latter was also divided into two—the period nearest infancy, and the period nearest puberty ; seven years of age being the dividing point. Puberty, though differing with each individual, was fixed by jurists at twelve for females, and fourteen for males. But as fourteen years of age were considered insufficient to enable a man to acquire the uncontrolled management of his affairs, a third period was introduced for the purpose, and twenty-five years of age was fixed as the time when all the legal disabilities of minors should cease. Accordingly, the infant had no capacity whatever, because he could not speak. From the age of infancy to seven years of age, all the acts of the minor were void, and he could only act by his guardian. From seven to fourteen, though he could act for himself, the guardian must have been joined with him to enforce his acts. And from fourteen to twenty-five a minor could bind himself, but if he had been wronged, he or his guardian could claim restitution.

Scotch law
on infancy.

These distinctions of the Roman law still prevail in many systems of jurisprudence. In Scotland two periods are recognised—that of pupillarity, or a state of absolute incapacity, extending from birth to fourteen years of age in males, and twelve in females ; and that of minority, or a state of limited capacity, from those ages to twenty-one. During the latter period a minor is held capable of consent, but of inferior judgment or discretion, requiring the protection of the law. The law of France is the same as in Scotland. But in England a minor under twenty-one years of age cannot bind himself, except for his education and necessaries. This complete disability of minors is not even modified by the law relating to emancipation, which prevails everywhere on the Continent. In France a minor may be emancipated at fifteen years of age complete, by the simple declaration of his father or mother ; and, if without father or mother, at eighteen, if the *conseil de famille* think him capable. If an emancipated minor engages in trade, he is deemed a major for his acts in such a trade and has full right

Laws of
foreign
countries.

to buy and sell, to sign bills and notes, and to bind himself for his acts of trade. In Holland, where the majority is attained at twenty-three, a minor may be emancipated at eighteen. In Prussia emancipation is only granted at the age of twenty to a man, and eighteen to a woman (*a*). By means of emancipation the inconvenience arising from the disability of minors is practically avoided.

BRITISH LAW.

A minor, or a person under twenty-one years of age, is not liable on contracts made by him in the course of trade, and cannot be made a bankrupt (*b*). He can, however, bind himself for necessaries, including food, raiment, lodging, education, and such like, according to the state and condition of the minor himself; and whenever the contract is, at the time he makes it, plainly and unequivocally for his benefit, he becomes bound to fulfil his contract (*c*). A father is not liable for necessaries supplied to his son, though under age, if beyond the age of nurture, unless there be some contract on his part to pay for them (*d*).

Contracts by minors are either good, void, or voidable. They are good when they are entered into for necessaries; void when they are to their prejudice; and voidable when they are of uncertain nature as to benefit or prejudice (*e*). A minor cannot appoint an attorney, state an account so as to bind himself, or do any act to prejudice his rights. He would not be bound by a bill of exchange, though given for necessaries; and he would not be bound by an agreement to refer any dispute to arbitration (*f*). He may bind himself as apprentice, though no action lies on such covenant. He may be a shareholder in a joint-stock company, and be bound to the payment of calls made during his minority (*g*). On his becoming of age he may repudiate the share, but if he continue to hold the same he becomes

Minor not
liable for his
act of trade.
May bind him-
self for neces-
saries.

Liability of
father for ne-
cessaries.

Contracts of
minors good,
void, or void-
able.

What he can-
not do.

May bind
himself ap-
prentice.

What a minor
must do on
his becoming
of age.

(*a*) Prussian Code, § 719.

Law *v.* Wilkins, 6 Ad. & E. 718;

(*b*) 1 Roll. Abr. 729; *Ex parte* Syde-
botham, 1 Atk. 146; Belton *v.* Hodges, 9

Andrews *v.* Garrett, 6 C. B. N. S.
262.

Bing. 365; *Ex parte* Moule, 14 Ves. 603.
(*c*) Chapple *v.* Cooper, 13 M. & W.
252; Wood *v.* Fenwick, 10 M. & W.
195; O'Brien *v.* Corrie, 3 C. & P. 283;
Zouch *v.* Parson, 3 Burr. 1801; Maddon
v. White, 2 T. R. 161.

(*d*) Goode *v.* Harrison, 5 B. & Ald.
156.

(*e*) Oliver *v.* Woodroffe, 4 M. & W.
650; Williamson *v.* Watts, 1 Camp.
551; Trueman *v.* Hurst, 1 T. R. 40;
Milner *v.* Lord Harewood, 18 Ves. 274.

(*f*) Rolfe *v.* Abbott, 6 C. & P. 286;
Shelton *v.* Springett, 11 C. B. 452;

(*g*) Caper *v.* Hutton, 2 Russ. 357;
North Western Railway Company *v.*

liable for all calls, even for those made during his minority, and no act of ratification would be necessary on his part.

Ratification.

Contracts which are voidable during minority may be ratified when the minor becomes of age. But in order that the ratification, after full age, of a contract entered into during minority may be valid, the same must be made in writing by the party to be charged therewith. The essential of a written ratification is the confirmation of the debt or promise. All other particulars may be established by parol evidence (a). A fresh consideration is not necessary to make securities given by a minor valid, if he ratifies them, after attaining twenty-one, with full knowledge and complete information respecting them (b).

Fresh consideration not necessary.

Minor representing himself of full age.

A minor representing himself of full age, and obtaining credit or money upon the faith of such representation, is precluded from pleading infancy, and will, in case of bankruptcy, be made responsible for his acts (c).

Privileges of minors personal.

The privileges of a minor are personal, and no one can take advantage of them but the minor himself; therefore, though by his contract he incurs no obligation, he is not thereby precluded from suing upon it the adult contracting party (d).

FOREIGN LAWS.

Conditions necessary to enable a minor to trade.

France.—Majority for both sexes is fixed at twenty-one years of age complete, for all acts except marriage (e). A minor emancipated, of the age of eighteen years complete, may be a trader, and is held to be of age for all his acts relative to trade, provided he be authorised by his father and mother, and in their absence by a family council; and provided such authority has been posted up in the Hall of the Tribunal of Commerce. That a minor may be able to bind himself by his acts of trade, four conditions are therefore necessary. He must be emancipated in legal forms or by marriage; he must be eighteen years of age complete, even though he has been emancipated; he must be authorised by his father or mother, and such

M'Michael, 5 Exch. 123; Dublin, Cork, & Bandon Railway Company v. Caze-nove, 10 Q. B. 939; Dublin and Wicklow Railway Company v. Black, 8 Exch. 181.

(a) Williams v. Moor, 11 M. & W. 256; 9 Geo. 4, c. 14, s. 15; Harris v. Wall, 1 Exch. 122; Hartley v. Wharton, 3 Per. & Dav. 529.

(b) Kay v. Smith, 21 Beav. 522.

(c) *Ex parte* Unity Joint Stock Bank Company, Re King, 6 Week. Rep. 640, Ch.; Price v. Hewett, 8 Exch. 146; Johnson v. Pye, 1 Sid. 258.

(d) Warwick v. Bruce, 2 M. & S. 205; Davies v. Manington, 2 Sid. 109.

(e) French Code Civil, § 388.

authorisation must have been enrolled in a registry, and affixed for one year in the Hall of the Tribunal. But notwithstanding such authorisation, neither the minor, or the tutor for him, can borrow money without a deliberation of the *conseil de famille*, or sell his real estate, or do any act beyond those of simple administration, without the formalities prescribed for the transfer of real estates by minors (a).

United States of America.—The age of majority is twenty-one years complete. The tendency of American decisions is to make the acts of minors voidable only, and subject to their election, when they become of age, either to affirm or disavow them (b). Even the bond of an infant has been held to be voidable only at his election (c). If the deed is voidable only, there are three modes by which it will be held to be affirmed on his becoming of age. 1. By an express ratification. 2. By acts which reasonably imply an affirmance. 3. By the omission to disaffirm in a reasonable time (d). In the case of voidable contracts it will depend upon circumstances, such as the nature of the contract and the situation of the infant, whether any overt act of assent or dissent on his part be requisite to determine the fact of his future responsibility.

Acts of minors voidable only.

Germany.—The age of majority here is twenty-four.

Bavaria, Norway, Denmark, and Mexico.—The age of majority in these countries is twenty-five.

Austria.—The age of majority is twenty-four years, but a minor may obtain permission to trade from the magistrate or tribunals.

Age of majority in different countries and effects of emancipation.

British India.—The full age of Hindoos and Mohammedans not under the Court of Wards is sixteen years complete. Male Arminians are of full age at eighteen. East Indians, or persons of European extraction in India, are governed by the laws of the nations from which they spring, though in a recent case the Sudder Court did not object to an East Indian obtaining his majority at eighteen.

Buenos Ayres.—Every person of eighteen years of age may engage in trade, provided he is emancipated, and has property of his own; or, in case he has no father, that he has received

(a) French Code Civil, §§ 2206 and 487; Code of Commerce, §§ 2 and 3.

(c) Conroe *v.* Birdsall, 1 Johns. Americ. Rep. 127.

(b) Kent's Comm., vol. ii., p. 251, 8th ed.; Wamsley *v.* Lindenberger, 2. Randolph's Rep. 478.

(d) Curtin *v.* Patton, 11 Serg. & Rawle, 305; Richardson *v.* Bright, 9 Verm. 365.

power to administer his property in the form prescribed by the common law.

Holland.—Majority is attained in Holland at twenty-three, but emancipation may be obtained at twenty years.

Italy, Russia, Sweden, Poland, Greece, and Hayti.—The age of majority in these countries is twenty-one years.

Malta.—A person eighteen of years of age may in Malta engage in trade.

Portugal.—No person less than twenty-five years of age can be registered as a trader, unless emancipated. This emancipation can only be obtained at the completion of the eighteen years of age. The conditions of emancipation are the same as those prescribed by the Spanish Code (*a*).

Spain.—A minor of the full age of twenty years is permitted to engage in trade whenever he can prove—1. That he has been legally emancipated. 2. That he has property in his own right. 3. That he has been declared able to administer his property. And 4. That he renounces the privileges afforded by the civil law to minors in commercial matters. A person under twenty-five years of age and a married female, being traders, may mortgage their real estate for the payment of debts contracted in trade (*b*).

Turkey.—The age of majority in Turkey is twenty-one years.

SECTION V.

LUNATICS AND DRUNKARDS.

BRITISH LAW.

Disability from unsoundness of mind.

Lunatics.—Unsoundness of mind constitutes a necessary disability to engage in trade; but a contract made with a person of unsound mind is not invalid, unless it be shown that advantage has been taken of his infirmity (*c*).

Disability from drunkenness.

Drunkards.—A person in a state of drunkenness, not knowing what he is doing, is incapacitated to contract, and would not be bound by contracts entered into whilst he was in a state of intoxication, provided he disallows his acts as soon as he becomes sober. But partial intoxication would not be sufficient to invalidate a contract, unless unfair advantage was taken of him by the other contracting party.

(*a*) Portuguese Code, §§ 5 and
14—17.

(*b*) Spanish Code, §§ 4, 5.
(*c*) Nelson v. Duncombe, 9 Beav. 211.

SECTION VI.

RESTRAINT OF TRADE FOR WANT OF FREE WILL.

MARRIED WOMEN.

By marriage, the personal identity of the woman is lost. Her person is completely sunk in that of her husband, and he acquires an absolute mastery over her person and effects. Hence her complete disability to contract legal obligations ; and except in the event of separation by divorce, or other causes, a married woman in the United Kingdom cannot engage in trade. In France, and other continental countries, however, a married woman is allowed to engage in trade with the consent of her husband, and the consent may be implied where he offers no opposition to her engaging in trade. Should he desire to withdraw his authority, he must register the same at the Tribunal of Commerce, and even give notice to such persons as are in the habit of dealing with his wife. The husband is liable for his wife's obligations, where there exists a community of property among them. And the wife has a right to sell and mortgage even her real estate for purposes of her trading.

INTRODUCTORY OBSERVATIONS.

BRITISH LAW.

A married woman is not liable for contracts entered into on her own account, and she cannot be made a bankrupt ; although where she has a separate estate, she would be bound by her bills of exchange, tradesmen's bills, and payment of rent(a). In the City of London a married woman may engage in trade and is liable for her own acts.

Married woman not liable for contracts.

A married woman, deserted by her husband, may in England apply to the Judge Ordinary of the Court of Divorce and Matrimonial Causes, or to a police magistrate, or justices in petty sessions, and in Scotland to the Lord Ordinary of the Court of Session, or Lord Ordinary on the bills, for an order to protect any means or property she may have acquired, or may acquire, by her own lawful industry, and any property she may have become possessed of, or may become possessed of, after such desertion, against her husband and his creditors, and any person claiming under him(b).

Protection of married woman when deserted.

(a) Bullpin v. Clarke, 17 Ves. 365 ; (b) 20 & 21 Vict. c. 85, s. 21 ; 21 & Stuart v. Kirkwall, 3 Mad. 387 ; Murray v. Barlee, 4 Sim. 82.

In cases of judicial separation married woman held as feme sole.

Husband must join in the suit.

Discharge of feme sole is discharge to husband.

Married woman cannot bind her husband by bills.

May bind him for necessaries.

Even after separation, when turned away by the husband.

Or when they separate by mutual consent.

In every case of judicial separation the wife is, whilst so separate, considered as a feme sole, for the purpose of contracts, and suing and being sued in any civil proceedings, her husband not being liable in respect of any engagements or contract she may have entered into (a).

The husband must sue jointly with his wife for the recovery of dividends on stock and shares standing in the wife's name, and upon all other choses in action belonging to the wife, and he may sue alone or jointly with his wife upon all bills of exchange or promissory notes payable to the wife before marriage (b). An action commenced against a feme sole may be continued after her coverture, but to make the husband liable a joint judgment must be obtained against them both (c).

A discharge of a feme sole prior to her coverture under the Insolvent Debtors Act would be a discharge to her husband, but a discharge of a wife during coverture under such Act would not discharge the husband (d).

A married woman has no implied authority to bind her husband by accepting or endorsing bills of exchange or promissory notes, except where she manages her husband's business. During cohabitation a wife has an implied authority as agent of her husband to pledge his credit for necessaries suitable to her station, notwithstanding any private agreement between them (e).

If a husband turns his wife away, and she maintains herself, she has authority of necessity to pledge his credit for necessities supplied to her (f). If a wife leaves her husband without his consent, she has no authority whatever to bind him (g). If a husband and wife separate by mutual consent, the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate allowance, and that allowance be duly paid to her. If, however, she commit adultery, her authority to pledge for necessities is gone.

(a) 20 & 21 Vict. c. 85, s. 21; Rudge *v.* Weedon, 7 Week. Rep. 368; 21 & 22 Vict. c. 108.

(b) M'Neilage *v.* Holloway, 1 B. & Ald. 221; Mason *v.* Morgan, 2 Ad. & E. 30; Connor *v.* Martin, 3 Wils. 5; Burrough *v.* Moss, 10 B. & C. 558; Philliskirk *v.* Pluckwell, 2 M. & S. 393.

(c) King *v.* Jones, 2 Str. 211; Cooper *v.* Hunchin, 4 East, 521; Carr *v.* Dun-

can and Wife, 31 L. J. 96.
(d) 7 Geo. 4, c. 17; Defries *v.* Davis, 1 Scott, 594.

(e) Warwick *v.* Bruce, 2 M. & S. 205; Davies *v.* Manington, 2 Sid. 109.

(f) Bright on Husband and Wife, 361.

(g) Bullpin *v.* Clarke, 17 Ves. 365; Stuart *v.* Kirkwall, 3 Mad. 387; Murray *v.* Barlee, 4 Sim. 82.

FOREIGN LAWS.

France.—A married woman cannot engage in trade without the consent of her husband ; and beside his consent, where the husband is himself a trader, she must have a trade distinct from that of her husband. Married women engaged in trade may pledge, mortgage, and sell their estates for the payment of their debts. A married woman trading on her own account may, even without the authority of her husband, bind herself for what concerns her trade, and in that case she will bind her husband also if there be community of interests between them (a).

United States of America.—In some of the states, as Pennsylvania and South Carolina, a wife may act as a feme sole trader, and become liable as such, the same as in the city of London (b). But for her greater protection no suit can be brought against a feme covert sole trader, unless her husband be joined. In Louisiana the wife may be a public merchant and bind herself, yet she cannot contract a debt by note without the authorisation of the husband.

Germany.—A married woman cannot trade without the consent of her husband, but he is presumed to have given his consent by allowing her to trade with his knowledge. The wife of a merchant who only assists her husband in his trade is not held to be a trader. A married woman who is a trader may lawfully bind herself for her trading without the consent of her husband, and all her private property is liable for the engagements of her business, irrespective of the rights of the husband. All the property which she has put in common is also liable for her debts. A woman who is a trader may appear in court for her mercantile matters, whether she is married or single (c).

Brazil.—A married woman of eighteen years of age may trade on her own account, with the authority of her husband. But she cannot hypothecate or alienate the property belonging to her husband before marriage, when their respective titles have been registered in the register of commerce within fifteen days of their marriage, nor can she bind the property which belongs to them in common, without the special authority of her husband,

(a) Civil Code, § 220; Code de Commerce, § 6.

(b) Burke v. Winkle, 2 Serg. &

(c) German Code, §§ 5—10.

Married woman may trade with consent of her husband.

In some states a married woman may trade as a feme sole.

Rights of a married woman who is a trader.

Power of married woman trading on her own and her husband's property.

Authority to trade may be revoked.

proved by public deed entered in the same register. She may bind, hypothecate, and alienate her dotal property and her paraphernalia, all she has acquired by her trade, and all the rights which accrue from the community. The authority to trade given by the husband to the wife may be revoked by judgment of Court or by public deed, but this revocation will only have effect relatively to third persons after it has been enrolled in the register of trade, published in a newspaper, and communicated by letter to all who had mercantile relations with the wife. When a married woman is in trade it is presumed that she has the authority of her husband, unless the contrary is shown by the publication of a circular, duly registered as above (a).

Liability of a woman engaging in trade.

Buenos Ayres.—A woman trading on her own account cannot claim to be protected from the consequences of the obligations which she has contracted. In case of doubt, as to the commercial nature of the obligation, all the obligations she has contracted are considered to be commercial, except those which she has secured by mortgage. Where a woman is the owner of a commercial establishment, it is presumed that she has registered it in the name of a gerant, or agent, and from that moment all her property becomes liable for the acts of her agent, according to the terms of the registered authority. The marriage of the trading woman does not alter her rights and obligations relatively to the trade carried on by her gerant, or factor. She is presumed to be authorised by her husband so long as the contrary is not shown by a circular, addressed to the persons with whom she has commercial relations, entered in the register of commerce, and published in the newspapers. When a woman enters into commercial partnership she has none of the rights or obligations of a merchant unless it be so expressly stipulated, and unless it has been made public that she will take part in the management of the partnership. The wife of a trader who merely helps her husband in his trade is not deemed a trader.

Right of married women to trade.

A married woman of eighteen years of age may engage in trade, provided she has the authority of her husband duly registered, or when she is judicially separated by sentence of divorce. In the first case she renders responsible for the obligations of her

(a) Brazilian Code, §§ 4 and 27 - 29.

trading all her dotal property and all the rights belonging to her in common with her husband, as far as they consist of her own property and of such as she has dedicated to her trade, including the dowry which may be restored to her by sentence, and all that she may have acquired afterwards. The authority may be tacit when the wife engages in trade in the presence and with the consent of her husband. The appreciation of the rights which may be established upon his tacit consent is reserved for the tribunals. The wife cannot be authorised by the Court to engage in trade against the will of her husband. When the authority to trade has been given, the wife may bind herself for all acts relative to her business without a special authority. The authority of the husband to engage in trade includes only what is necessary for the same. The wife authorised to trade cannot appear before the Court, not even for the rights she has contracted relative to her trading, unless with the express authority of her husband, or in case she has been judicially separated from him. Married women whether minors or of age being traders may hypothecate immovable property belonging to them as a security for the obligations which they contract as traders. It is for the creditor to prove that the convention arose out of an act of trade. Where the married woman has been authorised by her husband to trade she cannot hypothecate the immovable property belonging to her husband, nor that which pertains in common to both, unless the deed gives her special authority to that effect. The revocation of the authority conceded by her husband to the wife can only have effect where it is by public deed duly registered and published. It will only have effect as respects third persons when it is inscribed in the register of trade, published by advertisement, and inserted in the newspapers(a).

Portugal.—A married woman of eighteen years of age may engage in trade when authorised by her husband to enter her name on the register of commerce, or when she is judicially separated from her husband. In the former case she is liable for the obligations which she contracts on her dowry and on the property which she holds in common with her husband. In the latter all the property which she owned and which she may acquire is liable for her debts. A woman entering a commercial partnership would not enjoy any of the privileges or rights, or

Extent of authority of married women engaged in trade.

Liability of a married woman in trade.

(a) Buenos Ayres Code, §§ 12—24.

contracts any of the obligations as a trader, unless she stipulates and expressly announces that she will take an active part in the transactions of the house (*a*).

Rights of married women to trade.

Spain.—A married woman of twenty years of age may engage in trade when she is authorised by her husband. In this case she may engage her own property. A married woman separated from her husband does not need his authority to trade (*b*).

SECTION VII.

ALIENS.

INTRODUC-
TORY OBSER-
VATIONS.

Effect of
patent of de-
nization.

Although *Magna Charta* inaugurated a new era of freedom towards aliens of all countries, it was not till a much later period that they ceased to be regarded with jealousy and enmity. Many were the disabilities imposed upon aliens in ancient times. Alien merchants were prohibited from selling by retail ; they were obliged to sell their merchandises within a certain time after their coming into this country, and to invest the proceeds of them in British produce. They were not allowed to take apprentices or servants, except native-born subjects ; and they were ill-treated not only in the English coasts and in inland markets, but in the city of London itself, the citizens being most earnest in their petitions to the Throne seeking the expulsion of all foreigners concerned in commerce. By a patent of denization a foreigner was only partially relieved from these disabilities ; but after the Reformation, when the need of excluding Roman Catholics from the realm became a question of State, a further difficulty was interposed to such denization or naturalisation by the enactment that no one should be naturalised unless he had received the sacrament of the Lord's supper, and unless he had taken an oath of supremacy and allegiance. This state of things was confirmed and firmly established by the Act of Limitation of William III., and then it was that the existing disabilities of aliens were fixed :—viz., that no person born out of the kingdoms of England, Scotland, and Ireland, or of any of the colonies and possessions of the Crown, even though naturalised or denizens, unless born of English parents, should be a member of the Privy Council, and

(*a*) Portuguese Code, §§ 19—27.

(*b*) Spanish Code, § 5.

of either House of Parliament ; nor fill any office of trust, civil or military ; nor receive from the Crown any grant of land, &c.

In progress of time, however, the constant influx of refugees from France, in consequence of the revocation of the Edict of Nantes, the majority of whom were industrious, skilful, and intelligent, opened the mind of the nation to the great utility of giving ample facilities to such migrations ; and by a statute, the preamble of which stated, " Whereas the increase of people is a means of advancing the wealth and strength of a nation, and whereas many strangers of the Protestant or Reformed religion, out of a due consideration of the happy constitution of this realm, would be induced to transport themselves and their estates into this kingdom if they might be made partakers of the advantages and privileges which the native-born subjects thereof do enjoy," provisions were made for allowing such aliens to acquire the rights of natural-born subjects by their taking the oath, &c. Still it was not till the sixth year of George IV. that aliens were relieved from the necessity of taking the sacrament in case of naturalisation, and with few modifications introduced at different times, such was the state of the law in England relating to aliens previous to the 7 & 8 Vict. c. 66, passed in 1843. The committee of the House of Commons, in their report, stated that aliens were debarred from the possession of real property and some descriptions of personal property ; that they could not take houses on lease for years without danger of forfeiture ; that they could not hold British registered shipping, nor shares therein ; and that they could not claim any commercial benefits by virtue of such treaties with other states, and were absolutely excluded from all places and offices of trust. By obtaining from the Crown letters patent of denization, foreigners were relieved from these disabilities so far that they could hold and transmit all kinds of real and personal property, but they could only transmit real property to such of their children as might have been born subsequent to their denization. They were also permitted, when otherwise qualified, to vote at elections of members of Parliament. By obtaining from Parliament an Act of naturalisation, foreigners acquired all the privileges of denization, and a slight addition to them. Foreigners might inherit real property and transmit it to any of their children, without distinction as to the time of their birth ;

Improvement
of legislation.

Effect of Act
of naturalisa-
tion.

and when they had resided in this country seven years from the period of their naturalisation without having quitted it for more than two months at any one time, they became entitled to the benefit of British treaties in their commercial relations with foreign states. But to either of these methods the great objection was the expense and delay, whilst the whole law required to be ascertained and consolidated. It was to remedy this state of the law that the 7 & 8 Vict. was passed.

BRITISH LAW.

Who are natural-born subjects and aliens.

Every man who is born within the allegiance, power, or protection of the Crown of the United Kingdom is a natural-born subject; and every man who is born out of such allegiance, power, or protection is an alien born, and continues alien unless afterwards made denizen or naturalised. Consequently all who are born in England, Scotland, Wales, and Ireland, or in any of Her Majesty's colonies and possessions, are natural-born subjects (a).

Children of British father born abroad natural-born subjects.

Children born abroad, whose fathers and grandfathers by the father's side are natural-born subjects, are deemed natural-born subjects unless their ancestors were, at the time of the birth of such children, attainted of treason, or were liable to the penalties of treason or felony in case of returning into the United Kingdom without licence, or were in the actual service of a prince at war with the United Kingdom (b).

Children of British mother born abroad capable of inheriting.

Every person born out of Her Majesty's dominion of a mother being a natural-born subject of the United Kingdom is capable of taking to him, his heir, executor, or administrator, any estate, real or personal, by devise or purchase or inheritance or succession (c).

Children of alien born in this country natural-born subjects.

Children of aliens, if born in this country, are natural-born subjects, provided their parents were not at the time at war with the United Kingdom (d). A woman married to a natural-born subject, or to a person naturalised, is deemed to be herself naturalised, and to have all the rights of a natural-born subject (e).

(a) 1 Bla. Com. 366; 7 Co. 46;

Coke's Calvin Case, 7 Co. Rep. 17.

(b) 7 Anne, c. 5; 4 Geo. 2, c. 21;

3 Geo. 3, c. 21.

(c) 7 & 8 Vict. c. 66.

(d) Stephen's Bla. Com. p. 413;

(e) 7 & 8 Vict. c. 66, s. 16.

Jews born in the United Kingdom are natural-born subjects, and enjoy all the rights and privileges of such (a).

All merchants have safe and sure conduct to come into, to tarry in, go through, and depart from the United Kingdom by land and by water, to buy and sell, by wholesale or by retail, without any manner of restriction. The sea is open to all merchants to pass where they please (b). Alien friends, or subjects of friendly states, have the same power of entering into and enforcing personal contracts as natural-born subjects of the realm (c). Alien friends may take and hold, by purchase, gift, bequest, representation, or otherwise, any species of personal property, as effectually, and with the same rights and remedies, as if they were natural-born subjects of the United Kingdom (d). They may also, by grant, lease, devise, assignment, bequest, or otherwise, take and hold land or houses for any term of years not exceeding twenty-one years (e). Aliens, upon taking the prescribed oath, may become naturalised by obtaining a certificate from the Secretary of State for the Home Department (f). Aliens so naturalised enjoy all the rights and

Alien's right to come and go.

Right of suing.

Aliens may possess personal property.

May own land property for no more than twenty-one years.

May become naturalised.

Rights of naturalised

(a) 7 & 8 Vict. c. 66, s. 16.

(b) Magna Charta, Hen. 3, c. 30 ; 27 Ed. 2, c. 3 ; 14 Ed. 3, c. 2, s. 2 ; 9 Ed. 3, c. 1 ; and 25 Ed. 3, c. 2.

(c) Com. Dig., "Alien," 5.

(d) 7 & 8 Vict. c. 66, s. 4.

(e) Ibid. s. 5.

(f) Ibid. The following regulations were issued by the Secretary of State for the Home Department on the 1st August, 1847, with reference to certificates of naturalisation, in pursuance of Statute 7 & 8 Vict., c. 66, entitled "An Act to amend the laws relating to aliens." "I. Upon an application to the Secretary of State for the grant of a certificate of naturalisation, it will be necessary that the applicant should present to one of Her Majesty's principal Secretaries of State a memorial, praying for such grant, stating :— Of what friendly state is he a subject? His age, profession, trade, or other occupation? Whether he is married, and has any children? Whether he has any settled place of residence, and where situated, and how long he has resided within the

kingdom? Whether he intends to continue to reside permanently within the United Kingdom? On what grounds he seeks to obtain the right and capacities of a natural-born British subject? II. That the memorialist should make a declaration before a magistrate, or other person authorised to take such declaration, verifying the statements in his memorial. III. That a declaration should be made and signed by four householders at least, being British-subjects, and neither of them the agent or solicitor of the memorialist, who should state their places of residence, vouching for the respectability and loyalty of the memorialist, verifying also the several particulars stated in the memorial, and stating how long each of them has personally known the memorialist; and that this declaration should be made in due form, either together or separately, before a magistrate, or other person authorised by law to receive such declaration, in pursuance of the Act passed in the 5th and 6th years of his late Majesty King Wil-

British subjects.

capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except the right of becoming a member of Her Majesty's Privy Council, or of either House of Parliament (a). Aliens have the right of perfect and unrestrained liberty of conscience ; they may exercise their religion publicly or privately within their own dwelling-houses, or in chapels appointed for the purpose ; and they may bury their dead in their own burial-places, which they may freely establish and maintain.

Who are alien enemies.

Alien enemies, or subjects of states at war with the United Kingdom, are not allowed to trade with British subjects, all trade with the enemy being prohibited as soon as hostilities commence (b).

Aliens residing in Britain bound by British laws.

Aliens born out of British allegiance, residing or domiciled in any part of the British dominion, are bound by all the laws and statutes of the realm (c).

FOREIGN LAWS.

Who is a French subject.

France.—Every individual born in France may, within a year of his attaining the majority, claim the character of a Frenchman, on the following conditions. When such individual resides in France he must declare his intention to fix his domicile there ; when he resides abroad, he must declare his wish to take up his domicile in France, and establish himself there within a year of such declaration. Every child born of a French subject in foreign countries is a French subject. Every child born in a foreign country of a Frenchman who had lost the quality of a French subject may still recover his titles by fulfilling the declaration as above (d).

United States of America.—An alien is capable of acquiring, holding, and transmitting movable property, in like manner as an American citizen. He may even take a mortgage upon real

liam IV."—To obtain a certificate of naturalisation an alien must have resided three years in this country, with the intention of permanent residence in it. A naturalised British subject may obtain from the Foreign Office a British passport giving him right to claim British protection everywhere except in his own country. Upon his return in his own country he is once more sub-

ject to its laws and local authorities. To preserve the right of British nationality in his own country he must first be denaturalised by its government.

(a) 7 & 8 Vict. c. 66, s. 6.

(b) The Sloop, 1 Rob. Rep. 196 ; Potts v. Bell, 8 T. R. 548.

(c) 32 Hen. 8, c. 16, s. 9.

(d) Code Napoléon, §§ 7—9.

estate by way of security for a debt, but he cannot acquire a title to real property by descent, or created by other mere operation of law. In North Carolina aliens may purchase, hold, and transfer real estate. In Louisiana aliens can inherit real estate and transmit it *ab intestato*.

Rights of
aliens in dif-
ferent coun-
tries.

Austria.—Foreigners may acquire the rights of citizenship by entering a public service, by undertaking an industry which renders a continuous residence in the country necessary, by an uninterrupted residence of ten years at least, provided within this period they have not been convicted of any crime, or by a special authority of the political authorities (a).

Belgium.—Aliens have the same right to trade as natives. By the treaty of commerce of 1851, British subjects in Belgium, and Belgian subjects in the British empire, enjoy the same rights, privileges, liberties, favours, immunities, and exemptions in matters of commerce, as are or may be enjoyed by native subjects.

Buenos Ayres.—Foreigners may engage freely in trade with the same rights and obligations as the citizens of the state.

Costa Rica.—By the treaty of 1849, reciprocal freedom of trade was established between Britain and Costa Rica. The subjects and citizens of the two countries have liberty to come with their ships and cargoes to all places, ports, and rivers in the territories, dominions, and settlements of her Britannic Majesty in Europe, and in the territories of the Republic of Costa Rica, to which other foreigners are permitted to come.

Greece.—By the treaty of 1837, it was agreed that throughout the whole extent of the territories of each contracting party, the subjects of both shall enjoy full and entire protection for their persons and property, with free and open access to the courts of justice, for the prosecution and defence of their just rights.

Holland.—Native and foreign subjects are distinguished as follows:—All persons born in the kingdom, and in the Dutch colonies, of parents domiciled there; children of Dutch parents born abroad; persons born in the kingdom, even of parents not domiciled in it, provided they have fixed their domicile there; children born abroad of foreign parents domiciled in the kingdom or her colonies, and absent for a time, or for the public service; and those who have been naturalised and made denizens

Who is a
Dutchman.

(a) Austrian Code, § 20.

are Dutchmen. Aliens are those who are not included in the above, or those who have lost the character of Dutchmen. Foreigners obtain the same rights as Dutchmen, when, by the authority of the king, they have established their domicile in the kingdom, and exhibited their authority to the provincial government, and when, after having established their domicile in a province of the kingdom, and remained there six years, they have declared to the provincial government that they have so resided in it and that they intend to establish themselves in the kingdom (a).

Treaty right
of aliens in
Paraguay.

Paraguay.—By the treaty of commerce of 1853, reciprocity of the right of trading was established between the United Kingdom and Paraguay. Although this Treaty is virtually expired, the same rights are continued to British subjects in Paraguay by an official declaration of the Paraguayan Government.

Russian laws
on aliens.

Russia.—Foreigners may enter all the guilds of merchants in the same manner as the natives of the empire, and enjoy all the rights which such guilds bestow on Russian merchants. The houses and warehouses of foreigners, and the lands which are connected with them, are under the protection of the general laws. No search or perquisition can be made in their residences, nor any inspection of their books of accounts, except according to the rules in force as regards Russian subjects. Foreigners may acquire by purchase or inheritance, legacy, donation, or concession from the Crown, all kinds of property movable or immovable, with the exception, nevertheless, of those over which Russian hereditary nobles or foreigners have obtained previous rights. Foreigners, with the exception of Jews, may be agents for occupied estates if they have the procurement of the proprietors to that effect. They are also allowed to farm real property, and every other kind of property, inhabited or not, by conforming themselves to the conditions imposed on the natives of the empire. Foreign Jews, known by their social position, and by the vast extent of their commercial operations, arriving from abroad may, according to established regulations, and by especial authority, given annually by the Ministers of Finance, Interior and Foreign Affairs, trade in the empire, and establish banking houses therein, by obtaining a trading patent

(a) Dutch Code, §§ 5—7.

of the second guild. Such Jews are also permitted to establish factories, and to purchase and rent land according to the regulations of the present ukase. The commercial rights of the Asiatics are determined by Art. 227—233, of the Regulations of Commerce, Vol. XI. of the Body of Law (a).

Spain.—Foreigners who have obtained their naturalisation or who are domiciled in Spain, according to the laws of the country, may freely engage in trade with the same rights and under the same obligations as the natives. Foreigners not naturalised, and not authorised to establish their legal domicile, can only engage in trade in the Spanish territory according to the existing regulations, and the treaties in force with their respective Governments. Where there are no special regulations they will enjoy the same rights and franchises as Spanish merchants enjoy in the states to which they respectively belong (b). Rights of aliens in Spain.

SECTION VIII.

DUTIES OF MERCHANTS—REGISTRATION.

BRITISH LAW.

There is no general registry of merchants in the United Kingdom. Registration is only required in the case of joint-stock banking companies and other companies, particulars of which will be given under these respective heads.

No registration of merchants in the United Kingdom.

FOREIGN LAWS.

Germany.—A registry of trade is established in connection with every commercial court, where all matters required by the code to be registered are to be entered. The register is public, and the inspection is allowed at the usual hours. An authenticated copy of any item entered may be procured by the payment of certain fees. Whatever is entered in the register of commerce is also made public by one or more newspapers, and every commercial court fixes, every year, the newspapers to be used for the purpose (c).

Registration of merchants in Germany.

Brazil.—No one is deemed a merchant able to enjoy the protection of the law in favour of trade unless he is matriculated Matriculation necessary for trading.

(a) Russian Code, §§ 291—293, and Edict of 1857.

(b) Spanish Code, §§ 18—20.

(c) German Code, §§ 12—14.

lated in the tribunal of commerce of the empire, and unless he makes of trading his habitual profession. The petition for matriculation must contain the name and address of the petitioner, and if it be a partnership, the names of the individuals who compose the firm, and the locality or domicile of the establishment. If any minor or married woman is to be united to the firm, his or her civil capacity must be stated. When the tribunal finds that the firm has legal capacity to contract and to have public credit, it will order the matriculation, and communicate the same to all the tribunals of commerce, and advertise it in the journals. The merchants who obtain a matriculation from a junta of commerce are bound to register the same in the tribunals of their domicile within four months. Every alteration which any merchant or partnership may make in his business must be entered in the matriculation within the same time, and must be alike published. The effective exercise of trade is understood to have a legal commencement from the date of publication of the matriculation (a).

**Matriculation
necessary.**

Buenos Ayres.—That his operations and acts of trade may be regulated by commercial law, the trader must be matriculated in the tribunal of commerce of his domicile. The matriculation of the merchant is made at the registry of trade upon a petition containing his name, condition, and nationality, and if in partnership, the names of the partners and of the firm, the nature of the trade, the place or domicile of the establishment, and the names of the gerant or agent at the head of the establishment. The inscription in the register will be made gratuitously by the tribunal of commerce, provided it may not have reason to doubt whether the petitioner will enjoy the credit which a merchant of his class should have. The tribunal will refuse matriculation if the petitioner has no legal capacity to engage in trade. Every alteration made in the state of the firm must be brought to the knowledge of the tribunal of commerce, with the same formalities and solemnity.

**Conditions for
registration.**

Portugal.—Every person has the right to engage in trade, but he must be inscribed on a special register at the tribunal of commerce of his domicile. The inscription states the name and firm of the merchant, and the nature of his operations. It is conceded, after an inquiry, that the applicant enjoys credit

(a) Brazilian Code, § 10.

and reputation. The applicant has the right to appeal should the registration be refused (*a*).

Spain.—A person who wishes to trade must have his name inscribed in the registry of merchants. If the inscription is refused by the syndic, he may appeal first to the ayuntamiento, and next to the intendent of the province. Without a registration no one can trade (*b*).

Switzerland.—In the canton of Lucerne, the merchants must be inscribed on a public register. This register is in the hands of the Chamber of Commerce, which receives a fee for every inscription. The merchant must be registered within a month after he has commenced business. No one can trade unless he is registered. The register is public, and every one may inspect it by paying a small fee. A page of the register is devoted to each merchant, and it contains—1st, the signature of the merchant, or of those who have the power to sign for the firm; 2nd, a statement whether the merchant trades on his own account, or on account of others, and if he be in partnership; 3rd, when there is a partnership, the names of the responsible partners, and the names of the commanditaires, with the sums of their shares. Every mercantile house must send a copy of his circular to the Chamber of Commerce. The retirement of a registered partner, or of a commanditaire, must be published six months, or one year, before the dissolution of the partnership, so that the creditors may secure their rights during its existence. Unless so published, the retirement of the partner or commanditaire is deemed to have had no effect (*c*). In the cantons of St. Gall and Bâle similar laws exist on the registration of merchants.

Registration entrusted with Chamber of Commerce.

SECTION IX.

BOOK-KEEPING.

BRITISH LAW.

There is no specific law in this country requiring merchants to keep certain number and kinds of books, yet it is incumbent upon them to keep correct books and accounts having regard to the requirements of the bankrupt law. If books are not satis-

No law prescribing number and kinds of books to be kept.
But their re-

(*a*) Portuguese Code, §§ 8—13.
(*b*) Spanish Code, § 13.

(*c*) Law of Lucerne, 11 October, 1832.

gularity indispensable in case of bankruptcy.

factorily kept and balanced from time to time, if the accounts in the ledger are not entered continuously, according to their priority, and without any intervening blank leaves, and if the cash-book is not properly kept, in either case a good ground would be afforded for the refusal of the certificate (a).

Not keeping or concealing books.

If the bankrupt, during his trading, wilfully, and with intent to conceal the true state of his affairs, have omitted to keep proper books of account, or kept his books imperfectly, carelessly, and negligently ; or if, with intent to defraud his creditors, he have destroyed, altered, or falsified any book or writing, or made any false or fraudulent entries, in any such cases there would be a misdemeanour subjecting the party to imprisonment for any term not exceeding three years (b).

Entries may be put in evidence.

An entry in commercial books of accounts may be put in evidence, after the death of the party, if made contemporaneously with the fact which it narrates, and in the usual routine of business, by a person whose duty it was to make the whole of it, who was himself personally acquainted with the fact, and who had no interest in stating an untruth (c). But entries made by a living tradesman in his book are not received in evidence, for no man is allowed to manufacture evidence for himself ; yet a tradesman may appear as a witness, and use his books to refresh his memory ; and they are always available as indicative evidence, or evidence not itself receivable, but indicative of better (d).

Court may receive books in evidence.

The Court of Chancery is empowered, when they shall think fit so to do, to direct that in taking accounts the books of accounts in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matter therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (e).

In Scotland, books of merchants, if kept with reasonable degree of regularity, so as to be satisfactory to the Courts, may be received in evidence, the party being allowed to give his own oath of sup-

(a) *Re Smart*, 1 Fon. B, 14 ; *Re* 560 ; Smith's Leading Cases, vol. i. p. Tracey, 1 Fon. 13 ; *Ex parte Carter*, 236. Price v. The Earl of Torrington ; 1 Fon. B. 83 ; *Re Sparrow*, Ibid. 69. 1 Salk. 285 ; Best, Principles of Evi-

(b) 12 & 13 Vict. c. 106, s. 251 ; 24 & 25 Vict. c. 134, s. 159. dence, 3rd ed. p. 617.

(c) Taylor on Evidence, vol. i. p. (d) Ibid.

(e) 15 & 16 Vict. c. 86, s. 54.

plement of such imperfect proof, provided there has been a course of dealing between the parties, and other satisfactory circumstances (a).

FOREIGN LAWS.

France.—Every merchant must keep a journal exhibiting daily the debts due to him and by him, the operations of his trade, his negotiations, acceptances or endorsement of bills, and generally all that he receives and pays, by whatever title it may be, showing also the sum monthly used for his own private expenses, besides other books used in trade which are not indispensable. He is bound to file the letters which he receives, and to copy in a book those which he sends. He is bound to make every year an inventory of his property, movable and immovable, and to copy it every year in a special book. The journal and the book of inventory must be examined once a year either by a judge of the tribunal of commerce, or by the mayor or his assistant, in the ordinary form and without any charge. The books must be kept by order of date, without blanks, omissions, or marginal references. No sheet can be torn from the books. The copy letter-book is not subject to these formalities. The merchant who has not kept his books, or whose books are incomplete or are badly kept, may be declared “banqueroutier simple.” The suppression of books would constitute fraudulent bankruptcy. Merchants are bound to keep their books for ten years. Merchants often keep other books which are not exacted by law, such as the ledger, the sale book, cash book, &c. These books are admitted as evidence in a court of law, the same as the journal and book of inventories. Commercial books, if regularly kept, *may* be admitted by the judge as a proof between merchants on matters of trade (b).

United States of America.—The law respecting the admission of the party's own books or his own entries differs in most of the states. It is permitted by statute in Vermont, Connecticut, Delaware, Maryland, as to sums below £10 in a year. In Virginia, North and South Carolina, Tennessee, Louisiana, and Maryland entries made by the party himself are not admitted. In the other states they are admitted at common law under various degrees of restriction; but before the books of

(a) Taylor on Evidence, vol. i. p. 561. Tait on Evidence, p. 286. (b) French Code of Commerce, §§ 8—17 and 536.

Value of
entries as
evidence in
American
courts.

the parties can be admitted in evidence they are to be submitted to the inspection of the court, and if they do not appear to be a register of the daily business of the party, and to have been honestly and fairly kept, they are excluded. If the books appear free from fraudulent practices, and proper to be laid before the jury, the party himself is then required to make oath in open court that they are the books in which the accounts of his ordinary business transactions are kept. He must also swear that the articles therein charged were actually delivered, and the labour and service actually performed. The books must be the register of business actually done, and not of orders and things to be done subsequent to the entry.

Obligation to
keep books.

Germany.—Every merchant is bound to keep books which shall exhibit the state of his business. He must preserve all letters of business which he receives, and keep a copy of the letters which he sends, entering them in a book according to date. Every merchant must, on his commencing business, set down accurately all his immovable property, the amount due to him, the amount of cash on hand, and any other property. He must make a valuation of such property, and make a balance-sheet, showing the relation of such property to his debts at the time. Such a balance-sheet must be made every year, unless from the nature of the business it can only be made every two years. The balance-sheet must be signed by the merchant, and if there are several partners all must sign it. The balance-sheets from year to year must be entered in a book to be preserved. When the balance-sheet is made out, the property must be valued as it is worth at the time. Doubtful debts are to be entered according to their probable value; and bad debts must be removed. The books must be kept in a living language, and they must be bound up and paged. No cancelling can take place in the books, nor any changes in the entries. Merchants are bound to keep their books and letters for ten years after the date of their last entries upon them. Books legally kept are an imperfect evidence among traders in commercial matters, to be completed by an oath or other evidence. It is, however, left with the judge to decide what additional proof may be required where the entries in such books are disputed. Commercial books irregularly kept are received in evidence according to circumstances. In case of dispute, the judge may demand the deposition

of the books ; and in case of refusal, the contents as asserted is taken as a proof to the prejudice of the refusing party (*a*).

Brazil.—Every merchant is bound to keep a journal and a copybook. He must enter in the journal every business he transacts, every document which he passes, every bill which he accepts, endorses, pays, and all that he receives and pays. These books must be numbered, sealed, and examined by an officer of the tribunal of commerce (*b*). Nature and form of books.

Buenos Ayres.—Every merchant must keep books to register his accounts and his mercantile correspondence. He must keep a journal, an inventory, and a copy letter-book. In the journal are to be entered daily all the operations of trade, all the documents and bills, and in general all he receives. The inventory-book begins with a description of all the property held at the commencement of the business, and contains balance-sheets made up every year, each balance-sheet being signed by all the parties interested in the establishment. No alteration, erasure, mutilation, or interlineation can be made in the books ; and books which are defective in any of the required formalities have no value in favour of the merchant who kept them. Commercial books kept in the form required are admitted in court as evidence between merchants. In matters not commercial the books of commerce serve only as a commencement of proof. The merchant must preserve his books for the space of twenty years (*c*). Kinds of books to be kept.

Greece.—The same law exists in Greece as in France. The books must be kept in the language of the country (*d*).

Italy.—The same law exists as in France. Books of account establish only half evidence (*e*).

Netherlands.—The merchant must keep his books thirty years (*f*). Length of time the books should be kept.

Portugal.—Merchants are bound to keep their books regularly, but the kind of books and the manner of keeping them are entirely left to their own discretion. Books of trade must be kept for thirty years. Merchants having accounts among themselves must close them every year (*g*).

Russia.—All merchants must keep books. Bankers, whole- Kind of books.

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| (<i>a</i>) German Code, §§ 28—40. | Lombardo-Venetian Code, §§ 8—11, |
| (<i>b</i>) Brazilian Code, §§ 10—14. | and 178—180 ; Two Sicilies Code, |
| (<i>c</i>) Buenos Ayres Code, §§ 54—80. | §§ 16—24. |
| (<i>d</i>) Greek Code, §§ 11—12. | (<i>f</i>) Dutch Code, §§ 6—14. |
| (<i>e</i>) Sardinian Code, §§ 17 — 27 ; | (<i>g</i>) Portuguese Code, §§ 218—240. |

sale traders, and foreign traders, or merchants of the first class, must keep the following books:—a journal, a cash-book, a ledger, a copy letter-book, a book of merchandise to enter in it all goods received or sold, an account-book to open an account with each debtor and creditor, a book to enter accounts for merchandises sold, and an invoice book. Merchants of the second class must keep the following books:—a merchandise book, a cash-book, an account-book where the merchant enters in detail all the money due to him and by him, specifying when due and the payments he has made and received, a document-book to register all bills of exchange, shares, contracts, and other agreements. Merchants of the third class—viz., retailers—must keep three books, a cash-book, a merchandise-book, and a balance-sheet-book, for the purpose of showing what they owe to others and what is due to them. The book ought to be kept regularly and in the order required by law, without corrections, erasures, interlineations, or blanks between the different items. Every merchant is bound every year, or every eighteen months at least, to verify the state of his accounts, and make a balance-sheet, showing all that is due to him and all that he owes to others. Bad debts cannot disappear from the books without showing what has been received against them. The balance-sheet must be duly registered, and the new books must commence with the sum of capital and property left over from the expired year. Books of trade cannot be taken from a merchant nor examined, unless in case of bankruptcy. The books must be kept in the Russian, Polish, or German languages; they cannot be kept in Hebrew unless accompanied with a translation in any of these languages. Every merchant is bound to preserve his rough note-book, in which he writes his transactions before they are entered in the regular books. The books must be preserved, and in case of bankruptcy the merchant may be required to produce books ten years old. Commercial books, regularly kept, are evidence in a court of law between merchants, when they are comparable; if there be a difference they cease to be of value. Books of trade are only a commencement of proof as against a non-trader for deposit of goods or loan of money, when the merchant shows, or it is otherwise proved, that the goods have in reality been deposited or the money received; and when doubt or dispute exists only as to the

Must be in
the Russian,
Polish, or
German lan-
guages.

Books of trade
valid as com-
mencement of
proof.

time of delivery, the quality or quantity or the price of merchandises, or on the term of payment. In support of this commencement of proof the merchant must take his oath. The proof resulting from books of commerce ceases to be valid after ten years, or if the merchant is dead, after five years from the day of his death, when used against a merchant. As regards non-traders this kind of proof can only be used for one year from the date of the entry, or it may be extended to five years by means of a protest, or in case the non-trader is absent or gone abroad. The books of commerce are no evidence in a court of justice if they are irregularly kept, if there be fraud, or if the merchant was a fraudulent bankrupt. In all cases such books may be produced against himself (a).

Spain.—Every merchant must register his business in three books—the journal, the ledger, and the book of inventories. These books are examined every year by the judge of the tribunal of commerce. Retail merchants are bound to make their inventories once every three years. Books irregularly kept are not received in evidence in court; the merchant who kept them thus incurs a penalty of 1,000 to 1,200 reals. A fine of 1,000 to 6,000 reals is incurred by keeping the books in any other language than the Spanish. Those so kept must be translated in the national language. Merchants are responsible for the preservation of books and papers connected with their trading until all their operations are concluded (b).

Switzerland.—The canton of Lucerne has the same regulations as the French code; but the books need not be examined by the judge, and the balance-sheet must only be made every two years. The merchant who does not keep his books is deemed a bankrupt. In the canton of Bâle the same law prevails.

SECTION X.

REGISTRATION OF MARRIAGE CONTRACT.

FOREIGN LAWS.

France.—Where either of the parties being a trader marries, an extract of the marriage contract must be sent to the civil and commercial tribunal, to be set up for one year; the extract

(a) Russ. Code, book iv. t. 2, chap. 9, §§ 1, 2, 3.

(b) Spanish Code, §§ 32—53.

showing if the parties are married with a community of goods or with separate property. Where during marriage one of the parties enters into business, the same contract must be registered within a month, provided it contains clauses in the ignorance of which third parties might be led to grant to either of them a false credit. The civil officer and the notary are respectively required to make known whether there exists a marriage contract (*a*).

Spain.—A contract of dower entered into between a merchant and his wife would confer no right or privilege unless enrolled in the register of the province (*b*).

Austria.—The civil Code provides that the tribunal must take cognizance of the marriage contract (*c*).

SECTION XI.

COMMERCIAL FIRM.

BRITISH LAW.

What is a commercial firm.

The firm is the name, style, or designation by which the trader carries on his commercial operations. It may consist of his own name alone, or of his name joined with that of one or more other persons; or of his name, with the addition of the words "& Co.," or of two or more names with such addition; or of the name of the undertaking in which the parties are engaged.

Right to a firm.

Although every man has a right to adopt any name, style, or designation by which to carry on his business, no one can fraudulently use the name of another so as to pass himself for the firm whose name he makes use of. No man has a right to adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose that he is that other person (*d*).

Use and existence necessary to give a right.

In order, however, to prevent another to use the name of any firm or undertaking, it must be proved that the same had been in use and existence (*e*).

FOREIGN LAWS.

What is a firm.

Germany.—The firm is the name under which the merchant

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| (<i>a</i>) French Code of Commerce, §§ 67—69. | (<i>d</i>) Welch v. Knott, 4 K. & J. 747; Knott v. Morgan, 2 Keene, 213. |
| (<i>b</i>) Spanish Code, § 19. | (<i>e</i>) Lawson v. The Bank of London, 18 C. B. 84. |
| (<i>c</i>) Austrian Civil Code, §§ 1230 and 1231. | |

carries on his business. A merchant who carries on business by himself, or with a dormant partner, is allowed to use his family name or surname, with or without his Christian name, as the name of his firm. He is not allowed to add anything in the firm which might indicate that he has a partner. But he may add anything which may serve to mark clearly the person or the business. Every new firm must be different from any one already in existence; and must also be entered in the register of commerce. When a merchant happens to have the same Christian and family name as another merchant already entered in the register, he must, if he wishes to use his own name for his firm, add something to it by which it may be distinguished from the one already registered. If the firm establishes a branch in another place, the same must be entered in the register of trade of that place. And if in that place there is already a firm entered by that name, he must add something to it by which it may be distinguished from the one already entered. The entry of the branch can only take place after the parent establishment has been duly entered. An existing business, acquired by purchase or succession, may be continued under the same name, with or without any addition denoting the time of the succession, provided the former partner, or his heir, expressly consents that the firm shall continue as it was. A firm cannot be sold independently of the business which it represents. In case any other person enters into or withdraws from the partnership the firm may be continued notwithstanding the change, with the express consent of the retiring partner. When the firm is changed or becomes extinct, or when the partners change, then the Board of Trade will make it known in the usual manner. When the change or extinction of the firm has not been duly entered in the register of trade, and publicly announced, the party whose name still appears in the firm continues liable for its debts unless he has given special notice to the claimant of his withdrawal. But where the change has been entered and the notice sent, third persons are held to have received such notice. The Commercial Court is to keep a list of the shareholders by order of date. Whoever is injured in his rights by the illegal use of his own firm may sue the party for the discontinuation of the same, and claim damages for the injury suffered.

Distinction of
a commercial
firm.

Changes in the
firm.

CHAPTER III.

PARTNERSHIP.

INTRODUCTORY OBSERVATIONS.

Partnership among the Romans, Italians, and Hanse Towns.

THE want of co-operation of capital and labour in carrying on extensive commercial intercourse, and the necessity of large resources to invest in difficult and hazardous undertakings, early suggested the formation of associations for mercantile purposes. The Romans were in the habit of forming associations for all their operations of trade. The business of banking was carried on by companies, and such companies were managed by one or more persons called *Magistri*, who had the right to bind the partners towards third persons. The Italian merchants recognised in partnerships the only means to preserve and extend their commercial position. The Hanseatic league was itself a great commercial association.

Progress of partnerships and companies in this country.

In this country, also, the foreign trade was carried on almost entirely by companies. As early as 1313 a company was formed of the merchants of the staple, and in the sixteenth and seventeenth centuries those great companies were established which carried on the commerce of Britain to the most distant regions of the earth. But though associated together for their mutual help and mutual protection, these companies had no joint stock, and no capital divided by shares. Each member traded upon his own stock and at his own risk, and the conditions of such associations consisted merely in the payment of a certain fine, and in the agreement to submit to certain regulations. It was only in progress of time, and when for the purpose of undertakings of a permanent character demanding a continuous supply of funds, it became necessary to allow persons to invest and to withdraw their capital, that the modern principle of joint-stock companies was introduced. And it was to provide for the necessities which have arisen from such new associations, and to supply

the acknowledged defects of common law, that the various statutes were passed regulating the formation, incorporation, and winding up of joint-stock companies.

The law of partnership, notwithstanding the many changes it has undergone of late years, is still wanting in some important respects. The recognition of the partnership firm as a moral person, or of private partnerships as quasi corporations, the registration of partnerships, a broader distinction between partnership and agency, and the introduction of the commandite principle, or of limited liability in private partnerships,—these are points upon which the English law differs from that of most of the continental nations, and which are likely to be the subjects of further regulations.

Defects of present law.

SECTION I.

AGREEMENT TO BECOME PARTNER.

BRITISH LAW.

An agreement to enter into a contract of partnership is binding in common law, and a Court of equity would decree a specific performance of the contract, provided it be for a specific term of time (*a*), and provided it be concluded and mutually assented to (*b*), and that all the conditions of the contract are duly performed (*c*).

Thus, where a prospectus has been issued and shares collected for a speculation to be carried on, provided a certain amount of capital is secured or subscribed to, a subscriber is not liable in the first instance unless the capital has been actually obtained (*d*). But if the parties show by their acts that they have allowed or acquiesced in any departure from the original

Agreement to become partners binding.

Provided all conditions must be fulfilled.

Acquiescence to departure

(*a*) *M'Neill v. Reid*, 9 Bing. 68; *Anon.*, 2 Ves. 629; *Hercy v. Birch*, 9 Ves. 357; *Buxton v. Lister*, 3 Atk. 382; *England v. Curling*, 8 Beav. 129. The decree in this case went only in terms to the ordering a proper partnerships' deed to be executed, and the injunction was continued against one partner acting contrary to his agreement. Practically, the Court cannot compel partners to carry on business together.

(*b*) *Duke v. Andrews*, 2 Exch. 290; *Fox v. Clifton*, 8 Bing. 726.

(*c*) *Dickinson v. Valpy*, 10 B. & C. 112; *Bourne v. Freeth*, 9 B. & C. 640; *Howell v. Brodie*, 6 Bing. N. C. 44; *Burnell v. Hunt*, 5 Jur. 650, Q. B.

(*d*) *Pitchford v. Davis*, 5 M. & W. 2; *Gabriel v. Evill*, 9 M. & W. 297; *Wood v. Argyll*, 6 M. & Gr. 928; *Hamilton v. Smith*, 5 Jur. N. S. 32.

may be sufficient. conditions, and have acted as partners, whilst such conditions were unfulfilled, then the partnership would be held to exist (a).

SECTION II.

WHAT IS PARTNERSHIP.

BRITISH LAW.

What is partnership. Partnership is a voluntary agreement whereby two or more competent persons place or bind themselves to place in common money, goods, labour, or skill, or either or all of them, for the purpose of a lawful undertaking, and with a view to a mutual participation in profit and loss.

It is a voluntary contract. Partnership is a voluntary contract of the parties and not a relation created by the operation of law or resulting from a community of interest or from joint tenancy in land or goods. Thus the creditors of a bankrupt united by a community of interest in the proceeds of the assets are not partners. Workmen compulsorily or spontaneously engaged to arrest the progress of a fire are not partners, though their wages should consist in a portion of the property saved to be divided among them. Part-owners of ships are not partners (b). A partnership must, moreover, be formed with a view to profit or loss. Clubs and other societies not founded for such purposes are not partnerships (c).

Must be formed for profit and loss. Each partner must bring something valuable, though it may be in different proportions and in different kinds. The capital invested may consist of stock or effects, labour or skill, land or goods, or even the communication of a discovery in art or science, the use of a patent, or of a factory, or of a machine, any thing, in short, that is valuable for the promotion of the joint undertaking.

Each partner must bring something. A partnership must have a lawful object in view. A partnership for smuggling or gambling or any other illegal object would be invalid.

(a) *Tredwen v. Bourne*, 6 M. & W. 461; *Galvanised Iron Company v. Westoby*, 8 Exch. 17; *Steigenberger v. Carr*, 3 Scott, N. R. 466.

(b) *Ex parte Young*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose, 76.

(c) *Caldicott v. Griffiths*, 8 Exch. 898; *Flemyng v. Hector*, 2 M. & W. 172.

FOREIGN LAWS.

France.—Partnership is a contract by which two or more persons agree to put something in common with a view to share any profit which may result from it. Every partnership must have a lawful object in view, and must be contracted for the mutual benefit of the parties. Every partner must bring either money or other property or labour (*a*). Definition of a partnership.

United States of America.—Partnership is a contract of two or more persons to place their money, effects, labour, skill, or some or all of them in lawful commerce or business, and to divide the profit and bear the loss in certain proportions (*b*). Definitions of partnership.

Mexico.—A commercial partnership is a contract between two or more persons in virtue of which they become mutually bound for a certain time and under certain conditions to transact and prosecute conjointly various affairs in common risk, and account the profit and loss to be divided in proportion to the capital or labour invested by each partner at the expiration of the fixed term (*c*).

Spain.—A contract of partnership by which two or more persons unite together their property and labour, or either, with the intention of dividing the profits, is applicable to all kinds of commercial operations, with the exception of the modifications and restrictions imposed by commercial law (*d*).

SECTION III.

KINDS OF PARTNERSHIP.

BRITISH LAW.

The law recognises only two kinds of partnerships, viz., private partnerships with no more than seven partners, and public partnerships or companies composed of any number of partners with limited or unlimited liability. Private partnerships and companies.

FOREIGN LAWS.

France.—There is a difference between a civil and commercial partnership. A commercial partnership exists only where it is formed for any of the objects which are deemed acts of

(*a*) Civil Code, §§ 1832 and 1833.

(*c*) Ordinance of Bilboa, § 1.

(*b*) Kent's Commentaries, vol. iii.

(*d*) Spanish Code, § 264.

p. 20, 8th ed.

trade. There are three kinds of partnerships, viz.: 1st. *Société en nom collectif*, viz., that contracted by two or more persons for purposes of trade under a social firm. 2nd. *Société en commandite*, or that contracted by one or more persons responsible to the whole extent of their property, and one or more persons who simply invest in the partnership a certain amount of money. Such partnership is carried on under a social firm, which must include one or more of the responsible partners. 3rd. *Société Anonyme*, which is not carried on under a social firm or under the names of any of the partners, but under the name of the undertaking. It is managed by agents, partners, or nonpartners, who are only responsible for the due execution of the trust reposed upon them. The French commercial code recognises also *Sociétés en participation*, which are not carried on under a social firm or for any period of time, but consist merely in a participation of interest in certain operations.

Commandite partnerships in the United States.

United States of America.—The law differs in different states. Commandite partnerships are allowed in Massachusetts, Connecticut, Pennsylvania, and New York.

Germany.—The code recognises general partnerships, commandite and dormant partnerships, and joint-stock companies.

Netherlands.—There are in this country *sociétés en nom collectif, commandite, anonyme*, and associations *en participation*, the same as in France.

Kinds of partnership in Portugal.

Portugal.—Besides the *sociétés en nom collectif, en commandite, anonyme*, and *en participation*, the law recognises a tacit partnership, which is supposed to exist when merchants meet together to carry on the same operations of trade, each bringing his capital and industry. The legal presumptions of the existence of such partnerships are, 1st, trading in common; 2nd, contracting and paying debts in common; 3rd, receiving money in common; 4th, sales and exchanges made in common; 5th, acquisition of property in common; 6th, public avowal of the existence of partnership; 7th, the choice by two or more persons of the same agent; 8th, the dissolution of the association as a partnership; 9th, the use of the pronouns "we" and "our" in the correspondence and books, and the use of a name with the addition of the words "& Co."

Russia.—There are in Russia collective partnerships, commandite partnerships, and anonymous partnerships.

Spain.—The Spanish law recognises three kinds of partnerships, viz., collective, commandite, and anonymous.

Switzerland.—The Swiss cantons have very few laws on commercial partnerships.

SECTION IV.

PARTNERSHIP AS BETWEEN THE PARTIES AND TOWARDS THIRD PERSONS.

BRITISH LAW.

Actual intention is requisite to constitute a partnership between the parties (*a*). Thus, no partnership would be held to exist from the simple fact that the parties possess or buy property in common. But if goods are purchased in common with a view to resell them, and to divide the profit and loss, then a partnership would be deemed to exist, whatever may be the ultimate agreement respecting them (*a*).

Partnership would exist between the parties where each of them is to take a share of the profits indefinitely, and is to bear a proportion of the losses, with equal rights to act as principals. A community of interest in the profits and losses of the business as principals is the essence of partnership (*b*). To be a partner one must have such an interest in the profits and losses as will entitle him to an account, and give him a specified lien or preference in payment over other creditors (*c*).

There may be a partnership of profit and loss without establishing a partnership in the capital stock (*d*). A contract of partnership may be held to exist towards third persons, even though it may not exist as between the parties themselves; but wherever it exists among the parties themselves they are necessarily partners towards third persons.

A contract of partnership would be presumed to exist as between the parties and between them and third persons wherever

(*a*) Hazard *v.* Hazard, 1 Story, 371; Cope *v.* Eyre, 1 H. Bl. 37; Lake v. Gibson, 1 Eq. Ca. Abr. 290; Bone v. Pollard, 24 Beav. 283.

(*b*) *Ex parte* Langdale, 2 Rose, 444; Pott *v.* Eytom, 8 C. B. 32; Heighoe *v.* Burge, 9 C. B. 431; Barry *v.* Nesham,

3 C. B. 641; Green *v.* Beesley, 2 Bing. N. C. 108; Brett *v.* Beckwith, 3 Jur. N. S. 81, Rolls; *Ex parte* Hodgkinson, 19 Ves. 291; 2 Rose, 172.

(*c*) Katsch *v.* Schenk, 18 Jur. 668.

(*d*) Fromont *v.* Coupland, 2 Bing. 170.

net profits whatever be their private agreement.

Holding oneself out as a partner.

Participation of profit as dormant partner.

Executors carrying on trade become partners.

Creditors carrying on the business become partners.

No partnership without intention or right to account.

Nor by remuneration as gross earnings.

Nor by a percentage of gross amount.

there is a joint and mutual interest in the profits and losses, or a participation in the clear profits of the concern. So an agreement between two or more persons, having separate business concerns, to share in certain portions the profits of their respective concerns, would constitute a partnership as towards third persons, though it may have been provided by the agreement that none of the contracting parties shall be accountable for the acts or losses of the other, but each party for his own.

A person holding himself out as a partner, so as to induce others to give credit on that assurance, would be liable as such, though he may have no interest in the concern(a). But a person would be liable as a partner if he participates in the profits and loss, though his name has never appeared(b).

When the executors of a deceased partner carry on trade for the benefit of the estate they become liable personally as co-partners, though they have acted in their official capacity(c). So where creditors agree together to carry on the business of the bankrupt estate for their joint benefit, and divide the net income of the business in rateable proportions among all the creditors, according to the amount of their respective debts, they would be liable as partners towards third persons(d).

No contract of partnership would exist as between the parties themselves or towards third persons where either of them receives a portion of the profits in lieu of, or in addition to, his wages of labour, or as a reward for services or skill as agent, clerk, or foreman, provided there has been no intention to contract partnership, nor any right has accrued to account, nor any property in the capital stock(e). So when a lighterman agreed to receive for his work as his remuneration half the gross earnings of the lighter, that did not constitute a partnership(f). So the receipt of a percentage upon the gross amount of sales made to certain customers by the person who recommended such customers did not constitute him a partner as against

(a) *Goode v. Heirson*, 5 B. & Ald. 147 ; *Bonsfield a. Smith*, 12 M. & W. 405 ; *Waugh v. Carver*, 2 H. Bl. 235 ; *Hoare v. Dawes*, 1 Doug. 371 ; *Guidon v. Robson*, 2 Camp. 302 ; *Godfrey v. Turnbull*, 1 Esp. 371 ; *Stables v. Eley*, 1 C. & P. 614 ; *Baird v. Planque*, 1 F. & F. 344.

(b) *Lloyd v. Archbowle*, 2 Taunt. 324 ; *Ruppell v. Roberts*, 4 Nev. & M. 31 ; *Drake v. Bekham*, 11 M. & W. 315. (c) *Wightman v. Townroe*, 1 M. & S. 412. (d) *Hickman v. Cox*, 3 C. B. N. S. 523. (e) *Hesketh v. Blanchard*, 4 East, 144 ; *Dry v. Boswell*, 1 Camp. 329. (f) *Dry v. Boswell*, 1 Camp. 330.

third persons (a). So seamen engaging on a whaling voyage, and receiving a certain proportion of the profits of the voyage in lieu of wages, were not thereby held as partners in the adventure (b). So persons engaged as dredgers in the oyster fisheries, having no interest in the boats nor in the fish caught, but merely receiving a share of the profits in lieu of wages, were not held as partners (c). So the captain of a coal barge, employed to carry out and sell coal on a remuneration for his services of two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery and the wages and pay of the crew, was not held to be a partner (d). So where a surgeon, in consideration for the assignment of the practice and of his being introduced to the patients, agreed to allow to the retiring surgeon one moiety of the clear profits of the business, to be paid yearly, it was held that the stipulation as to profits did not create a partnership between the parties (e).

Where, however, there is an agreement to divide profits and loss as principals, there is partnership (f). So a broker employed to purchase goods under an agreement to receive a proportion of the profits arising from the sale, and to bear a proportion of the loss, was held as a partner towards third persons (g). So where a person joins another in the furtherance of an undertaking, and contributes his work and labour towards the attainment of the object, on the condition that the remuneration is to depend on the realisation of the profit, he would be held to be a partner (h). So where one agreed with another to convey by horse and cart the mail at a certain price per annum, and to pay his proportion of the expense of the cart, the money received for the carriage of parcels to be divided between the parties, and the damage occasioned by loss of parcels to be borne in equal portions, the agreement was held to constitute partnership (i). So where a party advance money

(a) *Pott v. Eyton*, 3 M. G. & Scott, 32; *Stocker v. Brockelbank*, 3 Mac. & G. 250; *Andrews v. Pugh*, 24 L. J. Ch. 58.

(b) *Wilkinson v. Frasier*, 4 Esp. 18; *Rice v. Austin*, 17 Mass. 197; *Mair v. Glennie*, 4 M. & S. 240.

(c) *Perrott v. Bryant*, 2 Y. & Col. 61.

(d) *Hartley's case*, Russ. & Ry. 141.

(e) *Rawlinson v. Clarke*, 15 M. & W. 292.

(f) *French v. Styrling*, 2 C. B. N. S. 357.

(g) *Smith v. Watson*, 3 D. & R. 751; *Meyer v. Sharpe*, 5 Taunt. 74; *Ex parte Langdale*, 18 Ves. 800.

(h) *Addison on Contracts*, p. 722.

(i) *Green v. Beesley*, 2 Bing. N. C. 108; *Barry v. Nesham*, 3 C. B. 641.

Nor by the mere sharing of profit without interest.

In whaling voyages.
In oyster fisheries.

In collieries.

Agreement among surgeons.

Illustrations.
Broker receiving portion of profits as remuneration.

Agent receiving remuneration dependent on profit.

Labour to be remunerated by participation of profit.

Lending money on con-

dition of an interest in the profit.

to another to assist him to prosecute an adventure, on an agreement that he is to receive half of the profits of the adventure, he was held as a partner towards third persons ; and an agreement that he should be indemnified against loss did not make him less a partner (a).

Retiring partner leaving money to participate in the profits.

A partnership would also be held to exist where a retired partner leaves money in the concern at a rate of profit, or at an annuity which rises and falls in proportion to the greater or less amount of profits (b).

Partnership by allowing name to be used as partner.

A partnership would be held to exist as regards third persons wherever the name of a real person is inserted in the firm with his own consent, or where the same is used in bills of parcels or invoices, or is allowed to remain over the door, although the party may have contracted that he should suffer no loss (c). If, however, he has used every precaution to prevent such use of his own name he will not be liable, even though he has not sought to obtain an injunction (d).

Not if the party endeavoured to prevent the use.

FOREIGN LAWS.

There is no partnership without the intention to unite.

France.—In no case is there partnership where there is no will to unite. Neither joint ownership of property, nor community of interest in profit and loss, is able of itself to produce partnership, unless there is the intention to enter in such a contract. Thus a clerk receiving a share of the profit instead of a fixed salary would not be held to be a partner. He would have no right over the partnership property, nor be liable for the partnership debts. So, where a person entrusts to another certain articles on sale, giving him the whole or a part of the proceeds in excess of a certain price, there would be no partnership. So a contract of bottomry bond, where both the lender and the borrower acquire a community of interest in the safety of the ship, does not constitute partnership (e).

What will constitute a partnership.

United States of America.—To constitute a partnership the person must be received into the association as a merchant, and

(a) *Coope v. Eyre*, 1 H. Bl. 37; *Ex parte Watson*, 19 Ves. 458; *Fox Bond v. Pittard*, 8 M. & W. 357; *v. Clifton*, 9 Bing. 116.

Geddes v. Wallace, 2 Bligh, 270. (d) *Newsome v. Coles*, 2 Camp. 617.

(b) *Elgie v. Webster*, 5 M. & W. 518; *Grace v. Smith*, 2 W. Bl. 1000; *Ex parte Chuck*, 1 M. & Scott, 616.

(c) *Williams v. Keats*, 2 Stark. 290; (e) *Pardessus*, Droit Commercial, vol. ii. 560, 563, 702, 969; *Dubergier*, Droit Civil Franc., tom. v. 48—56.

not as an agent, and his interest in the profits must not be intended as a mere substitute for a commission or in lieu of brokerage. So the allowance to a clerk or agent of a portion of the profits of sales as a compensation for labour, or a factor a percentage of the amount of sales, does not render the agent or factor a partner, when it appears to be intended merely as a mode of payment adopted to increase and secure exertion, and when it is not understood to be an interest in the profits in the character of profits, and there is no mutuality between the parties. Shipments from America to India, upon half profits, have never been considered to involve the responsibility of partners, unless it flows from special agreements. The test of partnership is a community of profits, a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services. There is a distinction between a stipulation for a compensation for labour proportioned to the profits, without any lien upon such profits, and which does not make a person a partner, and a stipulation for an interest in such profits, which entitles the party to an account as a partner (*a*).

Spain.—Agents who, instead of a salary, receive a share in the profits are not partners; and when they have received such shares in due time, and not in anticipation, they cannot be called to restore any sum (*b*).

Agents are not
partners.

SECTION V.

COMMENCEMENT AND DURATION OF THE PARTNERSHIP.

BRITISH LAW.

Where no time is fixed for its commencement, the partnership is held to have commencement on the date of the agreement (*c*). But where the partnership has commenced prior to that date, the time of the execution of the deed is immaterial (*d*).

Date of com-
mencement.
A partnership
de facto may
have com-
menced prior
to date.

- | | |
|---|--|
| (<i>a</i>) Kent's Comm., vol. iii. p. 22,
32 ; Muzzy <i>v.</i> Whitney, 10 Johns. R.
226 ; Rice <i>v.</i> Austin, 17 Mass. 206 ;
Story on Partnerships, pp. 60—75. | (<i>c</i>) Williams <i>v.</i> Jones, 5 B. & C.
108 ; Battley <i>v.</i> Bailey, 1 Scott, N. R.
143. |
| (<i>b</i>) Spanish Code, § 269. | (<i>d</i>) Battley <i>v.</i> Bailey, 1 Scott, N. R.
143. |

How long it is presumed to exist. A partnership once shown to exist would be presumed to continue till it is proved to have been dissolved (*a*). A partnership

Partnership at term and at will. may be for a specific time or at will. If no terms are specified, the partnership is held to be at will. A partnership continued

When term has elapsed. after the specific time has elapsed is treated as a partnership at will.

May be for one adventure. A partnership may be formed for one particular adventure, or for a continuous course of transactions without making the parties partners in any other business.

May be limited to one object. A partnership may be limited to any particular object, as to the working of a particular patent or to operations to be carried on at some particular place (*b*).

SECTION VI.

WHO MAY BE PARTNER.

BRITISH LAW.

Who may be partner. Any person of age and of sound mind may be a partner, unless otherwise disqualified by law.

Minor may be for his benefit. A minor may be a partner for his own benefit, but he would not be liable for contracts entered into during his minority (*c*).

His duty on attaining his majority. On his attaining the age of majority, a minor may elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolve the partnership, and gives due notice to that effect within a reasonable time before or after he has become of age, he will cease to be a partner; and if he had derived no advantage or benefit he may recover any money paid by him for the partnership (*d*).

Married woman may be if held as feme sole. A married woman may be a partner whenever she has capacity to trade, and is recognised at law as a feme sole (*e*).

(*a*) Clark v. Alexander, 8 Scott, N. R. 161.

(*b*) De Berkom v. Smith, 1 Esp. 29; Heyhoe v. Burge, 9 C. B. 431; Redgway v. Philip, 1 C. M. R. 415.

(*c*) Corpore v. Overton, 10 Bing. 252; Holmes v. Blogg, 8 Taunt. 508; Goode v. Harrison, 5 B. & Ald. 157.

(*d*) Goode v. Harrison, 5 B. & Ald. 157; Warwick v. Bruce, 2 M. & S. 205; Corpore v. Overton, 10 Bing. 253.

(*e*) Ex parte Franks, 7 Bing. 762; 20 & 21 Vict. c. 85; Derry v. Mazarine, 1 Lord Raym. 147; Bardon v. Keverberg, 2 M. & W. 61.

SECTION VII.

PARTNERSHIP DEEDS AND REGISTRATION OF PARTNERSHIPS.

BRITISH LAW.

Partnership is regulated principally by the express contract or articles of partnership, but where the contract does not reach all the duties and obligations arising from that relation, then they are implied and enforced by law (*a*).

It is not requisite that the contract of partnership be drawn out in writing; it may be established by verbal agreement or inferred from the acts of the parties (*b*). But an action, could not be sustained for breach of an agreement to become a partner without proof of the specific terms of the intended partnership (*c*). The existence of a partnership may be established also by the fact that the parties have shared profits and losses, that the party held himself out as a partner, and by any admission or advertisement tending to prove the existence of a partnership agreement (*d*).

Partnership articles should state the nature of the business, the commencement and duration of the partnership, the style of the firm, the capital and property of the firm, the amount to be contributed by each partner, the allowances to be made to, and the amount allowed to be drawn out by each partner, with provisions for the retirement of partners and the admission of new partners, the settlement of disputes by arbitration, dissolution of partnership, &c.

Bonds executed by partners, relating to their rights as partners, bearing the same date as the partnership deed, are read in a court as part of the partnership contract (*e*).

(*a*) *Crawshay v. Collins*, 15 Ves. 218.

(*b*) *Peacock v. Peacock*, 16 Ves. 49; *Alderson v. Clay*, 1 Stark. 405; *Studdy v. Sanders*, 2 D. & Ry. 307.

(*c*) *Figes v. Cutler*, 3 Stark. 139.

(*d*) With regard to third persons, partnership is a fact of the existence of which they have rarely the means to obtain written proof. When they allege that a partnership has existed between certain parties in order to deduce their rights against them, they may be allowed to prove the existence of such

Partnerships regulated by deed as far as it provides.

Need not be in writing.

What necessary to prove in a suit for a breach of agreement to become partners.

May be established by facts.

Provisions of partnership deeds.

Bonds executed at the same time.

partnership even by oral evidence, provided such proof refers to facts personal to the party against whom they wish to proceed. Proof of the existence of a partnership may be obtained from a combination of documents and public facts, the introduction of which is necessarily left with the judges, and also from the books, correspondence, circulars, and advertisements published by or with the consent of the parties.

(*e*) *Morison v. Moat*, 9 Hare, 260.

Articles can-
not be altered
except by con-
sent of all.

Clauses deli-
berately disre-
garded.

Clauses not
acted upon not
binding.

The articles which are agreed on, to regulate the partnership, cannot be altered without the consent of all the partners.

The Court of Equity will decree the specific performance of any clause of the partnership deed where there has been a studied and deliberate disregard of the same (a). But when any of the clauses of the partnership articles have not been acted upon by the parties, they will be held as not binding by a Court of Equity (b).

FOREIGN LAWS.

Partnerships
must be by
deed.

What must be
published.

France.—A partnership in collective name, or en commandite must be drawn up either by public deed, prepared and signed by notaries, or by an act under private signature, signed by all the partners, and written out in as many copies as there are partners. No oral evidence can be admitted against and besides the contents of the partnership deed written at the same time of the deed, or afterwards, even if it be a question below one hundred and fifty francs. The partnership deed must be made public by the publication of an abstract of it, signed by the notary, and by all the partners when the partnership is in collective name, and by the responsible partners only if the partnership is en commandite, or divided by shares. This extract must contain the names, surnames, condition and residence of the partners, the firm of the partnership, the designation of the partners, the authority to manage the business and to sign on behalf of the firm where such has been delegated to some of them only, the amount of capital invested, or to be supplied by shares en commandite, the time the partnership will continue, and the circumstances which cause its dissolution. It is not necessary to publish the proportion in which the profits and losses are to be divided, nor any of the clauses which do not interest third parties (c). The extract of the deed must, within a fortnight of its date, be sent to the Tribunal of Commerce of the district where the house is established, to be enrolled in the register, and posted up for three months in the hall. If the partnership has several houses of trade, situated in different districts, the extract must be sent, and must be enrolled and

- (a) *Marshall v. Colman*, 2 Jac. & Const v. *Harris*, T. & R. 528.
Walk. 266. (c) French Code of Commerce, §§ 42
(b) *Ex parte Harris*, 1 Rose, 437; —44.
Jackson v. Sedgwick, 1 Swanst. 460;

posted up, in the tribunal of each. This extract must be inserted in one of the journals designated by the tribunal every year, from among those published in the chief place of the district, or in default which appear in the department. Moreover, a copy of the journal containing this insertion must be certified by the printer, legalised by the mayor, and registered within three months of its date. The same conditions are required for all the changes made in the deed of partnership, and for all the new clauses agreed upon after the publication of the original deed. If these formalities are not observed, the deed has no value as regards the parties themselves, though the partners cannot make use of such defect as against third parties.

United States.—All persons doing business in a partnership capacity must file or cause to be filed in the office of the prothonotary in the county or counties where the said partnership is carried on, the names and location of the members of such partnership, with the style and name of the same ; and as often as any change of members in said partnership takes place, the same must be certified by the members of such new partnership, and in default or neglect of such partnership so to do, they are not permitted in any suits or actions against them in any court to plead any misnomer or the omission of the name of any member of the partnership or the inclusion of the names of persons not members of the said partnership (a).

Germany.—The partners must give notice of the formation of the partnership by entering in the register of trade the name, surname, profession, and residence of all the partners, the name of the firm and of the place where it is to be established, the date when the partnership will commence, and if there be an agreement that one or several of the partners only are to represent the firm, the names of such persons must be registered. When the firm of an existing partnership is altered or the same is removed to another place, or when new partners enter the same, or when a partner receives the right to represent the partnership, or when this right is taken away from him, notice of all these facts must be given to the tribunal of commerce that they may be entered in the register of trade. When such facts are not duly registered they cannot be proved against

Registration of partnerships.

(a) Act of 14th April, 1851.

these parties. The notices must be signed by all the partners in the presence of the tribunal of commerce, or they must be sent in in an authenticated form.

Deed must be published.

Italy.—The same law prevails as in France. The extract of the deed must be inserted in the gazette of the province where the partnership is founded, and if there be no gazette in the province, it must be inserted in the gazette of Turin ; the insertion must take place within one month from the time it has been sent to the tribunal of commerce. If the extract has not been sent, or has not been inserted in the gazette within the time fixed, each partner has power, so long as these formalities have not been complied with, to withdraw from the partnership by giving notice to his co-partner, by an act deposited in the tribunal. In such a case the partnership is dissolved. But the non-observance of these formalities cannot be set against the rights of third persons against partners (a).

Partnership deed to be registered and published.

Netherlands.—The partnership deed must be inscribed in a special register, at the tribunal of the district, or at the court of the department. An extract is sufficient, provided it be drawn up in an authentic form, and signed by all the partners. The register is public, and every one may take extracts from it. The extract must contain all the conditions which may interest third parties. The partners are bound, besides, to cause an extract to be published, both in the official journal and in one of the journals of the place where the partnership is established, or in a journal of a neighbouring place. Before the enrolment and publication of the deed, the partnership is considered, as regards third persons, as a general partnership, contracted for an unlimited time, and excluding none of the partners from the right of management and agency for the firm. If the published conditions differ from the written convention, the first only have force. The dissolution of a partnership before the time agreed by contract for its continuance, as well as all the changes made upon the first agreement, which might interest third parties, must be registered in the same manner, and in default of those formalities no advantage could be taken of such changes as against third parties. If the renewal of a partnership in collective name is not enrolled and registered, the partnership is

(a) Sardinian Code, §§ 51—57.

considered to be constituted as a general partnership for an unlimited duration, the same as when a partnership newly constituted has not complied with the required formalities.

Portugal.—A partnership in collective name, or of capital and labour, must be formed by deed. But though the obligation to make the contract in writing is binding between the parties, the existence of the partnership towards third persons may be established by any other evidence. Every partnership deed should be published in full in the register of commerce. The law on registration of partnerships is the same as in Spain. Every person may ask to inspect the register. So long as the partnership deed has not been enrolled in the public register of commerce, the partnership is deemed, as regards third persons, as a general partnership, constituted for an unlimited time, and in which none of the partners is excluded from the management (a).

Russia.—A partnership is not deemed established until a notice of its formation is given to the guild of merchants, and a copy of the deed is transmitted to the public authority. Notice of every partnership formed must also be given to the minister of finance. Every partnership that has not complied with these formalities for inscription and publication is deemed in a state of dissolution.

Spain.—Every partnership deed must be drawn up in an authentic form. The agreement made under private signature is only valid as against the parties who have engaged to unite in the execution of the deed, which must be made before the partnership commences its operations. In case of contravention, neither the partnership nor any of the partners can institute any suit relative to their property. For this purpose the partnership must, on the request of the defendant, be prepared to prove the execution of the deed. The partnership which has not fulfilled this formality is moreover liable to be fined. The deed must state the name, surname, and domicile of the interested parties; the firm, the names of the partners certified to manage for the firm, the capital each partner brings in cash, credit, or bills, showing their value, or the basis upon which they are valued; the portion of profit and loss due

Partnership
must be re-
gistered.

Public notice
of partnership
necessary pre-
vious to its
commencement.

Partnership
must be by
deed.

(a) Portuguese Code, § 601.

to each partner, the duration of the partnership which can only be formed for a fixed time, or for a definite object; the kind of business, the sum to be given annually to each partner for his private expenses, and the amount of compensation to be made to others, in case no excessive sum is received by one of them, the declaration that the partnership will submit to the judgment of arbitrators in case of dispute among the partners, and the manner in which the partnership capital shall be divided at the dissolution of partnership. No agreement can be made by the partners contradicting those included in the public deed, nor would such be admitted in evidence. All changes in the partnership deed must be executed in the same form as the deed itself. An extract of the deed of partnership must be enrolled in the register of trade, kept in each province. Partnership deeds not enrolled have no effect between the parties, though they have force in favour of third parties, who had contracted with the partnership. The extract must also be sent to the tribunal of commerce of the place where the partnership is situated, posted up in the hall, and transcribed on a register. Every transgression of such regulations is punished by fine (a).

SECTION VIII.

INTRODUCTION OF NEW PARTNERS.

BRITISH LAW.

Unanimous consent necessary for the admission of new partner.

Deed may stipulate for such admission.

As it is an essential principle of partnership that partners choose one another, no partner can compel the others to receive in his place a person to whom he proposes to transfer his rights. The admission of a partner at any time must be by the unanimous will of all the partners. The majority cannot compel the minority in this matter (b). The deed of partnership may stipulate that in case of death of one of the partners his heir or representative shall succeed him, but without a stipulation to that effect the executors of a deceased partner are not allowed to occupy his place (c).

(a) Spanish Code, §§ 207—292.

(b) *Ex parte Barrow*, 2 Rose, 225; 33.
M'Neill v. Reid, 9 Bing. 68.

(c) Pearce v. Chainberlain, 2 Ves.

Although no one can be introduced as a new partner without the concurrence of all the partners, this does not preclude a partner entering into a sub-partnership with a stranger (*a*) ; but though such a stranger would participate in the share of profit and loss, he would not become a partner on that account.

In joint-stock companies with a capital divided in transferable shares, the power to transfer the interest in the company is always presumed.

Sub-partner-ships.

In joint-stock companies shares are transferable.

FOREIGN LAWS.

France.—The deed of partnership may provide that in case of death of one of the partners his heir or representative shall be admitted in his stead, but in the absence of such provision the heir or representative can only demand his share of the profits on all the business done before the death of the partner (*b*). In companies by shares the shareholders are presumed, unless otherwise expressed in the deed, to have the right to sell their shares, and to constitute the purchasers of them members of the company (*c*).

Effect of clause for the admission of a new partner in case of death.

United States.—A partnership cannot be compelled by the act of one partner to receive a stranger into an association which is founded upon personal confidence (*d*).

Admission of new partner must be by unanimous consent.

Germany.—Without the consent of all the partners a partner cannot take another person into the partnership. A partner may allow another person to participate in his share, but he cannot give him any direct title to the partnership, nor entitle him to examine their books and accounts (*e*).

Portugal.—Each partner may, without the consent of his copartners, accept as partner in his share a third party, but he cannot without such consent make him a member of the firm. The party thus interested is not bound as a partner towards the creditors of the partnership (*f*).

Sub-partner not entitled to the same rights as partner.

(*a*) Brown *v.* De Tastet, Jac. 284 ; (*d*) Kent's Comm., vol. iii. p. 60.
Sir Charles Raym. case, 2 Rose, 255. (*e*) German Code, § 98.

(*b*) Code Napoléon, § 1868.
(*c*) Code de Commerce, §§ 35, 36.

(*f*) Portuguese Code, §§ 586—590.

SECTION IX.

MANAGEMENT OF THE PARTNERSHIP.

BRITISH LAW.

All partners entitled to management.

All the partners have equal rights and equal duties to perform in the management of the partnership, and in the absence of special agreement each partner has an equal deliberative voice in all the affairs of the concern, and has a right to be consulted respecting them. No partner can be deprived of this right unless he himself has renounced it in favour of others (*a*).

Majority rule the minority.

All questions relating to the administration of the partnership, and unprovided for by the articles of partnership, are subject to the decision of the majority of partners, and the majority, acting fairly and *bond fide*, have a right to conduct the business notwithstanding the dissent of the minority.

No change in essential conditions except by all the partners.

No change, however, can be made in the essential conditions of the partnership except by the unanimous consent of all the partners. So it would not be competent for the majority in a company constituted to construct a railway between two places to decide to make a railway between two other places, or for the majority in a company constituted for fire and life insurance to undertake marine risks also; nor is it competent for the majority in case of dispute to give the choice to the dissentient party to accept or retire (*b*).

FOREIGN LAWS.

France.—Every partner has an equal right to the administration of partnership affairs, and he cannot be deprived of this right unless he himself wishes to entrust it to others in his stead. Every partner has a deliberative voice. The votes are taken by head and not in proportion to the property invested, and the majority will bind the minority. But this power of the majority extends only to administrative questions. The majority

(*a*) Domat's Civil Law, l. 1, tit. viii. 6; Oldaker *v.* Lavender, 6 Sim. 239; Code Napoléon, § 1859.

(*b*) Bagshaw *v.* The East Union Railway Company, 9 Hare, 326; Bugon *v.* Metropolitan Saloon Omnibus Com-

pany, 3 De Gex & J. 123; Australia Auxiliary Steam Clipper Company *v.* Mounsey, 4 K. & J. 733; Natusch *v.* Irving, Gow on Partnership, App. 390.

could not change the primary or constitutary basis of the partnership. There must be unanimity among all the partners, in order to change any clause of the deed which was itself the work of all the parties in the transaction.

In partnerships in collective name the partners often agree to entrust the whole management to one or more partners, who are called *gérants*. When the powers of the *gérant* are not determined, he may, according to the object of the partnership, purchase and sell, freight ships, insure, and do everything necessary for the existence of the partnership; but he cannot go beyond his administrative capacity. Thus, in a manufacture, the *gérant* might purchase merchandise, and sign bills for them. He might sell the manufactured articles, and even the raw material purchased to manufacture them, because in some cases the same may be resold for a profit; and he has the right to recover the sums due to the partnership. But the sale, without the authority of his copartners, of the house and warehouses where the trade or manufacture is carried on, would be null as regards third parties, who can never think that his powers extend to the sale of the establishment itself. It would be the same as regards the mortgage of real estates belonging to the partnership, though the *gérant* would not violate this rule by selling an estate which was purchased for the purpose of resale. The *gérant* could not alone consent to a cession of all partnership property in favour of its creditors. And as the *gérant* can only bind the partnership in virtue of the powers conferred upon him, it follows that he can bind the partnership towards third persons only for what he has done in his capacity of *gérant*; though third parties would be bound for their engagements towards the partnership. The *gérant* properly stands in the capacity of agent for the partnership. A partner expressly nominated as *gérant* cannot substitute another in his stead without the formal consent of all the partners. Where a *gérant* has been appointed, the copartners have no right to interfere in the management. They have only a right to watch over the *gérants*, and to inspect the books (a).

Germany.—The management of the partnership may be confined by the deed to one or more partners; and if one or more

All the part
ners have

(a) *Pardessus, Droit Commercial*, tom. iii., § 1013.

equal right of management.

partners have been appointed for the purpose, they cannot be deprived of their special right without a rightful cause. Where no one is specially appointed, all the partners have equal right to carry on the business of the partnership. For anything which is not within the limits of the partnership the consent of all the partners must be obtained. Unanimity is also required in the appointment of the *gérant*, or managing partner (*a*).

Authority of managing partner.

Portugal.—Every partner is held to be a managing partner unless otherwise provided for by the deed. When in conformity with the deed the partners have confided to one of themselves the management of the partnership, they are at liberty to extend or restrict his authority. The managing partner may do all that belongs to the administration of the partnership notwithstanding the opposition of other partners. But if the managing partner abuses his authority, the other partners may nominate another to inspect his management, or demand a dissolution of the partnership (*b*).

Rights of co-partners restricted when managing partners are appointed.

Spain.—Unless otherwise provided, all the partners have the right to concur in the general administration of the partnership. When some of the partners have been specially entrusted with the management of the partnership, those who do not possess such authority cannot counteract their orders or interfere with their management. The management of the business cannot be withdrawn from the partners appointed by the deed, except upon a valid cause (*c*).

SECTION X.

INTEREST OF PARTNER IN THE CAPITAL STOCK.

BRITISH LAW.

Capital stock absolute property of all the partners.
What is capital stock.

Whatever is brought by each partner into the joint stock must be brought absolutely and unconditionally, and not as a loan or for the temporary use of the partnership. The partnership property consists of the original stock, whether personal or real property, or both ; and of all the additions made to it in

(*a*) German Code, §§ 99—104.

(*b*) Portuguese Code, §§ 611—616.

(*c*) Spanish Code, §§ 304—307.

the course of trade (*a*). The good-will of a mercantile establishment forms part of the partnership stock (*b*) ; and so a trade mark (*c*).

All the partners have a joint and mutual interest in all the stock and effects of the partnership, including all that each partner has brought into it, and all that may have been acquired during the continuation of the partnership (*d*). But no partner has an exclusive right over any part of the joint effects until a balance of accounts be struck between him and his copartner (*e*).

All partners have a joint interest in the stock.

Property, although used and risked for common profits of the partners, may still remain the private property of one of them. The profits accruing from it may be divided, and yet not the ownership of property (*f*). A community of profit and loss does not necessarily carry with it a community in the capital stock ; but in the absence of express contract to the contrary, such community will always be presumed (*g*). So an agreement between an author and a publisher, by which the publisher agreed to publish the work at his own expense and risk, and after deducting all charges and expenses, and a per-cent-age on the gross amount of the sale, for commission and risk of bad debts, the profits remaining to be equally divided, would not constitute a partnership in the unsold copies of the work, but only in the profits of the sale (*h*).

Property may remain the private property of one partner.

Each partner has a specific lien on the partnership stock, not only for the amount of his share, but for all he may have advanced beyond that amount for the use of the partnership ; and also for what may have been abstracted by his co-partner beyond the amount of his share (*i*). So the surviving partner has a lien on the share of the deceased partner for the payment of the debts of the partnership (*k*).

Each partner has a specific lien on the partnership stock.

Notwithstanding the joint tenancy in the partnership stock, No survivor.

(*a*) *Crawshay v. Collins*, 2 Russ. 339 ; *Nerot v. Burnard*, 4 Russ. 247 ; *Bone v. Pollard*, 24 Beav. 283 ; *Forster v. Hale*, 5 Ves. 308.

(*b*) *Kennedy v. Lee*, 3 Meriv. 441 ; *Shackle v. Baker*, 14 Ves. 468.

(*c*) *Hine v. Lart*, 10 Jur. 106.

(*d*) *West v. Skigs*, 1 Ves. 242.

(*e*) *Lingen v. Simpson*, 1 Sim. & Stu. 600 ; *Fox v. Hanbury*, Cowp. 445 ; *Garbett v. Veale*, 5 Q. B. 408.

(*f*) *Ex parte Hamper*, 17 Ves. 404 ; *Barton v. Hanson*, 2 Taunt. 51 ; *Wilson v. Whitehead*, 10 M. & W. 503.

(*g*) *Reid v. Hollinshead*, 4 B. & C. 867 ; *Smith v. Watson*, 2 B. & C. 401.

(*h*) *Wilson v. Whitehead*, 10 M. & W. 503 ; *Reade v. Bentley*, 3 K. & J. 271.

(*i*) *West v. Skigs*, 1 Ves. 242.

(*k*) *Payn v. Hornby*, 4 Jur. N. S. 446.

ship in mercantile partnership.

Real estate is converted into personal estate.

Real estate not purchased with partnership fund not so converted.

Real estates devised to partner not partnership property.

Partners joint tenants.

no survivorship takes place in mercantile partnerships ; in case of death of one of the partners, the property vests in the representatives of the deceased partner (a).

In the absence of a specific agreement to the contrary, real estates purchased with partnership funds, for partnership purposes, is converted into personal estate (b). But real estate purchased with partnership property, but not for partnership purposes, is not converted into personality (c). Real estate brought into partnership by a partner, under an agreement that during the partnership, and, if necessary, for partnership purposes, after the expiration of the partnership should be considered as personal estate, but not purchased with partnership fund, and not required to be sold for partnership debts, or for any of the other purposes of the partnership, is not converted into personal estate as between heirs and personal representatives (d).

Real estates devised to partners is not partnership property, though used for partnership purposes (e). Though partners purchase with partnership funds, the equity of redemption of mortgages devised to them, the equity of redemption follows the mortgage, and does not become partnership property.

FOREIGN LAWS.

France.—Each partner must guarantee to his co-partner the property or the use of the funds he has invested.

United States of America.—Partners are joint tenants in their stock in trade, but without the *jus accrescendi* or right of survivorship. On the death of one partner, his representatives become tenants in common with the survivor ; and with respect to *chooses in action*, survivorship so far exists at law, that the remedy to reduce them into possession vests exclusively in the survivor for the benefit of all the parties in interest. But no partner has an exclusive right to any part of the joint stock until a balance of accounts be struck between him and his

(a) *Jackson v. Jackson*, 9 Ves. jun. Rep. Ch. 591.

Thornton v. Dixon, 3 Bro. C. C.

199.

(b) *Townsend v. Devaynes*, 1 Mont. Partn. 97 ; *Morris v. Kearaley*, 2 Y. & Col. 139 ; *Broom v. Broom*, 3 My. & K. 443 ; *Bissett on Partnerships*, p. 56 ; *Houghton v. Houghton*, 11 Sim. 491 ;

(c) *Randall v. Randall*, 7 Sim. 271 ; *Phillips v. Phillips*, 1 My. & K. 649 ; *Holroyd v. Holroyd*, 28 L. J. Ch. 902.

(d) *Cookson v. Cookson*, 8 Sim. 529.

(e) *Phillips v. Phillips*, 1 My. & K. 649.

co-partners, and the amount of his interest accurately ascertained. If partnership capital be invested in land for the benefit of the company, though it may be a joint tenancy in law, yet equity will hold it to be a tenancy in common, and as forming part of the partnership fund, and liable to all the incidents of partnership property. The decisions of the Courts are not uniform in regarding land purchased with partnership fund as property in common. They seem to have considered that partners purchasing an estate out of the joint funds, and taking one conveyance to themselves as tenants in common, would hold their undivided moieties in separate and independent titles, and that the same would go, on the insolvency of the firm, or on the death of either, to pay their respective creditors at large (a).

Germany.—The funds invested by the partners in the partnership become the property of the partnership. In case of doubt, the presumption is that the property, both movable and immovable, which stands in favour of one partner only, but which has been entered into the inventory of the partnership, has become the property of the partnership (b). Each partner is entitled to receive 4 per cent. interest on the money he has advanced beyond his share in the profit of the concern ; and he will be also charged 4 per cent. interest on the amount which he takes out of the partnership. The interest credited to a partner is added to his share in the partnership fund. A partner cannot withdraw the funds he has invested in the partnership without the consent of all the other partners. But he may, even without this consent, take the interest due to him upon his share for the year, and an amount not exceeding his share of the profit of the year (c).

Spain.—No partner can withdraw a greater sum than that fixed by agreement, and if he does so, he must restore the same. Power to withdraw profits limited.

Interest due to
partners for
their advance.

SECTION XI.

INTEREST OF PARTNERS IN PROFIT AND LOSS.

BRITISH LAW.

Where there is no express contract varying the rights of the Unless specially provided

(a) Kent's Comm. vol. 3, p. 38.

(c) *Ibid.* § 106.

(b) German Code, § 91.

partners are equally interested in profit and loss.

partners, the presumption of law is, that there is to be an equal participation of the profits of the business, whatever be the difference in the capital or labour respectively brought in by the partners (*a*). Such presumption will, however, be rebutted, where, by the entries in the book, and other evidence, it be proved that the shares of the different partners differed in amount and value, and another practice than an equal distribution of profits has been introduced.

Agreement to divide profits and not losses void.

An agreement between two partners that the profits shall be equally divided, but that the entire loss shall be borne by one of them, would be void. And when a partner is excluded from his share of profits, the Court of Equity will compel his co-partner to account to him for it.

What are profits and losses.

The profits of the partnership consist of what remains in surplus of the capital invested after all the debts and expenses of administration have been defrayed, and the losses are the excess of debt, and expenses of management, over the capital extant. The profit and loss of the partnership are usually ascertained every year, and, except otherwise provided, each partner has a right to withdraw his share annually from the partnership.

FOREIGN LAWS.

Right of industrial partner to profit.

France.—Where the partnership deed does not determine the share of each partner in the profit and loss, the share of each is in proportion to the funds he has invested in the partnership, and the share of profits of the partner who gives his labour and skill is like that of the partner who invested the least amount of capital. Any convention giving to one partner the whole of the profits is void. Any stipulation which would free from contribution to losses the capital put in the partnership by one or more of the partners is also void (*b*).

Holland.—Partners may stipulate that one or more of them shall alone bear all the losses (*c*).

Losses to be

Spain.—The same law prevails as in France respecting the

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| (<i>a</i>) <i>Peacock v. Peacock</i> , 2 Camp. 45, | (<i>b</i>) <i>French Civil Code</i> , §§ 1852 and
16 Ves. 49; <i>Farrar v. Beswick</i> , 1 M. & Rob. 527; |
| <i>& Rob. 527</i> ; <i>Robinson v. Anderson</i> , 20 Beav. 98; | <i>1855.</i> (<i>c</i>) <i>Dutch Code</i> , § 1672. <i>Webster v. Bray</i> , 7 Hare, 159. |

division of profits among the partners, but, unless specially provided, the losses are to be divided among the partners supplying capital, without allowing the industrial partner to participate in them (a). defrayed by contributor of capital only.

SECTION XII.

DUTIES OF PARTNERS.

BRITISH LAW.

The first duty of the partner is to hand over to the use of the partnership whatever he has promised to bring, and no partnership would be held to exist till this primary obligation is fulfilled (b). He must also guarantee to the partnership the right of property in, and the use of such investment, unless otherwise provided by the contract; and where his quota of investment consists in his labour and skill, it is his duty to devote these exclusively to the benefit of the partnership. Duty of partner to bring in his share.

Partners being bound together by a general engagement to act for each other as each would act for himself, owe to one another a perfect fidelity. They are bound to communicate to one another all that belongs to the partnership and all that may prove advantageous to it, and neither of them can appropriate to himself more than the agreement gives him right to (c). He must guarantee the use.

In the discharge of his regular duties for the partnership, a partner is not allowed to secure to himself any private advantage or derive any profit at the expense of his copartners. His copartners may compel him to account for any profit which he may have appropriated from any business carried on in his own name which ought to belong to the partnership, whilst he would have no right of reciprocity against his copartners should the business have produced loss (d). Partners must be faithful to one another.

So when a person owing money to a partner in his own account, as well as to the partnership, makes a payment without appropriating the amount, the partner cannot appropriate the same to his own account. Cannot derive advantage at the expense of another.

(a) Spanish Code, § 319.

(d) Pardessus, H. 1016; Fawcet v.

(b) Venning v. Leckie, 13 East, 7.

Whitehouse, 1 Russ. & My. 148; Bent-

(c) Domat's Civil Law, L. 1, tit. viii. a.

ley v. Craven, 18 Beav. 75.

4; Blissett v. Daniel, 10 Hare, 522, 536.

Cannot appropriate payments to himself and neglect the partnership.

Cannot engage in a concern adverse to the interest of partners.

Parties bound to each other by express or implied contract to promote an undertaking for the common benefit are not allowed to engage in another concern which may give them a direct interest adverse to that undertaking (a).

Must account for partnership property.

It is the duty of a partner the instant he receives partnership property either to apply it to partnership purposes, or to charge himself as debtor with it in the partnership's books (b).

Must exercise care and watchfulness.

Partners are bound to exercise the same care over the affairs of the partnership as they would exercise over their own.

Cannot claim an allowance except under agreement.

The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade when there is neither a contract between the parties nor a custom of the place to authorise such allowance (c).

Executor of a deceased partner not entitled to allowance.

So the surviving partner, being the executor of his deceased partner, is not entitled to an allowance for carrying on the business after his partner's decease for the benefit of the estate; nor is an executor and legatee of such surviving partner entitled to it (d).

Must keep proper accounts.

It is the duty of the partners to keep proper accounts, ready at all times for the inspection of all the partners (e).

Each must do his duty.

A partner who complains that the other partners do not do their duty towards him must be still ready at all times and offer himself to do his duty towards them.

SECTION XIII.

AUTHORITY OF PARTNERS.

BRITISH LAW.

Each partner is a general agent.

Every partner is constituted a general agent for all the other partners as to all matters within the scope of the partnership dealings, and is possessed as such of all authority necessary for carrying on the partnership, and all such as is usually exercised by partners in the business in which they are engaged (f).

(a) *Glassington v. Thwaites*, 1 Sim. & Stu. 133; *Burton v. Wooley*, 6 Madd. 367. (d) *Stoken v. Dawson*, 6 Beav. 371. (e) *Goodman v. Whitcomb*, 1 Jac. & W. 593.

(b) *Ex parte Yonge*, 3 Ves. & B. 36. (f) *Vere v. Ashby*, 10 B. & C. 288.

(c) *Hutcheson v. Smith*, 1 Jr. Eq. R. 117.

Any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which each of them possesses as a general agent for the other is operative only as between the partners themselves, and does not limit their authority as to third persons (a).

Where, however, a special notice of a want of authority has been given, should a person cognisant of this limitation still continue to deal with such a partner, the other partners would not be bound by such dealings (b).

Partners in trade may bind each other by drawing, accepting, or indorsing bills of exchange or promissory notes in the name of the firm (c). A partner may bind his copartners by signing a bill or note even in his own name, provided such bill or note be directed to the partnership (d). When, however, there is nothing on the face of the bill or note to connect it with the partnership, or that the drawing, acceptance, or indorsement was made on behalf of the partnership, then the partner only whose name is on the instrument can be sued thereon (e).

A partner has no power to bind his copartners by using the name of the firm on a matter which is not in the usual course of the partnership (f); and the authority of partners to bind each other by drawing, accepting, or endorsing bills of exchange or promissory notes, is limited to partnerships for trading purposes. In partnerships not for trading, a special authority to that effect would be requisite (g). So it is not extended to mining or farming, or other purposes where bills of exchange are neither usual nor necessary for carrying on the business (h). For the same reason attorneys or solicitors could not bind each other by bills and notes (i).

So it being not incidental to the general power of a partner to bind his copartners by a guarantee such an instrument would not bind his copartners, except where an implied or

- (a) *Hawken v. Bourne*, 8 M. & W. 710.
- (b) *Gallway v. Mathew*, 10 East, 264.
- (c) *Swan v. Steele*, 7 East, 210; *Maclae v. Sutherland*, 3 E. & B. 1; *Bank of Australasia v. Breillat*, 6 B. C. 152.
- (d) *Hall v. Smith*, 1 B. & C. 407; *Wilks v. Back*, 2 East, 142; *Mason v. Rumsey*, 1 Camp. 385; *Wells v. Merterman*, 2 Esp. 731.

(e) *Siffkin v. Walker*, 2 Camp. 308.

(f) *Levy v. Pyne*, Car. & M. 453.

(g) *Ibid. Thickerness v. Bromilow*,

2 C. & J. 425; *Dickinson v. Valpy*, 10 B. & C. 139.

(h) *Davidson v. Robertson*, 3 Dow.

229.

(i) *Duncan v. Lowndes*, 3 Camp. 478; *Ex parte Nolte*, 2 Glyn. & Jam. 306.

No restriction of power valid except as between the parties.

Unless special notice be given.

Partners' power to bind each other by bills.

Bills drawn on the firm and signed by one partner.

When there is nothing to connect with partnership, the partner alone is bound.

Must be in a matter in the course of partnership.

Authority limited to partnerships for trading.

Partnerships for farming have no such authority.

Nor between attorneys, &c.

No authority to bind by a guarantee when it has no reference

to the business.

express authority was given to that effect, or where the obligation had reference to business connected with the partnership (*a*).

When assurance has reference to partnership business.

When, however, an act is done, or an assurance given with reference to the business transacted by the partnership, although out of the regular course, it is still within the scope of the partners' authority, and will bind the firm (*b*). Even a promise or an admission by one partner, relative to a partnership transaction, would bind the firm (*c*).

Promise or admission of partner binding on the firm.

All contracts of sale and purchase.

All contracts of sale and purchase.

All contracts to be binding must be in the name of the firm.

Where carried on in the name of one only, he will bind all by his acts.

May bind his copartners even for fraud; in breach of revenue law;

for misappropriation of money; not if committed whilst dealing on his own account.

Copartner may bind for money or for goods he appropriates to himself.

All contracts to be binding must be in the name of the firm.

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for misappropriation of money; not if committed whilst dealing on his own account.

Copartner may bind for money or for goods he appropriates to himself.

All contracts of sale or purchase by one partner on joint account, and for purposes connected with the partnership, are binding against the firm, each partner having an unlimited authority to deal with the partnership effects (*d*). But a partner has no authority to bind the partnership in any other name than that held out to the world as the name of the firm (*e*). Where, however, the partnership is carried on in the name of one individual partner, all acts done by him on behalf of the partnership, and in his name, will bind all the partners collectively (*f*).

A partner may render his copartner liable even for his fraud and misconduct, provided it have a sufficient relation to the business of the firm (*g*). So if a partner is guilty of a breach of the revenue law, all the partners would be liable to answer for the partnership (*h*). So if a partner misapplies money belonging to other persons, left in custody with the firm, all the partners are liable to restore the same (*i*). If, however, a partner commit a fraud whilst trading on his own account, the firm is not liable (*k*).

A partner may also bind his copartners by a loan contracted for his own private expenses while engaged in partnership business, or by a purchase of goods such as the firm trades in, but which he uses for his own benefit, provided there be no collu-

(*a*) *Duncan v. Lowndes*, 3 Camp. 478; *Ex parte Nolte*, 2 Glyn. & Jam. 306.

(*b*) *Sandilands v. Marsh*, 2 B. & Ald. 680; *Brettel v. Williams*, 4 Exch. 628.

(*c*) *Pritchard v. Draper*, 1 Russ. & M. 199.

(*d*) *Bond v. Gibson*, 1 Camp. 185; *Barton v. William*, 5 B. & A. 405.

(*e*) *Kirk v. Blurton*, 9 M. & W. 284.

(*f*) *South Carolina Bank v. Case*, 8 B. & C. 427.

(*g*) *Ropp v. Latham*, 2 B. & A. 795; *Blair v. Bromley*, 2 Ph. 354.

(*h*) *Lindley on Partnerships*, p. 239.

(*i*) *Devaynes v. Noble*, 1 Meriv. 529; *Bourdillon v. Roche*, 27 L. J. Ch. 681; *Hartman v. Johnson*, 3 C. & K. 272; *Sims v. Brutton*, 5 Exch. 802.

(*k*) *Bishop v. The Countess of Jersey*, 2 Drew. 148.

sion between him and the lender of money or the seller of goods (*a*).

But the partnership will not be bound by a joint security given by one of its partners for a transaction not relating to the partnership, except where its express or implied sanction can be shown, or where the giving of such guarantee is necessary for the carrying on of the ordinary business (*b*). A partner would be bound by his copartner's misapplication or misappropriation of trust property (*c*).

The partnership agreement, though under seal, does not authorise partners to bind each other by deed, unless a particular power be given for the purpose. A deed, therefore, executed by a person on behalf of himself, and his partners will be binding on him but void as to them (*d*). If, however, he executes it as an individual partner only, and not professedly on behalf of the others, he would not be bound unless the others execute, the execution of each being presumed upon the faith that the other partners are to be equally bound (*e*).

Nor can a partner, without special authority, bind the other partner by a submission to arbitration, even of matters arising out of the business of the firm, though he himself would be bound by the award (*f*).

Notice by or to one partner would be notice by or to the firm (*g*). So payment to one partner is also payment to all, and a receipt by one partner for a joint debt is valid as against all partners (*h*).

Each partner has authority to act for the firm in bankruptcy, proving debts, voting for assignees, and signing certificates (*i*). One partner has not, however, implied authority to consent to an order for a judgment in an action against himself and his

(*a*) *Bond v. Gibson*, 1 Camp. 185; *La Marquise De Ribeyre v. Barclay*, 23 Beav. 107; *Hope v. Cust*, 1 East, 53.

(*b*) *Crawford v. Stirling*, 4 Esp. 207.

(*c*) *La Marquise de Ribeyre v. Barclay*, 23 Beav. 107.

(*d*) *Ball v. Dunsterville*, 4 T. R. 313; *Harrison v. Jackson*, 7 T. R. 210; *Elliot v. Davis*, 2 B. & P. 338; *Hawkshaw v. Parkins*, 2 Swanst. 543.

(*e*) *Elliot v. Davis*, 2 B. & P. 338; *Hawkshaw v. Parkins*, 2 Swanst. 543.

(*f*) *Stead v. Salt*, 3 Bing. 101; *Strangford v. Green*, 2 Mod. 228; *Hilton v. Royle*, 3 H. & N. 500.

(*g*) *Mayhew v. Eames*, 1 C. & P. 550; *Alderson v. Pope*, 1 Camp. 404.

(*h*) *Bristow v. Taylor*, 2 Stark. N. P. C. 50.

(*i*) *Ex parte Hodgkinson*, 19 Ves. 293; *Ex parte Mitchell*, 14 Ves. 597; *Ex parte Hall*, 17 Ves. 62.

Not if the transaction does not relate to the partnership.

Partners may bind co-partner for misapplication of trust property.

Cannot bind by deed unless under special powers.

But the partner himself would be bound.

Not by a submission to arbitration.

Notice by or to one is notice by or to all.

Payment to one is payment to all.

Each partner may act in bankruptcy. But cannot consent to an order for judgment.

Service of a notice to one is not service to all.

copartners (*a*). Service of a notice on one of two joint defendants who are partners, or at the partnership place of business, is not a sufficient service upon the other (*b*).

SECTION XIV.

PARTNERSHIP LIABILITY.

INTRODUCTORY OBSERVATIONS.

The law imposes a partnership liability upon every one who participates in the profits and loss of a concern, although there may not have been any intention to contract partnership, and nothing was done to lead others to believe that there existed a contract of partnership. This law is founded on the principle that inasmuch as he who takes a portion of all profits really takes from the creditors a part of that fund which is the proper security to them for the payment of their debts, it is but right that he should become liable to third persons to losses, if losses arise. But what difference does it make to third persons whether the money is withdrawn in the shape of interest for money lent, or as a portion of realised profits, provided there be no interference in the management of the partnership?

With reference to third persons.

Third persons will rather be the gainers where the money is invested at a contingent rate of profit rather than lent at interest, because whilst the lender at interest will withdraw the interest, whether there be loss or gain in the business, the participator in the profit and loss will withdraw his profits only when there has been actual gain; and whilst the lender at interest will rank with creditors for the amount lent, and for interest, no matter at what an exorbitant rate the money was lent, the participator in the profits must wait till all the creditors are satisfied before he can claim any part of the investment, or any interest or profit thereon.

Bills on partnership liability.

To amend the law on the subject, a bill was introduced in the House of Commons, in 1855, providing that the lending of money on condition to receive a portion of the profit, or a sum varying according to the amount of such profits, either in lieu of, or in addition to, any interest for or on account of such loan,

(*a*) *Hambridge v. De la Crouée*, 3 C. B. 742. (*b*) *Mosedon v. Wyer*, 6 Scott, N. R. 945.

should not constitute a partnership between the lender and borrower. It was required, however, that such loans should be registered, and that in the event of bankruptcy of the borrower the rights of the lender should be postponed until all the creditors have been satisfied. To this there was added a clause that no agent should be deemed a partner by reason simply of his receiving in lieu of or in addition to wages for his service a portion of the profits made by his principal, or a sum varying according to the amount of such profits. This bill was rejected by the Commons on the ground that the publication of the names of the lenders on such terms might lead to a fictitious credit. In 1856 another bill was introduced to the same effect not providing for any registration, and with the addition that no person receiving by way of annuity or otherwise any portion of the profits made by any trader in his business, shall by reason only of such receipt be deemed to be a partner or be subject to any liabilities incurred by such trader. Considerable opposition was, however, offered to the progress of the bill ; and upon the passing of a clause for the registration of such lenders, the framer of the bill, Mr. Lowe, withdrew it. Since then no further attempt has been made to legislate on the subject, and as the law of limited liability applies only to companies of seven or more partners, the unlimited liability in private partnership continues unaltered.

BRITISH LAW.

All the partners in a concern, whether active, nominal, or dormant, are equally liable to third persons for all the debts and engagements of the partnership, not only to the extent of their interest in the joint stock, but also to the whole extent of their separate property (*a*).

All partners
equally liable.

The unlimited responsibility of partners may, however, be expressly limited by contract as between the parties themselves, and by special notice as between them and third persons (*b*). So where a partner gives notice to a person who has been in the habit of supplying the firm with goods that he will no longer

Responsibility
may be limited
between the
partners.

Or by special
notice to a
third party.

[*(a)* Carlen v. Drury, 1 V. & B. 157. Fleming, 1 You. & Jer. 227 ; Hassell v. Merchant Trader Ship. Co., 4 Exch. Rep. 137, 1 Johnson, 80 ; Hallett v. 525. Dowdale, 21 L. J. Q. B. 98 ; Vice v.

be answerable for such goods he cannot be charged for goods subsequently supplied (a).

Commencement and termination of liability.

The liability of a partner commences with the commencement of the partnership, and ceases upon his dissolving it and giving notice of the dissolution (b). The firm is, therefore, not liable for debts contracted by any of the partners prior to the formation of the partnership, even if such debts were contracted for the purpose of founding the partnership (c).

Incoming partner not liable for former acts.

So an incoming partner is not liable for debts contracted previous to his joining the partnership, unless there be an express covenant for that purpose between the partners themselves, or a tacit or express agreement between the new partner and the creditor. The simple ratification of the former acts by the new partner would not render him liable. Therefore, where one purchased goods and another is afterwards permitted to share in the adventure, the seller could not recover against such other person the price of the goods (d).

Liability contracted by receiving a benefit from former acts.

If, however, the incoming partner receives a benefit from the contract, and there be sufficient evidence that he has assented to debts previously contracted by the firm, he will be liable (e). Slight circumstances would be sufficient to establish the liability of an incoming partner, where at any subsequent time he has acquired all the benefit of it (f).

Incoming partner subject to the same terms as original partner.

An incoming partner joining without specifying the terms on which he becomes such partner would have the same rights and would be subject to the same liabilities as the original partners (g).

Infant partner becoming of age the same as incoming partner.

An infant partner coming of age and not disaffirming the partnership will stand in the same capacity of an incoming partner, but will in no case be liable for past contracts, unless he ratifies such contracts, or renews in writing the promise made during infancy (h).

Dormant partner liable.

A dormant or secret partner is liable for all the contracts of a

(a) *Vice v. Fleming*, 1 You. & Jer. 226; *Lord Galway v. Mathew*, 10 East, 268.

(b) *Battley v. Lewis*, 1 M. & G. 155; *Heath v. Sansom*, 4 B. & A. 172.

(c) *Greenslade v. Dower*, 7 B. & C. 635; *Wilson v. Whitehead*, 10 M. & W. 503; *Saville v. Robertson*, 4 T. R. 720.

(d) *Young v. Hunter*, 4 Taunt. 582.

(e) *Ex parte Jackson*, 1 Ves. 131; *Ex parte Peele*, 6 Ves. 602.

(f) *Ex parte Peele*, 6 Ves. 601.

(g) *Austen v. Boyd*, 24 Beav. 598.

(h) *Gode v. Harrison*, 5 B. & Ald. 150.

partnership in which he was interested whenever discovered, and may be sued on the contract (a).

One who holds himself out to the world as a partner will acquire all the liability of a partner, although he is not, in point of fact, a partner in the concern, and has no share or interest in the profits of the business (b). By inducing the public at large, or any particular person, to give credit to the partnership, a person becomes liable as a partner for the debts so contracted, although he should in reality not be a partner (c). It would, however, be otherwise where the person knows that the party thus appearing as a partner actually possesses no interest in the concern, and that by the contract between the parties he was not to be liable (d). And when a party is charged as a partner, on the ground of his having held himself out as such, he can only be affected by acts of holding out prior to the contract (e).

A retiring partner known to be a member of the firm will continue to be liable for all the debts and contracts of the partnership to all persons who have previously dealt with the firm and who had no notice of his retirement (f).

The liability of a partner for the future acts of his copartners and for the affairs of the partnership may at any time be made to cease by notice, except in case of death or bankruptcy, where no notice is required to prevent its continuation (g).

But no notice is necessary to determine the liability of a dormant partner, his liability continuing only so long as he was interested in the partnership, and for those contracts only in which he was interested as a partner. If, however, he was known to any special creditor to have been a partner, special notice should be sent (h).

A notice of retirement inserted in the Gazette is a sufficient general notice to all who had no previous dealings with the

Holding one-self out as partner.

Retiring partner liable for former acts.

Liability may cease by notice.

No notice necessary for dormant partners.

What notice is sufficient.

(a) *Grace v. Smith*, 2 W.B. 1000; *Barry v. Nasham*, 3 C. B. 641; *Beckham v. Drake*, 9 M. & W. 79; *Ex parte Hamper*, 17 Ves. 412.

(b) *Guidon v. Robson*, 2 Camp. 304; *Bourne v. Freeth*, 9 B. & C. 641.

(c) *Gurney v. Evans*, 3 H. & N. 122.

(d) *Alderson v. Pope*, 1 Camp. 404.

(e) *Guidon v. Robson*, 2 Camp. 302; *Baird v. Planque*, 1 F. & F. 344.

(f) *Heath v. Sansom*, 4 B. & A. 172.

(g) *Devaynes v. Noble*, 1 Meriv. 616; *Webster v. Webster*, 3 Swanst. 490; *Brown v. Gordon*, 16 Beav. 302.

(h) *Heath v. Sansom*, 4 B. & A. 172; *Parkin v. Carruthers*, 3 Esp. 248;

Stables v. Eley, 1 C. & P. 614; *Evans v. Drummond*, 4 Esp. 89; *Farrar v. Deflinne*, 1 C. & K. 580.

Effect of the notice.

Payment by new firm discharges old firm.

Rule as to payments by continuing partners.

Payments by surviving partners.

Special appropriation.

Payment by one partner.

firm ; but as respects those who have had dealings an express notice, or an ordinary circular sent round to all the correspondents, would be required (*a*). Such notice exonerates the retiring partner from all future debts, though it does not affect past transactions (*b*).

When by the retirement of any of the partners a new firm is called into existence, payment by the new firm will discharge the debts contracted by the old firm (*c*).

Where any payment is made by the new firm in current account generally without any special appropriation, that payment would be applied to the earliest standing account. Where two partners were indebted to a person, and after dissolution of the partnership the continuing partner also becomes indebted on his personal account to the same person, all payments made by such continuing partner without any specific appropriation after the dissolution would be applied to the reduction of the entire account, and go to the discharge of the partnership debt (*d*).

So where one of several partners dies, and the surviving partners continue their dealings with a particular creditor, towards whom the partnership also was indebted, if the creditor joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners would be applied to the old debt (*e*).

Where, however, a special appropriation has been made, or an intention to appropriate the payment to some particular debt can be shown to have existed from any circumstance, arising either out of the course of business between the parties or of the source from which the money was obtained, then the rule ceases to be applicable, and the payment would be made as specially appropriated (*f*).

The payment of a partnership debt by one of the partners with partnership funds extinguishes the liability of all the others. If, however, the partner paid the debt with his own money, with

(*a*) *Newsome v. Coles*, 2 Camp. 617 ; *Hart v. Alexander*, 7 C. & P. 753 ; *Ex parte Burton*, 16 Jur. 967 ; *Ex parte Leaf*, 1 Deac. 176 ; *Graham v. Hope*, 1 Peak. 208.

(*b*) *Wood v. Braddick*, 1 Taunt. 104 ; *Ault v. Goodrich*, 4 Russ. 430 ; *Dobbin v. Foster*, 1 C. & K. 323.

(*c*) See *Lindley on Partnership*, p. 340.

(*d*) *Clayton's Case*, 1 Meriv. 572 ; *Smith v. Wigley*, 3 Moo. & Sc. 174.

(*e*) *Simson v. Ingham*, 2 B. & C. 72.

(*f*) *Stoveld v. Eade*, 4 Bing. 154 ; *Thompson v. Brown*, Moo. & M. 40 ; *Wickham v. Wickham*, 2 K. & J. 478.

the intention of keeping the debt alive against the firm, their liability will in that case still continue (a).

Where a partner in trade who is indebted to the same person to whom the partnership is also indebted pays the amount out of the funds of the partnership, the payment is deemed to have been made on behalf of the firm, and their liability is thereby extinguished (b).

A release to one partner from a partnership debt, or of a debt for which several persons are jointly and severally bound, is a release to all the others, except where the right against the other parties is expressly reserved.

To discharge a partner from his liability by the substitution of another party, there must be a clear agreement on the part of the party entitled, and the creditor is never presumed to have discharged the original debtor. Therefore an agreement by the continuing partners with a retiring partner that they will take all the debts upon themselves, though valid as a contract of indemnity as between the parties, will not discharge the retiring partner from his liability to third persons (c).

Even where the creditor treats the continuing partner as his debtor, or even accepts a new security for the old debt, unless he discharge the retiring partner, or unless the new security is of such a nature as to merge the original debt, the liability of the retiring partner will still continue (d).

Nor would the introduction of a new partner affect the liability of the retiring partner, or the estate of the deceased partner. Nothing but the adoption by the creditor of the new firm as his sole debtors will have the effect of a discharge of the original liability (e).

Where, however, the creditor receives a security of a higher nature than he had before the original debt, as where a creditor accepts the bond of one partner for the simple contract debt of both, then the debt is merged in the higher security (f).

The right of suing partners on any contract not under seal is Right of suing

Payment by
one partner
deemed on
behalf of the
firm.

Release to one
partner a re-
lease to all
unless with
reserve.

Discharge of a
partner by
substitution
of another.

What will dis-
charge the
original debt.

Adoption of
the new firm
necessary to
discharge the
old.

Merger in a
higher
security.

(a) *Watters v. Smith*, 2 B. & Ad. 889 ; *M'Intyre v. Miller*, 13 M. & W. 725 ; *Thorne v. Smith*, 10 C. B. 659.

(b) *Thompson v. Brown, Moo. & M.* 40 ; *Thorne v. Smith*, 10 C. B. 659.

(c) *Smith v. Jameson*, 5 T. R. 601.

(d) *Heath v. Percival*, 1 P. W. 682 ; *Bedford v. Deakin*, 2 B. & A. 210.

(e) *Hart v. Alexander*, 7 C. & P. 746.

(f) *Ex parte Hernaman*, 12 Jur. 642 ; *Higgens' Case*, 6 Co. 44, b.

limited by Statute of Limitation.

Mutual authority of partners cease by death or bankruptcy.

Partnerships for commercial and not for commercial purposes.

Partnership obligations must be in the name of partnership firm.

extinguished by the Statute of Limitations after the lapse of six years.

By the death, bankruptcy, or insolvency of one partner, the mutual authority of partners to bind each other ceases, and the liability for each other's acts is at an end.

FOREIGN LAWS.

France.—In partnerships in collective name, all the partners are responsible, to the full extent of their property, for all the engagements of the partnership, even where one of the partners only has signed the obligation, provided it be in the name of the partnership. In partnerships not for commercial purposes, partners are not bound in *solidum* for the social debts, and the partners have no implied authority to bind one another. All partners are bound in equal share, even if the share of one be less than that of the others, unless the deed has distinctly limited his obligation to the proportion of his share. Where the partners in a commercial partnership have entrusted to some of themselves, or to a third party, the signature of the firm, the partnership is bound only by the acts of such parties. All the acts of the managers, even their frauds if committed in the management of the business, bind all the partners, even although they have expressed their opposition to such business, provided there be no complicity between such third parties and the managers, and the managers have not acted in their own names. Where the partners have not conferred to any one of them in particular the right of contracting obligations for the partnership, or even, where they have made an agreement to that effect, and they have not published it, the act of each partner binds all the partners, because they are constituted as mutual agents, and they are deemed to have announced to the public that what may be done by one of them shall be considered as done by them all. The partnership is not bound by the acts of the managers, or of the partners, unless they are done in the name of the firm. As the firm is the true and only name which designates the partnership, and secures its individuality, it cannot consider as its own engagement what has been contracted in the name of another. Nevertheless, if a manager signs as the head of the house, he is deemed to have signed in the name of the partnership. The partnership is

also bound by engagements, not contracted in its name, if it be clear that they were contracted on account of the partnership. The creditor of partners mutually bound may sue any of the partners and may discharge any of the partners of his own share. Yet the creditor must first sue the firm, and then go against the partners separately. Partners are not quite joint debtors, but are rather securities for the engagements of the firm (*a*).

United States of America.—Though the law allows parties to regulate their concerns as they please in regard to each other, they cannot, by arrangement among themselves, control their responsibility to others; and it is not competent for a person who partakes of the profits of a trade, however small his share of those profits may be, to withdraw himself from the obligations of a partner. Each individual member is answerable *in solidum* to the whole amount of the debts, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates. When a person joins a partnership, as a member, he does not, without a special promise, assume the previous debts of the firm, nor is he bound by them. To render persons jointly liable upon a contract as partners, they must have a joint interest contemporary with the formation of the contract (*b*).

Liability of
partners ab-
solute.

Germany.—Partners are bound, jointly and severally, and for all their property, for the obligations of the partnership. An agreement among the partners of a contrary effect has no force as against other persons. An in-coming partner is bound with all the other partners for the obligations which the partnership has contracted before he entered it, no matter whether the firm was altered or not. An agreement to the contrary would have no effect towards other persons. The partnership is bound by the acts done in its name by the managing partner, even where the business was not done in the name of the partnership, if it be shown that it was on behalf of the partnership. The partnership is not bound by the deed of the partner when he had no authority to act for the firm, but such restriction of authority would have no effect as respects third persons. The private creditors of a partner have no claim upon the partnership property, or

Extent of
liability.

In-coming
partners.

(*a*) Pardessus, Droit Comm., vol. iii. p. 93. (*b*) Kent's Comm., vol. iii. pp. 31—36.

any portion of it, for their private debt. They can only claim the share belonging to the partner after the settlement of accounts. The same regulations apply in case of mortgages possessed by creditors on the property of a partner. To the debt due to the partnership, the debtor cannot set off the private debt due to him by a partner (a).

Holland.—In partnerships in collective names, the partners are bound to the full extent of their property, for the engagements of the partnership. But in partnership not for commercial purposes, partners are not bound *in solidum* for their social debts (b).

Liability of partners for each other's acts.

Portugal.—Every commercial partner is bound to the full extent of his property for partnership debts. The engagements of the partnership are binding upon all partners. The act of one partner is the act of all. Engagements contracted by a partner not authorised to act on behalf of the company, where the exclusion has been duly published in the deed, would not be binding on the firm, unless they have benefited thereby. A partner may bind the firm even for his own private expenditure, if he borrows in the name of the partnership, but he would not bind the firm for any object foreign to the business of the partnership. An obligation entered into by one of the partners beneficial to the partnership is held as a separate and conjoint obligation. So a bill of exchange drawn upon the firm, and accepted by one of the partners in his own name, is binding on the firm. When a partner draws a bill in the name of the firm for the payment of a debt, part owing by the firm and part by himself, the partnership is only bound to the extent of its own obligation. A bill drawn in the name of the firm by one of the partners, for a private obligation, or for purposes foreign to the business, does not bind the other partners. No partner can bind his co-partners by deed without special authority. Nor can a partner bind his co-partners by a submission to arbitration (c).

Private property of partners attachable only after the joint estate is exhausted.

Spain.—The same law prevails as in Portugal. The private property of the partner not invested in the partnership can be attached for the payment of the obligations contracted by the partnership only after the joint estate of the partnership has been exhausted (d).

(a) German Code, §§ 113—121.

(b) Dutch Code, § 18; Comm. Code, §§ 1679—1682; Civil Code.

(c) Portuguese Code, §§ 663—692.

(d) Spanish Code, § 352.

Switzerland: Canton of Lucerne.—In commercial partnerships partners are always presumed to be bound *in solidum* for the engagements of the partnership. Engagements contracted by the managing partners bind third parties towards the partnership, when such management has been entrusted to them by the deed of partnership. Persons who invest capital in a partnership, with a view to participate in the profits and losses, but who do not appear as partners, are only responsible for the sum they have invested. The partners whose names are included in the firm are all bound for all their property. In case of bankruptcy, creditors must first attach the joint capital of the partnership; if such capital is insufficient to satisfy these debts then they may attach the private property of the partners (a).

Presumption
of unlimited
liability.

SECTION XV.

ARBITRATION CLAUSES.

BRITISH LAW.

The deed of partnership generally contains a clause to the effect that in case any difference shall arise between the parties, and they cannot agree, and determine the same between themselves, then the parties shall nominate and appoint two persons, one to be chosen by each, giving them power to determine such matters by their award in writing under their hands, and in case such persons cannot agree to determine the matter to them referred, within a specific time after the reference, that the same shall be referred to, and determined by, such other person as the two first referees shall for that purpose nominate and appoint umpire in the premises, who shall determine the same by writing under his hand, and the parties shall perform the award or arbitrament made by the arbitrators or their umpire without further trouble.

Arbitration
clauses may
be enforced.

When the deed of partnership contains such a clause to refer all future disputes to arbitration, if any of the partners commence an action at law or a suit in equity against the other parties, the Court may, on application by the defendant, stay all such proceedings (b).

Clause to refer
suits to arbit-
ration.

(a) Law of 21 October, 1833, §§ 684 (b) Aitken's Arbitration ; 6 Week.
—687. Rep. 145.

Cases of agreement.

If, in any case of arbitration, the parties do not, after differences have arisen, concur in the appointment of an arbitrator, or if, where the parties or the arbitrators are at liberty to appoint an umpire, such parties or arbitrators do not appoint an umpire, in such cases the Court may after service proceed to appoint an arbitrator or umpire, with power to act in the reference and make an award as if it had been appointed by consent of all partners (a).

When arbitrator not appointed.

When reference is to two arbitrators, one to be appointed by each party, and one party fails to appoint an arbitrator for seven days, the other party may appoint an arbitrator to act alone (b). Every agreement or submission in writing may be made a rule of court, unless a contrary intention appear (c). But although a clause to refer all future disputes to arbitration is now valid and may be enforced, a negative clause that neither party should bring an action before the arbitrator has made his answer is illegal, it being illegal, by any agreement between the parties, to withdraw the decision of the question from the determination of the ordinary tribunals of the country (d).

Old French law.

France.—The French code of commerce provided that every dispute among partners for causes connected with the partnership shall be settled by arbitration; but there was an appeal from the award unless there was a stipulation to the contrary. The appeal was before the royal court. The nomination of the arbitrators might be either by a private or by a notarial deed, by an extra-judicial act, or by the consent given in court. The time when the award was to be given was to be fixed by the parties when they nominated the arbitrators, and if they did not fix it, the same was to be fixed by the judges. In case of refusal by one or several of the partners to nominate the arbitrators, they were to be nominated officially by the Tribunal of Commerce. The parties were to deliver their papers and documents to the arbitrators without any formality of court; and any partner who delayed to deliver such papers was to be summoned to do so within ten days,

(a) 17 & 18 Vict. c. 125, ss. 11—17.

(b) *Ibid.*

(c) *Ibid.*

(d) *Lee v. Page*, Law Journal, Vol. 30,

Ch. 857; *Scott v. Avery*, 8 Exch. 487;

4 H. L. Cas. 811.

unless the arbitrators allowed a longer time for it. If, however, no further delay was granted, the arbitrators might adjudicate upon the documents *pro tem.* In case of difference of opinion the arbitrators might nominate an umpire, unless the same was nominated in the deed of submission. And if the arbitrators differed in such nomination, the same was to be named by the Tribunal of Commerce. The award made in writing and deposited at the Tribunal of Commerce was rendered executory by an ordinance of the tribunal. These were the provisions of the French Code of Commerce, but by the law of the 17th July, 1856, forced arbitration was suppressed; the arts. 51 to 63 of the code were abrogated, and all disputes among partners were made to be within the competence of the Tribunal of Commerce. Yet voluntary arbitration remains, and commercial questions may be submitted to the decisions of arbitrators in the ordinary manner (a).

New French
law.

Italy.—The code of the Two Sicilies provided the same mode of settling partnership disputes by arbitration as the French code.

Portugal.—All differences for the non-execution of agreements on the part of one of the partners are to be settled by arbitration, and it is forbidden to stipulate otherwise. All appeals from the award of the arbitrators are carried to the Tribunal of Commerce. The submission may be by private *ct* or by deed. In case of arbitration in a place where there exists a tribunal of commerce, the award cannot be confirmed by the president until after it has been reviewed and confirmed by the juries of the tribunal. If the juries of the tribunal do not agree with the award, the president may cite the interested parties to appear before the Court to sign a deed by which they shall declare to submit to the award, to abandon all recourse, and that they simply demand a confirmatory decree, in which case the president will confirm the award of the arbitrators. If the parties or one of them refuse to sign such deed, the president will appoint a time for hearing the case, and will proceed as in case of an appeal in ordinary justice (b).

Spain.—The same law exists here as prescribed by the French code (c).

(a) French Code of Commerce, §§ 15—63, and Law of 17 July, 1856. (c) Spanish Code of Commerce, §§ 323—325.

(b) Portuguese Code, §§ 48—7760.

SECTION XVI.

LEGAL AND EQUITABLE REMEDIES BETWEEN PARTNERS.

BRITISH LAW.

Legal rights between co-partners for money lent.
Non-payment of instalments.

Distinct transaction.

Balance struck.

Not for work and labour on account of the partnership.

A partner has a right of action against his copartner for money lent for the purpose of launching the partnership (*a*), for the non-performance of an agreement to pay certain instalments for the formation of a partnership (*b*), and for the neglect to fulfil a covenant to contribute capital and labour to the joint stock of the partnership. So where a publisher undertakes with an author to publish a work for their joint benefit, an action will lie for the refusal to complete the manuscript (*c*).

An action may be maintained by a partner against his co-partner upon any transaction held by special agreement distinct from the ordinary business of the concern (*d*), where the debt is a separate debt, where a negotiable instrument has been given for value received on partnership account (*e*), and where a partnership account has been settled and a balance struck (*f*). When there is a covenant to render accounts at specific periods, an action could be maintained for the non-performance of such a covenant, and damages may be recovered for breach of any stipulation in the partnership articles.

But a partner cannot maintain an action against his co-partner for work and labour performed or money expended on account of the partnership (*g*), nor for a contribution for damages for a loss or negligence affecting the partnership (*h*), nor for contribution for losses and expenses of the partnership so long as the partnership accounts are unsettled (*i*).

(*a*) *Ex parte Notley*, 1 Mont. & A. 46; *Elgie v. Webster*, 5 M. & W. 518; *Gale v. Leckie*, 2 Stark. 107.

(*b*) *Brown v. Tapscott*, 6 M. & W. 123.

(*c*) *Gale v. Leckie*, 2 Stark. 107.

(*d*) *Preston v. Shutton*, 1 Anstr. 50; *Oliver v. Hamilton*, 2 Anstr. 453; *Coffee v. Brian*, 3 Bing. 64; *Jackson v. Stopherd*, 2 C. & M. 361; *Wilson v. Cutting*, 10 Bing. 436; *Sharp v. Warren*, 6 Price, 132.

(*e*) *Smith v. Barrow*, 2 T. R. 476; *Venning v. Leckie*, 13 East, 7; *Lomas v. Bradshaw*, 19 L. J. C. P. 273.

(*f*) *Moravia v. Levy*, 2 T. R. 483; *Foster v. Allanson*, 2 T. R. 479; *Wray v. Milestone*, 5 M. & W. 21; *Henley v. Soper*, 8 B. & C. 16; *Winter v. White*, 1 Bro. & Bing. 350; *Carr v. Smith*, 5 A. & E. N. S. 128.

(*g*) *Holmes v. Higgins*, 1 B. & C. 74; *Smith v. Barrow*, 2 T. R. 476.

(*h*) *Pearson v. Skelton*, 1 M. & W. 504.

(*i*) *Brown v. Tapscott*, 6 M. & W. 123; *Burnell v. Minot*, 4 Moore, 342; *Holmes v. Williamson*, 6 M. & S. 158; *Edger v. Knapp*, 6 Scott, N. R. 712.

The Court of Equity will interfere by injunction where there is a breach of contract in the articles of partnership sufficiently important to authorise the complaining party to call for a dissolution; also where the partnership property is applied to other purposes than those authorised by the articles, or where it is taken in execution for the separate debts of one partner (a).

Equitable remedies in case of breach of articles of partnership.

The Court of Equity will appoint a receiver or a manager of a partnership where there has been some breach of the duty of a partner, or of the contract of partnership, or some culpable conduct, or in cases of a collusion, or of exclusion of a partner from his full share of management, provided in all cases sufficient cause is shown to entitle the plaintiff to a dissolution (b).

Appointment of receiver.

The Court would not decree an account between partners unless upon the dissolution of the partnership, though it might in some cases direct an account of past transactions whilst the partnership is being carried on. But after six years' acquiescence unexplained by circumstances, the Court would not decree an account between a surviving partner and the estate of a deceased partner (c).

Court will not decree an account unless upon dissolution.

SECTION XVII.

ACTIONS BY AND AGAINST PARTNERS.

BRITISH LAW.

Where the same person is a member of two different firms the partners of one could not maintain an action against the partners of the other for transactions which took place while such person was partner of both firms, and that whether the action be brought in the lifetime of the common partner or after his decease, yet after his decease the surviving partner of the one house may sue the surviving partner of the other house

Where the same person is member of two firms.

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| (a) Newell <i>v.</i> Townsend, 6 Sim. 419. | (c) Blackeney <i>v.</i> Dufaur, 15 Beav. 40; Richards <i>v.</i> Davies, 2 Russ. & M. 481; Const <i>v.</i> Harris, 1 Turn. & Russ. 517. |
| (b) Wilson <i>v.</i> Greenwood, 1 Swanst. 481. | 847; Knebell <i>v.</i> White, 2 Y. & C. 15. |

upon transactions subsequent to the decease of the common partner (*a*).

No action maintained when the partnership is illegal.

Where the partnership is illegal no action could be maintained by the partners on any contract arising out of their partnership dealings (*b*). So no suit could be maintained by a partnership where one or more of the partners are domiciled in an enemy's country.

All who were parties to the contract must join.

In all actions to enforce contracts made with the firm, all who were partners at the time the contract was made must join in the suit (*c*). Where a contract is under seal, if it was made in the name of one partner only, he alone can sue, and if it was in the name of all the partners, then all must join in it (*d*). Yet a

contract not under seal may be enforced either by those for whose benefit it was effected or by those whose names appear in the contract (*e*). So an action may be maintained upon a bond expressed to be payable to a mercantile firm by the persons who constituted the firm when the bond was executed (*f*) ; though if a note has been made payable to one partner to secure a debt due to the firm, the rest cannot join to sue thereon (*g*).

Optional to join nominal or dormant partner.

It is optional with a dormant partner, as well as with a nominal partner having no interest, unless he be expressly named, to join in a suit with the ostensible partner ; but both of them may be sued for the debts and contracts of the partnership (*h*).

Guarantee.

When new partners are admitted, those only who originally made the contract must sue on securities granted to the original partners (*i*). So a guarantee made in favour of an existing firm, or a continuing contract made with such, would cease to be in force upon any change in the old firm, except a special

(*a*) *Bosanquet v. Wray*, 6 *Taunt.* 598 ; *De Tastet v. Shaw*, 1 *B. & Ald.* 664.

(*f*) *Moller v. Lambert*, 2 *Camp.* 543 ; *Phelps v. Lyle*, 10 *Ad. & E.* 113.

(*b*) *Morse v. Wilson*, 4 *T. R.* 353 ; *Griswold v. Waddington*, 16 *Johns.* 438 ; *M'Connell v. Hector*, 3 *B. & P.* 113.

(*g*) *Siffkin v. Walker*, 2 *Camp.* 308.

(*c*) *Anderson v. Martindale*, 1 *East*, 497.

(*h*) *Cothay v. Fennell*, 10 *B. & C.* 671 ; *Beckham v. Drake*, 9 *M. & W.* 79 ; *Teed v. Elworthy*, 14 *East*, 210 ; *Kell v. Naishy*, 10 *B. & C.* 20 ; *Guidon r. Robson*, 2 *Camp.* 304.

(*d*) *Vernon v. Jefferys*, 2 *Str.* 1146 ; *Scott v. Godwin*, 1 *B. & P.* 67.

(*i*) *Metcalf v. Bruin*, 12 *East*, 400 ; *Barclay v. Lucas*, 1 *T. R.* 291 ; *Robson r. Drummond*, 2 *B. & Ad.* 303.

(*e*) *Hall v. Smith*, 2 *Dow. & Ry.* 584 ; *Grove v. Dubois*, 1 *T. R.* 112 ; *Gordon v. Ellis*, 13 *L. J. C. P.* 179 ; 2 *C. B.* 821.

provision has been made importing a continuing liability notwithstanding any change in the firm (*a*).

Partners in their collective capacity possess the same rights and remedies in equity against third persons which are enjoyed by every private individual. So an action for libel or tort or a defamation of the firm may be brought jointly, but the partners can recover damages for such injuries only as they may have sustained in their joint trade or business (*b*).

In an action against the firm all those who were partners at the time the contract was made may be joined as defendants (*c*).

A partner who was an infant when the contract was made need not be joined as a defendant unless he has since attained his majority and ratified the contract in writing (*d*). A bankrupt partner who has obtained his certificate need not be joined in the suit as co-defendant.

Where one of the partners dies the action may be brought against his survivors. All partners being jointly and severally bound for all the debts of the partnership, it is in the option of the creditor to sue either partner for his debt, or he may discharge any of them without affecting the liability of the others.

Actions for libel.

Actions against the firm.

Bankrupt partner need not be joined.

Surviving partner may be sued.

Creditor may sue either partner.

SECTION XVIII.

DISSOLUTION OF PARTNERSHIP.

BRITISH LAW.

The dissolution of partnership takes place by the death of one or more of the partners; by the expiration of the time for which it had been constituted; by the happening of the event which the deed contemplated for its dissolution; by the bankruptcy of the partnership; by the bankruptcy, outlawry, or felony of any one of the partners; and by the marriage of a feme sole partner. Just causes for decreeing a dissolution may also be the impossibility of proceeding in the busi-

Causes of dissolution.

Death.

Bankruptcy.

Felony.

Marriage of feme sole.

Impossibility of proceeding.

(*a*) Metcalf *v.* Bruin, 12 East, 400; Barclay *v.* Lucas, 1 T. R. 291; Robson

(*c*) Bristow *v.* James, 7 T. R. 257; Lodge *v.* Dicas, 3 B. & Ald. 611.

v. Drummond, 2 B. & Ad. 303.

(*d*) Thornton *v.* Illingsworth, 2 B. &

(*b*) Haythorn *v.* Lawson, 3 C. & P. 196.

C. 824; *Ex parte* Henderson, 4 Ves. 164.

Lunacy. ness ; the hopeless state of the concern ; and the lunacy of any of the partners.

Partnership at will determined at will. A partnership at will may be determined when either party thinks proper, provided the renunciation be made fairly, from no improper motive, and at no inconvenient time. It would not be in good faith if the partner does it for the purpose of taking advantage to himself at the expense of the company (*a*).

Partnership for a time may be dissolved by consent. A partnership for a specific time will be dissolved at the expiration of such time, or before such time by the mutual consent of the parties. Where, however, such a partnership is continued after the expiration of the original term, and no arrangement has been made for its further duration, the partnership is held to be a partnership at will, and may be dissolved by the will of any of the partners (*b*).

Terms of continuation. But though a partnership for a specific time continued after the expiration of such time is held to be partnership dissolvable at the will of the parties, all the covenants of the old partnership, except that of its duration, are considered as adopted by the new partnership (*c*). Although the death of any of the partners dissolves, *ipso facto*, the partnership as respects all the partners, a stipulation may be made in the deed to avert such a consequence by providing that the partnership shall subsist notwithstanding the death of any one, or that the heir or representative shall take the place of the deceased (*d*).

Stipulation to prevent dissolution by death. Insanity may be a ground for dissolution. That insanity may be a ground for dissolution it must be confirmed and incurable. And even where insanity is proved to have existed before the filing of the bill, a decree of dissolution by the Court of Equity will not be made in a disputed case without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership. The affirmation of this issue would then lie with the party who had been of unsound mind, who would have to show that he was so far restored as to be able to conduct the business (*e*). A

(*a*) *Benham v. Gray*, 5 C. B. 138; *Peacock v. Peacock*, 16 Ves. 49; *Nerot v. Burnand*, 4 Russ. 260; *Featherstonough v. Fenwick*, 17 Ves. 298; *Crawshay v. Maule*, 1 Swanst. 506; *Marshall v. Marshall*, Jan. 26, 1815, Fac. Dec. (Scotch).

(*b*) *Montgomery v. Forrester, &c.*, June 17, 1791, M. 14, 583 (Scotch); *Featherstonough v. Fenwick*, 17 Ves. 307. (*c*) *Per Sir A. Hart, Molloy*, 466. (*d*) *Gillespie v. Hamilton*, 3 Madd. 251. (*e*) *Wrexham v. Huddleston*, 1 Swanst. 517; *Nerot v. Burnand*, 4 Russ. 260;

right of dissolution may also accrue where there arises an incapacity or habitual infirmity on the part of any of the partners (*a*).

A Court of Equity will also decree a dissolution in cases of breach of faith between the partners ; of exclusion of one from his interest in the partnership ; where any of the partners raises money for private use on the credit of the firm ; or fails to fulfil his engagement ; or has acted fraudulently. Where a partner has been guilty of embezzlement or has done acts inconsistent with the duty of a partner, and of a nature to destroy the mutual confidence which ought to subsist between partners, and makes it impossible that the business can be conducted in partnership with benefit, then the Court will decree its dissolution, even before the expiration of the time for which the partnership was entered into (*b*). A partnership will be dissolved when one of the partners belongs to, and resides in a country declared to be at war with the United Kingdom (*c*). And where the undertaking is found impracticable, and cannot be carried on as profit without further capital, the Court will decree a dissolution (*d*).

A notice in the Gazette is a sufficient notice of dissolution, but a circular letter, announcing the fact, should be sent to the correspondents of the firm. No notice, however, is necessary in case of death (*e*).

A partnership formed by deed must also be dissolved by deed, and if the dissolution is to be immediate the deed must contain express words to that effect.

The dissolution of a partnership operates as the revocation of the mutual powers of the partners to bind each other to buy or to sell, or to dispose of the partnership property, to sign bills of exchange in the name of the firm, or to do any act in furtherance of partnership affairs. The partners cease to incur any liability for future transactions, though they continue liable for

In case of
breach of
faith.

When one
partner is in
the enemy's
country.

Notice in the
Gazette and
circular suffi-
cient.

Partnership
by deed dis-
solvable by
deed.

Revocation of
mutual
powers.

Cessation of
mutual
liability.

Sayer v. Bennet, 1 Cox, 107 ; *Sadler v. Lee*, 6 Beav. 324 ; *Waters v. Taylor*, 2 V. & B. 303 ; *Leaf v. Coles*, 1 De Gex, M. & G. 175 ; *Anonymous*, 2 Kay & Johns. 41.

(*a*) *Jones v. Noy*, 2 My. & K. 125.

(*b*) *Smith v. Jeyes*, 4 Beav. 503 ; *Essell v. Hayward*, 29 L. J. Ch. 806.

(*c*) *Grienwood v. Waddington*, 16 Johns. 438 (American).

(*d*) *Baring v. Dix*, 1 Cox, 213 ; *Jennings v. Baddeley*, 3 K. & J. 78 ; *Harrison v. Tennant*, 21 Beav. 482 ; *Waters v. Taylor*, 2 Ves. & B. 299 ; *Jones v. Noy*, 2 My. & K. 125 ; *Smith v. Jeyes*, 4 Beav. 503 ; *Liardet v. Adam*, 1 Mont. Part. 112.

(*e*) *Doe v. Miles*, 1 Stark. 181 ; *Emmet v. Butler*, 7 Taunt. 599.

all that is past, and every partner has a right to demand the winding up of the concern.

Partnership property to be used for winding up.

When the partnership is dissolved no person can make any use of the partnership property inconsistent with the purpose of winding up the concern, and it is only for such purposes that the partnership continues (a). Partnership property ceases to be held jointly by the partners, and they are thereafter tenants in common of all partnership effects.

Partnership property first liable to the payment of debts.

All partnership property, whether real or personal, must first be applied to in satisfaction of the debts and liabilities of the partnership, each partner having a lien on such for the discharge of partnership debts.

Value of partnership property to be ascertained by sale.

The partners have a right to ascertain by sale the value of the partnership fund ; no partner can demand any individual proportion of a specific article or take any portion at a valuation and leave the remainder (b).

Duty of surviving partner and executor of deceased partner.

On the dissolution of the partnership by the death of one of the partners, it is the duty of the surviving partner to ascertain by sale the value of the partnership property. The executor of the deceased partner becomes tenant in common with the surviving partner, and is entitled to have the partnership affairs wound up, and to receive the share of the partnership property belonging to the deceased partner, subject to partnership debts.

No survivorship in partnership property.

There is no survivorship in partnership property, and the maxim *jus accrescendi inter mercatores locum non habet*, applies to manufacturers as well as to merchants. The surviving partner acquires a *jus disponendi* over the partnership chattels, but he cannot dispose of the share of the deceased partner in the way of mortgage, for the payment of partnership debts (c).

If the executor continues the testator's trade, though it be on behalf of his widow and children, he would assume a personal responsibility, and become liable as a partner in the concern ; whilst the deceased partner's estate would be liable upon such assets only as were by the will directed to be employed in the partnership trade (d).

(a) *Crawshay v. Maule*, 1 Swanst. 507.

(b) *Featherstonough v. Fenwick*, 17 Ves. jun. 298.

(c) *Buckley v. Barber*, 6 Exch. 164.

(d) *Cutbush v. Cutbush*, 1 Beav.

184 ; *Williamson v. Naylor*, 3 You. & Coll. 208.

Where land has been purchased by partners out of the partnership assets, and used for the purpose of the business, it is to be considered as personalty, both as between the partners themselves, and as between the heir and personal representatives of the deceased partner (a).

The good-will of a trade carried on without articles survives. Good-will. It is not a tangible interest on which a specific value can be placed, or for which a separate allowance can be made. Yet when the good-will is valuable it will form assets of the estate of the deceased partner, and the share of the good-will will be measured by his interest in the concern (b).

Each partner is to be allowed whatever he has advanced to the partnership, and charged with what he has failed to bring in, or has drawn out more than his just proportion, and also with all the debts and claims which he owes or he is accountable for to the partnership, with all interest accruing on the same debts and claims. Where the partnership advances a sum to an individual partner, his profit is first answerable for that sum, and if his profits are not sufficient to answer it, the deficiency is made good out of his capital, and if both his profits and his capital are not sufficient to make it good he is considered a debtor for the excess.

In case of dissolution by the bankruptcy of one of the partners, the assignee of the bankrupt partner becomes tenant in common with the solvent partner, and is entitled to have the partnership affairs wound up. He has also the right to demand the sale of the whole property and a division of the proceeds (c).

But he can obtain no share of such partnership effects until after all partnership debts have been extinguished, and all that is due from the bankrupt partner to the partnership is satisfied (d). A partner's interest in the partnership property is his share upon a division of the surplus after payment of the partnership debts.

Where there has been a joint bankruptcy, the joint as well as In joint bank-ruptcy joint

(a) *Holroyd v. Holroyd*, 28 L. J. Ch. 902; *Bell v. Phyn*, 7 Ves. 453; *Thorn-ton v. Dixon*, 3 Bro. C. C. 199; *Houghton v. Houghton*, 11 Sim. 491.

(b) *Smith v. Everett*, 29 L. J. Ch. 236; *Wade v. Jenkins*, 30 L. J. Ch. 633.

(c) *Fox v. Hanbury*, Cowp. 445; *Crawshay v. Collins*, 15 Ves. 218; *Crawshay v. Maule*, 1 Swanst. 495; *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, 1 East, 368.

(d) *Holderness v. Shackles*, 8 B. & C. 618.

No survivorship in land purchased for partnership.

Assignee of bankrupt partner tenant in common with solvent partner.

Assignee's right to share after settle-ment of accounts.

and private
property
liable.
In separate
bankruptcy
assignee's
rights subject
to rights of
solvent
partners.
When a part-
nership ends.

Liquidation

the private property of the partners pass to the assignees. But under a separate bankruptcy the assignees are entitled to hold the undivided share of the effects of the bankrupt partner, subject to the rights of the solvent partner (*a*).

FOREIGN LAW.

France.—Partnership ends of right by the expiration of the time for which it was contracted ; by the extinction of the thing, or the accomplishment of the negotiation ; and by the death of one of the partners when there was no agreement to continue with the heir. When the time specified is certain and not contingent, there is no difficulty. When the partnership is formed for a specific object, such as the construction or lading of a ship, as soon as the ship is completed and loaded the partnership is ended. If the completion of the object and a duration of time are both mentioned, then the intention of the parties must be sought as to which should be preferred. The extinction of the thing is a cause of dissolution. If part only of the object perished, then it depends whether it had become the property of the partnership ; if so, the loss would have no influence, the partnership would continue with what remains. If the partnership had only the use of it, then the loss even of part would cause the dissolution. A conventional dissolution of the partnership must result from the unanimous consent, unless the deed provided that the majority may dissolve it in certain cases. When the partnership has been contracted without any limitation of time, the partners are presumed to have intended that it shall only be dissolved by death or by legitimate causes. Nevertheless any one partner may demand the dissolution by giving notice to his co-partners to that effect, provided it be done in good faith and not in an inconvenient time. When the duration of the partnership was determined by deed, a partner cannot dissolve it without just motives, such as the insolvency of one of the partners or any infirmity which may render him incapable of fulfilling his social obligations. There is no valid dissolution as regards third persons unless it be notified and published by advertisement in the newspapers. Every partner has a right to demand the division of the property and winding up of the accounts. One or more partners may be nominated as liquidators,

(*a*) *Garbett v. Veale*, 5 Q. B. 408.

giving the preference to the partner who had for the longest time the management of the partnership, and in the circul-
lars announcing the dissolution information should be given of the name of the partner so authorised. The first thing such a partner has to do is to draw up a balance-sheet of the business, and then proceed to recover the debts and realise the estate. The division takes place after the liquidation and ascertainment of the respective rights. When the estate includes goods or merchandises, each partner may ask a portion of them. Arbitrators may be appointed to divide the articles equally among the partners. The books and accounts remain, unless otherwise provided, with the liquidating partner. If there be real property which cannot be divided, then it must be sold by auction (a).

United States.—If a partnership be formed for a single purpose or transaction, it ceases as soon as the business is completed. If for a definite period, it terminates when the period arrives. A partnership may be dissolved by the voluntary act of the parties or of one of them, and by the death, insanity, or bankruptcy of either, and by judicial decree, or by such a change in the condition of one of the parties as disables him to perform his part of the duty. It may be also dissolved by operation of law, by reason of war between the governments to which the partners respectively belong, so as to render the business carried on by the association impracticable and unlawful. If the partnership be formed for no definite period, any partner may withdraw at a moment's notice and dissolve the partnership, provided it be free from fraud. If it be for a definite period, mutual consent is necessary to dissolve it before the period arrives. Yet it was decided that the assignment by one partner of all his interest in the concern dissolved the partnership though the other partners wished the business to be continued. And it was even held that there is no such a thing as an indissoluble partnership, and each party may, by giving due notice, dissolve the partnership as to all future contracts of the firm, though the partner would by so doing subject himself to damages for a breach of the covenant (b).

Causes of dissolution.

(a) Pardessus, Droit Commercial, Marquand *v.* New York Manuf. Company, 17 Johns. 525; Skinner *v.* Day-

(b) Kent's Comm., vol. iii. p. 60; ton, 19 Johns. 538.

Just causes of dissolution.

Goodwill.

Conflicting rights of private and partnership creditors.

The death of either party effects *ipso facto* from the time of the death the dissolution of the partnership, however numerous the association may be. The representatives of the deceased partner have a right to insist on the application of the joint property to the payment of the joint debts and a due distribution of the surplus. Insanity does not operate as a dissolution of partnership *ipso facto*, but is a just cause for the interference of the Court of Chancery to dissolve the partnership. Bankruptcy or insolvency, either of the whole partnership or of an individual partner, dissolves a partnership. A partnership may be dissolved by judicial decree, as in case of insanity, or when the business is found to be impracticable, or if the scheme was visionary, or in case of habitual drunkenness of one of the partners. When a partnership is dissolved by death or other effectual mode, no person can use the joint property in the way of trade or inconsistently with the purpose of settling the affairs of the partnership and winding up the concern; the mutual authority among partners ceases. On dissolution by death the surviving partner settles the affairs of the partnership, and he alone is suable at law, though a partnership contract upon the death of one partner is in equity to be considered joint and several, and to be treated as the several debt of each partner. Each party may insist on a sale of the joint stock. The goodwill of a trade is not partnership stock. It has been doubted whether a good-will survives. When it is a valuable interest the Court will order it to be sold (a). Partnership property is primarily liable for partnership debts. Separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The legislation of the United States is not, however, uniform on this point. In Pennsylvania joint and separate creditors are allowed to come in under their insolvent laws *pari passu* for a distributive share of the estate of an insolvent partner, whether the fund be a separate or partnership fund. In Georgia a judgment creditor of a partner in his individual capacity may levy on the partnership effects, and sell his debtor's undivided interest therein without reference to the claims of the creditors of the firm. In Vermont partnership creditors have no priority over a creditor of one of the partners even as to the partnership effects. In

(a) *Williams v. Wilson*, 4 Sandf. Ch. R. 379.

South Carolina a partnership creditor has a right to resort either to the partnership property or to the separate property of the partners. He has two funds, and may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of the individual partner. But the private creditors of a partner have but one fund, and cannot go against the partnership funds beyond the debtor's interest in the balance left, after payment of the partnership debts. In Massachusetts the attachable interest of one of the copartners by a separate creditor is the surplus of the joint estate remaining, after discharging all joint demands upon it; and this necessity creates a preference in favour of the partnership creditors on the application of the partnership property. Upon a dissolution of the partnership each partner has a lien upon the partnership effects as well for his indemnity as for his proportion of the surplus. But creditors have no lien upon the partnership effects for their debts. To render the dissolution safe and effectual there must be due notice of it to the world (a).

Germany.—The partnership is dissolved by the bankruptcy of the partnership or of one of the partners, by the death of a partner unless otherwise provided by the contract, by mutual agreement, by the expiration of the time, or by notice of a partner where the time was not fixed. The notice for the dissolution of a partnership for an indefinite duration must be given at least six months before, unless it can be shown that important reasons prevented it. A dissolution may also be granted if it becomes impossible to carry on the business; if the partner has neglected his duties; if he abuses his right to sign for the firm; or misuses the partnership property for his private purposes, or if he becomes incapable of doing what devolves upon him to do. The private creditor of a partner may demand a dissolution of the partnership in order to enforce his claim on the share of the partner, but six months' notice must be given for the purpose. The dissolution of partnership must be enrolled in the register of commerce. A partner who retires from the firm is entitled to a prompt settlement of the affairs, and if that be impossible he may ask a yearly account of the transactions wound up. The retiring partner has no right

(a) Kent's Commentaries, vol. iii., p. 76, 8th ed.

to demand a share of the property in goods or other kind, but only an amount of money equivalent to the value of the same. Unless otherwise provided, the winding up of the partnership is entrusted to all the partners. If one of the partners is dead his heir must appoint a representative to act for him. On the request of the partners and for urgent reasons the judge may appoint a manager to wind up the estate. The partners must communicate the name of the liquidators to the Tribunal of Commerce. The retirement of a liquidator must also be communicated to the tribunal. Where there are several liquidators they must all join in all their acts. The liquidators have the right to realise the estate and to pay all claims, and they may sue and be sued on behalf of the partnership. Without the consent of all the partners real estates can only be sold by public auction. After the affairs have been wound up the books and papers of the partnership are left in the custody of one of the partners, or of a third person duly appointed by them. The partners and their executors have always the right to examine and use such books and papers (a).

Dissolution
before the ap-
pointed time.

Italy.—The Sardinian Code provided that, in case of dissolution before the time appointed, the partnership is not considered as dissolved towards third persons till a month after the publication of such dissolution in the Gazette, though the partner may prove that before such month had elapsed the dissolution was known to the party. If the partners do not agree as to the parties who are to act as liquidators the nomination will be made by the tribunal, but till such nomination has been made the managing partners will proceed with it. All the books and papers are to be deposited with the liquidators. The liquidators cannot refer any dispute to arbitration unless specially authorised to do so. At the expiration of the term of the partnership, or at its dissolution, when the act has been inserted in the Gazette, the partners cease to be bound *in solidum* towards the creditors of the partnership, and each of the partners is only bound for the share of interest he had in the partnership, without prejudice notwithstanding to the action against the liquidating partner for all the undivided fund that he may still have. Where the debt becomes due after the dissolution of the partnership, the prescription

Rights of
liquidators.

(a) German Code, §§ 123—145.

commences to run only from the day that the debt became due (*a*). The regulations of the civil code of the Two Sicilies are similar to those of the civil code of France (*b*).

Portugal.—If no term be fixed each partner may dissolve the partnership by giving notice. If the term is fixed the partnership can only be dissolved before its expiration by the unanimous consent of all the partners. A partnership is deemed dissolved before the appointed time if it be proved that its continuance is impossible. The Court may order a dissolution on account of the misconduct of one of the partners, of betrayal of confidence, of the impossibility of carrying on the business, or in consequence of the dissolution promoted by the will of one partner. The sale of the partnership effects for the private benefit of one of the partners may be a valid ground for dissolution. So the bankruptcy of one of the partners. The dissolution must be inserted in the public register, and published in the local gazette, and a circular conveying information of the fact must be sent to all the correspondents of the house. After dissolution the partners have no more power to bind each other. Unless by special agreement, or by an adverse vote of the majority of partners, the managing partners are intrusted with the winding up of the business. If the joint estate is not sufficient to pay all the debts, the liquidators have a right to ask and to obtain the requisite amount from each partner, according to his share. The private creditors of a partner cannot touch the partnership stock. They can only claim the amount of his share after the settlement of accounts. They are not even allowed to prove their debt against the firm. After the creditors of the firm have been paid, they may then bring forward their claim, except as regards privileged debts. When the same persons establish several partnerships under different firms, in distinct localities, and one of these partnerships fails, the creditors of this firm cannot proceed against the other firms which are solvent till after the creditors of these respective houses have been paid. If the same person is member of different partnerships, composed of different members, and in distinct places, and one of these houses fails, the creditors of such house have only a subsidiary right upon the share that such common partner possesses in the other houses. The re-

Causes of dis-solution.

Effects of dis-solution.

(*a*) Sardinian Code, §§ 57—68. (*b*) Two Sicilies' Civil Code, §§ 1720—1745.

spective creditors of each house must first be satisfied. After liquidation and division, in the want of any stipulation on the subject in deed of partnership, all books and papers are deposited with one of the partners nominated by a majority of votes, and by lot in case of difference of opinion, to be always within reach of the other partners or their heirs in case of need. They will remain with such partner for the whole time prescribed by law for the preservation of books (a).

Causes of dissolution.

Spain.—Partnership is dissolved by the expiration of the time or the attainment of the object for which it was constituted. By the entire loss of the capital. By the death of one of the partners, unless the deed provides for its continuation with his representative. By the insolvency of the partnership or of one of its partners. By the will of one of the partners when no time or object was specified, and by lunacy or other causes incapacitating one of the partners. Partnerships by shares are only dissolved by the expiration of the term, the attainment of the object, or the loss of the entire capital. A partnership is not compelled to continue after the expiration of the term. If the partners wish to continue they must have a new deed with the same formalities as the first. In a partnership for an unlimited time a dissolution cannot take place at the request of one partner without the consent of the other. The act of dissolution must be registered in the commercial register of the province. Unless otherwise provided by the deed, the managers of the partnership must act as liquidators for the winding up of the concern. But, if the partners wish it, two or more extra liquidators may be nominated by the majority of votes. The managers must within fifteen days of the dissolution draw up an inventory and balance-sheet. The division of the partnership fund may be made either by the liquidators or at a meeting of partners. If the partners object to the division, they must notify the same within fifteen days. No partner can demand any share of the partnership fund till all the debts are paid. Partners who have lent money to the partnership must be paid first, the same as creditors. The private property of the partners not invested in the partnership can only be attached for joint obligations after the partnership funds are exhausted (b).

(a) Portuguese Code, §§ 693—747. (b) Spanish Code, §§ 329—352.

CHAPTER IV.

COMMANDITE PARTNERSHIPS.

As already stated, the English law does not provide for the formation of partnerships consisting of partners, some with a limited, and some with an unlimited liability, on the principle of the commandite partnerships of France and other states. The English law allows limited liability to companies of seven members and upwards, but all the members have an equal liability whether limited or unlimited. Yet it is submitted that the combination of limited and unlimited liability is founded upon sound principles. It is just and reasonable that those who appear before the world as partners, who manage the affairs of the concern, and who, by their names or by their acts, either as directors or managers, whether of a private partnership or a public company, lead others to trust the firm, should be liable, to the full extent of their property, for any debts which that partnership or company may have contracted. But it seems also just and reasonable that a partner or shareholder who takes no part in the management, and whose name never appears, and who is not likely to deceive third parties in the belief that he is a partner in the concern, should be liable only for the amount he had invested in the concern. This union of limited and unlimited partners is the distinctive principle of commandite partnership, as contrasted with general partnerships called in French "Sociétés en nom collectif," and with companies with limited or unlimited liability in this country.

INTRODUC-
TORY
OBSERVA-
TIONS.

SECTION I.

COMMANDITE IN PRIVATE PARTNERSHIPS.

FOREIGN LAWS.

France.—A partnership *en commandite* is contracted between one or more partners called *commandités* responsible to the full extent of their property, and one or more partners called *commanditaires* or simple shareholders. Such a partnership is What is a commandite partnership.

carried on under a social firm which must necessarily consist of the names of one or more of the responsible partners. Where there are several responsible partners, whether one or more of them take part in the management, the partnership is a general one, or one in collective name as respects themselves, and *en commandite* as respects the shareholders. The name of the commanditaires partners cannot be included in the firm. The commanditaires cannot suffer losses beyond the fund which they have, or ought to have, invested in the partnership. They cannot assume any part in the management, nor be employed in the business of the partnership, even in virtue of a procuration. In case of infringement of this prohibition, the commanditaires become bound, to the full extent of their property, in the same manner as the general partners, for all the debts and engagements of the partnership. The deed of partnership *en commandite* must be published, and the extract must specify the number and amount of shares the partnership is to consist of; if such shares have been all taken up, or if they are still to be paid. But it is not necessary to publish the names of the commanditaires. The commanditaires are not simple lenders of money; they are partners, and they are subject to all the rights and duties which result from this contract. The principal condition of such partnerships is, that the commanditaires shall not, by their conduct or management, lead others to think that they are the general or responsible partners. But acts passed between the commanditaire and the commandité, such as any advice given, or counsel taken, among them on inspection of accounts, are not to be considered as unlawful. Although the name of the commanditaire cannot be included in the firm, it is not unlawful to use the name of the commandité, with the addition of " & Company." The firm " Jones & Company" indicates that Jones is not alone, but in partnership, but it does not exclude the possibility of its being a commandite partnership. Whilst the commandités have the right of dealing with third persons, without the consent of the commanditaires, they are still answerable to them for their acts. As regards their co-partners, they stand in the capacity of agents, as well as of partners. The restrictions imposed on the rights of the commanditaire secure to him the advantage of being only responsible for the loss of the funds which he has invested in the partnership. During the partner-

Rights and
duties of the
commandi-
taire.

ship, the creditors of the firm cannot proceed against them direct for the debts of the partnership. They can only act against the commanditaires. If they do not pay, they may seize the partnership funds; and if these be not sufficient, they may then cause the bankruptcy of the firm. And as soon as the bankruptcy has been declared, the creditors acquire the right against the commanditaires for any portion of their shares which they may not have yet paid up, the amount subscribed by the commanditaire forming part of the partnership estate liable to the partnership debts.

SECTION II.

COMMANDITE IN PUBLIC PARTNERSHIPS (*a*).

Partnerships *en commandite* cannot be divided into shares of less amount than 100 frs. (£4) when the capital does not exceed 100,000 frs. (£4000), and of less than 500 frs. (£20) when the capital exceeds that amount. Such partnerships cannot be definitively constituted until the whole of the partnership capital has been subscribed, and a fourth at least of the amount of the shares subscribed has been paid up by each shareholder. The shares of partnerships *en commandite* are not transferable till they are all taken up. The shareholders are, notwithstanding any stipulation to the contrary, responsible for the payment of the total amount of the shares subscribed by them. The shares are not negotiable till two-fifths of the amount have been paid up. Should a partner pay the amount of his share otherwise than in cash, or stipulate to his own benefit any special advantages, the body of shareholders must cause such investment or such benefit to be ascertained and valued.

The partnership is not definitively constituted till after all the conditions have been agreed on at a general meeting. The votes are taken by the majority of shareholders present. The majority must consist of at least a fourth of the shareholders, representing a fourth of the partnership fund in cash. Those partners who have paid otherwise than in cash, or who have stipulated for themselves special advantages subject to the consent of the body of shareholders, have no deliberative voice. A council of inspec-

Council of inspection.

(a) Law of Partnerships by shares, 17 July, 1856.

tion, composed of five shareholders at least, is established in each partnership *en commandite* by shares. This council is nominated by the general meeting of shareholders immediately after the definitive constitution of the partnership, and before any social operation is begun. It may be re-elected every five years at least: but the first council can only be nominated for one year. All partnerships *en commandite* by shares constituted contrary to any one of the above regulations are null and void with regard to third persons; but this nullity cannot be pleaded by the partners against third persons. When the partnership is void, according to the preceding article, the members of the council of inspection, together with the managers, may be declared personally responsible for all the operations made after their nomination. The same personal responsibility may be pronounced against those partners who have paid their shares otherwise than in cash, or who have secured special advantages.

The members of the council of inspection must examine the books, money, effects, and capital of the firm, and make each year a report to the general meeting on the accounts and on the distribution of dividends made by the managers. The council of inspection may call a general meeting; and may also promote the dissolution of the partnership. Every member of the council of inspection is personally responsible with the managers in his person and property. 1st. When, knowingly, he has allowed great irregularities to be committed in the accounts, injurious to the partnership and to third persons. 2nd. When he has, with knowledge of facts, consented to the distribution of dividends not justified by true and regular accounts.

The issue of shares of a partnership constituted contrary to Arts. 1 and 2 of the present law is punished with imprisonment of eight days to six months, and with a fine of from 500 frs. to 10,000 frs., or with either of these penalties only. The same penalty will be awarded to the managers who should commence social operations before the council of inspection has entered into its functions.

Criminal Acts. The negotiation of shares or of coupons of shares of the value or form, contrary to the disposition of Arts. 1 and 2 of the present law, or for which the payment of two-fifths has not been made according to Art. 3, is punished with a fine of 500 frs. to 10,000 frs.

The same penalties are awarded upon every one who takes part in these negotiations, or in the publication of the value of such shares. Any one who by false signatures or payments, or who by the publication of false statements or of payments which have not been made, or of any other false facts, have obtained, or attempted to obtain, subscriptions or payments. Those who in order to promote subscriptions or payments have with bad faith published the names of persons falsely designated as being attached to the partnership under whatsoever title. And the managers who in the absence of accounts or by means of fraudulent accounts have divided among the shareholders dividends not really gained by the partnership, become subject to the penalties imposed by Art. 405 of the penal code.

When the shareholders of a partnership *en commandite* by shares have to maintain or to defend any suit with the managers or members of the council of inspection, they are represented by agents nominated at a general meeting. Where some shareholders only are engaged as plaintiffs or defendants to the suit, the agents are named at a special meeting of the shareholders who are parties to the suit. Where any obstacles hinder the nomination of agents by the general or special meeting the Tribunal of Commerce will proceed to the nomination upon the request of the interested parties. Notwithstanding the nomination of agents, each shareholder has the right to appear personally in the suit provided he bears the expense of his appearance.

Partnerships *en commandite* by shares now existing, and which have no council of inspection, are bound, within six months' time from the promulgation of the present law, to constitute such council of inspection.

United States (New York).—Limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business within the state may be formed of two or more persons upon the terms, with the rights and powers, and subject to the condition and liabilities herein prescribed; but the law does not apply to partnerships for purposes of banking or insurance. Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law; and one or more persons who shall contribute in actual cash payments a

Mode of suing
and being
sued.

Limited liability allowed
for mercantile
or manufac-
turing busi-
ness.

specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital.

The general partners only shall be authorised to transact business and sign for the partnership, and to bind the same. The persons desirous of forming such partnerships shall make and severally sign a certificate which shall contain—1st, the name or firm under which such partnership is to be conducted ; 2nd, the general nature of the business intended to be transacted ; 3rd, the names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence ; 4th, the amount of capital which each special partner shall have contributed to the common stock ; 5th, the period at which the partnership is to commence and the period at which it will terminate.

The certificate to be made and certified before a judge of any court, and to be filed in the office of the clerk of the county in which the principal place of business of the partnership is situated. If the partnership have places of business in different counties a transcript of the certificate is to be filed by the clerk of every such county.

When the original certificate is filed, an affidavit must also be made by one or more of the general partners, stating that the sum stated in the certificate to have been contributed by each of the special partners to the common stock has been actually and in good faith paid in cash. If any false statement be made in such certificate or affidavit, all the persons interested in such partnership are to be liable for all the engagements thereof as general partners.

Registration
of limited
partnerships.

The partners must publish the terms of the partnership, when registered, for at least six weeks after such registry, in two newspapers designated by the clerk of the county ; and if such publication is not made, the partnership is deemed general. Affidavit by the printer of such newspaper to be evidence of the fact.

Every renewal or continuance of such partnership beyond the time originally fixed for its duration, and every alteration in the names of the partners, in the nature of the business, or in the

capital or shares thereof, is deemed a dissolution of partnership, and must be renewed as a special partnership by certificate and affidavit, in the manner as required for its original formation.

The business of the partnership must be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word "company," or any other general term; and if the name of any special partner be used in such firm with his privity, he is deemed a general partner. Suits in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners.

No part of the sum which any special partner shall have contributed to the capital stock can be withdrawn by him, or paid or transferred to him, in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest do not reduce the original amount of such capital; and if after the payment of such interest any profits remain to be divided, he may receive also his portion of such profits.

If it shall appear 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 capital, with interest. A special partner may from time to time examine into the state and progress of the partnership concerns, and may advise as to their management, but he cannot transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise. If he interfere contrary to these provisions he is deemed a general partner. The general partners are liable to account to each other and to the special partners for their management of the concern, both in law and equity, as other partners now are by law.

The capital
cannot be
reduced.

Every partner guilty of any fraud in the affairs of the partnership would be liable civilly to the party injured, to the extent of the damage, and also liable to an indictment for a misdemeanor.

Every sale, assignment, or transfer of partnership property made by such partnership when insolvent, or in contemplation

of insolvency, with the intent of giving a preference to any creditor of such partnership or insolvent partners over other creditors of such partnership, and every judgment conferred, lien created, or security given by such partnership, under the like circumstances and with the like intent, must be void as against the creditors of such partnerships.

Every special partner who violates any provisions of the two last sections, and who concurs in and assents to any such violation by the partnership, or by any individual partner, becomes liable as a general partner.

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

No dissolution of such partnership by the acts of the parties can take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the clerk's office in which the original contract was recorded, and published once in each week for four weeks in a newspaper printed in each of the counties where the partnership may have places of business, and in the State papers.

General partner may transfer his interest.

A general partner in any limited partnership may, with the assent of his partners, transfer or bequeath his interest in the partnership. A special partner, with the assent of his partners, may likewise sell or assign his interest in a limited partnership. The insolvency of any special partner does not cause a dissolution of the partnership, but his interest must be sold for the benefit of his creditors. When any general or special partner dies without having disposed of his interest, his executor may sell the same under the direction of the Court. All such alterations must be duly acknowledged, certified, and recorded, as in the case of the original formation of such partnership (a).

Registration of commandite partnerships.

Germany.—A commandite partnership exists where two or more persons carry on trade together, some with limited and some with unlimited liability. A commandite partnership must be entered in the register of commerce. The register must contain the name, profession, and residence of all the partners with unlimited liability; the name, profession, and residence of each

(a) Law of 16 April, 1838.

commanditaire, with the designation that he is a commanditaire ; the name of the firm, the place where it is established, and the amount of the shares of each commanditaire. The register must be signed by all the partners before the Tribunal of Commerce. In the publication of the particulars in the Gazette it is not necessary to give the names of the commanditaires and the amount of their shares. Any change in the commandite partnership must likewise be published and registered. The management of the business rests with the general partners. The commanditaire must not take any part in the business of the partnership. But he is only responsible for the amount of capital which he has invested or which he has yet to pay. He is not bound to restore any part of the interest and profits which he may have drawn out for losses subsequently incurred. If the original capital is diminished by subsequent loss, future profits are employed to cover this loss. If no provision has been made as to the share of each partner in profit and loss, the division will be made by the tribunal or by arbitrators. The obligation of the commanditaire commences from the registry of the partnership. All suits against a commandite partnership must be instituted against the general partners. The name of the commanditaire must not be included in the firm, otherwise he becomes responsible as a general partner. The death or incapacity of a commandite partner does not cause the dissolution of the partnership. The dissolution of a commandite partnership, on the retirement of a commandite partner, must be entered in the register.

The capital of partnership *en commandite* may be divided in shares and parts of shares in favour of distinct persons, but must be for an amount each of at least 100 thalers conventional coins. Such partnerships can only be established by government consent, and constituted by deed. The deed must contain the names, surnames, profession, and residence of each general partner ; the name of the firm, and the place where it is situated ; the object and duration of the partnership, the number of shares, the stipulation for a council of inspection, the manner of calling meetings, the mode of advertising, &c. The deed must be registered at the tribunal of commerce in an extract containing the principal conditions as above. A decla-

Liability of
the com-
mandite and com-
manditaire.

Capital of
commandite
may be di-
vided into
shares.

The deed must
be registered.

ration signed by the general partners must also be made that the amount of capital of the commandite partners has been all subscribed ; that each commandite partner has paid at least a fourth part of the amount he has subscribed, and that the council of inspection has been appointed. As the commandite partnership does not exist till the consent of the government has been obtained, no transaction is valid if made before such consent has been granted. No share can be issued on the credit of the commandite partners. The shares cannot be

Notice must
be given of all
transfers of
shares.

transferred without the consent of all the partners. Notice of the transfer must be given to the company, and the same must be registered in the book of register of shares ; and no one is considered a shareholder unless he has been entered in the book. So long as the full amount of the share has not been paid, the original allottee remains bound to the company for the payment of the arrears. The general partners must lay before the commandite partners and council of inspection the balance-sheet of the previous year during the first six months of the ensuing year. All the regulations respecting the calling of general meetings and the authority of the council of inspection are the same as those of the French law of 1856. No part of the capital advanced can be repaid to the commandite partners so long as the company is in existence ; nor can any rate of interest be secured to them. The death or bankruptcy of a commandite partner does not produce a dissolution of the partnership. The general partners and the council of inspection are responsible for any amount of capital repaid to the commandite partners ; for any interest or dividend paid to them not out of profits, for any division of property or repayment of capital without observing the proper rules. The winding up of the company devolves on the general partners and council of inspection (a).

Canada.—A law on Limited Partnerships has been introduced in Canada in all important particulars the same as that of New York (b).

Holland.—Partnerships *en commandite* are allowed, the same as in France (c).

Italy.—Commandite partnerships must in all cases receive

(a) German Code, §§ 173 to 196 ; c. 9, 1853.

German Code, §§ 250 to 270.

(c) Dutch Code, §§ 19 to 21.

(b) 12 Vict. c. 75, 1849 ; 17 Vict.

the authority of the Government, and their deed must be approved in the same manner as "anonymous partnerships."

New South Wales.—Limited partnerships may be formed for the transaction of agricultural, mining, mercantile, mechanical, manufacturing, or other business, except for banking and insurance. The firm must contain the name of the general partners only, with the addition of the words "and another," or "and others." In other particulars the law does not differ from the preceding statutes (a).

Limited partnerships in New South Wales.

Portugal.—The law on commandite partnerships is the same as in Spain and France (b).

Russia.—Commandite partnerships must be established with the same formalities as other partnerships. The *commanditaire* cannot bind the partnership by his acts, and is only responsible for the amount he has invested. In the copies or extracts to be presented to the public authority the names of the *commanditaires* may be omitted, but the capital they invest must be stated.

Spain.—The same law exists as in France. The capital of partnerships en commandite is divisible in shares. The share may be represented by *cédules* or *scrips*, and they may be divided in coupons. The shares are not issued till the money has been paid; and if they are issued before this payment, the party who delivers the share is responsible. The transfer is effected by a declaration of transfer enrolled in the register of the partnership. The transferors of shares enrolled continue responsible so long as they have not paid the entire amount of each share (c).

SECTION VIII.

ANONYMOUS COMPANIES.

FOREIGN LAWS.

France.—An anonymous company is carried on, not in the name of any of the partners, but by the name or object of the undertaking. The credit of such companies does not rest on the solvency of any partner. The name of *Sociétés anonymes* is given to companies of a small number, and of *Compagnies* Nature of anonymous companies.

- (a) 17 Vict. c. 19, 1853.
- (b) Portuguese Code, §§ 565 to 570.
- (c) Spanish Code, §§ 271 to 278.

anonymes to companies of a large number. In an anonymous company no partner has an unlimited liability, none can lose more than the sum they have invested. Such company can only be formed by the authority of the State, which will consider whether the capital is proportionate to the extent of the enterprise, and whether the management is placed upon a proper footing. The company must be formed by deed before a notary, and until the authority of the State has been obtained, partners would only bind each other conditionally. The mode of obtaining the authority is as follows. The deed and documents of the company must be enclosed to a petition, addressed to the Préfet of the department. The petition must be signed by all who have signed the deed, and by parties subscribing at least one-fourth of the real capital. The same must be accompanied with an authentic copy of the deed. The deed must state the business which the company will undertake, the name by which it will be carried on, the domicile, duration, and amount of capital, the number of shares issued, and the mode of management. After one-fourth of the capital has been secured, permission may be obtained to commence the business before the whole has been subscribed. The Préfet will send the petition and documents to the Minister of the Interior, with his opinion :—1. As to whether the enterprise is contrary to law, morals, or good faith, or opposed to the interests of commerce ; or whether the success is likely to be improbable or inconvenient to the shareholders. 2. As to the character of the subscribers, especially where the subscribers of one-fourth of the capital only are known, and the character of the managers, if they are named. 3. As to the extent of means of the subscribers, and whether they are in a position to pay the amount of their shares. The documents and opinion of the Préfet are examined by the Council of State with a view to enable the Ministers to decide—1. Whether the conditions of the deed are in conformity with the laws and ordinances which secure their execution. 2. Whether the object of the company is lawful. 3. Whether the capital is sufficient. 4. Whether it is well guaranteed. 5. Whether the interests of all the partners are sufficiently secured. 6. Whether the administration offers moral guarantees both to the parties interested and to the public. When the proposed company is for banking, the opinion of the Préfet

Petition to
the Préfet of
the depart-
ment.

One-fourth of
the capital
must be re-
served.

must be given especially as regards public utility. The authority of the Government may be refused if there be proper cause, and the Minister may hear any objection which may be offered to the establishment of such companies. The decree and the deed itself must be posted up in the same manner as the documents of other partnerships. The affairs of an anonymous company are administered by directors or clerks, sometimes chosen from among the partners; sometimes strangers, after a council, composed of shareholders, is formed to direct and watch over the management, and no one else has a right to mix himself in the affairs. When the deed does not specify the authority of the directors, or managers, their powers are such as a salaried agent possesses. The authority of the manager may be revoked, especially when he is not a partner. The capital of an anonymous company is divided into shares, which may be created to order or to bearer. The shareholders participate in the profits by dividends, which increase or diminish with the profits. The creditors of an anonymous partnership can only sue the managers; but they are not personally responsible except in case of fraud. If the estate has not sufficient to pay its debts, it may be wound up, and declared bankrupt. If the creditors discover that dividends were made when there were no profits, they may institute a criminal suit for the same against the managers, and any one who gave authority to that effect. Neither the managers of anonymous companies, nor the creditors in case of bankruptcy, would have any means of suing the original shareholders for the completion of payment of their shares after they have transferred them, unless they have taken the precaution to receive some security when they issued the shares (*a*).

Germany.—An anonymous company is a company in which all the partners advance a certain amount of capital, without incurring any personal responsibility for its obligations. The capital is divided into shares, and parts of shares. Such companies can only be established with the authority of the State. It must be formed by deed, which must set forth the name and domicile of the company, its object and duration, the amount of capital, and the number of shares, the kind of shares, whether

Authority of
Government
may be re-
fused.

Authority of
directors.

Anonymous
companies
must be
formed by
deed.

(*a*) French Code of Commerce, §§ 29, 30, 42, and 45; Pardessus, Droit Commercial, Vol. iii. p. 136.

in favour of persons nominated or of bearer ; the principle on which the accounts are to be made up, the mode of appointing the board of directors, the mode of voting, and the form of advertisements. The deed must be registered at the Tribunal of Commerce, and an abstract of it, containing the principal provisions, must be published. The company does not exist till the authority of the State has been obtained. No shareholder can at any time withdraw any part of his investment, and no fixed rate of interest can be secured to the shareholders. Where the whole amount of the share has not been paid up, notice for calls should be advertised at least three times, and the last time at least four weeks before the time fixed for payment. If the shares are in favour of persons nominated, and not to bearer, special circulars should be sent to them instead of resorting to advertisements. If the shares are in favour of bearers they should not be issued till the whole amount has been paid up. Bills or notes are not sufficient. The subscriber is bound unconditionally to pay forty per cent. of the share ; he cannot avoid this obligation by transferring the share to a third person, nor can the company exonerate him from it. A subscriber who is declared to have forfeited his share for delaying to pay his calls, remains still bound to pay forty per cent. of the amount.

A shareholder may, by agreement, be exonerated from further payment after he has paid forty per cent. As long as the amount of the share has not been paid in full the shareholder cannot release himself from his responsibility by transferring his share to another, unless the company consent to transfer his liability to that other person. Even in that case the retiring shareholder would remain bound to the company for his arrears, and for all the obligations entered into by the company up to the period of his retirement. In the general management of the company the shareholders have one vote for each share. If a board of inspection has been appointed, such board has the same rights in anonymous partnerships as in commandite partnerships by shares. The company may have a board of management to consist of one or more members, paid or unpaid, shareholders or not. The names of the members of such board must be entered in the registers of trade. The board must sign in the name of the company, and in the form specified by the deed. They cannot exceed the authority given to them as regards the trans-

Subscribers to shares bound to pay 40 per cent.

Power of board of inspection.

actions of the company. The members of the board are not personally bound for the debts of the firm. An anonymous company is dissolved by the expiration of the time fixed by the deed ; by a resolution of the shareholders duly recorded, by a decision of the board of directors, when the capital has been reduced by half, and by bankruptcy. The dissolution of the company for any reason other than bankruptcy, must be entered in the register of trade. The winding up of the company is to be entrusted to the board of directors, unless other persons are nominated by the shareholders. The property is divided among the shareholders according to their shares, after all the debts have been paid. The books of the company must be kept for ten years. The merging of one company into another can only take place by authority of the State. A general regulation provides that the Government may, in special cases, consent that the advance necessary for the formation of the company may be reduced to twenty-five instead of forty per cent. (a).

Dissolution of
anonymous
companies.

Holland.—The Royal authority is required for the formation of anonymous companies. Such authority is granted where the company is not against good morals and public order, and provided the conditions of the deed are duly fulfilled. The company may also be dissolved by Royal ordinance, if the conditions of the deed are not observed. The Royal authority must be published in full in the official journal, and duly registered. The capital of the company is divided into shares, either personal or in blank. No share in blank can be issued till the whole amount of it has been paid in cash. The deed must provide for the transfer of shares, and for the registration of the transfer. If the company sustains a loss of fifty per cent., the same must be recorded in the register. If the loss amounts to seventy-five to one hundred per cent., the company must be dissolved, and the directors will become personally responsible for all obligations contracted after the discovery of such a deficit. The Royal authority will only be granted when the original partners represent at least one-fifth of the capital. The company cannot commence till ten per cent. at least of the capital has been paid up. The deed must provide for the mode of voting. Once a year the directors must present to the shareholders a balance sheet of the affairs of the company (b).

Royal auth-
rity necessary.

When the loss
amounts to 75
to 100 per
cent. the com-
pany must be
dissolved.

(a) German Code, §§ 207 to 249. (b) Dutch Code, §§ 36 to 56.

Portugal.—An anonymous company is an association designated by the name of the object it undertakes, and managed by directors, shareholders, or not, salaried or not. Such companies can only be formed by public deed, and such deed must be entered in the Register of Commerce. Till the company has been registered each shareholder is personally responsible for the contracts of the company (a).

Anonymous
companies re-
quire the au-
thority of the
State.

Russia.—Anonymous companies may be formed with a capital divided in shares. Such companies may be instituted for carrying out any useful invention not exclusively the property of a third person, any enterprise for science, art, trade, navigation, or any industrial operation. No anonymous company can be formed without the special authority of the State. Such authority may be granted either pure and simple or with temporary exemptions, as with freedom of taxes or with concession of monopolies or privileges. The authority of the Government does not in any case imply any guarantee for the success of the company. Anonymous companies are either for railways, aqueducts, or other objects implying scientific or technical knowledge or for general business, such as insurance. The authority with concession of privileges or monopoly can only be granted to companies for the first of these objects. A company desiring to obtain a privilege for the exclusive use of an invention made in Russia, must first receive a patent for the purpose. The privilege of the patent must be transferred by the patentee to the company, in which case the patentee would reserve to himself no other right than as the head or founder of the company. The duration of the company may be limited or unlimited, but the privilege or concession can only be granted for a limited time, having regard to the nature of the undertaking, the extent of the risk, the amount of the capital, and other considerations. It is understood that the exclusive use of the privilege cannot exceed the duration of the privilege itself, whatever be the duration of the company; that the expiration of the privilege does not imply the dissolution of the company, and that at the expiration of the time the shareholders may agree to renew the company, whilst in no case can the exclusive privilege be either renewed or extended.

A patent is
required where
exclusive pri-
vileges are
sought.

(a) Portuguese Code, §§ 538 to 546.

Such companies are designated by the nature of the undertaking. A company for commercial or manufacturing purposes must have a licence proportioned to its capital. Companies first established in Russia do not need such a licence. The authority will not be granted to companies for objects contrary to law or good morals, or injurious to the interests of the State. No change can be made in the constitution of the company without special authority. If the shares are not taken up, and the founders wish to abandon the undertaking, the authority would be revoked. Any exemption or privileges will cease by the dissolution of the company or when any forfeiture is incurred. The dissolution must be published and advertised. The shares must be nominal and not to bearer. The terms and conditions are all set forth in the deed. When the shares are to be paid up in several instalments, the scrip may be delivered on the first payment, setting forth the further payments to be made; and, when the last payment has been made, the scrip will be changed for the share. In no case can the share be issued before the amount has been paid up. The founders of the company have the right to reserve to themselves a limited number of shares, not exceeding a fifth of the total number, and the other shares may be allotted to other parties applying for the same. The shares are transferable, but the transfer must be registered. All trade in shares or scrips is prohibited and void. The liability of the shareholders extends only to the amount invested. The management of the company is entrusted to directors appointed by the shareholders. The directors are the agents of the company, and are responsible for the execution of their duties. The directors must give an account of their business, setting forth the state of the funds, the receipts and expenditure, the amount of profit or loss, and the reserve, if any. Every dispute between the company and shareholders must be settled by arbitration. The mode of obtaining the authority from the State is as follows: A petition must be made to the minister setting forth the character of the undertaking, the patent possessed, the amount of capital, the number of shares, the nature of the privileges sought, &c. The petition, with all the documents, is remitted, with the opinion of the minister, to the Council of Ministers, if it refers to a simple company, and to the Council of the Empire if it concerns privileged

Shares must
be in favour
of persons
named.

Trade in
scrips pro-
hibited.

Authority of the State. companies. Immediately on the authority being granted the deed must be executed, and the company is advertised in the public journals (*a*).

Spain.—Anonymous companies are formed with a capital divided into shares, the company being designated by the object of the undertaking, and the administration being entrusted to a board of directors. Anonymous companies must be formed by the authority of the State. The law relating to partnership applies also to anonymous companies (*b*).

(*a*) Russian Code, Regulation of Dec. 6, 1856, §§ 1 to 56.
(*b*) Spanish Code, §§ 265, 283, &c.

CHAPTER V.

JOINT STOCK COMPANIES.

OUR present Joint Stock Companies differ materially from those Regulated Companies which, from very early times, carried on the commerce in Britain in distant parts of the world. Such companies consisted of a number of persons alike engaged in certain trades and possessing in common certain monopolies, but they had no joint stock. It is only in late years that the idea of trading upon a joint stock has been introduced with such manifest advantage for the purpose of carrying on operations of a permanent character, and requiring a permanent supply of funds. And it was with a view to enable the parties investing to withdraw such funds, without causing a complete abandonment of the undertaking, that such joint stock was divided into transferable shares.

INTRODUC-
TORY OBSER-
VATIONS.

The first legislative enactments with reference to joint-stock companies, commonly called the Bubble Act (*a*), was one tending to repress the abuses arising out of such transfer of shares. That statute rendered illegal and void the acting or presuming to act as a corporate body, the raising or pretending to raise transferable stock, and the transferring or pretending to transfer or assign any share in such stock without legal authority. In progress of time, however, it became necessary to facilitate the formation of incorporated companies with power to issue and transfer transferable stock, as well as to sue and be sued in the name of its officers, without the limitation of liability usually arising from a charter of incorporation, and power was granted to the Crown (*b*) to grant certain corporate privileges to trading associations without limiting the liability of their member. Later on it was found expedient to give additional facilities for the for-

The Bubble
Act.

(*a*) 6 Geo. I. c. 13.

(*b*) 6 Geo. IV. c. 91.

mation of companies, and the Crown was empowered (*a*) to constitute companies by letters patent with the privilege of suing and being sued in the name of an officer of the company, and to limit the liability of the shareholders to a certain extent only per share as in such letters patent should be declared and limited.

Extension of joint-stock companies.

But the immense expansion of commerce greatly encouraged the formation of associations, and even the facilities of obtaining a charter or letters patent from the Crown were found wholly inadequate for the purpose. Many companies were therefore in existence which had no corporate capacity and no power to sue and be sued in the name of their officer. To provide for these increased wants the Joint Stock Companies Act, 1844 (*b*), was passed, enabling companies to obtain all the corporate privileges by registration, whilst another act was passed with especial reference to railway, canal, and other public purposes (*c*), and several acts having for their object the winding up and dissolution of joint-stock companies (*d*). But as yet the power to limit the liability of partners was left in the hands of the Crown, and much dissatisfaction was felt at the mode in which such powers were exercised, the privilege being granted to some and refused to others. Inquiries were then instituted into the principle of limited liability in partnerships, and, after many years of discussion, the Limited Liability Act of 1855 was passed (*e*), allowing, on certain conditions as to publicity, companies to be formed on limited or unlimited liability. Considerable simplification was afterwards introduced in the whole law of joint stock companies by the Act of 1856, and this act, with two other acts passed in 1857 and 1858 (*f*) for the winding up of Joint Stock Companies, constitute the present law on joint stock companies, though insurance companies are excepted from those acts, and are, therefore, still governed by the Act of 1844 (*g*).

Limited Liability Act.

Companies Bill.

Since then an attempt has been made to consolidate the whole law on companies, and a Bill on the subject was passed by the House of Lords and committed in the House of Commons in the session of 1860. It being now probable that the same

(*a*) 7 W. IV. and 1 Vict. c. 73.

Vict. c. 108.

(*b*) 7 & 8 Vict. c. 110.

(*c*) 18 & 19 Vict. c. 133.

(*c*) 8 & 9 Vict. c. 116.

(*f*) 19 & 20 Vict. c. 47.

(*d*) 11 & 12 Vict. c. 45 ; 12 & 13

(*g*) 7 & 8 Vict. c. 108.

bill may pass into law during the present session (1862), we defer giving the statute law on the subject to a later portion of this work.

SECTION I.

WHAT IS A JOINT STOCK COMPANY.

BRITISH LAW.

A joint stock company is a partnership whereof the capital is or is to be divided into shares, transferable without the express consent of all the members. It differs from a partnership in the large and fluctuating number of members of which it is composed, and in the extent of the authority entrusted to its members.

Joint stock companies are either incorporated or unincorporated. Incorporated companies are those incorporated either by Royal charter by special acts of parliament, such as companies for railways, canals, docks, or waterworks, or companies registered under the Joint Stock Companies Act, with a liability limited or unlimited. Unincorporated companies are those formed for mining on the cost-book principle, and constituted under the Letters Patent Act as well as banking companies formed under the 7 Geo. IV. c. 46.

What is a
joint stock
company.

Joint stock
companies
incorporated
or unincorpo-
rated.

SECTION II.

LIABILITY OF PROJECTORS OF JOINT STOCK COMPANIES.

Persons combining as promoters of a joint stock company either by charter or under an act of parliament are not partners. A company does not exist till it is formed; and each promoter is only liable for that portion of the expenses which he himself either actually or implied by law may be held to have sanctioned (a).

Copartnership
liability till
the company
is formed.

Whoever acts as promoter or member of the provisional committee of any company is liable on all contracts entered into by

Projectors
liable for the
contracts they
enter into.

(a) *Hamilton v. Smith*, 28 L. J. Ch. 404.

Liable for each other when acting under authority.

Or whether the party represented himself as having authority.

Consent to act as provisional committee-man necessary.

If project abortive, money deposited to be restored.

Accounts to be given.

Right to sue subscribers for deposit.

himself or by any third party under an authority special or general from him (*a*). Such authority will not be presumed from the mere fact of his having consented to act as a promoter or member of the provisional committee, or even from his having allowed his name to be printed and published in a prospectus, but must be established by evidence of such act on his part as will be held to constitute an authority special or general (*b*). If he has, by words or conduct, represented himself as having given such authority, and if the contract has been truly entered into on the faith of his representation, he will be stopped from disputing the truth of it, and will be liable as if the authority had been directly established.

To render a provisional committee-man liable for any contract made by the committee it must be proved that he consented to associate himself with the parties taking such steps; that he knew they were continuing to act, and that the expenses incurred were usual and reasonable (*c*). Such liability would in no case extend over contracts made before he became a member of such committee, or after he has ceased to be one (*d*).

Where the projected steps for the formation of the company have proved abortive, the promoters are bound to return to the subscribers any money deposited with them free from any deductions for expenses incurred (*e*).

The managers of a projected company are bound to render to their subscribers an account of the moneys received and of the expenses incurred, and to apply the funds in their hands to the liquidation of the liabilities of the company (*f*). They have, on the other hand, a right to sue the subscribers for the sum they have agreed to subscribe, or for the deposits which they were to make on the allotment of the shares, provided the directors have acted *bond fide* and the contract for the allotment of shares was complete (*g*).

- (*a*) Bailey *v.* Macaulay, 13 Q. B. 815; Reynell *v.* Lewis, and Wyld *v.* Hopkins, 15 M. & W. 517.
- (*b*) Patrick *v.* Reynold, 1 C. B. N. S. 727.
- (*c*) Barrett *v.* Blunt, 2 C. & K. 272.
- (*d*) Newton *v.* Belcher, 6 Railw. Cases, 38; Bremner *v.* Chamberlayne, 2 C. & K. 560.
- (*e*) Nockells *v.* Crosby, 3 B & C. 751.
- (*f*) Cooper *v.* Webb, 15 Sim. 454; Colbery *v.* Smith, 2 M. & Rob. 96.
- (*g*) Duke *v.* Dove, 1 Ex. 36; Duke *v.* Forbes, 1 Ex. 356.

Where in the carrying out of the undertaking the directors have in any material condition departed from the terms of the prospectus issued, a subscriber will not be bound to assume the character and duties of a member of the company except he has by his act acquiesced in the doings of the directors (*a*). Departure from conditions.

Contracts entered into by the promoters of a company prior to incorporation are not binding upon the company unless they are adopted when it is in actual operation or unless they have received the full benefit of the consideration for which the agreement stipulated in its behalf (*b*). Contracts prior to incorporation not binding unless adopted.

The rights of members of a joint stock company among themselves are determined by the deed of settlement; whenever the deed is silent and no regular charter exists, they are governed by the general law of partnerships.

SECTION III.

FORMATION OF COMPANIES.

The prospectus setting forth the object and conditions of the company constitutes the contract on the faith of which the public accept shares; and if a person is induced by the fraudulent representations therein contained to take shares in the same, such allottee may be entitled to the damages for the injury he may have thereby suffered (*c*). The prospectus is the basis of the company.

Shares are considered as allotted when the deposits on the shares as required by the prospectus are received from the applicant, and a scrip is issued to him declaring him entitled to the indicated number of shares in the company. Allotment of shares.

The simple acceptance of shares in a company is not sufficient to make the parties liable to pay the preliminary expenses for the same (*d*). The members of the provisional committee Liability of the allottee.

(*a*) *Pitchford v. Davis*, 5 M. & W. 2; *Wastab v. Spottiswoode*, 15 M. & W. 514.

(*b*) *Williams v. St. George's Harbour Company*, 3 Jurist, N. S. 1014; *Edward v. The Grand Junction Railway Company*, 1 My. & C. 651.

(*c*) *Gerhard v. Bates*, 2 E. & B. 476;

Taylor v. Ashton, 11 M. & W. 401; *Clarke v. Dickson*, 4 Jurist, N. S. 832 —5 Jurist, N. S. 1027; *Burt v. British Nation Life Assurance Association*, 5 Jurist, N. S. 355.

(*d*) *Hutton v. Thompson*, *Norris v. Cooper*, 3 H. L. C. 11.

having never acquired the relation of partners, are not liable as such for each others' debts (*a*). To make the allottee liable for the expenses, it must be shown that he has authorised the making of such expenses, or that in accepting the scrip he has entered into an obligation to pay for the same.

Rights of the company against original allottees.

When the company is incorporated, it has a right to register as shareholders the original allottee to whom the scrips were issued, and he cannot free himself from the responsibilities by transferring such scrip to another (*b*), though the company may consent to accept another shareholder instead of himself.

Original allottee may transfer his share after registration, but cannot abandon the liability by selling his scrips.

The original allottee may, after his name has been placed in the register, transfer his shares according to the regulations of the company (*c*), but he cannot compel the purchaser of his scrips to take the shares off his hands (*d*), nor has the company any direct remedy against him (*e*).

SECTION IV.

WHAT CONSTITUTES A MEMBER OF A JOINT STOCK COMPANY.

Agreement to take shares.

An agreement to take shares may result either from a subscription to a contract as required in the case of railway bills, or from a letter of application combined with the letter of allotment, either with or without the addition of a prospectus, provided the letter of application contains an unconditional offer. The possession of a share gives all the right of membership in a joint stock company.

Every shareholder is a member of the company.
A share is a

A share in the joint stock company may be purchased or sold

(*a*) *Bright v. Hutton, and Hutton v. Bright*, 3 H. L. C. 368.

(*b*) *Midland Great Western of Ireland Company v. Gordon*, 16 M. & W. 804; *Bronlow v. Nixon*, 2 H. & N. 455.

(*c*) *Midland Great Western of Ireland Company v. Gordon*, 16 M. & W. 804; *Newry and Enniskillen Railway Company v. Edmonds*, 2 Exch. 118; *Ex parte Neilson*, 3 De G. M. & G. 556; *Sheffield, Ashton-under-Lyne*, and

Manchester Railway Company v. Wedcock, 7 M. & W. 574.

(*d*) *Jackson v. Cocker*, 4 Beav. 59; *Humble v. Langston*, 7 M. & W. 517.

(*e*) *London Great Junction Railway Company v. Freeman*, 2 M. & G. 606; *Daly v. Thompson*, 10 M. & W. 309; *Wolverhampton New Waterworks Company v. Hawkesford*, 1 Jurist, N. S. 632.

even by parol agreement (*a*). A share is constituted by statute personal estate.

As soon as the shareholder of a joint stock company has received his titles complete he becomes liable to all the calls which the directors may make according to the contract, and the obligation dates from the passing of the resolution authorising the same (*b*).

A minor may be a member of a joint stock company, but is not liable for the payment of calls. On his becoming of age he may repudiate his share within a reasonable time, but if he takes no steps to renounce his interest, he becomes liable (*c*).

When an allottee discovers that he was induced by misrepresentation and fraud to become a member of the company, he may repudiate his share, but that he may get rid of his liability he must forthwith take steps to that effect (*d*).

Shareholder liable to calls.

Minor may be a member, but is not liable for calls.

Discovery of fraud sufficient cause for repudiating a contract.

SECTION V.

MANAGEMENT OF COMPANIES.

The company is known by its name, and after the same has been registered no alteration can be made in it.

The name not to be changed.

In the general management of the company's affairs the majority governs the minority. That the resolutions passed at meetings of the company may be valid the meetings must be summoned by a person duly authorised for that purpose a reasonable time before, in order to allow all the members to attend, the notice stating the object for which the meeting is convened. In the absence, however, of any rule specifying the number of members which shall constitute a quorum, any number of members duly assembled are held to be a quorum (*e*).

Majority governs the minority.

Meeting must be duly called.

How many will form a quorum.

(*a*) *Duncroft v. Albrecht*, 12 Sim. 189; *Knight v. Barber*, 16 M. & W. 66; *Humble v. Mitchell*, 11 Ad. & E. 205.

and *Enniskillen Railway Company v. Coombe*, 3 Exch. 365; *Dublin and Wicklow Company v. Black*, 7 Railway Cases, 434.

(*b*) *Shaw v. Romley*, 16 M. & W. 810; *R. v. Londonderry and Coleraine Railway Company*, 18 Q. B. 998.

(*d*) *Ex parte Nicol*, 28 L. J. Ch. 257; *Ex parte Mixer*, 28 L. J. Ch. 879.

(*c*) *Cork and Bandon Railway Company v. Cazenove*, 10 Q. B. 935; *Newry*

(*e*) *Smith v. Darley*, 2 H. L. Cases, 789.

SECTION VI.

POWERS OF THE COMPANY AND DIRECTORS.

Company has no power to depart from the object for which it is constituted.

Trading company may borrow money, but a parliamentary cannot.

Directors are particular agents.

A company has no power to depart from the original purposes for which it is constituted, nor can the majority bind the minority in such acts (*a*).

A trading company, unless specially restricted, would have an implied power to borrow money, and to bind themselves by bills or notes. But in a parliamentary company the power is restricted to the special mode prescribed by the Act (*b*).

The directors of a joint stock company are held to be particular agents of the company, with a limited authority delegated to them for an express object, and any act of them exceeding their authority would be void. So they would have no power to cancel shares issued in their own names, and upon which they paid no deposit. So, unless express power be granted by the deed to the directors for the purpose, it is not competent for them to amalgamate with another company carrying on the same business, and to assume, on behalf of their own company, the debts and responsibilities of the other (*c*).

SECTION VII.

LIABILITIES OF DIRECTORS AND MEMBERS FOR FRAUD.

Directors, &c., of any body corporate or public body fraudulently appropriating property; or keeping fraudulent accounts;

The Fraudulent Trustees Act provides as follows :—

If any person, being a director, member, or public officer of any body corporate, or public company, shall fraudulently take or apply for his own use, any of the money or other property of such body corporate, or public company, he shall be guilty of a misdemeanor (*d*).

(*a*) *Midland Great Western of Ireland Company v. Leech*, 3 H. L. C. 872; *Charlton v. Newcastle, &c. Railw. Company*, 5 Jurist, N. S. 1096; *Naturch v. Irving, Gow. Partn. Simpson v. The Westminster Palace Company Limited*, 6 Jurist, N. S. 985.

(*b*) *Hodgkinson v. The National Live Stock Insurance Company*, 28 L. J. Ch. 676; see *Simpson v. The Westminster Palace Hotel Company Limited*, 29 L. J. Ch. 561.

(*c*) *Re The Joint Stock Companies Winding-up Act, 1848*, and *Re The Era Assurance Society*; *Ex parte Williams*, and *Ex parte The Anchor Assurance Company*, 30 L. J. Ch. 137. See as to the power of directors to borrow or purchase, *In re The London and County Assurance Company*, *Wood's Claim*, and *Brown's Claim*, 30 L. J. Ch. 373.

(*d*) 20 & 21 Vict. c. 54, § 5.

If any person, being a director, public officer, or manager of any body corporate, or public company, shall, as such, receive or possess himself of any of the money or other property of such body corporate, or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, he shall be guilty of misdemeanor (a).

If any director, manager, public officer, or member of any body corporate, or public company shall, with intent to defraud, destroy, alter, mutilate, or falsify any of the books, papers, writings, or securities belonging to the body corporate, or public company, of which he is a director or manager, public officer or member, or make or concur in the making of any false entry, or any material omission in any book of account or other document, he shall be guilty of misdemeanor (b).

If any director, manager, or public officer of any body corporate, or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate, or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any money or property to such body corporate or public company, or enter into any security for the benefit thereof, he shall be guilty of a misdemeanor (c).

Independent of this statute, a director of a joint-stock company who issues false and fraudulent representations, whereby a person is induced to buy shares in the same, are held liable for damages, although the representation was not made to him in a direct manner (d). So directors ordering dividends to be paid when no profits have been made, are liable to damages to those who have been thereby injured, and are guilty of conspiracy, for which they may be prosecuted and punished (e).

(a) 20 & 21 Vict. c. 54, s. 6.

Exch. 59 ; 4 H. & N. 538 ; Scott v.

(b) Ibid. s. 7.

Dixon, 29 L. J. Exch. 62.

(c) Ibid. s. 8.

(c) Burnes v. Pennell, 2 H. L. Cases,

(d) Bedford v. Bagshaw, 29 L. J. 521.

Frauds of
directors at
common law.

SECTION VIII.

INSURANCE COMPANIES.

Insurance companies alone governed by the Act of 1844.

Insurance companies are at present the only companies governed by the Joint Stock Companies Act of 1844. This Act was originally applicable to all kinds of companies. But the new Joint Stock Companies Acts, 1856, 1857, and 1858, which supplanted it, purposely excepted banking and insurance companies. The exception, as regards banking companies, was afterwards removed by a special Act, but no legislation has taken place on insurance companies. As, however, it is expected that the new Companies Act will include insurance companies it is expedient to defer a fuller statement of the law on the subject till the new Act shall have passed.

SECTION IX.

BANKING COMPANIES.

Banking companies with limited or unlimited liability.

Banking companies were excepted from the operation of the Joint Stock Companies Acts both of 1844 and 1856, but in 1857 an Act was passed, the 20 & 21 Vict. c. 49, which, whilst making special provisions for banking companies, declared that the Joint Stock Companies Act, 1856 and 1857, shall be deemed to be incorporated with it. Among other regulations, no banking company can be established except with a capital divided in shares of an amount not less than £100 each. Banking companies may be formed with a limited or unlimited liability, with the exception of banks issuing notes ; and any existing banking company, with the assent of the majority of the shareholders, may register itself with a limited or with an unlimited liability, provided it gives at least thirty days' notice of the intention so to register the same to every person or partnership firm who shall have a banking account with the company. The expected new measure on companies will embrace banking companies, and therefore it is needless to enter at present into further details on the existing law.

SECTION X.

MINING COMPANIES ON THE COST BOOK PRINCIPLE.

A cost-book mining company consists of a number of adventurers who, having obtained permission to work a lode, agree to work it with a capital divided into a certain number of shares.

Constitution
of company
on cost-book
principle.
Power of the
purser.

The management of the affairs of the company is entrusted to an agent called a purser, who acts under the control of the shareholders. His duties consist in keeping the minutes, registering the names of all shareholders, keeping the accounts, inspecting the works, and making due report thereon. He is empowered to make calls voted at a general meeting, to make disbursements for materials necessary for carrying out the project, and to summon shareholders to the meetings. The agreement of the company, all receipts and expenditure of the mine, and the names of the shareholders, with their respective accounts, are to be entered in the cost book, which is open at all times for the inspection of shareholders.

Every shareholder possesses a direct and positive interest, according to the amount of shares he holds and the calls made in the gear, machinery, and wrought materials of the mine, the use of the said machinery for the term during which he was a shareholder, being duly considered in abatement of demand, should such be made when a shareholder withdraws from the adventure.

Shareholders in a cost-book company incur the same liability as members of ordinary partnerships. A person acquires the rights and duties of a shareholder when he signs the cost-book, or gives written authority to the purser to sign it (*a*). The liability of shareholders is the same as that of members of an ordinary company (*b*). The shares in a cost-book mining company are transferable, and as a share in a cost-book is not under the statute of frauds it may be transferred even by parol (*c*). With such transfer the liability in a cost-book mining com-

Liability of
shareholders.

The shares are
transferable.

Transfer of
liability.

(*a*) Any note, instrument, or writing requesting or authorising the purser or other officer of any mining company conducted on the cost-book system to enter or register any transfer of any share or shares, or part of a share, in any mine, or any notice to such purser or officer of any such transfer, must be stamped with an adhesive stamp of 6d. (23 Vict. c. 15.)

(*b*) *Tredwen v. Bourne*, 6 M. & W. 461; *Peel v. Thomas*, 15 C. B. 714; *Toll v. Lee*, 4 Exch. 230; *Northey v. Johnson*, 19 L. T. 104, Q. B.

(*c*) *Hayter v. Tucker*, 4 K. & J. 243.

Purser cannot sue for calls.

Authority of co-adventurers.

pany is also relinquished. Where, however, a transfer has been made in respect of which all the calls have not been paid, the transferee is not liable for the amount still remaining due, nor would he forfeit the share for the non-payment of calls. The purser being a manager for the time being only, has no right to sue the shareholders for calls (*a*).

Co-adventurers in a mine have no implied authority, as such, to borrow money on the credit of the company, for the purpose of carrying on the mines, or for any other purpose, however useful or necessary to the objects for which the company is formed (*b*). Nor would the fact that the party had the general management of the mine make any difference in the absence of circumstances from which an implied authority for that purpose can be inferred (*c*).

Mining companies on the cost-book principle may be registered under the Joint Stock Companies Act with a limited or unlimited liability.

SECTION XI.

ON RAILWAY AND OTHER COMPANIES REQUIRING THE AUTHORITY OF PARLIAMENT.

Sources of law. The regulations for such companies are laid down partly in the Joint Stock Companies Acts and partly in the Companies Clauses Consolidation Act passed in 1855 (*d*). The object of the latter statute was to comprise in one general Act sundry provisions relating to the constitution and management of joint-stock companies, usually introduced into Acts of Parliament authorising the execution of undertakings of a public nature by such companies. It was also framed in order to provide means for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, and for ensuring greater uniformity in the provisions themselves.

(*a*) Fenn's case, 4 De G. M. & G. 285 ; Bodmin United Mines Company, 23 Beav. 376 ; Hybart v. Parker, 4 C. B. N. S. 209.

(*b*) Burmester v. Norris, 6 Exch. 796.

(*c*) Ricketts v. Bennett, 4 C. B. 686 ; Dickinson v. Valpy, 10 B. & C. 128 ; Tredwen v. Bourne, 6 M. & W. 461 ; Hawtayne v. Bourne, 7 M. & W. 595 ; Hawken v. Bourne, 8 M. & W. 703.

(*d*) 8 Vict. c. 16.

The capital of such companies is divided into shares bearing a Capital di-
numerical progression, the shares being personal estate, and vided into
transferable as such; and every person becoming entitled to a shares.
share, and whose name has been entered in the register of shareholders, is deemed a shareholder of the company. A register of shareholders with their addresses must be kept, and certificates of shares are to be issued to the shareholders, which certificates are evidence in court, and may be renewed when destroyed. The transfer of shares must be by deed duly stamped and registered, but no shareholder can transfer his share till he has paid all calls for the time (*a*).

The company may make such calls as they may require, and Calls.
they have a right to sue any shareholder who fails to pay the amount of such call. If any shareholder fail to pay any call, the directors, after the expiration of two months from the day appointed for payment, may declare the shares forfeited, provided they transmit notice of such intention to the party, and the forfeiture be confirmed at a general meeting of the company.

If authorised by special Act to borrow money on mortgage or bond, the company may do so. The company may convert the sum borrowed into capital, and may consolidate shares into stock, but all the money raised by the company, whether by subscriptions of the shareholders or by loan, must be applied, first, in paying the costs and expenses incurred in obtaining the special Act, and secondly, in carrying the purposes of the company into execution (*b*).

Ordinary meetings of the shareholders must be held half-yearly, and extraordinary meetings may be called by the directors as required by the shareholders, giving fourteen days' notice of all such meetings, by advertisement specifying the purpose for which the meeting is called. Every shareholder is entitled to vote according to the prescribed scale, and where no scale is prescribed, every shareholder has one vote for every share up to ten, and an additional vote for every five shares beyond the first ten shares up to one hundred, and one additional share for every ten shares held by him beyond the first one hundred shares (*c*).

(*a*) 8 Vict. c. 16, ss. 6 to 19. (*b*) 8 Vict. c. 16, ss. 21 to 36.
(*c*) 8 Vict. c. 16, ss. 66 to 80.

Number and powers of directors.

The number of directors must be the prescribed number. No person is capable of being a director unless he be a shareholder ; and no person holding an office or place of trust or profit under the company or interested in any contract with the company is capable of being a director. The directors have the management and exercise of all the powers of the company. The manner in which such powers may be exercised is as follows :— Any contract which, if made between private persons, would by law be required to be in writing and under seal, must also be entered into, if on behalf of the company, in writing and under seal. Any contract which, if made between private parties, would be by law required to be in writing and signed by the parties to be charged therewith, the same must also be entered into by the directors in writing, signed by any two of them. And any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, may also be made by the directors by parol only. No director, by being party to or executing in the capacity of director any contract or instrument on behalf of the company, or executing any of the powers given to the directors, acquires any personal liability on the same (a).

Dividends.

Auditors must be appointed, and proper accounts kept of all matters. Previously to the declaration of dividends a scheme should be prepared showing the profits, if any, of the company, but no dividend can be made whereby the capital stock will be in any degree reduced. The company may from time to time make bye-laws (b).

Arbitration.

When any dispute arises which must be settled by arbitration, each party must nominate and appoint an arbitrator, and if one of the parties fails to appoint an arbitrator, the other party may appoint his arbitrator to act for both parties, and when more than one arbitrator has been appointed, they may nominate and appoint an umpire to decide on any matters on which they may differ (c). In all cases where damages, costs, or expenses are directed to be paid, and the method of enforcing the same is not provided for, such amount is to be ascertained and determined by two justices ; and if no sufficient goods can be found to levy such damages, the same may be levied by

(a) 8 Vict. c. 16, ss. 81 to 100. (b) 8 Vict. c. 16, ss. 101 to 127.

(c) 8 Vict. c. 16, ss. 128 to 134.

distress of the goods of the treasurer of the company. Other clauses refer to penalties, appeal, &c.

The Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of lands for undertakings of a public nature (*a*), provides, first, for the purchase of land by agreement, and otherwise than by agreement. In the latter case the whole capital must be subscribed before compulsory powers of purchase can be put in force. In case of disputes as to compensation, where the amount claimed does not exceed 50*l.*, it must be settled by two justices. Where it exceeds 50*l.*, it must be settled by arbitration or jury, at the option of the party claiming compensation (*b*). The other clauses of the Act apply to conveyances, entry on lands, copyhold, common lands, &c.

Power to take
lands.

(*a*) 8 Vict. c. 18.

(*b*) 8 Vict. c. 18, ss. 16 to 23.

CHAPTER VI.

PRINCIPAL AND AGENT.

SECTION I.

CREATION OF AGENCY.

BRITISH LAW.

Agency how constituted.

THE relationship of principal and agent is constituted whenever one person, having power to do any act, authorises another person to do it for him in his name. The person employing is called the principal or employer ; the person employed is called the agent or attorney ; the relation between the parties is one of agency ; and the power thus delegated is the authority. When the agency is created by a formal instrument or by deed under seal, it is called a letter of attorney.

May be special or general,

The agency may be special or general. A special agency exists when a person authorises another to do a single act ; a general agency exists where the party is empowered to do all acts connected with a particular business or employment. The authority may be limited or unlimited. It is limited when accompanied by instructions as to the course to pursue. It is unlimited when such course is left to the agent's own discretion.

limited or unlimited.

Authority by deed or by parol.

The authority may be created by deed, by writing, or by verbal instructions (*a*). It may also be inferred from the conduct or relation of the parties ; and it may be either antecedently given or subsequently adopted by an act of recognition or by acquiescence (*b*). An authority to execute a deed on behalf of his principal must, however, be by deed (*c*).

Every person may be principal or agent.

Every person capable of contracting, and not personally disqualified by law, may be a principal. Infants, married women, idiots, lunatics, and other persons having no capacity to contract

- (*a*) *Coles v. Trecothick*, 9 Ves. jun. 250. (*c*) *Harrison v. Jackson*, 7 T. R. 209 ; *Coombs's case*, 9 Coke R. 766 ;
 (*b*) *Maclean v. Dunn*, 4 Bing. 722 ; *Horsley v. Rush*, 7 T. R. 207.
 Jones v. Bright, 5 Bing. 533.

are incapable of appointing an agent. Nevertheless an infant may authorise another to do any act for his own benefit, and a married woman may delegate to another powers with respect to her private property (*a*).

The authority of the agent is personal to himself. A person authorised to do an act for another requiring the exercise of discretion and judgment must execute it himself, and cannot transfer the authority to another. The trust and confidence are reposed on him, and he cannot assign them to a stranger unknown to the principal. To enable an agent to delegate his authority to another a special power must be given him, except where such power is indispensable for the right performance of the act, or where it is implied by the usage of trade (*b*).

When a husband permits his wife to act for him in any department of business, her admissions or acknowledgments are evidence to charge the husband.

FOREIGN LAWS.

France.—Agency is a contract by which a person gives power to another to do something for himself. The contract is completed by the acceptance of the authority. The party to whom such agency is offered may refuse it, but in that case he should notify his refusal as soon as possible. If he keep silence, it will be understood that he has accepted it. But even in case of refusal he must have some regard to the interest of his principal. Thus, when goods are sent for sale, if the party refuses to receive them he cannot leave such goods uncared for; but, whilst making due protest, he must take care of them till they are taken from his hands. The agent who has undertaken to execute an order cannot renounce it unless the principal himself fails to fulfil his obligation in not sending the necessary funds or becomes bankrupt. The authority may be by deed, by letter, and also by parol. The acceptance may be proved by silence or implied by the agent fulfilling his instructions. The authority may be general or special (*c*).

(*a*) *Keane v. Boycott*, 2 H. Bl. 515.

(*b*) *Solly v. Rathbone*, 2 M. & S. 298. In *Cahill v. Dawson*, 26 L. J. C. P. 253, doubts were expressed as to whether an agent instructed by another

agent to procure an insurance could employ a broker to effect it. *Hender- son v. Bramwell*, 1 Y. & J. 387; *Catlin v. Bell*, 4 Camp. 183.

(*c*) French Civil Code, §§ 1984 to 1990.

Authority can
not be trans-
ferred,

unless author-
ised by usage.

Agency may
be refused.

Once under-
taken cannot
be renounced.

Contract of agency express or implied.

United States.—Agency is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it. The authority of the agent may be created by deed or writing, or verbally without writing. The agency may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. It is sufficient that there be satisfactory evidence of the fact that the principal employed the agent, and the agent undertook the trust. The extent of the authority of an agent will sometimes be extended or varied on the ground of implied authority, according to the pressure of circumstances connected with the business with which he is entrusted. If an agent is to convey real estate or any interest in land, the appointment must be in writing. The agency must be antecedently given or be subsequently adopted, and in the latter case there must be some act of recognition, but an acquiescence in the assumed agency of another when the acts of the agent are brought to the knowledge of his principal is equivalent to an express authority. By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent. So when a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills for another, the authority was implied from the fact that the principal had assumed and ratified his acts, and he was bound by a repetition of such acts where there was no proof of any revocation of the power or of collusion between a third party and the agent. Even silence, under certain circumstances, is equivalent to an approval. When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time, and if he does not, his assent and ratification will be presumed (*a*).

Ratification express or tacit.

Holland.—The Dutch Code prescribes the same laws as the French (*b*).

Prussia.—An agency may be given verbally, unless in special cases the law prescribes that it must be by deed. Public agents

(*a*) Kent's Commentaries, vol. ii., p. 797.

(*b*) Dutch Code, §§ 1829 to 1836.

must notify without delay if they refuse to accept the agency.

An agency for unlawful purposes or in opposition to one's own interest and agencies for conflicting interests should be refused. What agency must be refused.

Every person who can bind himself may accept an agency. The agent should execute the authority himself, and he would be responsible for any one whom he may substitute without the consent of his principal (*a*).

SECTION II.

KINDS OF AGENTS.

BRITISH LAW.

The following kinds of agents are recognised by custom and law, and each kind possesses incidental authorities and rights with reference to the peculiar occupation :

A broker is one that contrives and concludes bargains and Brokers. contracts for fee and reward (*b*). Under the general denomination of brokers are included those especially who make contracts between merchants and traders, but there are other kinds of brokers, who take their names from the special business in which they are engaged. No one can practise as broker in the City of London unless admitted by the Lord Mayor and Aldermen (*c*).

(*a*) Prussian Civil Code, §§ 5 to 37.

(*b*) Milford *v.* Hughes, 16 M. & W. 177 ; Jansen *v.* Green, 4 Burr. 2103.

(*c*) 6 Anne, c. 16, s. 4. Brokers acting within the City of London must obtain a licence from the mayor and aldermen of the City, and every person acting without such licence forfeits 25*l.* for every offence. The regulations imposed for the admission of brokers within the City of London are as follows :—Every person applying to be admitted into the office and employment of a broker must produce and show to the satisfaction of the Court a certificate of his having competent skill and knowledge in the particular trade or business wherein he seeks to be admitted and act as broker, which certificate shall also recite the nature of his former servitude, or otherwise the line of business, &c., he has been brought up in and has lately used ;

such certificate to be signed by respectable merchants and others, not fewer than six in number at the least, using and carrying on trade or manufacture. No person is licensed to exercise the employment of a broker who drives any other trade, and all persons who have been admitted as brokers and who do use and exercise any trade or calling or otherwise will be discharged from the office or employment of a broker. No broker is to make out or take any bill of parcels in his own name, or receive or take any bill of parcels or invoice on account of his principal made out in his, the broker's, name ; nor can demand, receive, or take any larger sum of money than the amount of his usual brokerage or commission. In the event of any broker becoming bankrupt, making composition with his creditors, or taking the benefit of any insolvent Act,

Stock brokers. A stock broker is one who, for brokerage and hire, concludes bargains for stock, and buys and sells in the public funds or in the funds of joint-stock companies. He is a broker within the statute, and must be admitted by the Lord Mayor and Aldermen, and is liable to pay forty shillings per annum for the benefit of the Corporation of the City of London (*a*).

his licence to act as a broker ceases and determines, and he is not afterwards permitted to exercise the office and employ of a broker unless he be re-admitted upon the application to the Court. Every broker must enter every bargain or contract he makes in a book, to be kept in his office, entitled, "The Broker's Book," on the day of making such bargain or contract, with the christian and surname at full length of both the buyer and seller, the quantity, and quality of the articles sold or bought, and the price of the same, and the term of credit agreed upon, and deliver a contract note to both buyer and seller, or either of them, upon being requested so to do within twenty-four hours after such request respectively, containing therein a true copy of such entry. No broker is to take or receive double brokerage, that is to say from both buyer and seller of the same article, but from the buyer or seller only, whichever it may happen to be that shall employ him; and no broker can be employed for both buyer and seller in the same transaction, except only in regard to purchases made by brokers at public sales, and then always in such cases that the said purchases be made *bond fide*, and that the name of the principal be entered in the broker's book immediately after the conclusion of the day's sale, or the space of twenty-four hours next after every such transaction.

Every broker must keep by him an authentic copy of his admission, and must produce the same and also the silver medal delivered to him at the time of his admission, for his authority and the satisfaction of all persons concerned to know the same upon

being required to do so by any such person.

(*a*) Clarke v. Powell, 4 B. & Ad. 846; Rex v. London Court of Request Commissioners, 7 East, 292.

The following regulations for the admissions and re-elections of stock brokers are made by the committee of the Stock Exchange:—

The committee for general purposes shall admit and re-elect such persons as they shall deem eligible to be members of the Stock Exchange, for one year, to be computed from the 25th of March then instant, or last preceding the admission of such subscriber, at the amount fixed by the trustees and managers for such admission.

Every new applicant for admission must be recommended by three persons who have been members of the Stock Exchange not less than two years immediately preceding, and who have fulfilled all their engagements therein. Each recommender must enter into an engagement to pay three hundred pounds to the creditors of the applicant, in case the latter shall be publicly declared a defaulter within two years from the date of his admission. In all cases where either of the parties is indemnified, the liability of all the recommenders shall continue for three years; but no applicant shall be eligible, unless one at least of his securities be not indemnified.

EXCEPTIONS. — If the applicant be a foreigner he shall not be admissible, unless he shall have been a constant resident in this country during the five years immediately preceding his application for admission. If the applicant has been a clerk in the Stock Exchange for four years previously to his applica-

A ship broker is one who undertakes to procure on commission freight and passengers for vessels, and who is employed in

tion he shall be required to provide two recommenders only, who must each enter into a similar engagement for two hundred and fifty pounds.

A notice of each application, with the names of the recommenders, stating whether they are, or expect to be, indemnified for the engagements they enter into, shall be affixed in the Stock Exchange at least eight days before the applicant can be balloted for.

Members who recommend applicants for admission are expected to have such personal knowledge of their past and present circumstances as may enable them to give a satisfactory account of the same to the committee.

Any recommender of a new member who at the time of such member's admission shall have avowed that he was not indemnified, nor expected to be so, and who shall subsequently receive any indemnity, shall, in the event of the new member failing within the time of his liability, be compelled to pay to the creditors any sum so received, in addition to the amount for which he had originally become security.

The recommendation of a firm, or of one member only of a firm, shall be allowed; but two members, one of whom is authorised clerk to the other, cannot recommend the same applicant, nor can a member be allowed to recommend any person who is to become, or to continue, his authorised clerk.

If a member shall enter into partnership with, or become authorised clerk to, either of his sureties, a new surety shall be found for such portion of the time as shall remain unexpired; as, likewise, should either of his sureties cease to be a member during his liability; and until this substitution is provided the committee have the power of prohibiting his entrance to the Stock Exchange.

No applicant is admissible if he be a bill or discount broker, or engaged in any business not connected with the

Stock Exchange, or if his wife be engaged in business, or if he be a member of, or subscriber to, any other institution where dealings in stocks or shares are carried on; and if subsequently to his admission he shall render himself subject to either of those objections he shall thereby cease to be a member. But the privileges granted to certain members of the foreign house on their admission to the Stock Exchange, in 1835, by which the strict enforcement of this rule was waived, shall be allowed to extend to their immediate descendants, provided such descendants were members of or had applied for admission to the Stock Exchange previously to March, 1857.

No applicant shall be eligible for admission if he be a clerk in any public or private establishment unconnected with the Stock Exchange.

A member intending to object to the admission of an applicant, or to the re-election of a member, is required to communicate the grounds of his objection, by letter, to the committee previously to the ballot.

If any applicant for admission, or re-election, shall on ballot be rejected, such rejection shall be conclusive for the year ending the 25th of March then next ensuing.

* No applicant for admission who has been a bankrupt, or has passed through the Insolvent Court, or has compounded with his creditors, shall be eligible, unless he shall have paid 6s. 8d. in the pound on his estate; nor then until two years after he shall have obtained his certificate, or fulfilled the conditions of his deed of composition, unless he shall have paid his debts in full; and no applicant having been more than once a bankrupt, or having passed more than once through the Insolvent Court, or having more than once compounded with his creditors,

Rules of the Stock Exchange.

* This rule does not apply to the re-admission of Members of the Stock Exchange.

**Rules of the
Stock
Exchange.**

buying and selling ships, and in adjusting the terms of charter-

shall be eligible for admission until he shall have paid in full.

The re-election shall commence, in every year, on the first Monday in March.

Every member desirous of being re-elected shall, on or before the 4th of March in each year, address a letter, of the form inserted in the Appendix, to the secretary of the committee.

Each individual of a partnership is required to sign a separate application.

Any former member who, not having been a defaulter, bankrupt, or insolvent, shall have discontinued his subscription for one year, must be recommended for re-election by two members, but without security. If he shall have discontinued his subscription for two years he will be considered in all respects a new applicant, and must apply for admission in the usual way.

A notice of every defaulter, bankrupt or insolvent applying for re-admission shall be affixed, without recommenders, in a conspicuous part of the Stock Exchange at least twenty-one days previously to his application being considered by the committee, and the committee shall take the application into consideration upon the report of the sub-committee, appointed according to rule 163.

On the days on which the re-admission of defaulters is to be considered no other business shall be previously brought before the committee.

The chairman of the committee, in addition to any other questions that may appear to be necessary, shall, to each of the recommenders of a new applicant, put the following:—Has the applicant ever been a bankrupt, or has he ever compounded with his creditors? and if so, within what time, and what amount of dividend has been paid?

Would you take his cheque for three thousand pounds in the ordinary way of business? Would you deal with him in 5,000*l.* or 10,000*l.* consols for time?

The chairman, in addition to any

other questions that may be deemed necessary, shall, if he think fit, put the following to every new applicant:—Is this your signature? Have you read the resolution at the back of the letter? Are you a British-born subject? Are you of age? Are you married, and is your wife engaged in business? Have you read the book of rules and regulations of the Stock Exchange?

PARTNERSHIPS.—In every year, as soon as possible after the general election, a list of all partnerships shall be made out, and affixed in some conspicuous part of the Stock Exchange. And in case of any new, or alteration in any old, partnership within the year, the same shall be communicated by the parties to the committee; and no partnership shall be considered as altered or dissolved until such communication be made.

All notices relative to partnerships must be signed by the parties, countersigned by the secretary, and posted in the Stock Exchange.

No member of the Stock Exchange shall be allowed to enter into partnership with any person who is not a member. Nor shall any member form a partnership until the liability of his recommenders shall have ceased, unless with the written consent of his sureties, such consent to be communicated to the committee.

Members dealing generally together in any particular stock or shares, and participating in the result, shall be held responsible to the Stock Exchange for the liabilities of each other, not only in the shares or stock in which they are jointly interested, but also in any other description of securities in which either of them may transact business, unless they forward a written notice to the secretary of the Committee for General Purposes, specifying the particular stock or shares in which they deal on joint account.

This rule to be applicable also to members allowing others to deal with their stock, shares, or capital, and participating in the result.

party and bills of lading. He is not within the statutes regulating the admission of brokers in the City of London (*a*).

An insurance broker is one who effects insurances on ships and goods, selects proper underwriters, arranges the terms and premiums of the policy, and keeps an account with the assured and underwriter for premiums and losses.

A Custom-house broker is one who transacts business at the custom-house in the port of London relating to the entry or clearance of any ships or of any goods or baggage of passengers (*b*).

Factors are general agents, acting for others, with limited or general authority. A factor differs from a broker. The broker is not trusted with the possession of the goods, nor ought he to sell in his own name ; but the factor, from its being usual for him to make advances upon the goods, has a special property in as well as a general lien upon them, and may sell in his own name (*c*).

Auctioneers are those who sell by public sale to the highest bidder. An auctioneer is not a broker. A broker is one who buys and sells, and the auctioneer sells only.

Masters of ships are agents for the equipment, repair, management, and navigation of the ships committed to their charges ; and

Ship's Husbands are persons delegated by the owners of ships to superintend the repairs, equipment, arrangement and other concerns of the ship.

Form of notice to be affixed in the Stock Exchange, countersigned by the secretary.

(NOTICE.)

We, the undersigned, beg to inform the Committee for General Purposes that, from this day until further notice, we hold ourselves jointly responsible to the Stock Exchange for all transactions entered into by either of us in

{ _____
We are, sir, &c.

In the event of a member doing a

private bargain, either for money or time, with any individual member of a partnership existing in the Stock Exchange, keeping the account of such private bargain separately from that carried on by the firm, both parties shall be expelled.

The committee will not sanction partnerships between a broker in the Stock Exchange and a dealer in stocks or shares ; nor will they allow the authorised clerks of brokers to act as dealers in the Stock Exchange.

(*a*) Gibbons *v.* Rule, 4 Bing. 301.

(*b*) 3 & 4 W. 4, c. 52, s. 144.

(*c*) Baring *v.* Corrie, 2 B. & A. 137.

Partners. Partners are mutual agents of each other in all things which belong to the partnership business.

Attorneys and solicitors. Attorneys at law and solicitors are public officers, who conduct legal proceedings on behalf of others called their clients, by whom they are retained, and who are entrusted with the management of suits and controversies in the courts of Common Law, Chancery, and Bankruptcy. No person can act as an attorney or solicitor without having previously obtained a stamped certificate (*a*).

FÓREIGN LAWS.

Commis, brokers, and commission agents.

France.—A factor is one who receives from a merchant or manufacturer authority to act on his behalf. The name of *commis* or agent is given to one who has more limited power, and who acts in a mercantile house, where the master himself directs the business. The name of servant is applied to persons paid by wages. Brokerage is different from commission. The commission agent binds himself to execute what he has promised to his principal. The broker is not personally bound to execute the business which he has negotiated, or to see that it be completed.

Commission agents.

The commission agent always deals in his own name, and third persons dealing with him acquire no direct action against the principal. He is not bound to discover the name of his principal, whether he acts as a commission agent or not. But whether he discovers the name of his principal, or the principal makes himself known, the commission agent is still liable, unless the third party has accepted the principal for his debtor. A commission agent in his own capacity is not bound to guarantee the result of his negotiation, but he may undertake such guarantee by charging an extra commission, called *Del credere*. The commission agent charged to sell is bound to take care of the goods and to execute his authority with diligence and good faith. He cannot sell at a less price than that prescribed to him by his principal, and if he does, he must account to the principal at the prices fixed to him. A commission agent cannot sell on credit, except where he has received authority for it, or there is an established usage to that effect. If he is authorised to sell on credit, he must be careful in the

(*a*) 6 & 7 Vict. c. 73, s. 26.

choice of the purchaser. The commission agent charged to purchase must use the same care in the choice of goods as he would if he bought them on his own account. He must in all respects fulfil his instructions. If he departs from them as regards the quality, the principal may refuse to receive any other goods than what he has ordered. If he has only exceeded the price, he may compel the principal to receive the goods by paying himself the difference. Where the agent receives the goods which he has purchased for his principal, they remain in his hands at the risk of the principal. And where the commission agent has made advances to his principal, and has not received sufficient instructions to sell the goods at the current prices, he may obtain from the Tribunal of Commerce authority for the purpose.

Brokers.—The functions of brokers and stockbrokers are distinct, though the same individual may exercise them both. The number of brokers and stockbrokers in any one place is fixed by the Government ; but they are permitted to nominate their successors, subject to the right of the Government to refuse the party nominated. Aliens not naturalised, minors not emancipated, or uncertificated bankrupts, cannot be nominated. The law requires that the Tribunal of Commerce of the town shall nominate, at a general meeting, ten bankers and merchants, and for Paris eight bankers and merchants, who will prepare a double list of the brokers and stockbrokers to be nominated, and address the same to the prefects of the departments, and these may add the names of other candidates without exceeding the fourth of the whole. The minister may also add names equal to a fourth of the number in the first list, and present afterwards the whole list to the chief of the Government, who will then make the appointments. The decrees which appoint the stockbrokers or brokers are presented and registered at the Tribunal of Commerce, before whom such parties will take the oath. Such officers cannot be admitted to the oath, or enter on their functions, till they have given their security for any fine, which may be pronounced against them. The brokers and stockbrokers form together two distinct corporations. They have the right to deliberate for their internal government, and they may choose their syndics, each corporation having one syndic, and six assistants. The syndics are elected annually, and their functions consist in preventing other persons

Nomination of
brokers.

to act as brokers, as well as in giving their opinions on the parties nominated and upon any disputes which might occur between the brokers and third persons. The brokers and stockbrokers are bound to prove the course of prices in the forms prescribed by law, and their certificates are evidence in court. The value of such certificates results from the publicity given to the different operations. Those which concern the public funds are loudly pronounced when the negotiation takes place. The prices of bills, shares, and other effects are gathered after the exchange hours, by the syndics, and appended to the bulletin, and the prices of merchandises are ascertained by the syndics of brokers united together and set upon each bulletin. The stockbrokers and brokers duly authorised have alone the right to act in the towns where they are established. Those who usurp those functions, or who employ other persons, are punished by a fine, equal to the sixth of the security furnished by the authorised agent. Brokers and stockbrokers cannot exceed their authority. As soon as they have accepted an order, they are bound to execute it, and they are responsible for the non-execution or delay. They must take note of the affairs they have concluded, and write daily in a book, kept in the same manner as the books of merchants, and by order of date, without erasures or abbreviations, all the conditions of the sales, purchases, &c., and deliver to every interested party, at the latest the day after the conclusion of the business, an extract of their journal relative to the negotiation. The broker is not bound to answer for the parties for whom he acts, but where he has contracted with a party whom he knew to be a minor, or a married woman, he would be responsible for it. The compensation which the broker has a right to receive is determined by a decree of the Minister of Commerce. Unless modified by law or usage, each contracting party should pay the half of the commission. Brokers and stockbrokers cannot engage in trade; and in case they should become insolvent, they would be declared fraudulent bankrupts.

Broker's com-
mission deter-
mined by law.

A stockbroker must know exactly all kinds of money having course in trade, and the laws which affect their negotiation. As an evidence that he does possess such knowledge, a person who wishes to be nominated stockbroker must show that he was engaged for four years in a banking house, or with a notary in Paris. The merchandise brokers must know the prices of different merchan-

dises, their qualities and dimensions, the adulterations to which they are subjected, the marks of different manufacturers, and the laws relating to them.

Germany.—Brokers are officially appointed, and must take an oath on their appointment. They contract purchases and sales of goods, ships, bills of exchange, home and foreign stock, shares, and business of insurance, bottomry, charter-party, &c. They are appointed either as general brokers, for all kinds of business, or for some special branches. They cannot engage in business on their own account, and are not responsible for the fulfilment of the business which they negotiate. They must transact the business themselves, and cannot entrust their authority to other parties. A broker must keep a day-book and a ledger, in which he must enter all his transactions every day. The day-book must be numbered and paged, and authenticated by competent authorities. The entries in the day-book must contain the names of the contractors, the date of the contract, the conditions, prices, time of delivery, &c. The entries must be made in the German language, or in the language of the place, and they must be inserted according to date, and without erasures or empty spaces. After the conclusion of the transaction, the broker must, without delay, deliver to each party a note, signed by himself, containing the particulars of the transaction. For transactions to be settled in future, the broker must lay the contract note before each party, to be signed by them, and cause the same to be exchanged among them. Should either party refuse to sign, the broker must notify the same to the other party. The broker is bound to give to either party, at any time, authenticated extracts from the day-book, with all the particulars of the transaction. Where a broker dies, or abandons his business, the book must be deposited with the authorities. The day-book properly kept, and the broker's note, furnish in general the proof of the conclusion of the transaction, and of the conditions of the same. If the broker has made a sale of goods according to sample, he must keep the sample, after marking it in such a way that it can be recognised, until the goods have been accepted or the business has been settled, unless the parties have exonerated him from such duty or it is not required by the custom of the place. A person suffering loss through the fault of the broker has a right to demand

Brokers can-not trade.

Broker's note.

Broker's right to the commission. damages from him. The broker has a right to his commission as soon as he has concluded the business, and if it be subject to any conditions, as soon as such conditions have been fulfilled. If the business has not been concluded, or the conditions have not been carried out, the broker is not entitled to any commission. The amount of the commission is regulated by the customs of the place, or by the custom of the trade. Unless there be a special agreement, each party must pay the half of the commission (*a*).

Duties of brokers.

Holland.—Brokers are nominated by the local government for each class of business, and before entering upon their functions they must take the oath. They are forbidden to deal on their own account, and to become responsible for the operations which they conclude. They are required to give an extract from their books, containing the conditions of the operations. When there is any dispute in the agreement, the entries made by the broker in his books are vouchers between the parties of the date the business was concluded, the prices, the quality, and time of delivery, &c., &c. The broker must keep samples of all the merchandises he has sold duly labelled. The broker who has negotiated the transfer of a bill of exchange is responsible for the identity of the last signature to this document. Where brokers do not conform to the rules, their authority may be suspended or their licence withdrawn. The broker becoming insolvent is suspended from his functions, and his licence may be altogether withdrawn (*b*).

Italy.—The Sardinian code prescribes the same law for brokers as the French Code, with some slight additions. Stockbrokers and brokers cannot refuse their ministry to those who demand it for commercial affairs in the towns where they are established. No other individual is allowed to act as broker besides those duly authorised (*c*).

Portugal.—The business of brokers consists in buying and selling, on account of their employers, merchandise, ships, public funds, bills of exchange, &c., and in negotiating charterparties, insurances, bottomry bonds, &c. The law is the same as the Spanish, with trifling amendments (*d*).

Russia.—Brokers are appointed in all seaports and towns

(*a*) German Code, §§ 60—84.

(*b*) Dutch Code, §§ 62—73.

(*c*) Sardinian Code, §§ 75—96.

(*d*) Portuguese Code, §§ 102—140.

where they are required. The duties of brokers consist in acting as mediators in all bargains, contracts, and agreements in matters of trade, in negotiating bills of exchange and loans. Brokers and notaries must keep two books, properly authenticated, one to register bills, loans, and notes, and the other to transcribe contracts and agreements, with their conditions. The law makes no difference between brokers and notaries as regards their rights and duties, but at St. Petersburgh notaries alone have the right to protest bills and negotiate loans, though brokers may be employed in all kinds of business. Any business done without the intervention of a broker is also valid. But in government affairs the intervention of brokers is necessary. Brokers are of the following kinds:—Stockbrokers, Imperial brokers, shipbrokers, bankbrokers, private and general brokers. Stockbrokers, Imperial brokers, and shipbrokers are only appointed in St. Petersburgh. Brokers of the Imperial bank are nominated by the Minister of Commerce; river navigation brokers are nominated by municipal bodies; but all brokers are chosen from the body of merchants. The broker must be a Russian subject, and belong to one of the guilds of the town where he wishes to practise. He must have experience in business, and must take the necessary oath. He cannot engage in trade on his own account. At the end of every year the broker must present his books to the municipality of the place for inspection and stamping. The entries must be regular and successive, and contain the names of buyer and seller, quality and quantity of goods, price of sale, &c. The broker must transcribe textually all the clauses of the bargain in the books, and give a copy of the same to both contracting parties, which becomes a valid voucher in a court of justice (a).

Spain.—Brokers duly authorised can alone intervene in the operations of trade in proposing business, bringing the parties in contact, and closing the transaction. The brokers' certificate, extracted from the ledger, is voucher at law. Merchants may transact business together without the intervention of brokers, but they can only employ those who are legally nominated. The merchant who employs an unauthorised broker is liable to a fine of five per cent. on the amount of the contract, and the un-

Public duties
of brokers and
notaries.

Authorised
brokers only
may be em-
ployed.

(a) Russian Code, §§ 1866—1938.

Qualifications
of brokers.

authorised broker is liable to a fine of ten per cent. In case of a second offence, the unauthorised broker is liable to be banished for ten years from his province. Those who illegally transact the business of brokers are forbidden to enter the exchange, and may be sued on the demand of the syndic of brokers. In every place of commerce there are appointed as many brokers as are necessary. They are appointed by the Sovereign from a list of three candidates presented by the secretary. The appointment may be for life, and the broker has the right to nominate his successor. No one can be a broker unless he be a native-born subject of Spain, of not less than twenty-five years of age, and unless he have passed six years' apprenticeship at a merchant's office, or at the office of an authorised broker. Foreigners, except they are naturalised, minors of twenty-five years of age, although emancipated, ecclesiastics, or uncertificated bankrupts cannot be brokers. Every candidate for the office of broker must pass an examination before the college of brokers ; must take the oath, and give a bond for 40,000 reals for appointments of the first class, of 25,000 reals for those of the second, and of 12,000 reals for those of the third class. It is the duty of brokers to make themselves certain of the identity of the persons with whom they contract, and in all negotiations of bills of exchange they are answerable for the authenticity of the signature of the last indorser. They are responsible for any injury from fraudulent representations of quality or price. They must themselves attend to the business entrusted to them, and register the business they complete as soon as possible. Within twenty-four hours after the conclusion of the business, the brokers should send to each contracting party an extract of the entry, and where the contract must be in writing, it should be signed by the parties in the presence of the broker, who should certify the same, and keep a copy of the contract. The broker is not responsible for the execution of the contract. He cannot become answerable for the solvency of the parties, or for any risk incurred by the transaction. He is forbidden to enter into any illegal contract. He cannot give any certificate for more than is entered in his register, though he may declare what he has seen and heard during the negotiation. Brokers have a right of brokerage according to the custom of the place. Where there are more than ten brokers, they form a college. The president

and assistants of such college watch for the observance of the laws of the exchange ; establish the course of exchange, and write it in tables to be posted up ; keep a register of such tables ; examine the candidates ; give any information to the authorities, if required ; and give, if required, their advice on any disputes between brokers and merchants on matters of exchange and merchandise (a).

College of
brokers.

SECTION III.

AUTHORITY OF THE AGENT.

BRITISH LAW.

The extent of the agent's authority is governed by the nature of his appointment. A general appointment implies power to act in all the affairs of his principal ; a special one, as when an agent is appointed for a particular purpose, implies only an authority to act in such special purpose. Thus a power to a land agent to manage and superintend estates authorises him to enter into any agreement for the usual and customary leases according to the nature and locality of the property (b).

Extent of
authority.

A general power may be restricted by special limitations. Thus the mere relation of principal and factor confers ordinarily an authority to sell, at such times, and at such prices, as the factor may, in the exercise of his discretion, think best for his employer, but if he receives the goods subject to any special instructions he is bound to obey them (c). Therefore it is that a factor cannot sell the goods of his principal in the exercise of a sound discretion contrary to the principal's orders, even for the purpose of reimbursing himself for advances made to the principal after the consignment (d). To meet this, however, it is the practice of factors, in making advances, to reserve for themselves the power of sale, without limitation of prices.

Authority may
be restricted.

Agent must
follow princi-
pal's instruc-
tions.

An authority to do a thing generally implies a power to use all means necessary for the accomplishment of it, or whatever is necessary to carry the purposes of the special power into effect (e). Thus the master of a ship has authority to provide

What is in-
cluded in an
authority.

(a) Spanish Code, §§ 63—115.

(d) *Ibid.*

(b) *Peers v. Sneyd*, 17 Beav. 151.

(e) *Withington v. Herring*, 5 Bing.

(c) *Smart v. Sandars*, 5 C. B. 895.

458.

necessaries for the ship (*a*). Thus an authority to recover debts includes a power to arrest (*b*), an authority to sign a policy, the power to adjust it (*c*), an authority to settle losses, powers to refer a dispute about a loss to arbitration (*d*), an authority to get bills discounted, the power to indorse them (*e*), an authority to sell goods, power to sell them by sample or with warranty (*f*), and an authority to buy railway shares implies power to do all that is needful to complete the bargain (*g*).

The authority of the agent includes also all means justified and allowed by the usage of trade; thus an agent authorised to sell goods may sell them upon credit or for cash, as it may be customary in the special trade. So a person who employs a broker on the stock exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of the rules (*h*).

Authority extended over all that is subjective to the authority.

In all cases, however, where the authority is confined to a particular subject-matter, nothing but what is subjective to that matter is presumed to be included in the authority (*i*). The larger powers conferred by the general words are construed with reference to the matters specially mentioned, and to include only such acts as are necessary to carry the purposes of the special powers into effect (*k*). So an agent appointed by the directors of a mining company to manage a mine has not an implied authority from the shareholders of the company to borrow money upon their credit (*l*). So a power of attorney to receive all salaries and moneys with authority to compound and discharge, and to give release, does not authorise the attorney to negotiate bills received in payment, nor to indorse them in his own name (*m*).

Authority extends over all

The authority of the agent extends also over all matters

- (*a*) *Cary v. White*, 1 Bro. Par. Cas. 284 ; *Speerman v. Degrave*, 2 Vern. 643.
- (*b*) *Ibid.*
- (*c*) *Richardson v. Anderson*, 1 Camp. 43.
- (*d*) *Goodson v. Brooke*, 4 Camp. 163.
- (*e*) *Fenn v. Harrison*, 4 T. R. 177.
- (*f*) *Andrews v. Kneeland*, 6 Cowen, 354, Amer. R. ; *Alexander v. Gibson*, 2 Camp. 555.
- (*g*) *Bayley v. Wilkins*, 7 C. B. 886.

- (*h*) *Wiltshire v. Sims*, 1 Camp. 257.
- (*i*) *Murray v. The East India Company*, 5 B. & Ald. 204 ; *Hogg v. Snaith*, 1 Taunt. 347.

- (*k*) *Rossiter v. Rossiter*, 8 Wend. Amer. R. 494 ; *Attwood v. Munnings*, 7 B. & C. 278.

- (*l*) *Hawtayne v. Bourne*, 7 M. & W. 595 ; *Attorney-General v. Jackson*, 5 Hare, 365.

- (*m*) *Murray v. The East India Company*, 5 B. & Ald. 204.

incidental to his particular business or employment, including whatever is usual in such trade, the rights usually exercised, and the duties usually attached to it (a).

matters incidental to the particular business.

The authority of the agent may be revoked at any time prior to the execution of the mandate; thus where goods have been intrusted to an agent for sale the principal may at any time before a sale demand that they be returned to him, or where the agent has been required to purchase goods the principal may at any time before the purchase revoke his authority, and demand that the money may be returned to him.

Authority may be revoked at any time.

But whatever is done by the agent *bond fide* before he knew of the revocation of the authority, is good and binding on the principal, and where the mandate has had a commencement of execution the agent has a right to conclude it. Where, however, the authority or power is coupled with an interest, or where it is given for a valuable consideration, it cannot be revoked, except upon an express stipulation to that effect (b). So a power of attorney given as part of a security for money is not countermandable (c). Thus an auctioneer being the agent of both parties, has authority to bind both seller and purchaser by his memorandum of sale (d).

Whatever was done by the agent before he knew of the revocation is valid.

Where authority cannot be revoked without special stipulation.

FOREIGN LAWS.

United States.—Where the agent's powers are special, and limited, they must be strictly followed; but whether there be a special authority to do a particular act, or a general authority to do all acts in a particular business, each case includes the usual and appropriate means to accomplish the end. So a power to settle an account implies the right to allow payments already made. An agent acting as such cannot take upon himself at the same time two incompatible duties; he cannot have an adverse interest or employment; he cannot be both buyer and seller, for this would expose his fiduciary trust to abuse and fraud. If the agent executes the commission in part only, the obligation of the principal to accept that part will depend upon the nature of the subject. If the power was given to buy a house with an ad-

Instructions must be followed.

When is the principal bound notwithstanding deviation.

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| (a) Bayliffe v. Butterworth, 1 Exch. 425; Pollock v. Stables, 12 Q. B. 765; Bayley v. Wilkins, 13 Jur. 883. | Gaussin v. Morton, 10 B. & C. 734. (c) Walsh v. Whitcomb, 2 Esp. 565. (d) Kemeys v. Proctor, 1 Jac. & Walk. 350. |
| (b) Webb v. Paternoster, Poph. 151; | |

joining wharf, and the agent buys the house only, then the principal would not be bound to take it, for the inducement to the purchase has failed. If, however, the agent was directed to buy a farm of 150 acres, and he buys instead one of 140 acres, the principal would be bound to accept it. If the agent does what he was authorised to do, and something more, it will be good so far as he was authorised to go, and the excess only would be void.

**Distinction
between a
general and a
special agent.**

If, however, the agent does a different business from what he was authorised to do, the principal is not bound though it might even be more advantageous to him. There is an important distinction between a general agent and one appointed for a special purpose. The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, or at a particular place, will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions. But an agent, constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power.

**An agent for a
limited pur-
pose does not
bind his prin-
cipal if he
exceeds the
limits of his
power.**

The special authority must be strictly pursued. Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power; though if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. A factor or merchant who buys or sells upon commission or as an agent for others, for a certain allowance, may, under certain circumstances, sell on credit without any special authority for that purpose, though, as a general rule, an agent for sale must sell for cash, unless he has express authority to sell on credit, or unless he has followed the usage of the trade at the place. Where, however, there is no usage to that effect the factor could not sell on credit unless he be expressly authorised.

SECTION IV.

AUTHORITY OF THE AGENT TO PLEDGE.

BRITISH LAW.

**Factors or
agents having
goods or mer-**

Any person intrusted, for the purpose of consignment or of sale, with any goods, and who shall have shipped such goods in

his own name, and any person in whose name any goods shall be shipped by any other person or persons, shall be deemed to be the true owner, so far as to entitle the consignee of such goods to a lien thereon in respect of any money or negotiable securities advanced by such consignee to or for the use of the person in whose name such goods shall be shipped, or in respect of any money or negotiable securities received by him to the use of such consignee, in the like manner as if such person was the true owner of such goods ; provided such consignee shall not have notice by the bill of lading for the delivery of such goods or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person so shipping in his own name, or in whose name any goods shall be shipped by any person is not the actual and *bond fide* owner of such goods so shipped, as aforesaid, any law, usage, or custom to the contrary thereof in anywise notwithstanding ; provided also, that the person in whose name any such goods are so shipped shall be taken to have been intrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear (a).

Any person intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed to be the true owner of the goods described in the said several documents hereinbefore stated, so far as to give validity to any contract thereafter to be made by such person so entrusted and in possession as aforesaid, with any person for the sale or disposition of the said goods, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument advanced or given upon the faith of such several documents or either of them, provided such person shall not have notice by such documents, or either of them, that such person is not the actual and *bond fide* owner of such goods (b).

In case any person shall accept and take any such goods in deposit or pledge from any such person so in possession and intrusted, without notice, as a security for any debt or demand

chandise in their posses-
sion shall be deemed to be the true
owners, so as to give vali-
dity to con-
tracts with
persons deal-
ing bona fide
upon the faith
of such pro-
perty.

Persons in
possession of
bills of lading,
&c., to be the
owner, so far
as to make
valid con-
tracts.

No person to
acquire a se-
curity upon
goods in the
hands of an

(a) 6 Geo. IV. c. 94, s. 1.

(b) 6 Geo. IV. c. 94, s. 2.

agent for an antecedent debt, beyond the amount of the agent's interest in the goods.

due and owing from such person so intrusted and in possession to such person before the time of such deposit or pledge, then such person, so accepting or taking such goods in deposit or pledge, shall acquire no further or other right, title or interest, in or upon or to the said goods or any such document, than was possessed or could have been enforced by the said person so possessed and intrusted at the time of such deposit or pledge as a security (a).

Persons may contract with known agents in the ordinary course of business, or out of that course if within the agent's authority.

It shall be lawful to any person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and pay for the same to such agent or agents ; and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent, provided such contract and payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorised to sell the said goods, or to receive the said purchase money (b).

Persons may accept and take goods, &c., in pledge from known agents; but in that case shall acquire no further interest than was possessed by such agent at the time of such pledge.

It shall be lawful to and for any person to accept and take any such goods or any such document as aforesaid, in deposit or pledge from any such factor, notwithstanding such person shall have such notice as aforesaid, that the person making such deposit or pledge is a factor or agent ; but then such person shall acquire no further or other right, title, or interest in the said goods, or document for the delivery thereof, than was possessed or could have been enforced by the said factor or agent at the time of such deposit or pledge as a security (c).

Right of the true owner to follow his goods while in the hands of his agent or of his assignee, in case of bankruptcy, or to recover them from a third person upon paying his advances secured upon them.

Provided always that nothing herein contained shall be taken to deprive or prevent the true owner of such goods from demanding and recovering the same from his agent, before the same shall have been so sold, deposited, or pledged, or from the assignee of such factor or agent, in the event of his bankruptcy ; nor to prevent such owner from demanding or recovering of and from any person the price agreed to be paid for the purchase of such goods, subject to any

(a) 6 Geo. IV. c. 94, s. 3.

(b) 6 Geo. IV. c. 94, s. 4.

(c) 6 Geo. IV. c. 94, s. 5.

right of set-off on the part of such person against such factor or agent; nor to prevent such owner from recovering of and from such person such goods so deposited or pledged, upon repayment of the money or on restoration of the negotiable instruments so advanced or given, on the security of such goods as aforesaid, by such person to such factor or agent, and upon payment of such further sum of money or on restoration of such other negotiable instruments (if any) as may have been advanced or given by such factor or agent to such owner, or on payment of a sum of money equal to the amount of such instruments; nor to prevent the said owner from recovering of and from such person any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting thereout the amount of the money or negotiable instruments so advanced or given upon the security thereof as aforesaid; provided always that in case of the bankruptcy of any such factor or agent the owner of the goods, so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them to the estate of such bankrupt (a).

In case of
bankruptcy of
factor, the
owner of goods
so pledged and
redeemed shall
be held to
have dis-
charged pro
tanto the debt
due from him
to bankrupt.

Under the above statute, however, it seemed that advances could not be made upon goods or documents to persons known to have possession thereof as agents only. Therefore another Act was passed on the subject, which, after reciting the provisions of the existing law in the following terms: And whereas by the said Act it is amongst other things further enacted, "that it shall be lawful to and for any person to contract with any agent intrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent; provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorised to sell the same, or to

(a) 6 Geo. IV. c. 94, s. 6.

receive the said purchase money," it was provided that the same protection and validity should be extended to *bond fide* advances upon goods and merchandise as it was given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should, in all cases where such owners would be bound by a contract of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bond fide* made on the security thereof.

Bonâ fide advances to persons intrusted with the possession of goods or documents of title, though known to be agents, protected.

With a view also to protect exchanges and securities *bond fide* made it was enacted that any agent who shall be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security *bond fide* made by any person with such agent so intrusted, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent (a).

Bonâ fide deposits in exchange protected ; but

no lien beyond
the value of
the goods
given up.

That where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandise, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if *bond fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent, as if the consideration for the same had been a *bond fide* present advance of money: provided always, that the lien acquired under such last-mentioned contract or agree-

(a) 5 & 6 Vict. c. 39, s. 1.

ment upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods and merchandise which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged (a).

This Act, and every matter and thing herein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made *bond fide*, and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *mala fide* in respect thereof against the owner of such goods and merchandise ; and not to be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorise any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner ; but that for the purpose of protecting all such *bond fide* loans, advances, and exchanges (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods (b).

That any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act ; and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the

But the statute to be construed to protect only transactions *bona fide* without notice that the agent pledging is acting without authority, or *mala fide* against the owner.

Meaning of the term "document of title;"

and when agent intrusted;

(a) 5 & 6 Vict. c. 39, s. 2.

(b) Ibid. s. 3.

and when in possession.

possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates ; and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on his behalf ; and where any loan or advance shall be *bond fide* made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this Act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto ; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent ; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this Act ; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence (a).

What to be deemed a "contract or agreement," and "advance."

Possession primâ facie evidence of intrusting.

Agent's civil responsibility not to be diminished.

Agent making consignments contrary to

That nothing herein contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract, or non-fulfilment of his orders or authority in respect of any such contract, agreement, lien, or pledge as aforesaid (b).

That if any agent intrusted as aforesaid shall contrary to or without the authority of his principal in that behalf, for his

(a) 5 & 6 Vict. c. 39, s. 4.

(b) 5 & 6 Vict. c. 39, s. 5.

own benefit and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or documents of title so entrusted to him as aforesaid, as and by way of a pledge, lien, or security ; or shall contrary to or without such authority, for his own benefit and in violation of good faith, accept any advance on the faith of any contract or agreement to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid ; every such agent shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be sentenced to transportation for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the Court shall award ; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court shall award, as hereinbefore last mentioned : Provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent : Provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him, and no agent entrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bond fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt (a).

instruction of
principal,
guilty of mis-
demeanor.

(a) 5 & 6 Viet. c. 39, s. 6.

Right of owner
to redeem;

or to recover
balance of
proceeds.

In case of
bankruptcy,
owner to prove
for amount
paid to re-
deem, or for
value of goods,
unredeemed.

That nothing herein contained shall prevent such owner as aforesaid from having the right to redeem such goods or documents of title pledged as aforesaid, at any time before such goods shall have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any sum of money for or in respect of which such agent would by law be entitled to retain the same goods or documents, or any of them, by way of lien as against such owner, or to prevent the said owner from recovering of and from such person with whom any such goods or documents may have been pledged, or who shall have any such lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid: Provided always, that in case of the bankruptcy of any such agent the owner of the goods which shall have been so redeemed by such owner as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy, or in case the goods shall not be so redeemed the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge, and shall, if he shall think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be (a).

The words of the statute, "entrusted with the goods or documents," are intended to give validity to pledges of documents entrusted to the factor by his principal, not to pledges of documents created by the factor himself. Therefore an entrusting with the bill of lading for the purpose of sale of goods is not an entrusting with the dock-warrant, which represents those goods, notwithstanding that the possession of the bill of lading enables the holder of it to obtain possession of the dock-warrant. It is not enough to show that the plaintiff empowered the factors to possess themselves of the warrant whenever they chose. It must be shown that he really intended the factors should be possessed of them at the time they pledged them, or it must be

(a) 5 & 6 Vict. c. 39, s. 7.

shown that he meant them not only to have the power the possession of the bill of lading would give of getting the warrant when they liked, but to exercise it by obtaining it whenever they in their discretion might think fit (*a*).

A contract made with an agent for the pledge of goods will be valid as against the principal though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bona fide* and without notice that the agent is acting *mala fide* and beyond his authority. But to deprive the pledgee of the protection of the Act he must be fixed with knowledge that the agent is so acting as above stated, and no mere suspicion will amount to notice ; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them (*b*).

FOREIGN LAWS.

United States.—The factor may sell and bind his principal, but he cannot pledge the goods as a security for his own debt. The principal may recover the goods of the pawnee, and his ignorance that the factor held the goods in the character of factor is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor ; for the lien which the factor might have had for such balance is personal and cannot be transferred by his tortious act, in pledging the goods for his own debt. But though the factor cannot pledge the goods of his principal as his own, he may deliver them to a third person for his own security, with notice of his lien and as his agent to keep possession for him. So if a factor, having goods consigned to him for sale, should put them into the hands of an auctioneer, or commission merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods for purposes connected with the sale, and as part payment in advance, or in anticipation of the sale, according to the ordinary usage in such cases. But if the goods be put into the hands of an auctioneer to sell, and instead of advancing money

At common law the agent has no right to pledge the goods of his principal.

(*a*) *Close v. Holmes*, 2 M. & Rob. 23 ; *Hatfield v. Phillips*, 9 M. & W. 647 ; 14 M. & W. 665. (*b*) *Navulshaw v. Brownrigg*, 2 De G. Mac. & G. 441.

upon them in immediate reference to the sale, according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnee instead of seller, he has no lien in the goods.

By statute law the person in whose name goods are shipped is deemed true owner.

By the statute law of New York, of Rhode Island, and of Pennsylvania, passed in 1830 and 1831, the above rules of common law are changed; and it was enacted that the person in whose name goods were shipped should be deemed the owner, so far as to entitle the consignee of goods to a lien thereon for his advance and liabilities for the use of the consignor, and for monies or securities received by the consignor to his use. But the lien is not to exist if the consignee had previous notice, by the bill of lading or otherwise, that the consignor was not the actual and *bond fide* owner. Every factor entrusted with the possession of any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of the goods, or with the possession of goods for sale, or as security for advances, shall be deemed the owner, so far as to render valid any contract by him for the sale or disposition thereof, in whole or in part, for monies advanced, or any responsibility in writing assumed upon the faith thereof. The true owner will be entitled to the goods or repayment of the advances, or restoration of the security given on the deposit of the goods, and on satisfying any lien that the agent may have thereon. The Act does not authorise a common carrier, warehouse-keeper, or other person to whom goods may be committed for transportation, or storage, to sell or hypothecate the same. Acts of fraud committed by factors or agents, in breach of their duty in that character, are punishable as misdemeanors. It has been held under this Act that a contract of sale by a factor or agent, entrusted with goods for sale, will protect the purchaser, though no money be advanced, or negotiable instrument, or other obligation be given at the time of the sale (a).

Authority not extended to carriers.

American law founded on English Acts.

This Act is founded chiefly upon the provisions of the British statute of 6 Geo. 4, ch. 94, passed in 1825, in pursuance of the recommendation contained in the report of a select committee from the British House of Commons of January, 1823. So by the Civil Code of Louisiana, art. 3214, every consignee or commission agent who has made advances on goods consigned to him, or

(a) Jennings *v.* Merrill, 20 Wendell, 1.

placed in his hands to be sold for account of the consignor, has a privilege for the amount of those advances, with interest and charges on the value of the goods, if they are at his disposal, in his stores, or in a public warehouse, or if, before their arrival, he can show by a bill of lading or letter of advice, that they have been despatched to him.

Portugal.—The Portuguese law is the same as the French on the constitution of an agency. Every act of trade carried on for the benefit of others is a trading on commission. An agent contracting with third persons in his own name, or in the name of a firm with which he is connected, is a commission agent. An agent acting in the name of his principal is a broker (*a*).

What is a
commission
agent.

SECTION V.

RIGHTS OF THE AGENT.

BRITISH LAW.

The agent has a right to his commission, which is either fixed by contract or determined by the usage of the trade, unless he is a mere gratuitous agent, or unless the nature of the service, or the understanding between the parties, repels such a claim (*b*). Thus, where a person performed work for a committee under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration and such remuneration be made as should be deemed right," it was held that no action would lie to recover a recompence for such work, the resolution importing that the committee were to judge whether any remuneration was due (*c*). Where, however, the contract is that the amount only shall be fixed by the employer, then the agent may maintain a suit for a reasonable remuneration if none be fixed by his employer (*d*).

Agent's right
to com-
mission.

The commission usually consists of a percentage upon the actual amount of the value of the business done, or upon the value of the goods sold or bought, or upon the value of the freight of a ship chartered, and is usually paid by the seller of

Amount of re-
muneration.

(*a*) Portuguese Code, §§ 762—772.

(*c*) *Taylor v. Brewer*, 1 M. & S. 290.

(*b*) *Eike v. Meyer*, 3 Camp. 412; *Roberts v. Jackson*, 2 Stark. 225.

(*d*) *United States v. M'Daniel*, 7 Peter, Am. R. 1.

goods or by the charterer of the ship. The rate and amount of remuneration or commission is usually regulated by the custom of trade, or of the particular business; but no custom of trade can prevail against an express agreement (a).

Del credere
commission.

Where there is a contract on the part of the agent to undertake to guarantee the fulfilment of the contract, or the payment of the goods sold upon the payment to him of a del credere commission, the agent may recover the same, and it becomes due upon his entering into the contract of guarantee (b).

The service
must be legal
to enforce the
right to re-
muneration.

To entitle the agent to enforce his claim to a commission the service must be legal. When the contract is either expressly or by implication forbidden by the common or statute law the agent cannot enforce his claim (c). Thus a broker not duly licensed by the mayor and aldermen of the City of London cannot maintain an action for work and labour, and for commission for buying and selling stock (d).

Agent guilty
of misconduct
not entitled to
remuneration.

An agent who is guilty of gross misconduct in the management of the affairs of his principal is not entitled to his commission (e). So if a yearly servant be dismissed by his principal before the year expires for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he has served (f). If the agent perform his duties in so negligent a manner that no benefit results from them he is not entitled to recover either his commission or even a compensation for his trouble (g).

The transac-
tion must be
completed.

That an agent may be entitled to his commission he must have wholly completed the duties required of him, or absolutely concluded the contract which he was contriving to establish, unless by the custom of trade he becomes entitled to a *quantum meruit* for what he has done where by any cause the duty remained unperformed. Thus it is the usage in the chartering of ships that when a broker has introduced the captain of a ship and a merchant together, and they by his means enter into

(a) *Bower v. Jones*, 8 Bing. 65.

(b) *Caruthers v. Graham*, 14 East, 578; *Solly v. Weiss*, 2 Moore, 420.

(c) *Cope v. Rowlands*, 2 M. & W. 157; *Josephs v. Pebrer*, 3 B. & C. 639; *Waldo v. Martin*, 4 B. & C. 319.

(d) *Cope v. Rowlands*, 2 M. & W. 157.

(e) *White v. Chapman*, 1 Stark. 113; *Denew v. Daverell*, 3 Camp. 451.

(f) *Turner v. Robinson*, 6 C. & P. 15.

(g) *White v. Chapman*, 1 Stark. 113; *Denew v. Daverell*, 3 Camp. 451; *Hammond v. Holiday*, 1 C. & P. 384.

some negotiation as to the intended voyage, the broker is entitled to his commission if a charterparty be effected for that voyage, even although they may employ another broker to prepare the charterparty, or may write the charterparty themselves (a). If a broker be authorised by both parties, and acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charterparty be ultimately effected for that voyage, the broker is entitled to his commission ; but if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other (b). So the actual earning of freight under a charterparty is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter (c). The work and service must be usefully and skilfully performed to entitle an agent to a remuneration. Where work which is useful has been performed unskilfully, or where work which is useless for the object in view has been performed skilfully, no compensation can be recovered (d).

An agent guilty of fraud towards his principal, or betraying his trust by acting against his interest, will forfeit his claims to a commission (e).

The agent has also a right to be reimbursed of all advances, expenses, and disbursements, made on account and for the benefit of his principal, and to interest upon the same (f).

The agent has a right of lien over all the goods in his hands belonging to his principal for the balance of his accounts, or for advances made by him to his principal on the credit of goods entrusted to him (g). So bankers have a right of lien on the securities belonging to their customers for their general balance due to them (h). So insurance brokers who have effected a

The service
must be skil-
fully per-
formed.

An agent
guilty of fraud
not entitled to
remuneration.

Agent has a
right of lien
for the balanc-
e of account and
for his ad-
vances.
Bankers' lien
on securities
for their
general
balance.

- (a) *Read v. Rann*, 10 B. & C. 438 ; *Burnett v. Bouch*, 9 C. & P. 620 ; *Broad v. Thomas*, 7 Bing. 99.
- (b) *Burnett v. Bouch*, 9 C. & P. 620.
- (c) *Hill v. Kitching*, 3 C. B. 299.
- (d) *Hill v. Featherstonagh*, 7 Bing. 569.
- (e) *Brown v. Croft*, 6 C. & P. 16.
- (f) *Bruce v. Hunter*, 3 Camp. 467 ;
- Calton *v. Bragg*, 15 East, 223.
- (g) *Gardener v. Coleman*, 1 Burr. 494 ; *Godin v. London Assurance Company*, 1 W. Bl. 104 ; *Dixon v. Stansfeld*, 10 C. B. 399 ; *Graham v. Ackroyd*, 10 Hare, 192 ; *Pultney (Bart.) v. Keymer*, 3 Esp. 182.
- (h) *Barnett v. Brandao*, 6 M. & G. 666.

policy have a lien upon it for their commission and balance (*a*), and an attorney has a lien for his general balance or papers of his clients which come to his hands in the course of his professional employment.

Agent contracting as principal may sue as principal.

An agent contracting in his own name for an undisclosed principal may himself sue as principal (*b*), though the latter also may sue on such a contract in his own name (*c*).

Right to advances and interest.

Right of lien for advances.

Bailee's lien.

France.—The agent has the right to demand the reimbursement of his advances after he has given a detailed account of them, with vouchers as usual. The interest runs from the day he has made them. He may demand to be indemnified of any loss he may have suffered in the execution of the authority without any imprudence on his part, and of all the consequences that may result from what he has done within the limits of his authority. He may also demand a compensation at the rate agreed upon, or such as is usually given, or arbitrators may decide upon the amount. A commission agent who has made advances on merchandises forwarded to him from another place to be sold on account of his principal, has a lien for his advances, interest, and expenses upon the value of the merchandises, if they are at his disposal in his own warehouse, or in a public deposit, or if before their arrival he can show by a bill of lading or carriage note that they have been forwarded to him. If the merchandises have been sold and delivered on account of the principal, the commission agent has a right over the produce of the sale for his advances, interest, and expenses, in preference to the creditors of his principal. Loans, advances, or payments made upon merchandises deposited or consigned by an individual residing in the same place as the agent, will give such privilege to the agent or depositors in case only he has conformed with the requirement of the Civil Code respecting pledges (*d*).

United States.—Every bailee for hire who by his labour and skill has imparted an additional value to the goods has a lien

(*a*) *Mann v. Forrester*, 4 Camp. 60.

(*c*) *Humphrey v. Lucas*, 2 C. & K.

(*b*) *Schmalz v. Avery*, 20 L. J. Q. B.

152.

228; *Rayner v. Grote*, 15 M. & W.

(*d*) French Commercial Code, §§ 93

359.

—95.

upon the property for his reasonable charges. So a porter or wharfinger, or warehouseman, or any person taking property in the way of his trade or occupation to bestow labour or expense upon it. Mechanics and labourers having a claim to the amount of twenty dollars for labour or material used in the erection of any building have a lien on the building. If goods come to the possession of a person, and he has been at trouble and expense upon them, he has a lien upon the goods for a compensation in one case only, and that is the case of goods lost at sea, and it is a lien for salvage. By the custom of trade an agent may have a lien upon the property of his employer entrusted to him in the course of that trade, not only in respect to the management of that property, but for his general balance of accounts. The usage of any trade sufficient to establish a general lien must, however, have been so uniform and notorious as to warrant the inference that the party against whom the right is claimed had knowledge of it. This general lien may also be created by express agreement, as, where one or more persons give notice that they will not receive any property for the purposes of their trade or business, except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their account. All persons who afterwards deal with the knowledge of such notice, will be deemed to have acceded to that agreement. How far such a notice would avail in the case of persons who, like common carriers and innkeepers, are under an obligation to accept employment in the business they assume, for a reasonable price to be tendered to them, and who had no right to impose any unreasonable terms and conditions upon their employers, or to refuse to serve them, remains yet to be settled by judicial decision.

Possession, actual or constructive, of the goods is necessary to create the lien ; and the right does not extend to debts which accrued before the character of factor commenced, nor where the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight. The right of lien is also to be deemed waived, when the party enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may fairly be inferred ; as, when he

Lien on goods
for compensa-
tion.

Right of lien
may be ac-
quired by
usage or by
express agree-
ment.

Possession
necessary to
the right of
lien.

Granting of
credit is a
waiver of lien.

gives credit by extending the time of payment, or takes distinct and independent security for the payment. The party shows, by such acts, that he relies, in the one case, on the personal credit of his employer; and in the other, that he intends the security to be a substitution for the lien; and it would be inconvenient that the lien should be extended to the period to which the security had to run. The lien is destroyed when a factor makes an express stipulation on receiving the goods to pay over the proceeds. So if the party comes to the possession of goods without due authority, he cannot set up a lien against the true owner; as if a servant delivers a chattel to a tradesman without authority, or a factor, having authority to sell, pledges the goods of his principal.

Portugal.—The Portuguese code has the same provisions as the French on the subject (*a*).

Spain.—The same law prevails in Spain as in France. Advances made on merchandise consigned by a person residing in the same place as the agent are considered as loans upon the property pledged (*b*).

SECTION VI.

DUTIES OF THE AGENT.

BRITISH LAW.

Agent's duties determined by instructions. The duties of the agent to his principal are primarily determined by the verbal or written instructions he receives, and in the absence of specific instructions they are implied to be in accordance with the ordinary practice in the business in which he is employed.

The first duty of the agent is to give to his principal the free and unbiassed use of his own discretion and judgment, and to exercise good faith and reasonable care and diligence (*c*). So he cannot engage himself with a third person when he has agreed to give up the whole of his personal services to his principal (*d*). An agent must be also competent to fulfil a trust reposed in him, and he should not engage in it without

(*a*) Portuguese Code, §§ 49—51.

(*b*) Spanish Code, §§ 169—171.

(*c*) Clarke v. Tippling, 9 Beav. 284.

(*d*) Thompson v. Havelock, 1 Camp.

527.

sufficient skill. When doubts are expressed as to whether the agent has exercised a competent skilfulness in the fulfilment of his duties, the best means to adopt with a view to determine the question is to see whether a majority of skilful and experienced agents would have so acted (*a*). Even where a person acts gratuitously, if he undertakes to do a thing to the best of his skill, and if his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence (*b*).

The agent must act according to the accustomed mode of transacting business. Where he is employed generally to do any act, he is authorised to do it only in the usual way of business. Any departure from the established usage and habits of business would subject the agent to the penalty of any accident or loss which might thereby accrue to the principal (*c*). So if an insurance broker ordered to effect a policy omits to insert in it the usual clauses to cover the vessel or goods from certain risks, he would be liable for any loss accruing from such negligence (*d*). He must not make himself an adverse party to his principal, unless by previous understanding with him ; therefore an agent instructed to sell an article cannot himself be the purchaser of it, nor can an agent employed to purchase be himself the seller (*e*). Where an agent employed to sell property purchases it himself, he is bound to show that there was no concealment or unfair representation, and that in purchasing himself the same advantages were afforded to his principal as if the property had been sold to a stranger (*f*). So if an agent employed to purchase becomes the purchaser for himself he is to be considered as a trustee for the principal (*g*). The agent must not exceed the letter of his instructions. If he does exceed them, he does it at his peril, unless the principal subsequently acknowledges the departure and ratifies the acts of the

Must act according to the accustomed course of business.

Must not make himself adverse to his principal.

Must attend to the terms of his instructions.

(*a*) *Chapman v. Walton*, 10 Bing. 63.

(*b*) *Shiells v. Blackburne*, 1 H. Bl. 161 ; *Mainwaring v. Brandon*, 2 Moore, 125.

(*c*) *Wiltshire v. Sims*, 1 Camp. 257 ; *Massey v. Banner*, 1 Jas. & Walk. 245.

(*d*) *Mallough v. Barber*, 4 Camp. 150.

(*e*) *Lees v. Nuttall*, 1 Russ. & My.

53 ; *Murphy v. O'Shea*, 2 Jon. & Lat. 422 ; *Trevelyan v. Charter*, 9 Beav.

140 ; *Murphy v. O'Shea*, 8 Ir. Eq. R. 329.

(*f*) *Charter v. Trevelyan*, 11 Clark & Fin. 714 ; *Lord Hardwicke v. Vernon*, 4 Ves. 411.

(*g*) *Lee v. Nuttall*, 2 Myl. & K. 819.

agent. But as such instructions are always applicable only to the ordinary course of things, the agent is authorised to deviate from them in cases of extreme and unforeseen emergency, in the same manner as any unavoidable calamity or overwhelming force will excuse the agent from a strict performance of his duties. The agent is also justified in violating his instructions where they require him to execute any immoral or illegal acts.

Must obey instructions as to price of sale.

It is the duty of the agent to attend faithfully to the instructions of his principal as to the price of sale. If the price has been limited he cannot depart from it even where he has made advances upon the goods. If no limit has been put, he must act to the best of his employer's interest (a). It is usual, however, when an agent makes advances upon goods to make them on the condition of full power being granted to sell whenever and at whatever price he may deem best for his own security and for the interest of his principal. An agent is bound to ordinary diligence in relation to the property confided to him. When he is entrusted with goods for sale, it is his duty to use the same care over them as if they were his own, and when his orders leave the management of the property to his discretion, he is bound to good faith and reasonable conduct (b).

Must use the same care with the goods as if they were his own.

So as respects the granting of credit; if the goods are habitually sold for ready money, it is the duty of the agent not to sell at credit, and where it is usual to grant credit, he is required to act with reasonable care and prudence in his employment and exercise his judgment after making proper inquiries and taking all necessary precautions. If he shut his eyes against the light, or sell to a person without inquiry, where ordinary diligence would have enabled him to learn the discredit or insolvency of the party, he is not discharged from responsibility (c).

Must insure the goods.

Where goods are consigned to a factor, it is his duty to insure them or to make every exertion to that effect, if he have sufficient effects in his hands to cover the cost of the insurance.

Must account faithfully to his principal.

It is the duty of the agent to furnish his principal in all cases with a correct account of the contracts he has made and

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| <p>(a) <i>Smart v. Sandars</i>, 16 L. J. C. P. 39; <i>Wiltshire v. Sims</i>, 1 Camp. 258.
(b) <i>Evans v. Potter</i>, 2 Gallis, Am.</p> | <p>Rep. 13.
Rep. 360.</p> | <p>(c) <i>Burrill v. Phillips</i>, 1 Gallis, Am.</p> |
|---|-------------------------------|--|

generally to account faithfully, at least when called upon, and not to suppress, conceal, or overcharge (*a*). An agent is always bound to act in the best manner he can for his principal, and in matters which are left to his own discretion he can only act for the benefit of his principal (*b*).

The duty of the agent is to procure and communicate to his principal all necessary information relating to the state of the market, to execute faithfully and promptly his employer's orders, and to consult his interest in all matters referred to the agent's discretion. Finally the law demands of the agent strict morals and good faith and a scrupulous regard to the principal's rights and interests.

General duties
of the agent.

FOREIGN LAWS.

France.—An agent is bound to fulfil his instructions so long as he remains charged with them, and is liable to damages if he does not execute them. He is bound to complete what he has commenced previous to the death of his principal if there be danger in the delay. The agent must conform literally to the instructions he has received, and will answer for all the consequences where he has not attended to such instructions, unless he can prove that by fulfilling them to the letter he would have compromised the interest of his principal. If the instructions are that he should act for the best, he should do what the father of a family would have done on such occasion. An agent is not only responsible for fraud but for the faults which he commits in his management. He is bound to give an account of his engagement and to pay to the principal whatever he has received in his character as agent. He would be responsible for the party whom he substitutes when he had no power to substitute any one, when the power was conferred on him without naming any person, and when the person chosen was evidently incapable or insolvent. In all cases the principal would have a right against the agent's substitute. When several agents are deputed by the same deed there is no joint respon-

Agent bound
to fulfil the
principal's
instructions.

What will ex-
cuse a devia-
tion from
instructions.

Must give an
account of his
management.

Must perform
the act him-
self.

(*a*) *Thom v. Bigland*, 8 Exch. 725; 572; *Pearse v. Green*, 1 J. & W. 135; *The Earl of Hardwicke v. Vernon*,¹⁴ 4 Collyer v. Fallon, 1 Turn. & Russ. Ves. 511; *Crosskey v. Mills*, 1 C. M. 471. & R. 298; *Boorman v. Brown*, 2 Per. & D. 401; *Topham v. Braddick*, 1 Taunt. 588.

sibility between them. An agent is bound to pay interest upon any sum which he may have employed for his own use and upon what he owes to his principal (*a*).

Must conform to the usages of trade.

When he may depart from his instructions.

Not responsible for the success of the business.

Portugal.—It is the duty of the agent, in the execution of his authority, to conform to the usages of trade. If he departs from them he becomes liable to damages. He is bound to execute the business entrusted to him promptly. He is not bound to accept an agency ; but if he has accepted it he must execute it. The agent must not depart from his instructions except in the following cases :—1, when it is for the real advantage of the principal ; 2, when injury would result from delaying the execution ; 3, when the deviation is immaterial ; or 4, when he can obtain the approval of his principal. The silence of the principal to an intimation of such a deviation is equivalent to an approval of the same. To determine how far the agent has transgressed his authority it should be considered —1, whether the agent has departed from his instructions to the injury of the principal ; 2, whether by so doing the principal has derived any benefit ; 3, whether the execution of the order might not have been injurious to the principal, having regard to the time or to any change unforeseen by the principal ; and 4, whether the agent was not able to execute his instructions in the manner prescribed by the principal. In the first case the agent would be responsible for the losses he may have caused. In the second case he is not liable. In the third and fourth, if a delay was not likely to cause any injury, the agent would be bound to ask and wait for further instructions. And if the business cannot be delayed without injury to the principal, the agent should act according to his own discretion. The agent who has bestowed every care to the execution of his instructions is not responsible for the non-fulfilment of the object, or for the bad result of the business entrusted to him, nor for the insolvency of those with whom he has contracted when at the time he contracted with them they were solvent, provided in all cases there was no fraud on his part. The agent charged to forward a cargo of merchandise is responsible for the good quality of such when he shipped them. But if he was employed to execute the order in a different port through another

(*a*) French Civil Code, §§ 1991—1997.

agent, the latter is responsible towards the first agent, who must prove to his employer that he has faithfully transmitted his orders (a).

Prussia.—A person who accepts an agency ought to execute it himself. He ought to manage the affairs of his principal as his own. If extraordinary cases should present themselves, he ought to communicate them at once to his principal ; and he must be ever ready to afford to the principal any information he may request.

Spain.—The commission agent is at liberty to accept or refuse the agency ; but if he does refuse it he ought to advise the principal by the first post, and in case of negligence he will be liable to damages. The agent who refuses to undertake the business entrusted to him is still bound to use every diligence for the preservation of the object until another agent has been named. And the agent who undertakes to execute an authority is bound to go through with it when he has once begun it. When, however, funds are necessary the agent is not bound to execute the authority, even though he may have accepted it, unless the principal supplies him with sufficient funds, and he may even suspend all further proceedings when he has used up the funds he has received. But if he has engaged to advance the necessary funds he must execute the agency, unless the employer is in a state of insolvency. When without any lawful cause the agent refuses to execute the agency he has accepted or to complete what he has commenced, he is responsible for damages. It is the duty of the agent to follow the instructions of his principal. He should consult him in matters which have neither been foreseen nor provided for ; and if he cannot consult him he should do precisely the same as if the business were his own. He should never depart from the instructions of his principal, and if he deems it necessary to deviate from them, he should advise him of it by the first mail. He should give the principal every information on the state of the negotiation and advise him immediately of the conclusion of the business. The agent should himself execute the agency, and he cannot delegate it to another without the previous consent of the principal. He must render to his principal

Commission
agent may
refuse the
agency.

Must consult
his principal
for things not
foreseen.

(a) Portuguese Code, §§ 804—817.

an account of all the transactions with all the vouchers attached to it (*a*).

SECTION VII.

LIABILITY OF THE AGENT.

Agent not liable where he contracts in the name of his principal.

The agent is not personally liable where he contracts in the name and on account of his principal. To relieve himself from all personal liability in a contract the agent must draw up the instrument in a manner that it shall purport in its face to be the contract of the principal, though he may sign it by his authority as agent (*b*).

But if the agent does not disclose the name of his principal, or contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, release himself from that responsibility (*c*).

Liable if he contracts in his own name.

Even where it is shown that the party acted as agent for other persons, that will not diminish his liability on the agreement executed in his own name; it will only show that it is also binding on others by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal (*d*). So where an agent makes a sale on behalf of an unnamed principal, and signs the note in his name as broker, evidence might be produced of a custom of trade that where a broker purchases without disclosing the name of his principal he was liable to be looked to as the purchaser (*e*). No person in fact in making a contract is considered to be the agent of another unless he stipulates for his principal by name, stating his agency in the instrument which he signs (*f*). Thus if a person signs a note or draws or accepts a

(*a*) Spanish Code, §§ 120—140.

845; *Jones v. Littledale*, 6 Ad. & El.

(*b*) *Deslandes v. Gregory*, 29 L. J. Q. B. 93; *Downman v. Jones, in error*, 7 Q. B. 103; *Schmaltz v. Avery*, 16 Q. B. 659; *Jenkins v. Hutchinson*, 13 Q. B. 744; *Amos v. Temperley*, 8 M. & W. 805; *Gaby v. Driver*, 2 Y. & J. 555; *Spittle v. Lavender*, 5 Moore, 270.

486; *Magee v. Atkinson*, 2 M. & W.

(*c*) *Higgins v. Senior*, 8 M. & W.

440; *Hanson v. Roberdean, Peake*, 163;

Kendray v. Hodgson, 5 Esp. 228; *Reid v. Dreaper*, 30 L. J. Ex. 268; *Wake v. Harrop*, 30 L. J. Ex. 273.

(*d*) *Franklyn v. Lamond*, 4 C. B. 637.

(*e*) *Humfrey v. Dale*, 7 E. & B. 266.

(*f*) *Stackpole v. Arnold*, 11 Mass. Am. R. 29.

bill in his own name, though on account of his principal, becomes personally liable on the note or bill (*a*).

The agent is personally responsible to third persons whenever he acts without authority or in excess of the authority delegated to him ; wherever he makes a fraudulent representation of his authority with an intention to deceive ; where he has no authority and knows it, but nevertheless makes the contract as having such authority ; and also where he makes the contract as agent *bond fide*, believing that such authority is vested in him, while he has in fact no such authority (*b*). A person professing to contract as agent for another implicitly, if not expressly, undertakes to the person who enters into such a contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in fact exist (*c*). The remedy, however, against the person who professes to make such a contract, but has no authority, is either by an escrow for the deceit, alleging and proving the scienter or on an implied contract that he had authority, but not by treating him as principal (*d*).

Where an English agent contracts on behalf of a principal residing abroad, the agent is *prima facie* considered to pledge his own credit. By the universal understanding of merchants and of all persons in trade the credit in such case is considered to be given to the British buyer and not to the foreign. It is, however, in all cases a question of intention capable of being explained by the custom or usage of trade where such can be shown to exist (*e*). Where the contract is on the face of it with the foreign principal and not with the agent, the presumption of liability of the British agent is at an end ; and though in a contract of sale without writing the party making the contract may be personally liable, notwithstanding he mentions it at the time that he is buying for a foreign principal, in the

The agent is responsible if he acts without authority.

When principal resides abroad.

(*a*) *Leadbitter v. Farrou*, 5 M. & S. 357.
345; *Goupy v. Harden*, 7 Taunt. 159;
Stackpole v. Arnold, 11 Mass. Am. R.

(*d*) *Lewes v. Nicholson*, 18 Q. B. 503.

27.
(*b*) *Kennedy v. Gouvera*, 3 D. & R. 503; *Smout v. Ilbery*, 10 M. & W. 10; *Jones v. Downman*, 4 Q. B. 235; *Harper v. Williams*, 4 Q. B. 219; *Wilson v. Zulueta*, 14 Q. B. 405.

(*e*) *Gonzales v. Sladen*, Bull N. P. 130; *Wilson v. Zulueta*, 14 Q. B. 405; *Smyth v. Anderson*, 7 C. B. 71; *Mahon v. Kekula*, 14 C. B. 390; *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Kirkpatrick v. Staines*, 22 Wend. Am. R. 254.

(*c*) *Collen v. Wright*, 4 Jur. N. S.

case of a written contract, the same is to be construed according to the intention of the parties as evidenced by the words they have used having regard also to the surrounding circumstances (*a*).

Liable for omission of duty and for wrongs.

For any nonfeasances or omissions of duty in the course of his employment the agent is liable to the principal only, but for any misfeasances or acts of direct positive wrong, the agent is liable to third persons as a wrong doer (*b*).

Masters of ships, however, are liable to third persons for neglect of duty. Thus if goods are injured or perish by the neglect of the master and crew, the master as well as the owner are severally liable for it.

Agent converting property to his own use guilty of misdemeanor.

If any person intrusted with a power of attorney for the sale or transfer of any property, fraudulently sell, or transfer, or otherwise convert such property, or any part thereof, to his own use or benefit, he is guilty of a misdemeanor (*c*).

When agent communicates the name of his buyer he ceases to be liable.

Except where he receives a *del credere* commission.

When the agent communicates to his principal the name of the buyer of goods sold on his account, he is not personally answerable to the principal for the fulfilment of the contract or for the payment of the goods, except in case of gross negligence. When, however, the agent charges a *del credere* commission, he makes himself liable for the loss which his conduct may bring upon the principal without the onus of proving negligence. His liability to pay is not an absolute engagement to the principal so as to make him liable in the first instance, and dispensing the vendor from resorting in the first instance to the vendee but contingent on the event of the agent failing to secure payment by the vendee. Upon non-payment by the vendee the debt falls absolutely on the factor (*d*).

FOREIGN LAWS.

The tribunal will decide whether a party to whom he has shown his instructions, unless he has

(*a*) *Green v. Kopke*, 18 C. B. 559; *Risbourg v. Bruckner*, 3 C. B. N. S. 812.

(*b*) *Lane v. Cotton*, 12 Mod. 448.

(*c*) 20 & 21 Vict. c. 54, s. 3.

(*d*) *Coutourier v. Hastie*, 8 Exch. 40; *Grove v. Dubois*, 1 T. R. 112; *Wien-*

holt v. Roberts, 2 Camp. 587; *Houghton v. Matthew*, 3 B. & P. 485; *Morris v. Clasby*, 1 M. & S. 576; *Leverick v. Meigs*, 1 Cowen, Am. R. 664; *Hornby v. Lacy*, 6 M. & S. 166; *Wickham v. Wickham*, 2 K. & John, 478.

assumed a personal responsibility, or the law decides to the contrary. When, however, a person enters into an operation in the character of an agent, it would be for the tribunal to decide according to circumstances, whether there was reason to think that he acted for himself (a).

son dealing as
agent has in
fact acted on
his own ac-
count.

United States.—Every contract made with an agent in relation to the business of the agency, is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal, and the principal, and not the agent, is bound to the party. Where an agent is duly constituted and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible and not the agent. The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power. And when the agent becomes personally bound by his own assumption his principal is not liable. If the agent makes the contract in behalf of his principal and discloses his name at the time, he is not personally liable, even though he should take a note for the goods sold payable to himself. But if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him. When an agent acts for merchants residing in foreign countries the legal presumption is, that the credit is given to the agent exclusively, yet the Supreme Court of New York held that the agent is not personally responsible when he appeared in the transaction as an agent only, and dealt with the plaintiff in that known character. If the agent buys in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods come to his use, or the agent contracted in the business intrusted to him and according to his power. And if the agent binds himself personally, and engages

Contract with
the agent is a
contract with
the principal.

Agent not
liable when
he does not
contract in his
own name.

When he dis-
closes the
name of the
principal he is
not liable.

If the name of
the principal
is not dis-
closed the
agent as well
as the princi-
pal are liable.

(a) *Parlesaus*, tom. ii. p. 63.

personally in his own name, he will be held responsible, though he should, in the contract or covenant, give himself the description or character of agent. And though the attorney who acts without authority, but in the name of the principal, be not personally bound by the instrument he executes, if it contains no covenant or promise on his part, yet there is no remedy against him by a special action upon the case, for assuming to act when he had no power. If, however, the authority of the agent be coupled with an interest in the property itself, he may contract and sell in his own name. There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in all the contemplation of the parties, intended to be given. An agent is liable to third persons for acts of misfeasance and positive wrong, but for mere nonfeasance and negligences in the course of his employment, he is answerable only to his principal, and the principal is answerable over to the third party. Agents and attorneys, using reasonable skill and ordinary diligence in the exercise of their agency, are not responsible for injuries arising from mistakes in a doubtful point of law (a).

Distinction
between public
and private
agents.

Public agents
never liable
personally.

(a) Kent, *Commentary*, Vol. iii. pp. 817 - 826.

SECTION VIII.

RIGHTS OF THE PRINCIPAL.

BRITISH LAW.

In all cases where the principal is bound for the acts and contracts of the agent done under his authority and with his consent, or ratification, the principal is equally entitled to the advantages and benefits of such acts and contracts as against third persons (a). So in all cases where the agent has contracted in the name of his principal, the principal may adopt the contract and may sue in his name exclusive of the agent. Even where the agent has contracted for an undisclosed principal in his own name, the principal may adopt the contract and sue upon it, but he must adopt it altogether (b).

The principal has a right to the benefit of the acts of the agent, and may sue upon the contract.

A foreign principal also may sue in his own name to enforce rights acquired by his agent in a course of dealings on his account.

A foreign principal may enforce the agent's contract.

Where a contract in writing, under seal, has been executed by the agent in the name of the principal, and the covenants are entered into with the principal and not with the agent, then the principal alone has a right to sue upon it. If, on the other hand, the agent contracted in his own name on behalf of his principal, the agent and not the principal must sue upon it. If the contract is entered into with the principal and the deed is executed by the agent in his own name, neither party could sue upon it. Payment or delivery by the agent is payment or delivery by the principal. Therefore, if the agent pays money of the principal, which the latter would be entitled to recover, as where the consideration fails, where money is paid through mistake, where money has been illegally extorted from the agent, or where the money has been fraudulently applied by the agent, the principal may sue upon it (c).

When the contract is in the name of the principal he alone may sue upon it; vice versa if the contract was in the name of the agent.

The principal has a right to the benefits of the acts of his agents. When, therefore, an agent derives profit from property

(a) *Seignior v. Walmer*, Godb. 360.

(c) *Tracy v. Veal*, Cro. Jac. 223;

(b) *Routh v. Thompson*, 18 East, 274; *Marah v. Keating*, 1 Bing. N. C. 196; *Sims v. Bond*, 5 B. & Ad. 393; *Sims v. Brittain*, 4 B. & Ad. 375; *Humphrey v. Lucas*, 2 Car. & K. 152.

Drope v. Thaire, Latch. 126; Duke of Norfolk v. Worsley, 1 Camp. 337; *Dalzell v. Mair*, 1 Camp. 532; *Archer v. The Bank of England*, Doug. 637; *Stevenson v. Mortimer*, Cowp. 805.

purchased on behalf of his principal he would be held trustee for the same (a).

FOREIGN LAWS.

The principal has a direct right against third parties for the acts of his agent.

Right of the principal to payment.

France.—Third parties who have dealt with an agent are deemed to have incurred a direct obligation towards the principal who may sue them direct as a personal obligation. And *vice versa* those who have contracted with an agent acquire a direct action against the principal.

United States.—When goods have been sold by the factor the owner is entitled to call upon the buyer for payment before the money is paid over to the factor, and a payment to the factor, after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. If, however, the factor should sell in his own name as owner, and not disclose his principal, and act ostensibly as the real and sole owner, the principal may nevertheless afterwards bring his action upon the contract against the purchaser, but the latter, if he *bond fide* dealt with the factor as owner, will be entitled to set off any claim he may have against the factor, in answer to the demand of the principal (b).

Holland.—The principal has a direct right against the party with whom the agent has contracted as such, and may demand the execution of the agreement (c).

SECTION IX.

LIABILITY OF THE PRINCIPAL.

BRITISH LAW.

An agent cannot bind his principal by deed, unless it is executed in his name.

That an agent may bind his principal by deed, the same must be executed in his name (d). Thus a conveyance by a deed executed by the attorney in his own name is a void conveyance, inasmuch as where an interest is to pass by an instrument, it must in terms purport to be conveyed by him in whom alone that interest is vested. In other commercial contracts,

- (a) *The Bank of London v. Tyrrell*,
28 L. J. Ch. 921.
(b) *Kent's Comment.* Vol. ii. p. 824.

- (c) Dutch Code, § 1836.
(d) *Wilks v. Back*, 2 East, 142.

wherever it is sufficiently shown that the true object and intent of the act was to bind the principal and not the agent, the same will be construed as such (a).

That the agent may bind his principal, the act done must be within the scope of his authority. Whenever the agent does any act beyond the scope of his power, it is void even as between him and the principal (b). A general agent acting within the general scope of his authority may bind the principal, although acting contrary to express private instructions, if these instructions are unknown to the party acting with the agent (c).

But in a case of special agency the agent will bind the principal only when he has strictly adhered to his instructions. Thus where an agent was authorised to sign his name to a note for a certain sum payable at six months, and the agent put the principal's name to a note for the same sum payable in sixty days, it was held that the principal was not liable.

If a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, provided, however, the state of the accounts between the principal and the agent is not altered to the prejudice of the principal (d).

On the other hand, if at the time of the sale the seller knows that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge chooses to make the agent his debtor, dealing with him and him alone, then the seller cannot afterwards on the failure of the agent turn round and charge the principal, having once made his election at the time when he had the power of choosing between one and the other. So if after the disclosure of the principal the seller lie by and suffer the principal to settle the account with his broker for the amount of his purchase, he cannot afterwards charge the

The act must be within the scope of the agent's authority.

Special agent will bind his principal only when he strictly adheres to his instructions.

Principal liable though the agent may have been debited.

Unless the agent be preferred as debtor.

(a) *Long v. Coburn*, 11 Mass. Am. R. 97. & B. 202; *Fenn v. Harrison*, 3 T. R. 757; *Whithead v. Tucker*, 15 East, 399.

(b) *Olding v. Smith*, 16 Jur. 497, Q. B.

(c) *Howard v. Braithwaite*, 1 Ves.

& B. 202; *Cox v. Midland Railway Company*, 3 Exch. 268.

latter so as to make him a loser, but will be deemed to have elected the broker for his debtor. The election to charge the principal must be made within a reasonable time after the discovery of him ; and if, after the discovery, the creditor goes on for nearly a year without any communication with the principal, he must be taken to have elected to take the agent as his debtor (*a*).

Payment by
the agent dis-
charges the
principal.

Payment by the agent discharges the principal. And if the creditor voluntarily give an enlarged credit to the agent of the debtor, or adopts a particular mode of payment whereby the principal is placed in a worse situation than he would otherwise have been, the liability of the principal is discharged. A delivery of goods to an agent is a delivery to the principal ; and a tender to an authorised agent is a tender to the principal.

Principal
bound for the
representa-
tions of the
agent and for
his frauds and
misrepresen-
tations.

The principal is bound for all the representations of the agent respecting the subject matter of the contract made at the time of the contract. And the principal is also responsible for all frauds, misrepresentations, torts, and negligences of the agent in the course of his employment, and for those also done by those employed by such agent in the execution of the business (*b*).

FOREIGN LAWS.

The principal
must fulfil the
engagements
contracted for
him by the
agent.

France.—The principal is bound to fulfil the engagements contracted by the agent according to his instructions, but he is not bound for anything done beyond that, unless he has ratified it either openly or tacitly. He ought to reimburse the agent of his advances and expenses incurred in the execution of his authority, and pay him the compensation agreed upon. Unless the agent is chargeable with any fault the principal cannot refuse such reimbursement and payment, even when the business has not succeeded well, nor can he demand any reduction of such expenses and advances on the pretext that they might have been less. The principal ought also to indemnify the agent for the losses which he may have suffered in the execution of the authority without any fault or imprudence on his part.

Must indem-
nify the agent
for his losses
and pay the
advances he
has made.

(*a*) *Smethurst v. Mitchell*, 28 L. J. 337 ; *Cornfoot v. Fowke*, 6 M. & W. Q. B. 241 ; *Thomson v. Davenport*, 9 358 ; *Hern v. Nicholls*, 1 Salk. 282 B. & C. 86. *Ormrod v. Hutt*, 14 M. & W. 652.

(*b*) *Udell v. Atherton*, 30 L. J. Ex.

The principal must also pay interests on such advances from the day they were made. When several persons unite in giving authority to an agent, every one of them is bound *in solidum* for all the effects of such authority (*a*).

SECTION X.

TERMINATION OF THE AGENCY.

BRITISH LAW.

The agent's authority is determined by revocation, by the Revocation of authority. death of the principal, by efflux of time, or by the performance of the commission.

A power of attorney is generally revocable, except when it is part of a security for money and when it is necessary to give validity to any security (*b*).

The authority of the agent may be revoked at any time; but, in order to determine the liability of the principal to third parties, the revocation must be publicly notified.

When the authority is revoked by death, transactions begun previous to the death may go on, and those done in ignorance of the death are effectual.

FOREIGN LAWS.

France.—An agency ends by revocation of the authority, by renunciation on the part of the agent, and by the natural or civil death of the principal or agent. The principal may revoke his authority at will, and may compel the agent to return to him the powers he had granted to him. The revocation notified to the agent only cannot be set against third persons who may have dealt with the agent in ignorance of such revocation, though the principal would have his right against the agent. The appointment of a new agent for the same business means the revocation of the authority given to the first from the time it has been notified to the latter. The agent may renounce the agency by intimating Agent may renounce the authority.

(*a*) French Civil Code, §§ 1998 to 2002. (*b*) *Walsh v. Whitcomb*, 2 Esp. 565.

his renunciation to his principal. But if such renunciation injures his principal, he ought to be indemnified by the agent, unless it should be impossible for the latter to continue his agency without suffering considerable injury. If the agent is ignorant of the death of his principal, or of any other cause which produces the revocation of the agency, whatever he has done in ignorance of it is valid. In such case the engagements contracted by the agent towards third persons in good faith must be executed. In case of death of the agent his heir must inform the principal, and meanwhile provide whatever is necessary for the interest of the latter (a).

Modes in
which the au-
thority ends.

United States.—The authority of the agent may terminate in various ways. It may terminate by the death of the agent, by the limitation of the power to a definite period of time, by the execution of the business which the agent was intrusted to perform, by a change in the state or condition of the principal, by the express revocation of the power, and by his death. The agent's trust is not transferable either by the act of the parties or by the operation of law. It terminates by his death. If the agent had entered upon the execution of the trust in his lifetime, and left it partially executed but incomplete at his death, his legal representatives would be bound to go on and complete it. A power of attorney or even naked authority is, in general, from the nature of it, revocable at the pleasure of the party who gave it. But where it constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable by the party himself, though it is necessarily revoked by his death. In the case of a lawful revocation of the power by the act of the principal, it is requisite that notice be given to the attorney; and all acts *bond fide* done by him under the power, prior to the notice of the revocation, are binding under the principal. Even if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had no just ground to presume a revocation, his acts done under his former power would still be binding upon his principal. He can, likewise, according to Pothier, conclude a transaction which was not

Authority re-
vocable at
pleasure.

Effect of
notice to the
agent.

(a) French Civil Code, §§ 2003—2010.

entire, but partly executed, under the power when the notice of the revocation was received, and bind the principal by those acts which were required to consummate the business. The principal may, no doubt, be compelled to act in such a case, and indemnify the agent, but it seems difficult to sustain the act of the agent after his power has been revoked, for he becomes a stranger after the revocation is duly announced.

The agent's power is determined likewise by the bankruptcy of his principal ; but this does not extend to an authority to do a mere formal act, which passes no interest, and which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy. Nor will the bankruptcy of the principal affect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal before the bankruptcy, but received afterwards. If the principal or his agent was a feme sole when the power was given, it is determined, likewise, by her marriage ; for the agent, after the marriage, cannot bind the husband without his authority, and the acts of a feme covert might prejudice her husband. Her warrant of attorney to confess judgment is countermanded by her marriage before the judgment is entered up. The authority of an agent determines by the death of his principal, and a joint authority to two persons terminates by the death of one of them.

Portugal.—Besides the cases provided by the French civil law, the Portuguese code provides that the agency ends by the marriage of the female who may have either given or received the authority. The authority may be revoked at any time, but the principal is bound to indemnify the agent for any outlays and damages he may have occasioned to him. In case of the death of the agent, or of any event which may render him incompetent to execute the authority, his heir must immediately give notice to the principal under penalty of damages and interest (a).

Spain.—The principal has always the power at any stage of the business to revoke, alter, or modify his authority. There is a revocation of the authority in case of death of the agent, or of any other cause which renders him unfit to execute the

(a) Portuguese Code, §§ 818—825.

Determined
by the bank-
ruptcy of the
principal,

by the death
of the prin-
cipal.

The marriage
of the female
principal or
agent causes a
revocation of
authority.

Death of the
agent causes a
revocation of
authority.

authority, notice being given of it to the party interested. As regards the principal, the authority is not deemed revoked by his death, so long as his lawful heirs do not revoke the same (a).

(a) Spanish Code, §§ 143—145.

CHAPTER VII.

HIRING AND SERVICE.

SECTION I.

CONTRACT OF HIRE AND SERVICE.

BRITISH LAWS.

A CONTRACT of hiring and service exists where there is an express mutual engagement binding the parties one to employ and remunerate and the other to serve for some determinate term. When it is optional for either party to carry out the arrangement, there is no contract for hiring and service (*a*). Definition and requisites of the contract.

A contract for hiring and service need not be in writing unless it be for more than one year, and if in writing it need not be stamped, except in the case of apprenticeships. In the absence of a contract in writing, a hiring may be presumed from the fact of the service, so as to entitle the servant to claim customary and reasonable wages (*b*) ; but without an express or implied contract to pay wages, no action can be maintained for them (*c*). So the master is not bound to pay increased wages for increased labour unless he has engaged to do so (*d*). Contract need not be in writing.

In a covenant of hiring and service for a limited term, it is an implied agreement that the service shall continue for the term so limited, and the employer is not at liberty to dismiss his servant at pleasure. And where by such a covenant the servant becomes bound to serve, he is entitled to his remuneration, though he may never be called upon or required to do any work (*e*). Implied duration of it.

(*a*) Williamson *v.* Taylor, 5 Q. B. 175 ; Dunn *v.* Sayle, 5 Q. B. 685.

(*b*) Phillips *v.* Jones, 1 A. & E. 338.

(*c*) Foord *v.* Morl, Fost. & F. 498 ; Rex *v.* Thames Ditton, 4 Doug. 300.

(*d*) Bell *v.* Drummond, Peake, 45 ; Harris *v.* Watson, Peake, 76.

(*e*) Emmens *v.* Siderton, 13 C. B. ; Reg. *v.* Welch, 2 E. & B. 362 ; Pil-

kington *v.* Scott, 16 M. & W. 600.

Hiring by the year, month, or week.

The hiring may be by the year, by the month, or by the week. A hiring of a permanent nature upon annual wages is a yearly hiring, and does not expire till the termination of the year (*a*). A hiring at so many shillings a month or week's wages is a hiring by the month or by the week, unless there be other circumstances to show a different agreement between the parties (*b*).

When wages are not settled remuneration is implied.

If the amount of wages has not been settled, there is an implied promise of a customary and reasonable rate of remuneration. If it be left with the employed to determine whether or any and what wages should be paid for service rendered, no action could be maintained (*c*).

Payment of wages in kind prohibited.

In contracts of hiring made with artificers, workmen, labourers, and other persons engaged or employed in mining, quarries, hardware, glass, porcelain, or in cotton, silk, and other manufactures, &c., the wages must be paid in the current coin of the realm, and not otherwise. An artificer or workman may recover his wages from his employer if not paid in the current coin, and in an action brought by a labourer for his wages no set-off is allowed for goods supplied to him by the employer, whilst the employer would have no action against his artificer or workman for goods supplied to him on account of wages (*d*).

Master not liable for ordinary injuries sustained by the workman.

The master is not responsible for injuries sustained by the servant whilst labouring in his service, although he is bound to provide for the safety of his servant in the exercise of his employment to the best of his judgment and information (*e*) ; nor is the master bound for surgical attendance to such a servant if he becomes injured whilst discharging his duties. When, however, by the negligence of the master an injury is caused to a servant in the course of his employment, the master is liable (*f*). The servant must undertake what he is ordered by the master to perform in the ordinary discharge of his duties, though he

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|---|---|
| <i>(a)</i> Fawcett v. Cash, 5 B. & Ad. 908.
<i>(b)</i> Rex v. Pricklechurch, 5 East, 382 ; Rex v. Dodderhill, 3 M. & S. 243 ; Rex v. Lambeth, 3 M. & S. 315.
<i>(c)</i> Taylor v. Brewer, 1 M. & S. 290 ; Moffat v. Dickson, 13 C. B. | 575 ; Moffat v. Lawrie, 15 C. B. 583.
<i>(d)</i> 1 & 2 W. 4, c. 37.
<i>(e)</i> Priestley v. Fowler, 5 M. & W. 5 ; Paterson v. Wallace, 23 L. J. Q. B. 249.
<i>(f)</i> Ashworth v. Stanwix, 30 L. J. G. B. 183 ; Riley v. Baxendale, 30 L. J. Ex. 87. |
|---|---|

may decline any service from which he may easily apprehend injury to himself.

It is the duty of the servant to serve his master faithfully, diligently, and honestly, to be obedient, and careful, and to fulfil his duties with due skill and knowledge (a). If he disobeys or absents himself from his work, or is otherwise guilty of misconduct or disobedience, or of moral turpitude, he may be dismissed before the expiration of his term of service (b).

In case of dismissal, the servant is entitled only to the wages which have accrued during the period of actual service, but in case of a wrongful dismissal he might even recover the wages which he has been prevented from earning (c).

The bankruptcy of the master does not *ipso facto* operate as a dissolution of a contract of hiring and service.

Duties of
servants.

Rights of
servants on
dismissal.

Bankruptcy
does not dis-
solve the
contract.

SECTION II.

COMBINATION LAWS.

BRITISH LAWS.

Considerable attention has of late been bestowed on the subject of wages, and on the right of workmen to combine among themselves and to strike or abandon their labour in case of dispute with their masters. In olden times the State misapprehending altogether the nature of wages, and the laws by which they are regulated, felt itself at liberty to fix the rates of wages by statute. It is easy to conceive how futile must every such attempt prove; but at last with a better knowledge of economical laws it was altogether abandoned. Of a similar character were our combination laws, which continued for much longer time to fill up the pages of our statute book. By a statute of Henry VI., any combination amongst workmen was made a capital offence. It was enacted by Edward VI. that if any artificer did conspire that they shall not do their work but at a certain price, or shall not take upon them to finish that which another has begun, or shall do but a certain work, at

INTRODUC-
TORY OBSER-
VATIONS.

(a) *Horton v. M'Murtry*, 29 L. J. Ex. 260. 513; *Trotman v. Dunn*, 4 Camp. 211.

(c) *Smith v. Hayward*, 7 A. & E.

(b) *Turner v. Robinson*, 6 C. & P. 15; *Callo v. Brounceker*, 4 C. & P. 544; *Wilkinson v. Gaston*, 15 L. J. C. B. 137.

certain times, every person so conspiring shall forfeit for the first offence 10*l.*, or be imprisoned for twenty days; for the second 20*l.*, or be pilloried; and for the third 40*l.*, or be pilloried, or lose an ear, and become infamous.

Considerable change has, however, been made on this subject also, and the statute now in force (*a*) repealed all the laws against the combination of workmen, and simply provided against using threats or intimidation.

**Using threats
or intimid-
ation.**

The principal provisions of this statute are as follows:—If any person shall by violence to the person or property, or by threats, or by intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished; or prevent or endeavour to prevent any journeyman, &c., not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct another for the purpose of forcing or inducing such person to belong to any club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any fund, or to pay any fine or penalty, or on account of his not having complied, or of his refusing to comply with rules, orders, resolutions, or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every person so offending, or aiding,

**Preventing
a journeyman
from working.**

**Using vio-
lence to the
person and
property of
another.**

(*a*) 6 Geo. 4, c. 95.

abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned, and kept to hard labour, for any time not exceeding three calendar months.

This Act does not extend to subject any persons to punishment who meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, amongst themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work in any manufacture, trade, or business ; and persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

Consultation amongst workmen lawful.

Nor does this Act extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen or workmen for their work, or the hours of time of working in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them shall pay to his or their journeymen, workmen, or servants, for their work or the hours of time of working in any manufacture, trade, or business ; and that persons so meeting for the purpose aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

Agreement amongst employers lawful.

By the other sections of the statute, one justice of the peace is empowered to exercise the summary jurisdiction given by the Act, and other provisions are made as to witnesses, &c.

Under this statute it is now lawful for any class of men to combine together for any purpose whatever. A hundred brick-layers, or a hundred tailors, may combine not to work for less than a certain remuneration, or not to work more than a certain

number of hours daily, and they are quite free to do so, provided they do not coerce any one to join their combination, or do not interfere with those who are content to work on lower terms.

Difficulties of proving coercion.

It is difficult, however, to discover coercion. When there is an actual assault, or the threat of violence, the matter is clear; but a formidable combination spreads terror without actually inflicting or threatening violence, by a tacit understanding that it will be inflicted if needful. It was proved, for instance, during the *great* strike by the London Building Workmen in 1859—1860, that a workman coming from the country to fulfil an engagement was met at the station where he arrived by a deputation of the Unionists, who accompanied him to a tavern, and never lost sight of him until they made him one of their body. There was no doubt that such a person was intimidated, yet no conviction could be obtained, because it might have been difficult to prove that he did not yield to moral persuasion. The law is founded on the clear and intelligible basis of allowing the fullest liberty of association, provided no coercion be used towards others to induce them to join the number.

FOREIGN LAWS.

A hire must be for a limited, and not an unlimited time.

Combination laws.

France.—A hire of services can only be made for a time, or for a specific enterprise. The master is believed on his own affirmation for the amount of wages, for the payment of wages for the year before, and for the accounts given for the current year (*a*). These are the only provisions in the Civil Code on this subject. But many other regulations of a local nature and of police are in force relating to workmen. Thus an old edict provides that if a workman leaves the manufacture where he was working, without express leave and in writing, he is liable to a fine of 100 frs., and the master who receives him to a fine of 300 frs. The Penal Code provides against combination of workmen as follows:—Every combination between employers of workmen for the purpose of unjustly lowering the wages, followed by an attempt to carry out the engagement, shall be punished by imprisonment of from six days to one month, and by a fine of from 200 frs. to 3000 frs. Every combination on the part of the workmen for the purpose of causing the simultaneous cessation

(*a*) French Civil Code, §§ 1780, 1781.

of labour, or the prevention of labour in a factory, or to hinder workmen from going to their work, and to remain there before or after certain hours, and in general to suspend or hinder labour or increase the value of it, will be punished by imprisonment of not less than one month and not exceeding three months. The chiefs or leaders will be punished by imprisonment of from two to five years. The same penalties are also awarded to workmen who shall have pronounced any fines, prohibition, &c., whether against the managers of workshops or heads of factories. In such cases the chiefs or leaders of the crime may, after the expiration of this penalty, be put under the inspection of the police for not less than two years and not exceeding five years (*a*). Disputes between masters and workmen are settled by special courts called "Councils of Prudhommes," which are instituted in the places where such are necessary. Such councils are also charged to give evidence upon complaints made before them, concerning the contraventions of the laws and regulations upon trade marks, robberies committed by labourers, &c. Each council of prudhommes keeps consequently an exact register of the number of factories in existence, and of the number of workmen employed in the manufactories of the district. The mode of election and jurisdiction of the Councils de Prudhommes will be considered in connection with the courts for the administration of commercial law.

(*a*) Penal Code of France, § 414.

CHAPTER VIII.

STATUTORY LAW ON JOINT STOCK COMPANIES.

INTRODUC- TORY OBSER- VATIONS.

As anticipated in the former portion of this work the law on Joint Stock Companies was amended and consolidated by an Act passed in the session of 1862, for the incorporation, regulation, and winding up of trading companies and other associations (*a*). No substantial innovations are introduced in it. The permission to form companies with limited or unlimited liability is now extended to companies for all purposes, including insurance, and the liability may be limited by guarantee as well as by shares. This Act repealed the following acts in force on Joint Stock Companies : An Act passed by the Parliament of Ireland to promote trade and manufactures by regulating and encouraging partnerships which allowed the formation of companies with limited liability (*b*) ; three Acts passed in 1844, for the registration and winding up of Joint Stock Companies, and to regulate Joint Stock Banks in England (*c*) ; the Act passed in 1845, for the winding up of insolvent Joint Stock Companies in Ireland ; the two Acts passed in 1846 for the dissolution of Railway Companies, and for the regulation of Joint Stock Banks (*d*) ; the Act of 1847, authorising Joint Stock Companies to obtain licences for the holding of land (*e*) ; the Winding-up Acts of 1848 and 1849 (*f*) ; the whole of the Joint Stock Companies Acts of 1856 and 1857 (*g*) ; and the Acts of 1858, which incorporated the Law on Banking Companies with that of other Joint Stock Companies, and allowed banking companies

- (*a*) 25 & 26 Vict. c. 89.
(*b*) 21 & 22 Geo. 3, c. 46.
(*c*) 7 & 8 Vict. c. 110 ; 7 & 8 Vict. c. 111 ; and 7 & 8 Vict. c. 113.
(*d*) 9 & 10 Vict. c. 28 ; and 9 & 10 Vict. c. 75.
- (*e*) 10 & 11 Vict. c. 78.
(*f*) 11 & 12 Vict. c. 45 ; 12 & 13 Vict. c. 108.
(*g*) 19 & 20 Vict. c. 47 ; 20 & 21 Vict. c. 14 ; 20 & 21 Vict. c. 49 ; 20 & 21 Vict. c. 78 ; 20 & 21 Vict. c. 80.

to be formed on the principle of limited liability. By the repeal of these Acts the law on Joint Stock Companies is almost exclusively governed by the present law, which is divided into nine parts. The first part relates to the constitution and incorporation of companies and associations, which is entirely taken from the Act of 1856, giving also a schedule of regulations for the management of a company limited by shares ; the second part relates to the distribution of capital and liability of members of companies and associations, also taken from the same Act ; the third part refers to management and administration, giving power to companies to refer matters to arbitration in conformity with the Railway Companies Arbitration Act ; the fourth part provides for the winding up of companies and associations, derived principally from the Act of 1856 and 1857, and partly from the Winding up Acts of 1848 and 1849 ; the fifth part gives the constitution of the registration office ; the sixth part provides for the application of the Act of Companies registered under former Joint Stock Companies Acts ; the seventh part describes the companies authorised to register under the Act ; the eighth part provides for the application of the Act to unregistered companies ; and the ninth part repeals the Act already described.

No company, association, or partnership consisting of more than ten persons can be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent ; and no company, association, or partnership consisting of more than twenty persons can be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the stannaries (a).

Prohibition
of partner-
ships exceed-
ing certain
number.

(a) 25 & 26 Vict. c. 89, s. 4.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

SECTION I.

MEMORANDUM OF ASSOCIATION.

Mode of forming company.

Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability (a).

Mode of limiting liability of members.

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.

Memorandum of association of a company limited by shares.

Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association must contain the following things :—The name of the proposed company, with the addition of the word “limited” as the last word in such name (b) ; the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate ; the objects for which the proposed company is to be established ; a declaration that the liability of the members is limited ; the amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount. Subject to the following regulations :—That no subscriber shall take less than one share ; and that each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

Memorandum of association

Where a company is formed on the principle of having the

(a) By the 20 & 21 Vict. c. 49, s. 12, unpealed, any number of persons not exceeding ten may carry on in partnership, the business of bank-

ing.

(b) New Brunswick and Canada Railway and Land Company v. Boore, 3 H. & N. 249.

liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association must contain the following things :—The name of the proposed company, with the addition of the word "limited" as the last word in such name ; the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate ; the object for which the proposed company is to be established ; a declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the right of the contributors amongst themselves, such amount as may be required, not exceeding a specified amount.

Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association must contain the following things :—The name of the proposed company ; the part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate ; the objects for which the proposed company is to be established.

The memorandum of association must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation is a sufficient attestation in Scotland as well as in England and Ireland. When registered it binds the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act.

Any company limited by shares may so far modify the conditions contained in its memorandum of association, if autho-

Memorandum
of association
of an unli-
mited com-
pany.

Stamp, sig-
nature, and
effect of
memorandum
of associa-
tion.

Power of
certain com-
panies to

alter memorandum of association.

rised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration can be made by any company in the conditions contained in its memorandum of association.

Power of companies to change name.

Any company under this Act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned, and with the approval of the Board of Trade testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name, and upon such change being made the registrar must enter the new name on the register in the place of the former name, and issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name (a).

SECTION II.

ARTICLES OF ASSOCIATION.

Regulations to be prescribed by articles of association.

The memorandum of association may, in the case of a company limited by shares, and must, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. The articles are to be expressed in separate paragraphs, numbered arithmetically. They may adopt all or any of the provisions contained in the table marked A. in the first schedule of this Act. They must, in the case of a company, whether limited by guarantee or unlimited, that has a

(a) 25 & 26 Vict. c. 89, ss. 6-13.

capital divided into shares, state the amount of capital with which the company proposes to be registered ; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration. In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber must take one share at the least, and must write opposite to his name in the memorandum of association the number of shares he takes.

In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the table marked A. in the first schedule of this Act, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

The articles of association must be printed, they must bear the same stamp as if they were contained in a deed, and must be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation is a sufficient attestation in Scotland as well as in England and Ireland. When registered, they bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act ; and all monies payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, is deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt (a).

Application of
Table A.

Stamp, sig-
nature, and
effect of
articles of
association.

(a) 25 & 26 Vict. c. 89, ss. 14—16.

SECTION III.

GENERAL PROVISIONS.

Registration
of memoran-
dum of asso-
ciation and
articles of
association,
with fees as
in Table B.

The memorandum of association and the articles of association, if any, are to be delivered to the registrar of joint stock companies hereinafter mentioned, who must retain and register the same. There must be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B. in the first schedule of this Act, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C. in the first schedule of this Act, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct. All fees paid to the said registrar in pursuance of this Act shall be paid into the receipt of Her Majesty's Exchequer, and be carried to the account of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.

Effect of re-
gistration.

Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this Act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited. The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, are thereupon a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as hereinafter mentioned. A certificate of the incorporation of any company given by the registrar is conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

Copies of me-
morandum
and articles

A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one

shilling or such less sum as may be prescribed by the company for each copy ; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall for each offence incur a penalty not exceeding one pound.

to be given
to members.

No company can be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved and testifies its consent in such manner as the registrar requires ; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name, and upon such change being made the registrar must enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case ; but such alteration of name does not affect any rights or obligation of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against this company by its new name that might have been continued or commenced against the company by its former name.

Prohibition
against
identity of
names in
companies.

No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, can, without the sanction of the Board of Trade, hold more than two acres of land ; but the Board of Trade may, by licence under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit (a).

Prohibition
against cer-
tain com-
panies hold-
ing land.

(a) 25 & 26 Vict. c. 89, ss. 17—21.

PART II.

DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

SECTION 1.

DISTRIBUTION OF CAPITAL.

Nature of interest in company.

The shares or other interest of any member in a company under this Act are personal estate, capable of being transferred in manner provided by the regulations of the company, and are not of the nature of real estate, and each share must, in the case of a company having a capital divided into shares, be distinguished by its appropriate number. The subscribers of the memorandum of association of any company under this Act are deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company are to be entered as members on the register of members hereinafter mentioned ; and every other person who has agreed to become a member or a company under this Act, and whose name is entered on the register of members, are deemed to be a member of the company (a).

Transfer by personal representative.

Any transfer of the share or other interest of a deceased member of a company under this Act, made by his personal representative, is, notwithstanding such personal representative may not himself be a member, of the same validity as if he had been a member at the time of the execution of the instrument of transfer.

Register of members.

Every company under this Act must cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars :—1. The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number. And of the amount paid or agreed to be considered as paid on the shares of each member. 2. The date at which the name of any person was entered in the register as a member. 3. The date at which any person ceased to be a member. And any company acting in contravention of this section shall incur a penalty not

(a) *New Brunswick and Canada Railway Company v. Muggeridge*, 28 L. J. Exch. 193, 365.

exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorise or permit such contravention shall incur the like penalty.

Every company under this Act, and having a capital divided into shares, must make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company ; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and must contain a summary specifying the following particulars :—1. The amount of the capital of the company, and the number of shares into which it is divided. 2. The number of shares taken from the commencement of the company up to the date of the summary. 3. The amount of calls made on each share. 4. The total amount of calls received. 5. The total amount of calls unpaid. 6. The total amount of shares forfeited. 7. The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint-stock companies.

If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Every company under this Act, having a capital divided into shares, that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, must give notice to the registrar

*Annual list
of members.*

*Penalty on
company, &c.,
not keeping
a proper
register.*

*Company to
give notice
of consolidat-
ion or of
conversion of
capital into
stock.*

of joint-stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted.

Effect of conversion of shares into stock.

Where any company under this Act, and having a capital divided into shares, has converted any portion of its capital into stock, and given notice of such conversion to the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock ; and the register of members hereby required to be kept by the company, and the list of members to be forwarded to the registrar, must show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

Entry of trusts on register.

No notice of any trust, expressed, implied, or constructive, must be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland.

Certificate of shares or stock.

A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a company, is *prima facie* evidence of the title of the member to the share or shares or stock therein specified.

Inspection of register.

The register of members, commencing from the date of the registration of the company, must be kept at the registered office of the company hereinafter mentioned : Except when closed as hereinafter mentioned, must during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection ; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied : If such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorise or permit such refusal shall incur the like penalty ;

and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

Any company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorised, and in the case of an increase of members within fifteen days from the time at which such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members : If such notice is not given within the period aforesaid the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of

Power to
close regis-
ter.

Notice of
increase of
capital and
of members
to be given
to registrars.

Remedy for
improper
entry or
omission of
entry in
register.

session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified ; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained ; the Court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register ; provided that the Court, if a Court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

**Notice to
registrar of
rectification of
register.**

Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the Court shall, by its order, direct that due notice of such rectification be given to the registrar. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein (a).

**Register to
be evidence.**

SECTION II.

LIAIBILITY OF MEMBERS.

**Liability of
present and
past members
of company.**

In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributors amongst themselves, with the qualifications following :—No past member

(a) 25 & 26 Vict. c. 89, ss. 22—37.

shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up. 2. No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. 3. No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act. 4. In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. 5. In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association. 6. Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract. 7. No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company ; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves (a).

PART III.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

SECTION I.

PROVISIONS FOR PROTECTION OF CREDITORS.

Every company under this Act shall have a registered office to which all communications and notices may be addressed : If Registered office of company.

(a) 25 & 26 Vict. c. 89, s. 38.

any company under this Act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.

Notice of situation of registered office.

Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him : Until such notice is given the company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office.

Publication of name by a limited company.

Every limited company under this Act, whether limited by shares or by guarantee, must paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and have its name engraven in legible characters on its seal, and have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

Penalties on non-publication of name.

If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall be liable to the like penalty ; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement, or other official publication of such company, or signs or authorises to be signed on behalf of such company any bill of exchange, promissory note, endorsement, cheque, order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or

goods, for the amount thereof, unless the same is duly paid by the company (a).

Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry shall incur a penalty not exceeding fifty pounds. The register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same and every director and manager of the company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

Every limited banking company and every insurance company, and deposit, provident, or benefit society under this Act must, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the form marked D. in the first schedule of this Act, or as near thereto as circumstances will admit, and a copy of such statement must be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and

Register of mortgages.

Certain companies to publish statement entered in schedule.

(a) *Lindus v. Melrose*, 3 H. & N. 177; *Penrose v. Penrose and Martyn*, 5 Jur. N. S. 362.

manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty. Every member and every creditor of any company mentioned in this section is entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

List of directors to be sent to registrar.

Every company under this Act, and not having a capital divided into shares, must keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and send to the registrar of joint-stock companies a copy of such register, and from time to time notify to the registrar any change that takes place in such directors or managers.

Penalty on company not keeping register of directors.

If any company under this Act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Promissory notes and bills of exchange.

A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company.

Prohibition against carrying on business with less than seven members.

If any company under this Act carries on business when the number of its members is less than seven for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six months, and is cognisant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member (a).

(a) 25 & 26 Vict. c. 89, ss. 39—48.

SECTION II.

PROVISIONS FOR PROTECTION OF MEMBERS.

A general meeting of every company under this Act shall be held once at the least in every year.

Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution is deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

A resolution passed by a company under this Act is deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed. At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same. Notice of any meeting shall, for the purposes of this section, be deemed

General meeting of company.

Power to alter regulations by special resolution.

Definition of special resolution.

to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

Provision where no regulations as to meetings.

In default of any regulations as to voting, every member shall have one vote, and in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the table marked A. in the first schedule in this Act ; and in default of any regulations as to the persons to summon meetings, five members shall be competent to summon the same ; and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside.

Registry of special resolutions.

A copy of any special resolution that is passed by any company under this Act shall be printed and forwarded to the registrar of joint-stock companies, and be recorded by him. If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Copies of special resolutions.

Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution. Where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling, or such less sum as the company may direct. And if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made ; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Any company under this Act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom; and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company.

Execution
of deeds
abroad.

The Board of Trade may appoint one or more competent inspectors to examine into the affairs of any company under this Act, and to report thereon, in such manner as the board may direct, upon the applications following :—1. In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued. 2. In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued. 3. In the case of any company not having a capital divided into shares upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

Examination
of affairs of
company by
inspectors.

The application shall be supported by such evidence as the Board of Trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the Board of Trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

Application
for inspection
to be sup-
ported by
evidence.

It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power. Any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly. If any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence.

Inspection of
books.

Result of examination how dealt with.

Upon the conclusion of the examination the inspectors shall report their opinion to the Board of Trade. Such report shall be written or printed, as the Board of Trade directs. A copy shall be forwarded by the Board of Trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them. All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the Board of Trade shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do.

Power of company to appoint inspectors.

Any company under this Act may by special resolution appoint inspectors for the purpose of examining into the affairs of the company. The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Board of Trade, with this exception, that, instead of making their report to the Board of Trade, they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the Board of Trade.

Report of inspectors to be evidence.

A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, is admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report (a).

SECTION III.

NOTICES.

Service of notices on company.

Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same or sending it through the post in a prepaid letter addressed to the company, at their registered office.

(a) 25 & 26 Vict. c. 89, ss. 49 - 61.

Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof ; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office.

Rules as to
notices by
letter.

Any summons, notice, order, or proceeding requiring authentication by the company, may be signed by any director, secretary, or other authorised officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print (a).

Authentica-
tion of
notices of
company.

SECTION IV.

LEGAL PROCEEDINGS.

All offences under this Act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, intituled "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders," or any Act amending the same ; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the Act passed in the session of parliament holden in the seventeenth and eighteenth years of the reign of Her Majesty Queen Victoria, chapter one hundred and four, intituled, "An Act to amend and consolidate the Acts relating to Merchant Shipping," or any Act amending the same, as regards offences in Scotland against that Act, not being offences by that Act described as felonies or misdemeanors ; and as to Ireland, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, chapter ninety-three, intituled, "An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions and the

Recovery of
penalties.

(a) 25 & 26 Vict. c. 89, ss. 62—64.

Duties of Justices of the Peace out of Quarter Sessions in Ireland," or any Act amending the same.

**Application
of penalties.**

The justices or sheriff imposing any penalty under this Act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered ; and, subject to such direction, all penalties shall be paid into the receipt of Her Majesty's exchequer, in such manner as the treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

**Evidence of
proceedings
at meetings.**

Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose ; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings ; and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all sets done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications.

**Jurisdiction
of Vice-
Warden of
Stannaries.**

In the case of companies under this Act, and engaged in working mines within and subject to the jurisdiction of the stannaries, the Court of the Vice-Warden of the Stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as on the equity side thereof, which it now possesses by custom, usage, or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this Act and with the constitution of companies as prescribed or required by this Act ; and for the purpose of giving fuller effect to such jurisdiction in

all actions, suits, or legal proceedings instituted in the said Court, in causes or matters whereof the Court has cognisance, all processes issuing out of the same, and all orders, rules, demands, notices, warrants, and summonses required or authorised by the practice of the Court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager, or servant thereof, may be served in any part of England without any special order of the Vice-Warden for that purpose, or by such special order may be served in any part of the United Kingdom of Great Britain and Ireland, or in the adjacent islands, parcel of the dominions of the Crown, on such terms and conditions as the Court shall think fit ; and all decrees, orders, and judgments of the said Court made or pronounced in such causes or matters may be enforced in the same manner in which decrees, orders, and judgments of the Court may now by law be enforced, whether within or beyond the local limits of the stannaries ; and the seal of the said Court, and the signature of the registrar thereof, shall be judicially noticed by all other Courts and judges in England, and shall require no other proof than the production thereof. The registrar of the said Court, or the assistant registrar, in making sales under any decree or order of the court shall be entitled to the same privilege of selling by auction or competition without a licence, and without being liable to duty, as a judge of the Court of Chancery is entitled to in pursuance of the Acts in that behalf.

Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

In any action or suit brought by the company against any member to recover any call or other monies due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other

Provision as
to costs in
actions
brought
by certain
limited com-
panies.

Declaration
in action
against
members.

monies due whereby an action or suit hath accrued to the company (a).

Board of
Trade may
alter forms
in schedule.

The forms set forth in the second schedule of this Act, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the Board of Trade may from time to time make such alterations in the tables and forms contained in the first schedule, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last-mentioned forms, as it deems requisite: Any such table or form, when altered, shall be published in the "London Gazette," and upon such publication being made such table or form shall have the same force as if it were included in the schedule to this Act, but no alteration made by the Board of Trade in the table marked A. contained in the first schedule shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table (b).

Power for
companies
to refer
matters to
arbitration.

Any company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway Companies Arbitration Act, 1859," any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies.

(a) 25 & 26 Vict. c. 89, ss. 65—70.

(b) 25 & 26 Vict. c. 89, s. 71.

All the provisions of "The Railway Companies Arbitration Act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this Act ; and in the construction of such provisions "the companies" shall be deemed to include companies authorised by this Act to refer disputes to arbitration (a).

Provisions of
22 & 23 Vict.
c. 59 to
apply.

PART IV.

WINDING UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

PRELIMINARY.

The term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up : It shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability ; and it is lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made.

If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly.

If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees

Nature of
liability of
contributory.

Contribu-
tories in case
of death.

Contribu-
tories in case
of bank-
ruptcy.

(a) 25 & 26 Vict. c. 89, ss. 72 and 73.

shall be deemed to represent such bankrupt for all the purposes of the winding up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets, in due course of law, any monies due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up; and for the purposes of this section any person who may have taken the benefit of any Act for the relief of insolvent debtors before the eleventh day of October one thousand eight hundred and sixty-one shall be deemed to have become bankrupt.

Contribu-
tories in case
of marriage.

If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance of the marriage be liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly (a).

SECTION I.

WINDING UP BY COURT.

Circumstances
under which
company may
be wound up
by Court.

A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances:—
 1. Whenever the company has passed a special resolution requiring the company to be wound up by the Court. 2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year. 3. Whenever the members are reduced in number to less than seven. 4. Whenever the company is unable to pay its debts. 5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

Company
when deemed
unable to pay
its debts.

A company under this Act is deemed to be unable to pay its debts:—1. Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service

(a) 25 & 26 Vict. c. 89, ss. 74—78.

of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor. 2. Whenever, in England and Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part. 3. Whenever, in Scotland, the inducæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made. 4. Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.

The expression "the Court," as used in this part of this Act, shall mean the following authorities :—In the case of a company engaged in working any mine within and subject to the jurisdiction of the stannaries,—the Court of the Vice-Warden of the Stannaries, unless the Vice-Warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case "the Court." shall mean the High Court of Chancery. In the case of a company registered in England that is not engaged in working any such mine as aforesaid,—the High Court of Chancery. In the case of a company registered in Ireland, the Court of Chancery in Ireland. In all cases of companies registered in Scotland, the Court of Session in either division thereof. Provided that where the Court of Chancery in England or Ireland makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings for winding up the same to be had in the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate ; and thereupon such last-mentioned Court of Bankruptcy is, for the purposes of winding up the company, deemed to be "the Court" within the meaning of the Act, and shall have for the purposes of such winding up all the powers of the High Court of Chancery, or of the Court of Chancery in Ireland, as the case may require.

Any application to the Court for the winding up of a company under this Act shall be by petition ; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributors of the company, or by all or any of the

Definition of
"the Court."

Application
for winding
up to be
made by
petition.

above parties, together or separately ; and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

Power of Court.

Any judge of the High Court of Chancery may do in chambers any act which the Court is hereby authorised to do ; and the Vice-Warden of the Stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the Stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in England ; and all orders made thereupon shall have the same force and effect as if they had been made by the Vice-Warden sitting at Truro or elsewhere within the jurisdiction of the Court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the Vice-Warden by like process and in like manner as at the hearing of any cause or matter at the usual sitting of the said Court ; and the registrar of the Court may, subject to exception or appeal to the Vice-Warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding up as he is now used to do and exercise in a suit on the equity side of the said Court.

Commencement of winding up by Court.

A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

Court may grant injunction.

The Court may, at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the Court thinks fit ; the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company.

Course to be pursued by Court on

Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or

unconditionally, and may make any interim order, or any other order that it deems just. hearing petition.

When an order has been made for winding up a company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose. Actions and suits to be stayed after order for winding up.

When an order has been made for winding up a company under this Act, a copy of such order shall forthwith be forwarded by the company to the registrar of joint-stock companies, who shall make a minute thereof in his books relating to the company. Copy of order to be forwarded to registrar.

The Court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the Court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit. Power of Court to stay proceedings.

When an order has been made for winding up a company limited by guarantee and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a debt (in England and Ireland of the nature of a specialty) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the Court. Effect of order on share capital of company limited by guarantee.

The Court may, as to all matters relating to the winding up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the creditors or contributories to be summoned, held, and conducted in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. In the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (a). Court may have regard to wishes of creditors or contributories.

(a) 25 & 26 Vict. c. 89, ss. 79—91.

SECTION II.

OFFICIAL LIQUIDATORS.

**Appointment
of official
liquidator.**

For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators; and the Court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators; in all cases if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons. The Court may also determine whether any and what security is to be given by any official liquidator on his appointment; if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the Court.

**Resignations,
removals,
filling up
vacancies,
and com-
pensation.**

Any official liquidator may resign or be removed by the Court on due cause shown. And any vacancy in the office of an official liquidator appointed by the Court shall be filled by the Court. There shall be paid to the official liquidator such salary or remuneration, by way of per-cent-age or otherwise, as the Court may direct; and if more liquidators than one are appointed such remuneration shall be distributed amongst them in such proportions as the Court directs.

**Style and
duties of
official
liquidator.**

The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names; he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the Court.

**Powers of
official
liquidator.**

The official liquidator shall have power, with the sanction of the Court, to do the following things:—To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company. To carry on the business of the company, so far as may be necessary for

the beneficial winding up of the same. To sell the real and personal and hereditable and moveable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels. To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal. To prove, rank, claim, and draw a dividend, in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors. To draw, accept, make, and endorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money; and the drawing, accepting, making, or endorsing of every such bill of exchange or promissory note as aforesaid on behalf of the company shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or endorsed by or on behalf of such company in the course of carrying on the business thereof. To take out, if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any monies due from a contributory or from his estate, and which act cannot be conveniently done in the name of the company; and in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any monies due from a contributory, such monies shall, for the purpose of enabling him to take out such letters or recover such monies, be deemed to be due to the official liquidator himself, to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court, and where an official liquidator is

Discretion
of official
liquidator.

Appointment
of solicitor
to official
liquidator.

provisionally appointed may limit and restrict his powers by the order appointing him.

The official liquidator may, with the sanction of the Court, appoint a solicitor or law agent to assist him in the performance of his duties (a).

Collection
and applica-
tion of
assets.

As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities.

Provision as
to repre-
sentative
contributories.

In settling the list of contributories the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others; it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the Court thinks fit.

Power of
Court to re-
quire delivery
of property.

The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *prima facie* entitled.

Power of
Court to
order pay-
ment of
debts by
contributory.

The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any monies due from him or from the estate of the person

(a) 25 & 26 Vict. c. 89, s. 92—97.

whom he represents to the company, exclusive of any monies which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act ; and it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any monies due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any monies due to him as a member of the company in respect of any dividend or profit. Provided that when all the creditors of any company whether limited or unlimited are paid in full, any monies due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls.

The Court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

The Court may order any contributory, purchaser, or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced in the same manner as if it had directed payment to the official liquidator.

All monies, bills, notes, and other securities paid and delivered into the Bank of England or any branch thereof in the event of a company being wound up by the Court, shall be subject to such order and regulation for the keeping of the account of such monies and other effects, and for the payment and delivery in, or investment and payment and delivery out of the same as the Court may direct.

Power of Courts to make calls.

Power Court to order payment into bank.

Regulation of account with Court.

Provision in case of representative contributory not paying monies ordered.

If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal or real estates of such deceased contributory, or either of such estates, and of compelling payment thereout of the monies due.

Order conclusive evidence.

Any order made by the Court in pursuance of this Act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the monies, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons, and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall only be *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

Court may exclude creditors not proving within certain time.

The Court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved.

Proceedings in the Court of the Vice-Warden of the Stannaries on proof of debts.

If in the course of proving the debts and claims of creditors in the Court of the Vice-Warden of the Stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the Court to be open to question, the Court shall have power, subject to appeal as hereinafter provided, to adjudicate upon it, and for that purpose the said Court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the Court, or to produce documents before the Court; and the Court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt, and to make declarations of right, binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on

such inquiry, the Vice-Warden shall have power, if he thinks fit to direct and settle any action or issue to be tried either on the common law side of his court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior Courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issue shall be conclusive of the facts found, unless the judge who tried it makes known to the Vice-Warden that he was not satisfied with the finding, or unless it appears to the Vice-Warden that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

The Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto.

Court to adjust rights of contributories.

The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges, and expenses incurred in winding up any company in such order of priority as the Court thinks just.

Court to order costs.

When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly.

Dissolution of company

Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

Registrar to make minute of dissolution of company.

If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the Court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

Penalty on not reporting dissolution of company.

Any petition for winding up a company by the Court under this Act shall constitute a *lis pendens* within the terms of the Act passed in the session holden in the second and third years of the reign of her present Majesty, chapter eleven, and intituled "An Act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in bankruptcy, pro-

Petition to be *lis pendens*.

vided the same is duly registered in manner required by such Act concerning suits in equity (a).

SECTION IV.

EXTRAORDINARY POWERS OF COURT.

Power of Court to summon persons before suspected of having property of company.

The Court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company ; and the Court may require any such officer or person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company ; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause such person to be apprehended, and brought before the Court of examination ; nevertheless, in cases where any person claims any lien on papers, deeds, or writings, or documents produced by him, such production shall be without prejudice to such lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to such lien.

Special provision as to court of Vice-Warden of the Stannaries.

If, after an order for winding up in the court of the Vice-Warden of the Stannaries, it appears that any person claims property in, or any lien, legal or equitable, upon any of the machinery, materials, ores, or effects on the mine or on premises occupied by the company in connection with the mine, or to which the company was, at the time of the order, *prima facie* entitled, it shall be lawful for the Vice-Warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the Act passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two ; and any action or issue directed upon such interpleader may, if the

(a) 25 & 26 Vict. c. 98, ss. 98—114.

Vice-Warden think fit, be tried in his Court or at the assizes or the sittings in London or Middlesex, before a judge of one of the superior courts, in the manner and on the terms and conditions hereinbefore provided in the case of disputed debts and claims of creditors.

The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid concerning the affairs, dealings, estate, or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.

The Court may, at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, monies, securities for monies, goods, and chattels to be seized, and him and them to be safely kept until such time as the Court may order.

Any power by this Act conferred on the Court shall be deemed to be in addition to and not in restriction of any other powers subsisting, either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory or debtor, or his estate, and such proceedings may be instituted accordingly (a).

Examination
of parties by
Court.

Power to
arrest con-
tributory
about to
abscond, or
to remove
or conceal
any of his
property.

Powers of
Court cumu-
lative.

SECTION V.

ENFORCEMENT OF AND APPEAL FROM ORDERS.

All orders made by the Court of Chancery in England or Ireland under this Act may be enforced in the same manner in which orders of such Court of Chancery made in any suit

Power to
enforce
orders.

(a) 25 & 26 Vict. c. 89, ss. 115-119.

pending therein may be enforced, and for the purposes of this part of this Act the Court of the Vice-Warden of the Stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in England has in relation to matters within the jurisdiction of such Court, and for the last-mentioned purposes the jurisdiction of the Vice-Warden of the Stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in England.

Power to order contributories in Scotland to pay calls.

Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the Court or Lord Ordinary.

Order made in England to be enforced in Ireland and Scotland.

Any order made by the Court in England for or in the course of the winding-up of a company under this Act shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the Courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the Court in Scotland for or in the course of the winding up of a company shall be enforced in England and Ireland, and orders made by the Court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the Courts which would respectively have had

jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the Court required to enforce the same in the case of a company within its own jurisdiction.

Where any order, interlocutor, or decree made by one Court is required to be enforced by another Court, as hereinbefore provided, an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the Court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned Court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree, in the same manner as if it were the order, interlocutor, or decree of the Court enforcing the same.

Mode of dealing with orders to be enforced by other Courts.

Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction ; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of appeal : Provided that it shall be lawful for the Lord Warden of the Stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the Vice-Warden made in the matter of a winding up to the Court of Appeal in Chancery, which Court shall thereupon hear and determine such appeal, and have power to require all such certificates of the Vice-Warden, records of proceedings below, documents, and papers as the Lord Warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the Lord Warden specified in the Act of Parliament passed in the eighteenth year of the reign of her present Majesty, chapter thirty-

Appeals from orders.

two, and any order so made by the Court of Appeal in Chancery shall be final, without any further appeal.

Judicial notice to be taken of signatures of officers.

In all proceedings under this part of this Act, all Courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in England or in Ireland, or of the Court of Session in Scotland, or of the registrar of the Court of the Vice-Warden of the Stannaries, and also of the official seal or stamp of the several offices of the Courts of Chancery or Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the Act, or any official copy thereof.

Special commissioners for receiving evidence.

The commissioners of the Court of Bankruptcy and the judges of the county courts in England who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act in cases where any company is wound up in any part of the United Kingdom, and it shall be lawful for the Court to refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner, although such commissioner is out of the jurisdiction of the Court that made the order or decree for winding-up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a commissioner of the Court of Bankruptcy, judge of a county court, commissioner of bankrupt, assistant barrister, or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the Court which made the order for winding up the company has; and the examination so taken

shall be returned or reported to such last-mentioned Court in such manner as it directs.

The Court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings, or affairs of any company in the course of being wound up, or in regard to the estate, dealings, or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory, and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds, or documents called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the Court, and shall transmit with such report the books, papers, deeds, or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the Court of Session and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland: If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the Court, and suspend the examination of such witness until such objection has been disposed of by the Court.

Court may
order the
examination
of persons in
Scotland.

Affidavits,
&c., may be
sworn in
Ireland,
Scotland, or
the Colonies
before any
competent
Court or
person.

Any affidavit, affirmation, or declaration required to be sworn or made, under the provisions or for the purposes of this part of this Act, may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any Court, judge, or person lawfully authorised to take and receive affidavits, affirmations, or declarations, or before any of Her Majesty's consuls or vice-consuls, in any foreign parts out of Her Majesty's dominions, and all Courts, judges, justices, commissioners, and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, judge, person, consul, or vice-consul attached, appended, or subscribed to any such affidavit, affirmation, or declaration, or to any other document to be used for the purposes of this part of this Act (a).

SECTION VI.

VOLUNTARY WINDING UP OF COMPANY.

Circumstances
under which
company may
be wound up
voluntarily.

A company under this Act may be wound up voluntarily.

1. Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.
2. Whenever the company has passed a special resolution requiring the company to be wound up voluntarily.
3. Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same. For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution, as hereinbefore defined.

Commence-
ment of

A voluntary winding up shall be deemed to commence

(a) 25 & 26 Vict. c. 89, ss. 120—128.

at the time of the passing of the resolution authorising such voluntary winding up.

Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding up shall be void, but its corporate seal and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up.

Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisement as respects companies registered in England in the *London Gazette*, as respects companies registered in Scotland in the *Edinburgh Gazette*, and as respects companies registered in Ireland in the *Dublin Gazette*.

The following consequences ensue upon the voluntary winding up of a company:—1. The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. 2. Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property. 3. The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him. 4. If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him. 5. Upon the appointment of liquidators all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers. 6. When several liquidators are appointed, every power hereby given may be exercised by such one or more of them, as may be determined at the time of their appointment, or in default of such determination by any number not less than two. 7. The liquidators may, without the sanction of the Court, exercise all

Effect of voluntary winding up on status of company.

Notice of resolution to wind up voluntarily.

Consequences of voluntary winding up.

powers by this Act given to the official liquidator. 8. The liquidators may exercise the powers hereinbefore given to the Court of settling the list of contributories of the company, and any list so settled shall be *prima facie* evidence of the liability of the persons named therein to be contributories. 9. The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they may deem necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same. 10. The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves.

Effect of winding up on share capital of company limited by guarantee.

Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators.

Power of company to delegate authority to appoint liquidators.

A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution, delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised ; and any act done by the creditors, in pursuance of such delegated power, shall have the same effect as if it had been done by the company.

Arrangement when binding on creditors.

Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors, shall be binding on the company if sanctioned by an extraordinary resolution, and on the

creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same.

Power of creditor or contributory to appeal.

Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court ; and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede, wholly or partially, to such application, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just.

Power for liquidators or contributaries in voluntary winding up to apply to Court.

Where a company is being wound up voluntarily the liquidators may, from time to time, during the continuance of such winding up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or extraordinary resolution, or for any other purposes they think fit ; and in the event of the winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

Power of liquidators to call general meeting.

If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation, or otherwise, the company in general meeting may, subject to any arrangement they may

Power to fill up vacancy in liquidators.

have entered into with their creditors, fill up such vacancy, and a general meeting for the purpose of filling up such vacancy, may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the company, be determined by the Court.

**Power of
Court to ap-
point liquida-
tors.**

If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the Court may, on the application of a contributory, appoint a liquidator or liquidators. The Court may also, on due cause shown, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up.

**Liquidators on
conclusion of
winding up
to make up
an account.**

As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators. The meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the "London Gazette," and as respects companies registered in Scotland in the "Edinburgh Gazette," and as respects companies registered in Ireland in the "Dublin Gazette."

**Liquidators to
report meeting
to registrar.**

The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved. If the liquidators make default in making such return to the registrar they shall incur a penalty not exceeding five pounds for every day during which such default continues.

**Costs of vo-
luntary liqui-
dation.**

All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.

Saving of

The voluntary winding up of a company shall not be a bar to

the right of any creditor of such company to have the same rights of wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up.

Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the Court, the Court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the Court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding up (a).

Power of Court to adopt proceedings of voluntary winding up.

SECTION VII.

WINDING UP SUBJECT TO THE SUPERVISION OF THE COURT.

When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.

Power of Court, on application, to direct winding up, subject to supervision.

A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the Court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding up the company by the Court.

Petition for winding up, subject to supervision.

The Court may, in determining whether a company is to be wound up altogether by the Court or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be sum-

Court may have regard to wishes of creditors.

(a) 25 & 26 Vict. c. 89, ss. 129—146.

mioned, held, and regulated in such manner as the Court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. In the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company.

Power to
Court to ap-
point addi-
tional liqui-
dators in wind-
ing up subject
to supervision.

Where any order is made by the Court for a winding up subject to the supervision of the Court, the Court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the Court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company. The Court may from time to time remove any liquidators so appointed by the Court, and fill up any vacancy occasioned by such removal, or by death or resignation.

Effect of order
of Court for
winding up
subject to
supervision.

Where an order is made for a winding up subject to the supervision of the Court, the liquidators appointed to conduct such winding up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the Court for a winding up, subject to the supervision of the Court, shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court, and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up, subject to the supervision of the Court.

Appointment
in certain
cases of vo-
luntary liqui-

Where an order has been made for the winding up of a company subject to the supervision of the Court, and such order is afterwards superseded by an order directing the company to

be wound up compulsorily, the Court may in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other persons, to be official liquidators (a). dators to office
of official li-
quidators.

SECTION VIII.

SUPPLEMENTAL PROVISIONS.

Where any company is being wound up by the Court or subject to the supervision of the Court all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up and the order for winding up, shall, unless the Court otherwise orders, be void.

Dispositions
after the com-
mencement of
the winding
up avoided.

Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

The books of
the company
to be evidence.

Where any company has been wound up under this Act and is about to be dissolved, the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way; that is to say, where the company has been wound up by or subject to the supervision of the Court, in such way as the Court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein.

As to disposal
of books, ac-
counts, and
documents of
the company.

Where an order has been made for winding up a company by the Court, or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and

Inspection of
books.

(a) 25 & 26 Vict. c. 89, ss. 147—152.

contributors of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributors, in conformity with the order of the Court, but not further or otherwise.

Power of assignee to sue.

Any person to whom anything in action belonging to the company is assigned, in pursuance of this Act, may bring or defend any action or suit relating to such thing in action in his own name.

Debts of all descriptions to be proved.

In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

General scheme of liquidation may be sanctioned.

The liquidators may, with the sanction of the Court, where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable.

Power to compromise.

The liquidators may, with the sanction of the Court, where the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of

the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities.

Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company ; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up ; subject to this proviso that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer ; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution. No special resolution shall be deemed invalid for the purposes of this section by reason that

Power for li-
quidators to
accept shares,
&c., as a con-
sideration for
sale of pro-
perty of com-
pany.

it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators ; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court.

Mode of determining price.

The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of the Companies Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act ; and in the construction of such provisions this Act shall be deemed to be the special Act, and "the company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

Certain attachments, sequestrations, and executions to be void.

Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.

Fraudulent preference.

Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly ; and for the purposes of this section the presentation of a petition for winding up a company shall, in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company shall in the case of a voluntary winding up, be deemed to correspond with the Act of Bankruptcy in the case of an individual trader ; and any conveyance or assignment made by any company

formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any monies of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just.

Power of Court to assess damages against delinquent directors and officers.

If any director, officer, or contributory of any company wound up under this Act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.

Penalty on falsification of books.

Where any order is made for winding up a company by the Court or subject to the supervision of the Court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the Court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Prosecution of delinquent directors in the case of winding up by Court.

Where a company is being wound up altogether voluntarily, Prosecution

of delinquent
directors, &c.,
in case of
voluntary wind-
ing up.

if it appear to the liquidators conducting such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the Court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

Penalty of
perjury.

If any person, upon any examination upon oath or affirmation authorised under this Act, or in any affidavit, deposition, or solemn affirmation in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, wilfully and corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury (a).

SECTION IX.

POWER OF COURTS TO MAKE RULES.

Power of
Lord Chan-
cellor of
Great Bri-
tain to make
rules.

In England the Lord Chancellor of Great Britain, with the advice and consent of the Master of the Rolls, and any one of the Vice-Chancellors for the time being, or with the advice and consent of any two of the Vice-Chancellors, may, as often as circumstances require, make such rules concerning the mode of proceeding to be had for winding up a company in the Court of Chancery as may from time to time seem necessary, but until such rules are made the general practice of the Court of Chancery, including the practice hitherto in use in winding up companies, shall, so far as the same is applicable and not inconsistent with this Act, apply to all proceedings for winding up a company.

Power of
Court of
Session in
Scotland
to make
rules.

In Scotland the Court of Session may make such rules concerning the mode of winding up as may be necessary by act of sederunt ; but, until such rules are made, the general practice of the Court of Session in suits pending in such court shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding up a company, and official

(a) 25 & 26 Vict. c. 89, ss. 153—160.

liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate.

The Vice-Warden of the Stannaries may from time to time, with the consent provided for by section twenty-three of the Act of eighteenth of Victoria, chapter thirty-two, make rules for carrying into effect the powers conferred by this Act upon the Court of the Vice-Warden, but, subject to such rules, the general practice of the said Court and of the registrar's office in the said Court, including the present practice of the said Court in winding up companies, may be applied to all proceedings under this Act ; the said Vice-Warden may likewise, with the same consent, make from time to time rules for specifying the fees to be taken in his said Court in proceedings under this Act ; and any rules so made shall be of the same force as if they had been enacted in the body of this Act ; and the fees paid in respect of proceeding taken under this Act, including fees taken under "The Joint Stock Companies Act, 1856," in the matter of winding up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the Court, as the Lord Warden of the Stannaries shall from time to time, on the application of the Vice-Warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund apart from the ordinary fees of the Court arising from other business, to await such direction and order of the Lord Warden herein, and to accumulate by investment in government securities until the whole shall have been so appropriated.

In Ireland the Lord Chancellor of Ireland may, as respects the winding up of companies in Ireland, with the advice and consent of the Master of the Rolls in Ireland, exercise the same power of making rules as is by this Act hereinbefore given to the Lord Chancellor of Great Britain ; but until such rules are made the general practice of the Court of Chancery in Ireland, including the practice hitherto in use in Ireland in winding up companies, shall, so far as the same is applicable and not inconsistent with this Act, apply to all proceedings for winding up a company (*a*).

Power to
make rules
in Stannaries
Court.

Power of
Lord Chan-
cellor of
Ireland to
make rules.

(a) 25 & 26 Vict. c. 89, ss. 170—173.

PART V.

REGISTRATION OFFICE.

Constitution
of registra-
tion office.

The registration of companies under this Act shall be conducted as follows :—1. The Board of Trade may from time to time appoint such registrars, assistant registrars, clerks, and servants as they may think necessary for the registration of companies under this Act, and remove them at pleasure. 2. The Board of Trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid. 3. The Board of Trade may from time to time determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office, and that no company shall be registered except at an office within that part of the United Kingdom in which by the memorandum of association the registered office of the company is declared to be established ; and the Board may require that the registrar's office of the Court of the Vice-Warden of the Stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the Court. 4. The Board of Trade may from time to time direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies. 5. Every person may inspect the documents kept by the registrar of joint-stock companies ; and there shall be paid for such inspection such fees as may be appointed by the Board of Trade, not exceeding one shilling for each inspection ; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar ; and there shall be paid for such certificate of incorporation, certified copy, or extract such fees as the Board of Trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or in Scotland for each sheet of two hundred words. 6. The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration

of joint-stock companies shall, during the pleasure of the Board of Trade, hold the offices and receive the salaries hitherto held and received by them, but they shall in the execution of their duties conform to any regulations that may be issued by the Board of Trade. 7. There shall be paid to any registrar, assistant registrar, clerk, or servant that may hereafter be employed in the registration of joint-stock companies such salary as the Board of Trade may, with the sanction of the commissioners of the Treasury, direct. 8. Whenever any act is herein directed to be done to or by the registrar of joint-stock companies, such act shall, until the Board of Trade otherwise directs, be done in England to or by the existing registrar of joint-stock companies, or in his absence to or by such person as the Board of Trade may for the time being authorise; in Scotland to or by the existing registrar of joint-stock companies in Scotland; and in Ireland to or by the existing assistant registrar of joint-stock companies for Ireland, or by such person as the Board of Trade may for the time being authorise in Scotland or Ireland in the absence of the registrar; but in the event of the Board of Trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the registered offices of the companies to be registered as the Board of Trade may appoint (a).

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT STOCK COMPANIES ACT.

The expression "Joint Stock Companies Acts" as used in this Act shall mean "The Joint Stock Companies Act, 1856," "The Joint Stock Companies Acts, 1856, 1857," "The Joint Stock Banking Companies Act, 1857," and "The Act to enable Joint Stock Banking Companies to be formed on the Principle of Limited Liability," or any one or more of such Acts, as the case may require; but shall not include the Act passed in the eighth year of the reign of her present Majesty, chapter one

Definition of
Joint Stock
Companies
Acts.

(a) 25 & 26 Vict. c. 89, s. 174.

hundred and ten, and intituled, "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies."

Application
of Act to
companies
formed
under Joint
Stock Com-
panies Acts.

Subject as hereinafter mentioned, this Act, with the exception of table A. in the first schedule, shall apply to companies formed and registered under the said Joint Stock Companies Acts, or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this Act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the Joint Stock Companies Acts, or any of them, and the power of altering regulations by special resolution given by this Act shall, in the case of any company formed and registered under the said Joint Stock Companies Acts, or any of them, extend to altering any provisions contained in the table marked B. annexed to "The Joint Stock Companies Act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding such regulations are contained in the memorandum of association.

Application
of Act to
companies
registered
under Joint
Stock Com-
panies Acts.

This Act shall apply to companies registered but not formed under the said Joint Stock Companies Acts, or any of them, in the same manner as it is hereinafter declared to apply to companies registered but not formed under this Act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts, or any of them.

Mode of
transferring
shares.

Any company registered under the said Joint Stock Companies Acts, or any of them, may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

PART VII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

The following regulations shall be observed with respect to the registration of companies under this part of this Act :—

1. No company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint-stock company as hereinafter defined, shall register under this Act in pursuance of this part thereof.
2. No company having the liability of its members limited by Act of Parliament or by letters patent shall register under this Act in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee.
3. No company that is not a joint-stock company as hereinafter defined, shall in pursuance of this part of this Act register under this Act as a company limited by shares.
4. No company shall register under this Act in pursuance of this part thereof unless an assent to its registering is given by a majority of such of its members as may be present, personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose.
5. Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting.
6. Where a company is about to register as a company limited by guarantee the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount. In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

Regulations
as to regis-
tration of
existing
companies.

Companies capable of being registered.

With the above exceptions, and subject to the foregoing regulations, every company existing at the time of the commencement of this Act, including any company registered under the said Joint Stock Companies Acts, consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

Definition of joint-stock company.

For the purposes of this part of this Act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint-stock company shall be deemed to be a company having a permanent paid up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferrable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons; and such company when registered with limited liability under this Act shall be deemed to be a company limited by shares.

Proviso as to banking company.

No banking company claiming to issue notes in the United Kingdom shall be entitled to limited liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof, and, if necessary, the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue, in addition to the sum for which they would be liable as members of a limited company.

Requisitions for registration by companies.

Previously to the registration in pursuance of this part of this Act of any joint-stock company there shall be delivered to the registrar the following documents:—1. A list showing the names, addresses, and occupations of all persons who on a day named in such list, and not being more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such persons respectively,

distinguishing, in cases where such shares are numbered, each share by its number. 2. A copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company. 3. If any such joint-stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars ; that is to say, the nominal capital of the company and the number of shares into which it is divided ; the number of shares taken and the amount paid on each share ; the name of the company, with the addition of the word " limited " as the last word thereof ; with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

Previously to the registration in pursuance of this part of this Act of any company not being a joint-stock company there shall be delivered to the registrar a list showing the names, addresses, and occupations of the directors or other managers (if any) of the company, also a copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee.

Requisitions
for regis-
tration by
existing
company
not being a
joint-stock
company.

Where a joint-stock company authorised to register under this Act has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

Power for
existing
company to
register
amount of
stock in-
stead of
shares.

The lists of members and directors and any other particulars relating to the company hereby required to be delivered to the registrar shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the Act passed in the sixth year of

Authenti-
cation of
statements
of existing
companies.

the reign of his late Majesty King William the Fourth, chapter sixty two.

Registrar may require evidence as to nature of company.

On registration of banking company with limited liability notice to be given to customers.

The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint-stock company as hereinbefore defined.

Every banking company existing at the date of the passing of this Act which registers itself as a limited company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company, and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company; and in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

Exemption of certain companies from payment of fees.

No fees shall be charged in respect of the registration in pursuance of this part of this Act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other Act of Parliament or by letters patent.

Power to company to change name.

Any company authorised by this part of this Act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name, by adding thereto the word "limited."

Certificate of registration of existing companies.

Upon compliance with the requisitions in this part of this Act contained with respect to registration, and on payment of such fees, if any, as are payable under the tables marked B. and C. in the first schedule of this Act, the registrar shall certify under his hand that the company so applying for registration is in-

corporated as a company under this Act, and, in the case of a limited company, that it is limited, and thereupon such company shall be incorporated and shall have perpetual succession and a common seal, with power to hold lands ; and any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under Act of Parliament.

A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the company is authorised to be registered under this Act as a limited or unlimited company, as the case may be, and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act.

All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this Act, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

The registration in pursuance of this part of this Act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce any debt or obligation incurred, or any contract entered into by, to, with, or on behalf of such company previously to such registration.

All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place ; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid ; but in the event of the property and effects of the company being insufficient to satisfy such judg-

Certificate to
be evidence
of compliance
with Act.

Transfer of
property to
company.

Registration
under this
Act not
to affect
obligations
incurred
previously to
registration.

Continua-
tion of exist-
ing actions
and suits.

ment, decree, or order, an order may be obtained for winding up the company.

Effect of registration under Act.

When a company is registered under this Act in pursuance of this part thereof, all provisions contained in any Act of Parliament, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association ; and all the provisions of this Act shall apply to such company and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject to the provisions following :—1. That table A. in the first schedule to this Act shall not, unless adopted by special resolution, apply to any company registered under this Act in pursuance of this part thereof. 2. That the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered. 3. That no company shall have power to alter any provisions contained in any Act of Parliament relating to the company. 4. That no company shall have power, without the sanction of the Board of Trade, to alter any provision contained in any letters patent relating to the company. 5. That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law, or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability ; or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid ; and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid ; and in the event of the death, bankruptcy, or insolvency

of any such contributory as aforesaid, or marriage of any such contributory being a female, the provisions hereinbefore contained with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply. 6. That nothing herein contained shall authorise any company to alter any such provisions contained in any deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had originally been formed under this Act, have been contained in the memorandum of association, and are not authorised to be altered by this Act. But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this Act in pursuance of this part thereof by virtue of any Act of Parliament, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company.

The Court may, at any time after the presentation of a petition for winding up a company registered in pursuance of this part of this Act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceedings against any contributory of the company as well as against the company as hereinbefore provided, upon such terms as the Court thinks fit.

Where an order has been made for winding up a company registered in pursuance of this part of the Act, in addition to the provisions hereinbefore contained, it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose (a).

Power of
Court to
restrain
further pro-
ceedings.

Order for
winding up
company.

(a) 25 & 26 Vict. c. 89, ss. 179 to 188.

PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

Winding up
of unregis-
tered com-
panies.

Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions ;—1. An unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate ; or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business ; moreover the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company. 2. No unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the Court. 3. The circumstances under which an unregistered company may be wound up are as follows (that is to say),—*a.* Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs. *b.* Whenever the company is unable to pay its debts. *c.* Whenever the Court is of opinion that it is just and equitable that the company should be wound up. 4. An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts. *a.* Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by other-

wise serving the same in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. *b.* Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same. *c.* Whenever, in England or Ireland, execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity instituted by such creditor against the company, or any member thereof as such, or against any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied. *d.* Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the Stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the Court of the Vice-Warden. *e.* Whenever, in Scotland, the *induciae* of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made. *f.* Whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

In the event of an unregistered company being wound up Who to be deemed a contribu- every person shall be deemed to be a contributory who is liable,

tory in the event of company being wound up.

at law or in equity, to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges and expenses of winding up the company, and every such contributory shall be liable to contribute to the assets of the company in the course of the winding up all sums due from him in respect of any such liability as aforesaid ; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs, and devisees of a deceased contributory, and to the assignees of a bankrupt or insolvent contributory, and to the husband of married contributories, shall apply.

Power of Court to restrain further proceedings.

The Court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided, upon such terms as the Court thinks fit.

Effect of order for winding up company.

Where an order has been made for winding up an unregistered company, in addition to the provisions hereinbefore contained in the case of companies formed under this Act, it is hereby further provided that no suit, action, or other legal proceedings shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the Court, and subject to such terms as the Court may impose.

Provision in case of unregistered company.

If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the order made for winding up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property real and personal, and including things in action, as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or

names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the Court directs, bring or defend any actions, suits, or other legal proceedings relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding up the company and recovering the property thereof.

The provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore contained with respect to winding up companies by the Court, and the Court or official liquidator may, in addition to anything contained in this part of the Act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act (a).

Provisions
in this part
of Act
cumulative.

PART IX.

REPEAL OF ACTS, AND TEMPORARY PROVISIONS.

After the commencement of this Act there shall be repealed the several Acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said Acts as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed.

No repeal hereby enacted shall affect, 1. Anything duly done under any Acts hereby repealed. 2. The incorporation of any company registered under any Act hereby repealed. 3. Any right or privilege acquired or liability incurred under any Act hereby repealed. 4. Any penalty, forfeiture, or other punishment incurred in respect of any offence against any Act hereby

*Saving
clause as to
repeal.*

(a) 25 & 26 Vict. c. 89, ss. 199 to 204.

repealed. 5. Table B. in the schedule annexed to the Joint Stock Company's Act, 1856, or any part thereof, so far as the same applies to any company existing at the time of the commencement of this Act.

Saving of existing proceedings for winding up.

Where previously to the commencement of this Act an order has been made for winding up a company under any Acts or Act hereby repealed, or a resolution has been passed for winding up a company voluntarily, such company shall be wound up in the same manner and with the same incidents as if this Act were not passed, and for the purposes of such winding up such repealed Acts or Act shall be deemed to remain in full force.

Saving of conveyance deeds.

Where previously to the commencement of this Act any conveyance, mortgage, or other deed has been made in pursuance of any Act hereby repealed, such deed shall be of the same force as if this Act had not passed, and for the purposes of such deed such repealed Act shall be deemed to remain in full force.

Compulsory registration of certain companies.

Every insurance company completely registered under the Act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies," shall on or before the second day of November one thousand eight hundred and sixty-two, and every other company required by any Act hereby repealed to register under the said Joint Stock Companies Acts, or one of such Acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this Act, register itself as a company under this Act, in manner and subject to the regulations hereinbefore contained, with this exception, that no company completely registered under the said Act of the eighth year of the reign of her present Majesty shall be required to deliver to the registrar a copy of its deed of settlement; and for the purpose of enabling such insurance companies as are mentioned in this section to register under this Act, this Act shall be deemed to come into operation immediately on the passing thereof; nevertheless the registration of such companies shall not have any effect until the time of the commencement of this Act. No fees shall be charged in respect of the registration of any company required to register by this section.

Penalty on company not regis-

If any company required by the last section to register under this Act makes default in complying with the provisions thereof,

then, from and after the day upon which such company is required to register under this Act, until the day on which such company is registered under this Act (which it is empowered to do at any time), the following consequences shall ensue :—

tering.
21 Vict. c. 14,
s. 28.

1. The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity. 2. No dividend shall be payable to any shareholder in such company. 3. Each director or manager of the company shall for each day during which the company so being in default carries on business incur a penalty not exceeding five pounds, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use. Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section ; and registration under this Act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any Act hereby repealed by reason of its not having registered under the said Joint Stock Companies Acts, 1856, 1857, or one of them.

Upon the application of the directors of any company registered under the Joint Stock Companies Acts as hereinbefore defined, or any of them, made within one year after the date of the commencement of this Act, sanctioned by a resolution passed at an extraordinary general meeting, but subject to the restrictions hereinafter mentioned, the Board of Trade shall have authority by their certificate in writing to change the registered office of any such company from any one part of the United Kingdom of Great Britain and Ireland to any other part thereof, and the registrar of joint-stock companies with whom the memorandum of registration of such company has been registered shall, upon receipt of such certificate, note in writing upon the margin or at the foot of the said memorandum the name of the place to which such registered office is to be transferred, and the day upon which such transfer is pursuant to such certificate to take place, and shall attach the certificate to the memorandum, and the said registrar shall thereupon transmit to the registrar of joint stock-companies for that part of the United Kingdom to which the registered office is to be so transferred copies of the said certificate and of the said memorandum

Temporary
power for
companies
to change
registered
office.

of registration so noted certified by him ; and the said registrar for the said last-mentioned part of the United Kingdom shall, upon receipt of such copies of certificate and memorandum, retain and register the same in like manner, and on payment of the like fees to him, as provided in the case of the registration of an original memorandum of registration, and thereupon the place of the registered office shall, from the said last-mentioned registration and the said day mentioned in the said certificate, be the place mentioned as such on the said certificate. Provided, however, that such change shall in nowise alter or affect anything theretofore done by the said company, or any of their rights or liabilities in respect thereof.

Restrictions
on issue of
certificate.

The Board of Trade shall not issue their certificate in pursuance of the foregoing section until they are satisfied that an advertisement of the intention of the company to apply to the Board of Trade for a certificate, with a declaration that all parties objecting thereto are forthwith to apply to the Board of Trade, has been published once at the least in each of four successive weeks in the newspapers following ; that is to say, in some newspaper circulating in the district where the registered office of the company is situate, and also if the company is registered in England in the "London Gazette," if in Ireland in the "Dublin Gazette," if in Scotland in the "Edinburgh Gazette," nor until the said Board are satisfied that the objections, if any, that may be urged against the issue of such certificate are groundless (a).

The schedules appended to this Act will be found at the end of the work.

(a) 25 & 26 Vict. c. 89, ss. 205 to 212.

CHAPTER IX.

ON CONTRACTS.

SECTION I.

CONTRACTS BY DEED.

BRITISH LAW.

A CONTRACT is an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act. A contract is bilateral when the obligation is mutual. It is unilateral when it binds one without producing a corresponding engagement in the other (*a*). What is a contract.

A contract may be express or implied. An express contract may be by matter of record, by deed, or by simple contract. Contracts by matter of record are those acknowledged in open court before an officer of the court, and in the presence of the party making the acknowledgment. Contracts by deed are contracts in writing, signed, sealed, and delivered by the parties to them. Simple contracts are either made by parol or implied from the conduct or dealings of the parties, or put into writing, but not sealed and delivered (*b*).

May be express or implied.
When it is express, it may be by deed or by simple contract.

A deed ought to be written, sealed, and delivered ; but its essentials are the sealing and delivery. A deed may, however, be delivered by words, without any formal act of delivery. So it may be printed or written on paper, or on parchment, and is valid, although it should mention, no time or date, or place of making (*c*). The difference between a deed and a simple contract is as follows :—A simple contract does not create an immediate obligation, but exhibits simply a mode of evidence, and cannot be enforced, unless it results from some valuable consideration (*d*). But a deed is good, even if voluntarily

Requisites of deeds.

(*a*) Pothier's *Traité des Obligations*, § 3.

(*b*) Addison on Contracts, p. 2.

(*c*) *Ibid.*, p. 5, Co. Litt. 36 A.

(*d*) Chitty on Contracts, p. 5, Iron v. Smallpiece, 2 B. & Ald. 551.

granted, when it is not obtained by fraud (*a*). A deed is supposed by law to express fully and absolutely the intention of the party, and he is bound to fulfil it, even in a Court of Equity, whether he received any consideration or not. A covenant founded on a deed cannot be varied, released, or discharged, except by an instrument of equal importance (*b*).

SECTION II.

SIMPLE CONTRACTS.

Statute of
frauds.

A simple contract may be either verbal or in writing. But no contract, sale of lands, tenements, or hereditaments, or any interest in or concerning them, and no agreement not to be performed within the space of one year from the making thereof, can be enforced, according to the provision of the Statute of Frauds, unless the agreement upon which the action is brought, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (*c*).

Requisites of
a simple
contract.

The requisites of an agreement are the capacity of the contracting parties, their mutual consent, and a valid and valuable consideration. The agreement must, moreover, be legal in itself, and founded on good faith.

Parties to a
contract.

The parties to a contract must possess physical and moral power to deliberate upon a matter, and weigh its consequences. Persons of insane mind, drunkards, infants, married women, and persons under duress, are therefore incapable of contracting (*d*).

The assent.

The assent must be complete on both sides. Until the terms of the contract are mutually and finally agreed upon, either party may retract. So a proposal to sell goods, giving time to the purchaser to determine, does not render the seller liable in an action for non-delivery, for at the time of coming into the contract the engagement was all on the one side. Where however the offer is made, "receiving an answer by return of post," the contract is binding from the moment the offer is accepted (*e*).

(*a*) *Shears v. Rogers*, 3 B. & Ad. 362. (*d*) *Gore v. Gibson*, 13 M. & W. 623.

(*b*) *Littler v. Holland*, 3 T. R. 590; (*e*) *Adams v. Lindsell*, 1 B. & Ald. Hewlins v. Shippam, 5 B. & C. 221. 684.

(*c*) 29 Car. 2, ss. 2 and 3.

As to the consideration, it is enough if there be a consideration for the bargain, and that such a consideration be a legal consideration and of some value. If there be any consideration, the Court will not weigh the extent of it. Inadequacy of consideration cannot impeach a contract even in equity (a). The sufficiency of the consideration may arise either by reason of a benefit resulting to the party promising, or to a third person by the act of the promisee, or by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, however small the benefit, charge, or inconvenience may be, provided such act be performed, or such inconvenience or charge incurred, with the consent, express or implied, of the promisee, or at his special instance and request (b). Forbearance of a debt for a given time is a good consideration. So the giving up of a suit instituted to try a question respecting which the law is doubtful (c). A mere moral consideration is not sufficient to support a contract.

A contract is illegal where it is against public policy and contrary to public morals, or in contravention of special statutes, or where it interferes with the administration of justice. Amongst contracts against public policy are contracts creating monopolies (d). Contracts in general restraint of industry and trade (e), and contracts with foreign enemies (f). Amongst those contrary to public morals are gaming contracts, wagers, lotteries, &c., &c. (g). And amongst contracts in contravention of special statutes are contracts by illegal weights and measures (h), contracts entered into on Sundays (i), and contracts made upon the truck system. In either case the contract is void, and it cannot be enforced in a Court of Law or

(a) *Smith v. Smith*, 3 Leon. 88; *Coles v. Trecothick*, 9 Ves. 246; *Low v. Barchard*, 8 Ves. 133.

(b) *Semple v. Pink*, 1 Exch. 74.

(c) *Longridge v. Dorville*, 5 B. & Ald. 117; *Jennings v. Brown*, 9 M. & W. 501.

(d) 3 Inst. 181, 21 Jac. 1, c. 3; *East India Comp. v. Sandy, Skin.* 169; *The Case of Monopolies*, 11 Co. 86; 6 Com. Dig. Trade, D. 4.

(e) *Thompson v. Harvey*, 1 Show.; 2 Com. Dig. Trade, 3; *Gunmakers' Co. v. Fell, Willes*, 389.

(f) *Potts v. Bell*, 8 T. R. 548; *Ogden v. Peele*, 8 D. & R. 1; *Bell v. Reid*, 1 M. & S. 731; *Furtado v. Rodgers*, 3 B. & P. 200.

(g) 8 & 9 Vict. c. 109; 10 & 11 Wm. 3, c. 17; 12 Geo. 2, c. 28; 42 Geo. 3, c. 119; 1 & 2 Geo. 4, c. 120; *Ritchie v. Smith*, 6 C. B. 462.

(h) 5 Geo. 4, c. 74; 6 Geo. 4, c. 12; 5 & 6 Wm. 4, c. 63; *Cundell v. Dawson*, 4 C. B. 376.

(i) 29 Car. 2, c. 71, s. 1, for Sunday Trading.

Equity. Where the contract is expressly or by implication forbidden by common or statute law, no Court will lend its assistance to enforce it (*a*). Illegality, however, is never presumed ; on the contrary, everything must be presumed to have been legally done till the contrary be proved.

Contracts made upon fraud and misrepresentation.

A contract made upon fraud and misrepresentation is avoidable ; but that a collateral statement made at the time of entering into a contract, but not embodied in it, may invalidate the contract on the ground of its being a fraudulent statement, it must be shown not only to have been false, but to have been known to be so to the party making it, and that the other party was thereby induced to enter into the contract (*b*).

SECTION III.

IMPLIED CONTRACTS.

Implied contracts.

Where there is no express contract or obligation a contract is often implied. Implied contracts are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform, as for instance where a man employs a person to do any business for him or perform any work, the law implies that he undertook or contracted to pay as much as his labour deserves (*c*). So if a person accept anything which he knows to be subject to a duty or charge, it is natural to conclude that he meant to take the duty or charge upon himself (*d*).

Contracts implied from the relation of the parties.

A contract may also be implied from the relation of the parties. A banker is bound by law to pay a cheque drawn by a customer within a reasonable time after he (the banker) has received sufficient funds belonging to the customer (*e*). So where there is an invariable usage the law implies it as the basis of the contract between the parties (*f*). And if there be a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage (*g*).

(*a*) *Cope v. Rowlands*, 2 M. & W. 149.

(*e*) *Marzetti v. Williams*, 1 B. & Ad.

(*b*) *Moens v. Heyworth*, 10 M. &

415.

W. 147.

(*f*) *Raitt v. Mitchell*, 4 Camp.

(*c*) 2 Bl. Comm. 443.

149.

(*d*) *Renteria v. Ruding*, 1 Moore & M. 513.

(*g*) *Sewell v. Corp*, 1 C. & P. 393.

SECTION IV.

CONDITIONAL CONTRACTS.

A contract may either be absolute or conditional upon the happening of some event, or upon the performance of some prior or precedent act. Where the contract is conditional no liability arises till the event has happened, or the precedent act has been performed (*a*).

A contract may moreover be either mutual and dependent, or mutual and independent. A mutual and dependent covenant is one in which the performance of one depends on the prior performance of another, in which case neither party can call upon the other to perform his part of the contract till he himself has performed all that he has stipulated to do. Thus in a contract between the directors of a company and the subscribers to the capital thereof, if the directors do not execute the deed which is their obligation in the contract, the subscribers would not be responsible upon their covenant (*b*).

A mutual and independent contract is one in which either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff. So where goods are sold to be paid for at any time after delivery, actual delivery is a condition precedent to the right of the vendor to sue for the price (*c*).

Whether the time appointed for the performance of a contract is to be held as a condition precedent to the liability of the other contracting party depends on the intention of the parties, manifested by the terms of the contract. If the contract is absolute, appointing the time for the doing of an act, the time so appointed is of the essence of the contract, and if the act is not performed on the day fixed the other contracting party may release himself from the contract. So where by a charter party the owner binds himself that the vessel shall sail by the next wind, such sailing by the next wind would be a condition pre-

Contracts
either abso-
lute or con-
ditional.

Mutual and
dependent,
or mutual and
independent
contracts.

When time is
a condition
precedent.

(*a*) *Lock v. Wright*, 1 Str. 571; (*b*) *In re Dover, Hastings, &c.*, 18 *Alder v. Boyle*, 4 C. B. 635; *Morgan v. Birnie*, 3 M. & Sc. 76; *Rae v. Hackett*, 12 M. & W. 724. (*c*) *Ripley v. M'Clure*, 4 Exch. 359; *Staunton v. Wood*, 16 Q. B. 638.

cedent to his right to recover the freight (*a*). If no time is mentioned for the performance of a contract the presumption is that it shall be performed within a reasonable time; and if the performance has taken place after an unreasonable delay, the other party will be released from his liability on the contract (*b*).

But whatever be the condition precedent, or however fixed the time of performance, if either party has waived his right to the fulfilment of it, the condition is at an end, and it is understood as if it had never been inserted in the contract at all (*c*).

SECTION V.

PERFORMANCE OF CONTRACTS.

Hindrance to fulfilment by the party.

When the performance of a contract has been prevented by the party with whom such contract was entered, he is precluded from enforcing the fulfilment of the same. So when one party has refused to perform, or has rendered himself incapable of performing his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to treat the contract as rescinded or abandoned (*d*).

Impossibility of performance no excuse.

Impossibility of performance by the act of God, or by circumstances over which the party had no control, is no excuse for the non-fulfilment of a voluntary contract, and will not release the party from the obligation of the same. Thus where a contract is made to deliver grain or to load a vessel at a foreign port, the party is not relieved from his obligation by the fact that a prohibition of exports, issued by the foreign Government since the contract was made, prevents the fulfilment of the contract, inasmuch as the casualty or accident might have been provided against by the contract (*e*).

Contract to be fulfilled in a reasonable time.

When no time for the performance is specified, the law implies that it shall be done within a reasonable time. But when the time is appointed, it is frequently of the very essence of the

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| (<i>a</i>) <i>Constable v. Cloberie</i> , Palm. 397 ;
<i>Bornmann v. Tooke</i> , 1 Camp. 377. | (<i>d</i>) <i>Peters v. Opie</i> , 2 Saund. 350 ;
<i>Collins v. Price</i> , 5 Bing. 132 ; <i>De Bernardo v. Harding</i> , 8 Exch. 822. |
| (<i>b</i>) <i>Clipsham v. Vertue</i> , 5 Q. B. 265. | (<i>c</i>) <i>Alexander v. Gardener</i> , 1 Sc. 640 ; <i>Wing v. Harvey</i> , 23 L. J. Ch. 511. |
| | (<i>e</i>) <i>Sjoerds v. Luscombe</i> , 16 East, 201. |

contract, so as to give an immediate right of action for the enforcement of the same. Although the party may perform the contract in the manner most convenient to himself, the contract must be performed in a substantial and *bond fide* manner, in accordance with the true meaning of the parties.

Must be performed in a substantial manner.

When one of the parties fails to perform the contract, the other may claim compensation in either general or special damages. General damages are those which are the direct result of the breach of contract, and special damages are those which result from acts done in connection with the contract, but which are not the necessary result of the breach of contract. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered as arising naturally, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it (*a*).

General damages.

In some cases where compensation in damages is manifestly insufficient, the Court of Equity and in some cases the Common Law Courts also will compel specific performance, as for example in case of agreements for the formation of a partnership (*b*), or for the sale of the goodwill of a trade (*c*), and of contracts to insure against loss by fire (*d*).

Specific performance.

SECTION VI.

CONSTRUCTION OF CONTRACTS.

An express contract is construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of the trade, or the like, acquired a peculiar sense distinct from the

Construction of contracts.

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| (<i>a</i>) Hadley v. Baxendale, 23 L. J. Exch. 179, | (<i>c</i>) Bryson v. Whitehead, 1 Sim. & Stu. 74. |
| (<i>b</i>) England v. Curling, 8 Beav. 129. | (<i>d</i>) Story, Equity Jurisp. sec. 722 ; Addison on Contracts, p. 1165. |

popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense (*a*).

Construction
of words.

If a word has acquired a particular meaning in a certain trade that meaning will be applied to it in construing a written contract respecting that trade, but that the word has acquired that particular meaning must be distinctly proved, and parol evidence is admissible to that effect (*b*).

SECTION VII.

PRIVATE INTERNATIONAL LAW ON CONTRACTS.

Contract
decided by
the law of
the place
where it is
made.

Exceptions to
the rule.

Formalities
and proofs
regulated by
the *lex loci*.

The validity of a contract is to be decided by the law of the place where it is made. If valid there, it is by the general law of nations held valid everywhere by the tacit or implied consent of the parties (*c*). With this exception, however, that any fraudulent evasion of the laws of the country or of the rights and duties of its subjects (*d*), and any contracts against public morals or against religion or against public rights (*e*), and contracts opposed by the national policy or national institutions, are null and void, even although they may be valid by the law of the place where they are made. Moreover, it is an established principle that no nation will regard or enforce the revenue laws of any other countries (*f*). All the formalities and proofs for the authentication of the contract which are required by the *lex loci* are indispensable to its validity everywhere else. So where the forms of a public instrument are regulated by the laws of a country they must be strictly followed, to entitle it to be held valid elsewhere (*g*).

(*a*) Robertson *v.* French, 4 East, 135; Mallan *v.* May, 13 M. & W. 511.

(*b*) Taylor *v.* Briggs, 2 C. & P. 525; Myers *v.* Sarl, 30 L. J. Q. B. 9; Simpson *v.* Margitson, 11 Q. B. 23.

(*c*) 2 Kent Comm. pp. 457, 458; Cammell and others *v.* Sewell and others, 29 L. J. Exch. 350.

(*d*) Brook *v.* Brook, 3 Small & Giffard, Rep. 481. See Phillimore, International, Vol. 4, Comity; Biggs

v. Lawrence, 3 T. R. 454; Waymell *v.* Reed, 5 T. R. 599.

(*e*) Smith *v.* Stokesbury, 1 W. Bl. 204; Story on Conflict of Law, sec. 259.

(*f*) De Weitz *v.* Hendrichs, 9 Moore, 586; Thompson *v.* Powles, 2 Sim. 194; Pattison *v.* Mills, 1 Dow & Clarke, 342; Madrazo *v.* Willes, 3 B. & Ald. 353.

(*g*) Story's Conflict of Law, ss. 259 to 261.

The law of the place of the contract will govern the nature, the obligation, and the interpretation of the contract. Thus, whether a contract be a personal or a real obligation, and whether it be conditional or absolute, these are points belonging to the nature of the contract, and are dependent upon the law and custom of the place of the contract, whenever there are no express terms in the contract itself which otherwise control them (*a*). Where, however, the tribunals of a foreign country misinterpret the law of the country where the contract is made, such decision will not be held obligatory upon the courts of the latter country (*b*). Contracts made between foreigners, or between foreigners and natives, are governed by the law of the place where they are made, and are to be executed (*c*).

Obligation
and interpre-
tation regu-
lated by the
lex loci.

Contracts
between
foreigners
and between
foreigners
and natives
regulated by
the *lex loci*.

FOREIGN LAWS ON CONTRACTS.

France.—Four conditions are essential for the validity of an agreement :—1st, the consent of the parties ; 2nd, their capacity to contract ; 3rd, a certain object forming the subject matter of the contract ; and 4th, a lawful consideration. A contract being the mutual agreement of two or more persons, can only exist by the concurrence of their will. There is no valid consent if it has been given by error, or if it has been extorted by violence, surprise, or fraud. An error may exist either upon the subject matter of the contract, or in the person with whom the contract is made, or in the kind of negotiation, or in the essential motive of the engagement. An error upon the thing which forms the subject matter will avoid the contract only where it has happened upon the substance itself, and not upon its external qualities. An error upon the quality of the thing does not in general avoid a consent. Violence exercised against the party contracting an obligation is a cause of nullity. No one can be constrained to enter into a contract. There is violence when the act is of a nature to make an impression on a reasonable person, and to inspire in him the fear of exposing his person or his property to considerable and immediate danger. A contract cannot be opposed on account of violence, if, after violence has ceased, such contract

Essentials of
a contract.

The consent.

Error, vio-
lence, and
fraud, are
causes of its
nullity.

(*a*) Story's Conflict of Law, s. 263. (*c*) Smith *v.* Meade, 3 Connect. Am.

(*b*) Novelli *v.* Rossi, 2 B. & Ad. 757 ; Rep. 253 ; Story on Conflict of Law, s. Castrique *v.* Imri, 29 L. J. C. P. 321. 279.

Fraud. has been approved of by the party. Fraud is a cause of nullity of an agreement, when the means practised by one of the parties are such that it is evident that, but for these, the other party would not have contracted. Fraud is not presumed : it must be proved. Good faith, which does not permit that one person shall enrich himself at the expense of the other, and which commands equality in contracts, enjoins that one party shall not make the other believe facts contrary to truth, in order to induce him to come to a decision which he would not have otherwise come to. Neither does it allow him to conceal anything with reference to the bargain important to the other party to know, if the knowledge of it would have prevented the conclusion of the bargain. But these rules belong to the forum of conscience; there are many moral delinquencies which the legislators have not been able to prevent or repress by the action of the tribunals. Unless, therefore, the nature of the contract prescribes to one of the parties to make known to the other all that is useful to know, an agreement is void only in cases where there has been a false representation, or where advantage has been taken by one party of the error of the other. Every contract must have reference to something certain and specific ; and it must be made for a lawful article.

The subject matter must be lawful.

Consideration. consideration for every transaction. In commerce every contract is based upon mutual interest, and the consideration consists in an appreciable equivalent. The existence of a consideration is not sufficient, it must be a valid one, and it will not be valid if the promised equivalent is of infinitely less value than the object of the obligation. Nevertheless, a great inequality between the thing promised and the equivalent given for it would only indicate the existence of some mistake, or give suspicion of fraud, of which it belongs to the tribunals to take cognizance.

Evidence of contracts. Commercial contracts may be proved by public deed, by private contracts, by brokers' notes duly signed, by accepted invoices, by correspondence, by commercial accounts, and by oral testimony where the tribunals will admit it, and where the law does not exclude it either expressly or by implication. Writing is not indispensable to prove what has been agreed by two parties, unless the law exacts it ; yet it is the surest means to establish a

contract. As regards the contracting parties, a written contract establishes whatever it contains, except in case of fraud. But as regards third persons, they are always at liberty to attack it, even where there has been no fraud. A private contract must bear the signatures of the parties, but it is not necessary that the whole be in the handwriting of the party. In general the want of date is not of itself a cause of nullity. Brokers' notes must be prepared by the brokers, and signed by the contracting parties, although when a merchant gives authority to a broker to sell, and the broker can prove such authority, the moment the purchaser accepts, the contract is perfect. Invoices are means of evidence, where it can be proved that they have been accepted, although the simple detention of the invoice or bill of lading would not give a right to the party to conclude that the consignee has become the purchaser of the article. Correspondence is another proof, provided it be kept in a legal form. To prove a contract by correspondence it must be shown, that the person who made an offer to another did not change his mind till the latter person received the letter, and declared in answer that he accepted it, but he is not presumed to have changed his mind. Usage and circumstances alone can determine at what time the consent to an offer must be made, in order to give a right to the party to demand the execution; sometimes even the silence of a correspondent may produce an obligation. If a merchant has received a formal offer of an article, with notice that the article will not be sold till the refusal is received, or that the want of an answer will be considered as an acceptance, if he does not answer, the tribunal may find in his silence an acceptance of the proposal. Commercial books are an important source of evidence. Where there is a dispute between merchants, their books, regularly kept, may be admitted as evidence in matters of trade. The greater part of commercial engagements can with difficulty be proved otherwise than by witnesses. When a written contract is required, oral evidence is not admissible, but in other cases the option of receiving such evidence rests with the judges (*a*).

United States.—An executory contract is an agreement of two or more persons upon sufficient consideration to do or not to do a particular thing. The agreement is either under

(*a*) *Pardessus' Droit Commercial*, Vol. i., p. 176, and following.

Deeds or
authenticated
acts.

Private
contracts.

Brokers'
notes.

Invoices.

Correspond-
ence.

Books.

Parol evi-
dence.

**Essentials of
a contract.**

seal or not under seal. If under seal it is denominated a specialty, and if not under seal an agreement by parol, and the latter includes equally verbal and written contracts not under seal. The agreement conveys an interest either in *possession* or in *action*. If a person sell and deliver goods to another for a price paid, the agreement is executed, and becomes complete and absolute. If the vendor agrees to sell and deliver at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is executory, and rests in action merely. There are also *express* and *implied* contracts. The former exist when the parties contract in express words or by writing, and the latter are those contracts which the law raises or presumes by reason of some value or service rendered, and because common justice requires it. Every contract valid in law is made between parties having sufficient understanding, and age, and freedom of will, and of the exercise of it for the given case. The

**Contracts of
lunatics.**

contracts of lunatics are generally void from the period at which the inquisition finds the lunacy to have commenced. But the inquisition is not conclusive evidence of the fact, and the party affected by the allegation of lunacy may gainsay it by proof without first traversing the inquisition. Sanity is to be presumed until the contrary be proved; and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies upon the person who alleges it. On the other hand, if a general mental derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown. So a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is void. Imbecility of mind is not sufficient to set aside a contract, when there is not an essential perversion of the reasoning faculties, or an incapacity of understanding and acting in the ordinary affairs of life. Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition, and it would awaken the attention of a court of justice to every unfavourable appearance in the case. Nor is a person born deaf and dumb to be deemed absolutely *non compos mentis*. If the contract be entered into by means of violence offered to the will,

or under the influence of undue constraint, the party may avoid it by the plea of duress ; and it is then requisite to the validity of every agreement that it be the result of a *bond fide* exercise of the will. If a person be under an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority, he may be considered as under duress. Nor will a contract be valid if obtained by misrepresentation or concealment, or be founded in mistake, as to the subject matter of the contract.

It is essential to the validity of a contract that it be founded Consideration. on a sufficient consideration. There must be something given in exchange, something which is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption. A contract without a consideration is a *nudum pactum*, and not binding in law, though it may be in point of conscience. Whether the agreement be verbal or in writing, it is still a *nudum pactum*, and will not support an action if a consideration be wanting. The rule that a consideration is necessary to the validity of a contract, applies to all contracts and agreements not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent indorser. The immediate parties to a bill or note, equally with parties to other contracts, are affected by the want of consideration, and it is only to third persons who come to the possession of the paper in the usual course of trade, and for a fair and valuable consideration, without notice of the original defect, that the want of a consideration cannot be alleged.

In contracts under seal, a consideration is necessarily implied in the solemnity of the instrument, and fraud in relation to the consideration is held to be no defence at law ; though fraud in respect to the execution of the specialty, and going to render it void, is a good defence. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.

Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time, and in that case the one promise is a good

In contracts
by deed con-
sideration is
implied.

What is a
sufficient con-
sideration.

consideration for the other. But if two concurrent acts are stipulated, as delivery by the one party, and payment by the other, no action can be maintained by either without showing a performance of his part of the agreement. If the consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or *request* of the party promising, and that request must have been expressly made, or be necessarily implied, from the moral obligation under which the party was placed ; and the consideration must have been beneficial to the one party, or onerous to the other. A subsisting legal obligation to do a thing is a sufficient consideration for a promise to do it ; but it is a disputed and unsettled point, whether a moral obligation be, of itself, a sufficient consideration for a promise, except in those cases in which a prior legal obligation had once existed. Though the consideration of natural love and affection be sufficient in a deed, yet such a consideration is not sufficient to support an executory contract, and give it validity, either at law or in equity. A promise to do a thing may be merely gratuitous and not binding, yet if the person promising enters upon the execution of the business, and does it negligently or amiss, so as to produce injury to the other party, an action will lie for this misfeasance. The consideration must not only be valuable, but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals. If the contract grows immediately out of or is connected with an illegal or immoral act, a court of justice will not enforce it. But if it be unconnected with the illegal act, and founded on a new consideration, it may be enforced, although the illegal act was known to the party to whom the promise was made, and he was the contriver of the illegal act. The courts of justice will allow the objection, that the consideration of the contract was immoral or illegal, to be made even by the guilty party to the contract, for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy. A *particeps criminis* has been held to be entitled in equity, on his own application, to relief against his own contract, when the contract was illegal, or against the policy of the law, and relief became necessary to prevent injury to others. It was no objection that the plaintiff himself was a party to the illegal transaction. But

The consider-
ation must
be lawful.

Illegality of
contract is a
good defence,
even on the
part of the
wrong-doer.

if a party who may be entitled to resist a claim on account of its illegality waives that privilege and fulfils the contract, he cannot be permitted to recover the money back, and the rule that *portior est conditio defendantis* will apply. If, however, the money be not paid over, but remains in its transit in the hands of the intermediate stakeholders, the law will not permit a third person, who is thus incidentally connected with the transaction, to set up the claim of illegality in the contract between the principal parties. An agent cannot shelter himself from paying over the money by such a plea, and the money advanced may be reclaimed. If any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract so entire, that there can be no apportionment, the good part shall stand, and the rest be held void; though if the part which is good depends upon that which is bad, the whole instrument is void.

The rules of construction of contracts are the same in courts of law and of equity, and whether the contract be under seal or not under seal. The mutual intention of the parties to the instrument is the great and sometimes the difficult object of inquiry, when the terms of it are not free from ambiguity. Plain unambiguous words need no interpretation, and subtlety and refinement upon terms would defeat the sense. Words are to be taken in their usual and obvious meaning, unless some good reason be assigned to show that they should be understood in a different sense; but if the intention be doubtful, it is to be sought after by a reference to the context, and to the nature of the contract. It must be a reasonable construction, and according to the subject matter and motive. The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. And the meaning is to be sought also by a reference to the usages of the place or the *lex loci*, according to another of the maxims of interpretation in the civil law. If it be a mercantile case, and the instrument be not clear and unequivocal, the usage of trade will frequently assist in determining the precise import of particular terms, and the certain intention declared by the use of them. The law places more reliance upon written than oral testimony; and it is an inflexible rule that parole evidence is not admissible to supply or contradict,

Construction
of contracts.

Effect of pa-
role evidence.

enlarge or vary, the words of a contract. Parole evidence is received, when it goes, not to contradict the terms of the writing, but to defeat the whole contract as being fraudulent or illegal; for it then shows that the instrument never had any valid operation. So when a contract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to and *dehors* the writing, are excluded as being merged in the instrument. In the case, however, of a latent ambiguity, or one not appearing on the face of the instrument, but arising entirely in the application of it—as when the person or object in view is not designated with precision—the maxim fitly applies, that *ambiguitas verborum latens verificatione suppletur : nam quod ex facto oretur ambiguum verificatione facto tolletur*. The true principle is to give the contract the sense in which the person making the promise believes the other party to have accepted it (a).

Contracts between absent persons.

Germany.—Except in cases specially provided for, neither writing or other formalities are required for the validity of commercial contracts. If an offer is made among persons present, the answer must be given at once, otherwise the party offering is not bound by the offer. If an offer is made between absent persons, the party offering continues bound till the time when an answer becomes due, provided the offer has been sent regularly, and the party offering has a right to presume, for the calculation of this period, that his offer has reached the other party in proper time. If the acceptance of the offer arrives after this period, the contract is not binding. If the withdrawal of an offer reaches the other party sooner or at the same time as the offer itself, the offer is considered as not made at all. In the same manner, no acceptance is held valid if the withdrawal of it reaches the party offering sooner or at the same time as the acceptance itself. If a contract has been concluded between absent parties, the date on which the acceptance has been forwarded is considered to be the date of the conclusion of the contract. An acceptance under any restriction or condition is a refusal of the offer, combined with a new offer. If there be a course of business between two merchants, or if a promise has been made by one of them to execute the order, the latter would be bound to signify his refusal to execute it without delay, otherwise his silence will be regarded as an acceptance of

(a) Kent's Commentaries, Vol. ii. p. 569, and following.

the order. Even if he refuses the order, he is bound to take care of the goods and other objects which might have been sent to him at the expense of the consignor, so far as he is covered for his expenses and he can do it without injury to himself. The tribunal may order on his demand that the goods shall be deposited in a public warehouse, or in that of a third person, until the owner has made other disposition for the same (a).

Netherlands.—The Dutch law is the same as that of France. The Code of Commerce expressly refers to the Civil Code for the laws applicable to commercial affairs. But independently of other means of evidence admitted by the civil law, oral evidence is admitted in commercial matters in all cases, whatever be the amount or the nature of the object, unless commercial law prescribes a special mode of evidence.

Oral evidence admitted in contracts.

Portugal.—The provisions of the Portuguese law as regards the mode of proving commercial operations and the principles to be followed in the interpretation of contracts are the same as in the Spanish code, with this exception, that contracts between merchants may be agreed to verbally, whatever be the amount; and that in such a case oral evidence is only admitted after a commencement of proof by a writing admitted by the tribunal (b).

Commercial contracts may be by parol.

Russia.—Commercial obligations are proved by acknowledgments, by written acts, either by authentic or private contract, by commercial books, by invoices and receipts, by oral evidence, and by oath in cases determined by law. An acknowledgment before the tribunal is complete evidence against the party making it. An acknowledgment made orally out of the tribunal is not admitted, where oral testimony is not accepted without a commencement of evidence by writing. Written documents are admitted as evidence when they are presented by the parties, and where they are referred to by them. Brokers' books are complete evidence in Court, if well kept. An act done through a broker is evidence as between the parties, even where such act has not been transcribed in the register. The extract given by the broker on the demand of the tribunal is also evidence. The books and notes of a broker, even after his death, are evidence, in the same manner as the attestation upon oath of the adverse party. Invoices may serve against the party who produces them, if they prove a payment,

Means of proof of commercial contracts.

(a) German Code, §§ 317—336.

(b) Portuguese Code, §§ 241—271.

but they cannot be used in his favour. Oral evidence is not admitted in cases where the law exacts written evidence, as, for example, in disputes relative to bottomry bonds, insurances, bills of exchange, or partnership deeds. But it is admitted in all other cases. An oath is a means of evidence, but it cannot be appealed to by one party against another as a means for the decision of a dispute. The tribunal may order a supplementary oath, to complete the evidence supplied by one of the parties, and should the party called upon refuse to take it, he may be condemned (*a*).

Commercial contracts may be by deed or by parol.

Spain.—Ordinary commercial contracts are subjected to the rules of common law in all matters relating to the capacity of the contracting parties, the formalities necessary, the exceptions which may hinder the execution, and the causes of nullity, subject to the modifications and restrictions established by the special laws of commerce. Commercial obligations may be contracted by an authentic act, by the intervention of a broker, by private contract, and by correspondence. Merchants may contract verbally, and such contracts are valid, although they have not been drawn up in writing, when their value does not exceed 1,000 reals; but that such contracts may be admitted in Court, their existence and terms must be proved by the testimony of the parties or any other means of evidence. In fairs and markets the power to contract verbally is extended to contracts of the value of 3,000 reals. Contracts made within the Spanish territory can only be admitted in Court where they are written in the language of the country. The contract is perfect when the parties are agreed upon the thing which forms the object of their respective stipulations.

Contracts by letters.

In negotiations entered into by correspondence, the contracts are considered concluded as soon as the party to whom an offer is made accepts it pure and simple. So long as the acceptance has not been given, the offer may be withdrawn. When the contract provides for a fine against the party who does not fulfil the conditions, the injured party may exact by legal means either the fulfilment of the contract, or the payment of the agreed indemnity. Commercial obligations may be proved, first, by authentic deeds, by the broker's note, by private contract, by an accepted invoice, by correspondence, by commercial books regularly kept, by oral evidence, and by legal presumptions (*b*).

(*a*) Russian Code of Com. §§ 1130—1220. (*b*) Spanish Code of Com. §§ 234—263.

CHAPTER X.

CONTRACT OF SALE.

SECTION I.

NATURE AND REQUISITES OF THE CONTRACT.

BRITISH LAW.

SALE is a contract by which one transfers or undertakes to transfer, and another receives or undertakes to receive and to pay for, certain articles at a certain price. The distinction between sale and barter is this : in sale the consideration consists of some price or recompence in value, in barter there is only a commutation or an exchange of goods, and no lapse of time will turn a contract of barter into a contract of sale (*a*). Three things are requisite to a contract of sale, viz., the consent of the contracting parties, a lawful and existing subject matter, and the price ; whilst in this, as in all other contracts, the transaction must be founded on good faith, the established principle being that fraud gives to either parties a right to avoid the contract (*b*).

There is no sale till the terms of the contract are mutually agreed upon (*c*). And till that is attained, either party may retract a contract of sale. There may be an offer on the one side, and an acceptance on the other, but it is only where both meet together and a mutual and simultaneous consent is obtained that a contract is complete (*d*). The consent is not valid if given under error, by violence, or by fraud. That an error be sufficient to annul a contract, it must be upon the subject matter itself, and not upon any of its incidents. An error committed as to the quality of the article is not sufficient to annul the contract. So a consent extracted by violence is

(*a*) *Harrison v. Luke*, 14 M. & W. 139.

(*c*) *Jackson v. Galloway*, 6 Scott, 192.

(*b*) *Stevenson v. Newham*, 13 C. B.

(*d*) *Routledge v. Grant*, 1 M. & P.

invalid and void. No person can be forced to do any business. A consent given upon a fraudulent misrepresentation is invalid, but fraud only gives a right to avoid a purchase (*a*). In sales by auction, the blow of the hammer is held to be a sufficient sign of mutual consent (*b*).

Sale by letters. Where goods are offered by letters, circulars, or catalogues, and time elapses before the acceptance can be obtained, the party offering undertakes no continuous obligation to deliver the goods, and on the receipt of the acceptance he is at liberty to change his mind and refuse to sell. When, however, an offer is made to sell certain goods, *receiving an answer by return of post*, the party offering is considered in law as making, every instant the letter is travelling, the same identical offer; and the moment the offer is accepted, it entitles the buyer to recover in an action for not completing the contract (*c*). In order to constitute an agreement by letter, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of new and different terms. If either party, previous to the acceptance being given, introduces new terms, there would be no contract (*d*). The consent may be given verbally, or in writing, and may also be implied by the act of the party.

**Subject matter
must be law-
ful.**

Every species of property, whether real or incorporeal, present or future, may be sold and purchased, provided it be not the subject of statutory restriction. Thus, sales of public offices, and matters touching the administration of justice, or the collection of the revenue, or of any office in the gift of the Crown, are void, though sales of commissions in the army at regulated prices are allowed (*e*). Sales of spirituous liquors are prohibited, unless delivered in quantities amounting to more than twenty shillings at one time (*f*). Sales of objects contrary to public policy and morality are also void (*g*). And sales of goods made abroad for the express purpose of being smuggled into this country, the

(*a*) White *v.* Garden, 10 C. B. 919; Stevenson *v.* Newnham, 13 C. B. 285.

(*b*) Payne *v.* Cave, 3 T. R. 148.

(*c*) Adams *v.* Linsdell, 1 B. & Ald. 681.

(*d*) Holland *v.* Eyre, 2 Sim. & Stu. 194; Honeyman *v.* Marriatt, 21 Beav. 14; Heyworth *v.* Barnes, 23 L. T. 68.

(*e*) 5 & 6 Edw. 6, c. 16, s. 28, extended to Scotland by 49 Geo. 3, c. 126; Barwick *v.* Reade, 1 H. B. 627; Lidderdale *v.* The Duke of Montrose, 4 T. R. 248.

(*f*) 24 Geo. 2, c. 40, s. 12.

(*g*) Bowry *v.* Bennet, 1 Camp. 348; Forces *v.* Johnes, 4 Esp. 97.

vendor being accessory to the smuggling, cannot be enforced (*a*). When, however, the contract and delivery of goods are complete abroad, and the seller does not assist in smuggling them into this country, the contract is valid (*b*).

All sales of goods made on Sundays are void, and no action can be maintained for the price of goods sold on a Sunday in the ordinary course of trade and business of the vendor. But the mere inception of a contract on a Sunday will not avoid it if it be completed the next day (*c*). In Scotland bargains and sales made on a Sunday are not null (*d*). All contracts by any denomination of weight or measure other than one of the standard or imperial weight or measure, or some multiple or aliquot part thereof, are void (*e*). Sales of coal, culm, and cannel by measure, and not by weight, are prohibited. So sales of game by persons not having either a licence to deal in game, or a game certificate (*f*). Sales of butter not properly marked and branded with the name of the seller, and the weight and tare of the vessel, are also prohibited (*g*). All contracts expressly or by implication forbidden by the common or statute law are void. Though the statute inflicts a penalty only, the contract is void, because such a penalty implies a prohibition (*h*).

The subject of sale must be certain and existing. The sale of a thing which, without the knowledge of the parties, had perished, is null (*i*). If part only of the thing sold has perished, it is at the option of the purchaser to rescind the sale altogether, or to accept the part preserved at a valuation.

There can be no sale without a price or a valuable consideration. The contract would be complete and binding, though silent as to price, but in that case such silence is equivalent to a stipulation for a reasonable price (*j*). The price must be in money, or what passes as such, and not in any security or goods,

(*a*) *Waymell v. Read*, 5 T. R. 599; *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penaluna*, 4 T. R. 466; *Pellecat v. Angell*, 2 C. M. & R. 311.

May 19, 1835; reversed Feb. 20, 1837;

2 S. M. App. Cases, 465.

(*b*) *Holman v. Johnson*, Cowp. 341.

(*c*) 29 Car. 2, c. 7, s. 1; *Bloxome v. Williams*, 3 B. & C. 233; *Smith v. Sparrow*, 4 Bing. 84; *Drury v. Defontaine*, 1 Taunt. 131.

(*d*) *Oliphan*, Feb. 2, 1662; *Phillips*,

(*e*) 5 Geo. 4, c. 74; 6 Geo. 4, c. 12;

5 & 6 Wm. 4, c. 63, s. 6.

(*f*) 1 & 2 Wm. 4, c. 32, s. 17.

(*g*) *Foster v. Taylor*, 5 B. & Ad. 887.

(*h*) *Cope v. Rowlands*, 2 M. & W. 157; *Bartlett v. Vinor*, Carth. 252.

(*i*) *Hastie v. Couturier*, 9 Exch. 102.

(*j*) *Valpy v. Gibson*, 4 C. B. 837.

as otherwise it would be barter, not sale. The price must be just and reasonable, not nominal or illusory. If it be grossly inadequate, or merely colorable, it would invalidate the sale. There must also be a mutual consent as to the price ; if there be a material error upon it, there would be no sale. The price must be certain or ascertainable by reference to some criterion by which it may be fixed. When it is left uncertain, the parties are held to have contracted for what the goods shall be found to be reasonably worth (a). The price may also be left to be decided by arbitrators appointed by both parties (b). When, however, the contract is executory, and the goods still remain in the possession or under the control of the seller, such presumption does not exist (c).

SECTION II.

FORM OF THE CONTRACT.

INTRODUC-
TORY OBSER-
VATIONS.

The Royal Commissioners appointed to inquire and ascertain how the mercantile laws in the different parts of the United Kingdom of Great Britain and Ireland may be advantageously assimilated, reported in favour of the repeal of the statute of frauds. "We are of opinion," they said, "that no party to a contract of sale of goods should be entitled to withdraw from the bargain merely because it has not been accompanied or followed by writing, or some other ceremony. For obvious reasons the important business of buying and selling ought not to be trammelled with unnecessary solemnities ; and such transactions, if they be satisfactorily proved by legal evidence of any kind, ought to be binding. While it appears from all the evidence we have received from Scotland that no inconvenience is experienced in that country from the extensive class of transactions being thus left untrammelled, the evidence as to the practical working of the English and Irish rule is of a different tendency. The general contravention of the rule of the laws of England and Ireland in the practice of the great commercial emporiums of these countries, whereby most of the innumerable sales which are there daily taking place are left out of the

- (a) *Valpy v. Gibson*, 4 C. B. 837. (b) *Cannan v. Fowler*, 14 C. B. 181.
(c) *Acebal v. Levy*, 10 Bing. 376.

protection of the law, indicates that the requirements of the seventeenth section of the English statute of frauds, and the corresponding section of the Irish statute, are not now adapted to the practical management of commercial business. We therefore recommend that that portion of those Acts should be repealed, and that the laws of England and Ireland should in this respect be assimilated to the simpler rule of the common law observed in Scotland." In conformity with the recommendations of the commissioners, a Bill to amend the laws of England and Ireland affecting trade and commerce, introduced in 1856, contained a clause abolishing the said provision of the statute of frauds. The Bill passed the House of Commons in its integrity. But the House of Lords struck out the clause. We have already seen that in foreign countries the law generally gives a discretionary power to the judges to admit parol evidence on sale of goods. And in Scotland a contract for sale of goods, with the exception of ships, is effectual without writing, and may be established by oral or other legal evidence, whether the goods are or are not specific, or ready for delivery, or whether they are to be delivered immediately, or at a future day.

A contract of sale may be by parol, by letter, or by deed. Thus a sale of goods for an amount below £10 may be by parol. Shares in a joint-stock company, railway shares, or consols, are not good wares and merchandise, and may therefore be bought and sold by parol (a). Some kinds of property, such as ships, land, &c., can only be sold by deed or by bill of sale; and where such or any other property is so sold, the property passes out of the vendor's into the vendee's hands by the execution and delivery of the deed (b). Provided, however, that to render such sales valid in case of bankruptcy or insolvency of the vendor as against the assignees or against any subsequent assignment or an execution, where the goods remain in the vendor's actual or apparent ownership, the instrument, or a copy of it, must be filed within twenty-one days of the making of the bill, together with an affidavit of the time of such a bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same (c).

Sale unaffected
by the statute
of frauds.

Sale by deed.

(a) *Humble v. Mitchell*, 11 A. & E. (c) 17 & 18 Vict. c. 36; *Allen v. 203; Bowlby v. Bell*, 3 C. B. 284; *Thompson*, 1 H. & N. 15; *Hatton v. Watson v. Spratley*, 10 Ex. 220. *English*, 7 E. & B. 94.

(b) *Gale v. Burnell*, 7 Q. B. 850.

Requisites of
the statute of
frauds.

In England and Ireland, that a sale of goods, wares, and merchandise, of £10 sterling or upward, may be enforced, there must be some note or memorandum in writing of the bargain made, and signed by the parties to be charged by such contract, or their agents lawfully authorised, or the buyer must have accepted part of the same so sold, and actually received the same, or something must have been given in earnest to bind the bargain, or in part payment (*a*). It is the same for contracts for the sale of goods of the value of £10 and upwards intended to be delivered at some future time, or not ready at the time of such contract, or where some act is requisite for the making or completing thereof, or rendering the same fit for delivery (*b*).

Note or
memorandum.

A note or memorandum in writing of a contract for the sale of goods, signed by the seller only, is not a sufficient memorandum within the meaning of the statute. To be valid, it must be signed by the party to be charged (*c*). But the omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. It is sufficient if the note amounts to an acknowledgment by the party that it is his agreement (*d*). An invoice or bill of parcels, in which the vendor's name is printed, delivered to the vendor at the time of an order given for the future delivery of goods is sufficient, and so a bill of parcels with the name of the vendor printed in it, and that of the vendee written by the vendor (*e*).

Who is the
agent contem-
plated by
statute.

The agent contemplated by the statute of frauds who is to bind the parties by his signature must be a third person, and not one or other of the contracting parties (*f*) ; and when a note is signed by the agent, it must appear that he was authorised to sign as agent to the buyer (*g*).

A broker is an
agent of both
parties.

A broker employed to sell goods, and giving a bought and sold note to the seller and purchaser, is considered as an agent of both parties, and the note is a sufficient note in writing within the statute of frauds (*h*). Should, however, the bought and sold note delivered to the vendor and vendee respectively

(*a*) 29 Car. 2, c. 17, s. 2.

W. 653.

(*b*) 9 Geo. 4, c. 14, s. 7.

(*f*) Wright *v.* Dannah, 2 Camp. 203;

(*c*) Graham *v.* Mussom, 7 Scott, 776; Champion *v.* Plummer, 5 Esp. 240.

Farebrother *v.* Simmons, 5 B. & A. 333; Cooper *v.* Smith, 15 East, 103.

(*d*) Ashcroft *v.* Morrin, 4 M. & S. 450; Stokes *v.* Moore, 1 Cox, 222.

(*g*) Graham *v.* Fretwell, 4 Scott, N. R. 25; Graham *v.* Mussom, 5 Bing. N. C. 603.

(*e*) Saunderson *v.* Jackson, 2 B. & P. 238; Johnson *v.* Dodgson, 2 M. &

(*h*) Rucker *v.* Cammeyer, 1 Esp. 105.

Bought and
sold notes.

differ in their terms, there would be no memorandum in writing under the statute (*a*). When bought and sold notes are given, these, and not the entry of the contract made by the broker on his book, constitute the contract between the parties ; but if there be no bought and sold note, the entry in the broker's book may be resorted to (*b*). And as the statute of frauds requires a writing, it is doubtful whether a machine copy of the bought and sold note would be sufficient (*c*).

That a memorandum in writing of a contract may satisfy the statute of frauds, it must have been made before the commencement of the action (*d*). And it is necessary to remember that, once put in writing, the terms of a written contract for the sale of goods falling within the operation of the statute of frauds cannot be varied or altered by parol (*e*). When however the contract is for the sale of goods to be manufactured, and alterations or additions are made in the progress of the work, such alterations or additions need not be made the subject of a distinct contract in writing (*f*). Letters do not constitute a note in writing of the contract if they vary in their description of the terms of the contract (*g*), but two distinct written instruments may be coupled together so as to constitute a valid memorandum of the contract (*h*).

The purchaser may by other acts of ownership be held to have accepted and received the goods within the statute, although he has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract (*i*). Whenever a manual receipt and acceptance are impracticable, the statute will be satisfied by an actual receipt, by acquiescence, or by any other act of ownership (*j*).

The delivery and receipt of a delivery order or dock warrant What is a delivery and

- (*a*) *Grant v. Fletcher*, 8 D. & R. 59; 57 ; *Moore v. Campbell*, 10 Exch. 323.
- Thornton v. Meux*, M. & M. 43 ; *Sievewright v. Archibald*, 17 Q. B. 203 ; 482.
- Townsend v. Drakeford*, 1 C. & K. 20. (*f*) *Hoadly v. McLaine*, 10 Bing. 482.
- (*b*) *Sievewright v. Archibald*, 17 Q. B. 403 ; *Hayman v. Neale*, 2 Camp. 337. (*g*) *Smith v. Surnam*, 9 B. & C. 561 ; *Archer v. Baynes*, 5 Exch. 625.
- (*c*) *Pitts v. Beckett*, 13 M. & W. 743. (*h*) *Jackson v. Lowe*, 1 Bing. 9 ; *Allen v. Bennet*, 3 Taunt. 169 ; *Archer v. Baynes*, 5 Exch. 625.
- (*d*) *Bill v. Bament*, 9 M. & W. 36. (*i*) *Morton v. Tibbett*, 15 Q. B. 428.
- (*e*) *Marshall v. Lynn*, 6 M. & W. 109 ; *Stead v. Dawber*, 10 Ad. & E. 445 ; *Edan v. Dudfield*, 1 Q. B. 302. (*j*) *Bushel v. Wheeler*, 15 Q. B. 445 ; *Edan v. Dudfield*, 1 Q. B. 302.

Terms of a written contract cannot be varied by parol.

receipt to
satisfy the
statute.

is not sufficient to satisfy the statute, unless the wharfinger had accepted the order of the consignor, and agreed to hold the goods to the order of the purchaser (a). The delivery and receipt of the bill of lading *in transitu* is not a sufficient delivery and receipt of the goods themselves, unless the purchaser has exercised a dominion and ownership over it (b). The delivery of goods at a wharf would not be an acceptance and receipt within the statute (c).

Earnest or
part payment.

The payment of any sum, however small, in earnest to bind the bargain, or in part payment, may be sufficient; but the part payment must take place either at or subsequent to the time when the bargain was made (d).

What delivery
will satisfy
the statute.

In order to satisfy the statute of frauds there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking possession of them as owner (e). When goods are sold by sample, and the sample delivered is part of the bulk, there will be part delivery. Not so, however, when the delivery of the sample is a collateral thing (f).

What accept-
ance will
satisfy the
statute.

That the acceptance and receipt may dispense with the necessity of a written memorandum of the contract there must be a final and absolute appropriation by the purchaser either of the whole articles sold or of a part thereof (g). There is no such acceptance unless the vendee has had an opportunity of judging whether the goods sent corresponded to the order (h).

Acceptance
by a carrier.

Acceptance and receipt by a carrier or wharfinger, or other forwarding agent appointed by the purchaser, are not acceptance and receipt by the vendee sufficient to satisfy the statute, unless the purchaser by his dealing with the carrier, or forwarding agent, causes him to keep the goods on his (the purchaser's) behalf (i).

Sales by
auction.

Sales by auction are within the statute of frauds, and a memo-

- (a) *Farina v. Home*, 16 M. & W. 119.
- (b) *Meredith v. Meigh*, 2 E. & B. 368.
- (c) *Hart v. Bush*, 22 Jur. 633.
- (d) *Walker v. Nussey*, 16 M. & W. 302.
- (e) *Phillips v. Bistolli*, 2 B. & C. 513.
- (f) *Kleneth v. Surrey*, 5 Esp. 267; *Hinde v. Whitehouse*, 7 East, 558; *Stokes v. Moore*, 1 Cox, 222.
- (g) *Morton v. Tibbett*, 15 Q. B. 428; *Hunt v. Hecht*, 8 Exch. 814.
- (h) *Curtis v. Pugh*, 16 L. J. Q. B. 199.
- (i) *Coats v. Chaplin*, 3 Q. B. 492.

randum of the bargain not annexed to the catalogue is not sufficient to satisfy the statute (*a*). The auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the bidding in the presence of the purchaser, is the authorised agent of both the vendor and purchaser, and his signature in the books binds both parties, and is sufficient to satisfy the statute (*b*). When, however, the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only, and his signature cannot bind the buyer (*c*).

British Colonies.—In Jamaica, Tortola, Antigua, Montserrat, Dominica, Tobago, Grenada, St. Vincent, Bermuda, Upper Canada, Nova Scotia, and Prince Edward's Island, the statute of frauds is in force as part of the English statute law received on the establishment of these colonies. It has also been adopted in Barbadoes by § 226, in Bahamas by the Court Act, 25th clause; in New Brunswick, by the 26 Geo. 3, c. 14; and in Nevis, by 6 Geo. 2, c. 12, by Acts of their own legislatures.

SECTION III.

EFFECTS OF THE CONTRACT ON THE PROPERTY SOLD.

When by a contract of sale the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after the delivery of the goods. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the vendee (*d*). In order, however, that the property may pass by the contract, the article must be specific and ascertained. When something remains to be done on the part of the seller before the goods are to be delivered, as when they are to be numbered, weighed,

Effect of contract as to possession.

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| <p>(<i>a</i>) <i>Kenworthy v. Schofield</i>, 2 B. &
C. 945.</p> <p>(<i>b</i>) <i>Hinde v. Whitehouse</i>. 7 East,
558; <i>Emmerson v. Heelis</i>, 2 Taunt. 38.</p> | <p>(<i>c</i>) <i>Meux v. Carr</i>, 1 H. & N. 484.
(<i>d</i>) <i>Per J. Parke, Dixon v. Yates</i>, 5
B. & Ad. 340.</p> |
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or measured, or when the quantity sold must be separated from the bulk the property in them, does not pass to the purchaser until what remains to be done is complete (*a*).

By the common law of Scotland the right of property in the goods sold did not pass to the buyer by the mere contract of sale, but remained with the seller until the goods were delivered. Thence, if before delivery of the goods to the buyer, the seller sold and delivered them to a third party, the first buyer had no remedy against such third party unless he established fraud or collusion. By a recent statute, however, it was enacted, that where goods sold remain in the hands of the seller, it shall not be competent for any creditor of such seller to attach such goods so as to prevent the purchaser to enforce the delivery of the same (*b*).

**Effect of the
contract as to
risk.**

When the sale is perfect, and nothing remains to be done by the seller before the goods are to be delivered, the right of property in the goods having passed to the purchaser without delivery, if they are injured or destroyed after the sale, the loss would fall upon the purchaser, and the seller would be entitled to payment of the price (*c*). Where the property has not passed to the purchaser, the goods still remain at the risk of the seller, and if destroyed, the seller will not be entitled to payment of the price. Whatever happens to the goods before the sale affects the seller only, and whatever happens to them after the sale affects the buyer.

**FOREIGN LAWS ON THE REQUISITES AND FORM OF THE
CONTRACT OF SALE.**

France.—Sale is a contract by which one binds himself to deliver a thing, and the other to pay for it. It may be made by deed or by private contract. A sale may be pure and simple, or under a condition either suspensive or absolute. It may also have for its object two or more things alternately. In all such cases its effect is regulated by the general principles of contracts.

A sale is perfected between the parties, and the ownership passes to the buyer, so soon as the parties have agreed as to the

(*a*) *Hanson v. Meyer*, 6 East, 614; *Rugg v. Minett*, 11 East, 219; *Simmons v. Swift*, 5 B. & C. 857; *Wallace v. Breeds*, 13 East, 522; *Dixon v. Yates*, 5 B. & Ad. 340.

(*b*) 19 & 20 Vict. c. 60, s. 1.
(*c*) *Tarling v. Baxter*, 6 B. & C. 360; *Whitehouse v. Frost*, 12 East, 614; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Martindale v. Smith*, 1 Q. B. 391.

thing and the price, although the thing has not yet been delivered or the price paid.

Wherever merchandises are sold, not in the lump, but by weight, by number, or by measure, the sale of them is not perfected, and the things sold continue at the risk of the vendor until such time as they are weighed, counted, or measured ; but the buyer is entitled to the delivery of them, or to damages, in case of non-performance of the engagement. If, on the contrary, the merchandise has been sold in the lump, the sale is perfected, although the merchandise has not been weighed, counted, or measured. As regards wine, oil, and other things, which persons are accustomed to taste before buying, the sale is not perfected so long as the buyer has not tasted and approved them. A sale made upon trial is always presumed as made under a suspensive condition.

If something has been paid in earnest, each of the contracting parties is at liberty to depart from the promise ; he who has given it, by losing the money given ; and he who has received it, by restoring two-fold.

A promise of sale is as good as a sale, where there is a reciprocal consent of the parties as to the thing and the price.

The price of sale must be determined and specified by the parties. The price must be reasonable, but it is difficult to define what is the just value of a thing. Generally, a just price is that at which things of a similar nature and quality are sold in the same place, at the same time, under the same circumstances, and to any person, without having regard to its extraordinary value—that is, to the price which might be obtained in certain cases and under special circumstances. It may, nevertheless, be left to the arbitration of a third person. If the third person cannot or will not value it, there is no sale. The expenses of the deed, and other accessories to a sale, are at the charge of the buyer (a).

Everything which is in commerce may be sold, unless particular laws have prohibited the alienation of it. The sale by a person of a thing belonging to another is null ; but it may give a right to the buyer to sue for damages where he was ignorant that the thing belonged to another.

The sale of moveable property belonging to another by the possessor of it would pass a valid title to one who believed him

(a) French Civil Code, §§ 1582 to 1593.

Effect of sale
on the transfer
of property.

As respects
moveable pro-
perty, posse-
sion gives
title.

to be the owner of it, or even to a buyer who was not ignorant that the seller was not the owner, provided the latter has acted in good faith, and thought that the seller had a right to sell. The owner of the thing sold and delivered by a bailee or a borrower to a third person *bond fide*, has no right to claim the article from the latter, and far less from another person to whom the latter may have sold it.

If at the moment of sale the thing sold was lost entirely, the sale would be null. If a part only of the thing was lost, it is at the option of the purchaser to abandon the sale, or to demand the part preserved on having the price determined by public auction (a).

Proof of the contract.

Purchases and sales may be proved by public deeds, by private contract, by the broker's note duly signed, by the books of the parties, and by parol evidence when the tribunal thinks it admissible. Nevertheless, a sale of patent right must be made by deed; the sale of a ship must be made in writing; public funds can only be sold by the instrumentality of exchange brokers; sale of goods made voluntarily by public auction can only be made by auctioneers where they are established, or by notaries in other places (b).

The thing sold must be in existence.

United States of America.—A sale is a contract for the transfer of property from one person to another for a valuable consideration, and three things are requisite to its validity; namely, the thing sold, which is the object of the contract, the price, and the consent of the contracting parties. 1. The thing sold must have an actual or potential existence, and be capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement. If the subject-matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one, depending on the future actual delivery. But if the article intended to be sold has no existence, there can be no contract of sale. If part of the thing sold be destroyed at the time, it is at the option of the buyer to abandon the sale, or to take the part preserved on a reasonable abatement of price. So, when the parties enter into an agreement for sale and purchase and the consideration partially fails, the buyer has a right

(a) French Civil Code, § 2229.

(b) French Code of Commerce, § 109.

to consider the contract at an end, and recover back any money which he had paid in part performance of the agreement.

2. A substantial error between the parties concerning the subject-matter of the contract, either as to the nature of the article or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity. In the case of a purchase of land where the title in part fails, the Court of Chancery will decree a return of purchase money, even after the purchase has been carried completely into execution by the delivery of the deed and payment of the money, provided there had been a fraudulent misrepresentation as to the title. But if there be no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase money, or for rescinding the purchase and claiming restitution of the money. The party is remitted to his remedies at law, on his covenants to insure the title. A failure of title in sales of land remits the party back to his covenants in his deed, and if there be no ingredient of fraud in the case, and the party had not had the precaution to secure himself by covenants, he has no remedy for his money, even in a failure of title. This rule applies equally to chattels when the vendor sells without any averment of title, and without possession. In sales of chattels the purchaser cannot resist payment in cases free from fraud, while the contract continues open and he has possession. In respect to land the same rule has been considered to be the law in New York. In South Carolina their courts of equity will allow a party, suffering by the failure of title, in a case without warranty, to recover back the purchase money in the sale of real as well as personal estates. The rule is that a partial, as well as total failure of the consideration, may be given in evidence by the maker of a note to defeat or mitigate, as the case may be, a recovery. In Indiana, by statute of 1831, in actions upon specialties or other contract, excepting conveyances of real estate and paper negotiable by the law merchant, the defendant may allege the want or failure of consideration, in whole or in part. He may allege fraud, or breach of warranty, and if he shows that the article was of no value, or had been returned or tendered, he destroys the action. In North Carolina, a total failure of consideration may be given in evidence in a suit on a promissory

Substantial
error destroys
the contract.

Effect of a
failure of title.

Failure of
consideration.

Indiana.

North Caro-
lina.

note, though a partial failure cannot, and the relief is by a distinct suit. In equity, as well as at law, the defendant, for the purpose of preventing circuity of action, may show, by way of defence, in order to lessen or defeat the recovery, a total or partial failure of the consideration, as the case may be, when sued for the consideration of a sale, or upon the security given for the purchase money. In Illinois, by statute a want of title in the vendor of lands may be set up by the vendee on the note given for the purchase money as a failure of consideration. So the true value of the articles sold may be shown in reduction of the price, in cases of sales with warranty, or representation, as well as in cases of fraud, and this is allowed to avoid circuity of action. In Louisiana, the failure of consideration, either in whole or in part, in a contract of sale, has been held to be a defence, as far as it goes, on the principle that matters which diminish, as well as those which destroy the demand, may be pleaded in defence of the suit. In Pennsylvania, the discovery by the vendee before payment of incumbrances, is held to be a valid defence in a suit for the purchase money to the amount of the incumbrance where there existed a general or special warranty. The defendant may, by way of defence, show a breach of warranty as to the quality of articles sold, without either returning them or giving notice to the vendor to take them away. In Virginia, it was provided by statute in 1830, that the defendant might allege, by way of plea, not only fraud in the consideration or procurement of any contract, but any such failure in the consideration thereof, or any such breach of warranty of the title or soundness of personal property, as would entitle the defendant in any form of action to recover damages at law, or to relief in equity. In Ohio, the rule is, that the fraud must go to the whole consideration, or the payment of a note cannot be avoided at law upon the ground of fraud. In Kentucky is the same law, and a plea going only to a part of the consideration is bad. If the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. In South Carolina, it has been held, that if the deficiency in the quantity of land be so great as to defeat the object of the

purchase, the vendee may rescind the bargain ; and if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price ; and this doctrine was applied equally to defects in the quantity and quality of land, and for unsoundness and defects in personal property.

3. The price is an essential ingredient in the contract of sale, ^{The price.} and it must be fixed or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties.

4. Mutual consent is requisite to the creation of the contract, ^{Mutual consent.} and it becomes binding when a proposition is made on one side and accepted on the other. The negotiation may be conducted by letter, as is very common in mercantile transactions, and the contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail or otherwise, provided it be done with due diligence after the receipt of the letter containing the proposal and before any intimation is received that the offer is withdrawn. On the other hand, if A makes an offer to B, and gives him a specific time to answer, A may retract before the offer is accepted, on the ground that until both parties are agreed it is no contract, and either of them has a right to re-cede, and one party cannot be bound without the other (a).

The statute of frauds has been frequently re-enacted in New York, and is held to be in force in the several states. The Massachusetts Revised Statutes of 1835 ; the Revised Laws of Illinois of 1833 ; of Indiana, 1838 ; of Connecticut, 1838 ; and of New Jersey, 1794, follow closely the English statute of frauds (b).

British India.—Sale is a mutual and voluntary exchange of ^{Nature of the} property for property. A contract of sale may be effected by ^{contract.} the express agreement of the parties or by reciprocal delivery. Sale is of four kinds ; it may be a commutation of goods for goods ; of money for money ; of money for goods, and of goods for money. Sales are either absolute or conditional, imperfect or void. An absolute sale is that which takes effect immediately ; a conditional sale is that which is suspended on the consent of the proprietor. An imperfect sale is that which takes effect on seisin. A void sale is that which can never take effect, where the articles given are of no legal value. The considera-

(a) Kent's Commentaries, Vol. 2, p. 602, and following. (b) Ibid. p. 669.

tion may consist of whatever articles bearing a legal value the seller and purchaser may agree upon. There must be two parties to every contract of sale, and it is sufficient that the parties have a sense of the obligation they contract. A minor, with the consent of his guardian, or a lunatic in his lucid interval, may be contracting parties. It is essential to the validity of every contract of sale that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery either immediately or at some future definite period. When payment is deferred to a future period, it must be determinate, and cannot be suspended on an event the time of the occurrence of which is uncertain, though its occurrence is inevitable. A warranty as to freedom from defect and blemishes is implied in every contract of sale. And where the property sold differs either with respect to quality or quantity from what the seller had described it, the purchaser is at liberty to recede from the contract. When the property has not been seen by the purchaser, nor a sample, he is at liberty to recede from the contract, provided he may not have exercised any act of ownership. But though the property has not been seen by the seller, he is not at liberty to recede from the contract, except in a sale of goods for goods, where no option was stipulated. A purchaser who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect of which he was not aware at the time of the purchase, unless while in the hands of the purchaser it received a further blemish ; in which case he is only entitled to compensation. But, if the purchaser have sold such faulty articles to a third person, he cannot exact compensation from the original seller, unless he was precluded from returning it to the original seller. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purchaser has not derived any benefit from them ; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportionate compensation. If a person sell an

Warranty
from defects
implied.

article which he had purchased, and be compelled to receive back such article, and to refund the purchase money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article, or attempt to remove the defect, he has no remedy against the seller, such act on his part implying acquiescence. It is a general rule, that if the articles sold are of such a nature as not easily to admit of separation or division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury. The practices of forestalling, regrating, and engrossing, and of selling on Friday after the hour of prayer, are all prohibited, though they are valid (a).

Germany.—An offer of sale by circulars or prospectuses is not a binding offer. A purchase on inspection or trial is conditional on such inspection and acceptance of the article. The purchaser is not bound till he has accepted it; but the seller ceases to be bound, if the purchaser does not signify his acceptance at the stipulated or usual time. And if the goods have already been delivered, the silence of the purchaser, after the expiration of such time, is considered as an acceptance. A sale on sample is not conditional, but the seller binds himself to deliver the goods equal to the sample. The delivery of the goods must be made at the place named in the contract, or at such a place as is implied from the nature of the contract or the meaning of the agreement. If nothing is provided on the subject, the delivery of the goods must be made at the place where the seller has his warehouse, or, in want of it, where he resided at the conclusion of the contract. The price must be paid on delivery, unless otherwise provided. The purchaser must make the payment at his own risk and expense, and at the warehouse or residence of the seller. The seller is bound to take care

Sales on inspection and on sample.

Delivery.

Price.

(a) *Mohummadan Law*, by W. H. Macnaghten.

Mutual duties
of the pur-
chaser and
seller.

of the goods, so long as the buyer does not delay in receiving them. If the buyer delays the reception of the goods, the seller may deposit them in a public warehouse, or with a third person, at the buyer's risk and expense. The seller is also entitled, after notice given, to have the goods sold by public auction or even by private sale, at the current price, through a broker or auctioneer. If the goods are likely to be spoiled, and there is danger in delaying the sale, no previous notice would be requisite. The seller must send notice of the sale to the buyer without delay; if he omits to do so, he would have to pay damages. If the goods are to be sent to the buyer from another place, and the buyer has given no instruction about the mode of transport, the seller is authorised to make the arrangement. After the delivery of the goods to the forwarding agent or carrier, the goods remain at the risk of the buyer. If, however, the buyer has given orders about the mode of transport, and the seller, without any urgent reason, transgresses them, he will be responsible for the neglect. Where the goods are sold at a price including the delivery at the buyer's place, the risk of transport to that place rests with the seller. But the simple fact that the seller is to pay the expenses of carriage is not sufficient to prove that the delivery was to be made at the place of the buyer, and that the seller was to undertake the risk. The buyer is bound to receive the goods if they are according to the contract; and must receive them at once, unless otherwise agreed. If the goods are forwarded from another place, the buyer must examine them immediately, or as soon after the delivery as possible, and if the goods are not according to contract, he must at once give notice of the same to the seller. If he omit to do so, the goods are considered as accepted, unless there are faults which could not be found by an examination on the spot. As soon as such faults are discovered, immediate notice must be given of them. If the buyer objects to the goods, he must take care of them in the meantime. When faults are discovered on the delivery, or afterwards, the buyer should show the goods to experienced persons, who are to give their written opinion on it. The buyer cannot object that the quality of the goods is not according to contract, if he cause six months to elapse after the delivery. Unless otherwise agreed on by special custom, the seller bears the expenses of the delivery, especially when the goods are to

be measured, or weighed, and the buyer those of the receipt. If the market price has been stipulated as the purchase price, the same is understood to be that which is fixed by the authorities at the time and place when the contract was made ; or if no price was fixed, or the same is found incorrect, the average price of the sale contracts will be taken as the price. If the buyer delays the payment, and the goods have not been delivered, the seller may either demand the execution of the contract, or sell the goods on account of the buyer, and ask damages, or rescind the contract altogether. If the seller delays the delivery, the buyer may either demand the fulfilment of the contract, or seek damages, or rescind the contract. If the buyer, instead of demanding the fulfilment of the contract, seek for damages, the amount of damages will be the difference between the purchase price and the market price at the time and place where delivery was to have been made (a).

What is the
market price.

Italy.—The Sardinian code has provisions equal to those of the French code (b).

Portugal.—A sale is a contract by which the vendor binds himself to deliver certain articles, and the purchaser to pay for them at a price agreed upon. The sale may be pure and simple, or upon certain conditions. When the price is not mentioned, the contract is to be considered concluded at the current price on the day and at the place of delivery, as declared by practical men. A sale made by correspondence is considered as concluded at the time when a mutual consent has been obtained. Commercial contracts may be concluded by parol, whatever the amount of the goods or their value may be ; but oral evidence is not admitted until after a commencement of proof in writing has been given, or unless it be allowed by the courts. The general law on contracts is the same as the French (c).

(a) German Code, §§ 337 to 359.

(b) Sardinian Code, 1605 to 1635.

(c) Portuguese Code, §§ 458 to 478.

SECTION IV.

DUTIES OF THE SELLER.

BRITISH LAW.

§ 1. Delivery.

The delivery must be at the time and place specified.

The first duty of the seller is to deliver the thing sold. He must deliver the goods by the time and at the place specified in the contract. Where he contracts to deliver the goods on a certain day, he has the whole of the day, and if in one of several days, the whole of the days, for the performance of his part of the contract ; but he must do all he can to complete the delivery at a convenient hour before midnight, and in sufficient time for examination and receipt, and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of such contract (*a*).

So if the delivery is to be performed at a certain place on a specific day, the tender must be to the other party at that place, and as the attendance of the other is necessary at that place to complete the act there, it is not necessary for the other party to be present through the whole day, provided he be at the place on a part of the day, and at a convenient time before sunset, so that the act may be completed ; and if the party tender goods before sunset, that is sufficient (*b*). A tender of goods purchased at the warehouse, at an hour which leaves him time enough for completing the delivery before twelve o'clock at night, is sufficient. If the contract makes no mention of the time of delivery, the seller undertakes to put the buyer in possession of the goods sold without delay, or in a reasonable time.

Delivery must be of the whole and not of part.

Where the contract is silent as to the place of delivery, the seller must deliver at the place where the thing sold was at the time, except the delivery was intended to take place elsewhere.

When the contract is not divisible, and for an entire quantity, the seller is not bound to comply with the request of the vendee to deliver a part only, and should he refuse to accept the whole the vendor may abandon the contract (*c*).

(*a*) *Startup v. Macdonald*, 6 M. & G. 600. (*b*) *Startup v. Macdonald*, 6 M. & G. 600.

(*c*) *Kingdom v. Cox*, 2 C. B. 661.

When the subject matter of the contract consists of a given quantity of an article, and not of any specific ascertained parcel of goods, the vendor is at liberty to give such goods as will answer the description given by him, but when the article is a certain and specified one, then the vendor must deliver the identical article so fixed, and not anything else of a corresponding nature. So where an order is given by the purchaser for certain specific articles to suit a certain market, the vendor would impliedly undertake to furnish the particular article specified (a).

When the goods have not been delivered on the day agreed on, the true measure of damages is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered (b). When, in an agreement subject to the Statute of Frauds, the time has been fixed for the delivery of the goods, an agreement to substitute another day for that purpose must, in order to be valid, be in writing (c). When the delivery has been fixed to be made forthwith, and the price to be paid in a month, or at any other time, the delivery must be made without delay (d). So when the words, "term cash" are inserted in a contract, payment on delivery is not a condition precedent to the delivery of the goods (e). When the right of property in the specific chattel has passed by the bargain, the buyer has no right to refuse to accept it by reason of a difference in the quantity or quality. Where, however, the right of property has not passed, then the buyer has a right to refuse the goods, wherever they do not correspond in quantity or in quality with the goods bargained or ordered (f).

Measure of damage in case of non-delivery.

Alteration as regards time must be in writing.

How long does the right to refuse extend.

§ 2. *Warranty of Title.*

The owner of goods may dispose of them to whomsoever he pleases at any time, and in any manner, unless judgment has

Rights of owner to dispose of goods.

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| (a) <i>Gardiner v. Gray</i> , 4 Camp. 144; | <i>Spartali v. Benecke</i> , 10 C. B. 212. |
| <i>Powell v. Horton</i> , 2 Bing. N. S. 668; | (e) <i>Nelson v. Patrick</i> , 2 C. & K. 641. |
| <i>Fisher v. Samuda</i> , 1 Camp. 190. | (f) <i>Street v. Blay</i> , 2 B. & Ad. 462; |
| (b) <i>Gainsford v. Carroll</i> , 2 B. & C. 624. | <i>Dawson v. Collis</i> , 10 C. B. 531; |
| (c) <i>Marshall v. Lynne</i> , 6 M. & W. 109. | <i>Covas v. Bingham</i> , 2 El. & B. 836; |
| (d) <i>Staunton v. Wood</i> , 16 Q. B. 638; | <i>Hart v. Mills</i> , 15 M. & W. 85; <i>Tan-</i> |
| | <i>vaco v. Lucas</i> , 28 L. J. Q. B. 150. |

Sale after the issue of a writ of execution and before actual seizure.

been obtained against him for a debt or damage (a). And although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, and is still in the debtor, and therefore he may confer a good title on them to any person purchasing them *bond fide*, and for a valuable consideration, before the actual seizure or attachment, and without notice that such writ or any other writ has been issued by which the goods of such owner might be seized or attached had been delivered to, and remained unexecuted in the hands of the sheriff (b).

Sale in market overt.

Possession is the criterion of title to a personal chattel, therefore the finder of goods, or any person in possession, is able to give an indefeasible title by sale in market overt (c). Every shop in London is a market overt, and sales in such shops of goods usually sold there are sales in market overt (d). A sale at a wharf is not a sale in market overt to change the property, and goods sold there by a wrongful owner may be recovered at the suit of the true owner against the purchaser (e). So the sale of any goods wrongfully taken at any pawnbroker in London, or within two miles thereof, does not alter the property.

Sales of stolen goods.

The owner of goods stolen, who prosecutes the thief to conviction, is entitled to recover the value of them in trover from a person who had purchased them from a thief not in market overt. If such purchaser had notice of the felony, he would be liable to restore the goods to the true owner, even if he had resold them in market overt (f). But if the goods were purchased *bond fide*, without any notice, or any reasonable cause to suspect that the same had been stolen, no restitution would be awarded (g).

Mere possession not sufficient to give an indefeasible title.

The mere possession of the goods, with no further indicia of title than a delivery order, is not sufficient to give an indefeasible title, and the pawnor or assign of such delivery order from the fraudulent holder could not resist the claim of the true owner in an action of trover (h). In Scotland, no pur-

(a) Blac. Comm. 446.

(e) Wilkinson v. King, 2 Camp. 335.

(b) 19 & 20 Vict. c. 97.

(f) 8 Geo. 4, c. 29, s. 57; Peer v.

(c) Hiern v. Mill, 13 Ves. 122.

Humphrey, 4 N. & M. 430.

(d) Lyons v. De Pass, 11 Ad. & E. 326. The case of market overt, 5 Rep. 836.

(g) 8 Geo. 4, c. 29, § 57.

(h) Kingsford v. Merry, 5 Weekly Rep. 151.

chaser of stolen goods can acquire an absolute right to them against the true owner.

There is no implied warranty of title in the sale of a specified ascertained chattel. In order to render the seller liable for a bad title, he must have given either an express warranty, or an equivalent to it, by declaration or conduct, or he must have practised fraud, as by concealing from the purchaser that he had no title (*a*). Such express warranty may be inferred from usage of trade, or from the nature of the trade being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys against all persons (*b*). But although on the sale of a specified chattel there is no implied warranty of title, the purchaser, who should be compelled to give up the goods to the real owner, may recover his money as on a consideration that has failed (*c*). In an executory contract, however, when the subject is unascertained, and is afterwards to be arranged, both parties must be taken to have meant that a good title to the subject should be transferred (*d*).

When a person sells goods which are not his own, and the real owner is found, the purchaser is entitled to pay him the price, and the wrongful vendor could not maintain an action against the purchaser for the price (*e*). When the vendor sells goods in his peculiar character, such as auctioneer, agent, sheriff, pawnbroker, or pledgee, it becomes the duty of the purchaser to inquire into the title, and if it be afterwards found that the vendor had no title to sell, and the purchaser is evicted, he cannot recover compensation except he can establish a case of fraud (*f*).

No implied warranty of title.

Title of the real owner when found.

§ 3. *Warranty of Quality.*

A fair price given for an article does not imply a warranty that the article is merchantable, and the seller is not answerable for any latent defect unknown to him. When the article turns out not to be that which it was supposed, the purchaser bears

No warranty implied against latent defects.

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| (<i>a</i>) <i>Morley v. Attenborough</i> , 3 Exch. 500. | (<i>e</i>) <i>Dickenson v. Naul</i> , 4 B. & Ad. 638; <i>Allen v. Hopkins</i> , 13 M. & W. 102. |
| (<i>b</i>) <i>Morley v. Attenborough</i> , 3 Exch. 500. | (<i>f</i>) <i>Morley v. Attenborough</i> , 3 Exch. 500. |
| (<i>c</i>) <i>Ibid.</i> | |
| (<i>d</i>) <i>Ibid.</i> | |

the loss (*a*). Both in England and Scotland, if the seller had no knowledge at the time of the sale that the goods were defective, or of bad quality, he is not held to have warranted their quality or sufficiency, and goods sold with all faults are at the risk of the purchaser, unless the seller has given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller is considered without such warranty to warrant that the same are fit for such purpose (*b*).

It is different when an article is sold for a particular purpose.

When an article is ordered to be used for a particular purpose, as copper for sheathing a ship, the seller in executing the order is held to warrant that the copper shall be fit for the purpose for which it is required (*c*). But where a party orders a known ascertained article, stating the purpose for which he intends to apply it, there is no implied warranty on the part of the seller that the article is suitable for that purpose (*d*).

What amounts to a warranty.

Every affirmation made by a seller at the time of sale is a warranty, provided it appears to have been so intended, but a mere representation by the seller of the quality of the article sold does not furnish a ground of action against the seller, on the representation turning out to be untrue, unless the representation be fraudulent (*e*). A representation made at the time of the sale, and in relation to the subject matter material to the contract, may amount to a warranty when the representation refers to matters within the special knowledge of the seller (*f*). A warranty may be inferred from a description in an invoice of the goods sold, but the ordinary praise or commendation by a vendor of the goods he sells does not amount to a warranty. The seller is not bound to disclose to the buyer such defects as are susceptible of a discovery by a rigid examination of the goods (*g*). Where goods have been sold warranted sound, which can be proved were unsound at the time of sale, the seller is liable to an action on the warranty, without either

- (*a*) *Jones v. Bright*, 3 M. & P. 155.
- (*b*) 19 & 20 Vict. c. 60, s. 2.
- (*c*) *Jones v. Bright*, 3 M. & P. 155.
- (*d*) *Chanter v. Hopkins*, 4 M. & W. 399 ; *Ollivant v. Bailey*, 5 Q. B. 288.
- (*e*) *Earley v. Garrett*, 9 B. & C. 928 ; *Ormrod v. Huth*, 14 M. & W. 651.

- (*f*) *Haycraft v. Creasy*, 2 East, 103 ; *Moans v. Heyworth*, 10 M. & W. 155 ; *Calverley v. Williams*, 1 Ves. 212.
- (*g*) *Baglehole v. Walters*, 3 Camp. 154 ; *Schneider v. Heath*, 3 Camp. 506 ; *Pickering v. Dowson*, 4 Taunt. 779.

the goods being returned, or notice given of the unsoundness (a).

The breach of a warranty is no answer to an action for the price of goods sold, although it may be used in reduction of the price, or made the subject matter of a cross action (b).

A misrepresentation will not vitiate a contract, unless bottomed on fraud, and made with an intention to deceive; if, however, such a representation amounted to a warranty, and the purchaser bought upon the faith of such a warranty, then the contract would be void, even though the seller was not aware of the fact at the time he gave the warranty (c).

Effect of a misrepresentation.

A purchaser of a commodity to be delivered according to sample is not bound to receive the bulk which may not agree with it, nor after having received what was tendered and delivered as being in accordance with the sample will he be precluded by the simple receipt from returning the article after having kept it a reasonable time for the purpose of examination and comparison (d). If, however, the purchaser acts on the contract, and avails himself of the privilege of selling, that would be equivalent to an acceptance (e).

Purchase by sample.

The buyer of goods by sample has a right to inspect the whole in bulk at any proper and convenient time, and if the seller refuses to show it, the buyer may rescind the contract (f).

Rights of buyer to inspect the goods.

When goods are sold by sample, and a custom exists that the purchaser should either return them within a reasonable time, or have an allowance for so much of the goods as do not answer, if the buyer neglects to examine the bulk and signify his rejection of the same, he cannot afterwards refuse to pay the whole price (g).

Where there is an agreement to take the goods back if "on trial" they should be found faulty, though they were accompanied with an express warranty, it is incumbent on the purchaser to return the goods as soon as the faults are discovered (h). If the purchaser, after giving a reasonable trial to the goods

Sale by trial and return.

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| (a) Fielder <i>v.</i> Starkin, 1 H. Bl. 17. | 394. | |
| (b) Dawson <i>v.</i> Collis, 10 C. B. 523. | | (f) Lorymer <i>v.</i> Smith, 1 B. & C. 1. |
| (c) Williamson <i>v.</i> Allison, 2 East, 446; Jones <i>v.</i> Bright, 3 M. & P. 155. | | (g) Cooke <i>v.</i> Riddlelien, 1 C. & K. 561; Sander <i>v.</i> Jameson, 2 C. & K. 557. |
| (d) Street <i>v.</i> Blay, 2 B. & Ad. 463. | | |
| (e) Parker <i>v.</i> Palmer, 4 B. & Ald. | | (h) Adams <i>v.</i> Richard, 2 H. Bl. 574. |

finds them insufficient, and gives notice to that effect to the seller, the latter is bound to take them away, and they remain at his risk (a).

Sales on trial
on conditional
sale.

Where goods are sold on trial, there is no sale till the buyer confirms the purchase (b). Where goods are sold "on sale and return," that is, to be paid for at a certain rate, if sold again by the vendee, and if not sold to be returned, the goods should be returned in a reasonable time, and if they are not so returned, they are held as sold (c).

FOREIGN LAWS.

Delivery of
immovables.

Delivery of
movables.

Delivery of
incorporeal
rights.

The vendor
may refuse the
delivery till
the payment
of the price.

France.—Delivery is the transfer of the thing sold into the power and possession of the buyer. The obligation to deliver immovables is fulfilled on the part of the vendor, when he has given up the keys, if they consist of a building, or when he has delivered up the title deeds of the ownership. Delivery of movables is effected:—Either by actual delivery; or by delivering the keys of the building containing them; or even by the sole consent of the parties, if the transfer cannot be made of them at the time of sale; or if the buyer had them already in his possession by another title. Delivery of incorporeal rights is effected either by giving up the title deeds, or by the use which the buyer makes of them, with the consent of the vendor. The expenses of the delivery are at the charge of the vendor, and those of the taking away at the charge of the buyer, if there has been no stipulation to the contrary. Delivery must be made at the place where the thing which formed the object of the sale was at the time of sale, if it has not been otherwise agreed. If the vendor does not effect the delivery within the time agreed upon between the parties, the buyer may at his option request him either to cancel the sale, or to deliver the article; if the delay arises from the sole act of the vendor. In all cases the vendor is liable to damages, if the buyer is injured from the non-delivery at the time agreed. The vendor is not bound to deliver the thing if the buyer does not pay its price, unless the vendor has granted him time for the payment. Neither is he

(a) *Okell v. Smith*, 1 Stark. 109. 779.

(b) *Ellis v. Mortimer*, 1 N. R. 257; (c) *Bailey v. Goldsmith, Park*, 56.
Andrews v. Belfield, 2 C. B. N. S.

bound to deliver even where he has granted credit, if subsequent to the sale the buyer has stopped payment, or has failed, so that the vendor is in imminent danger of losing the price, unless the buyer is prepared to give him security for payment at the time agreed. The thing must be delivered in the state in which it was at the moment of the sale. The obligation to deliver a thing comprises also its accessories, and all that is adapted to its continuous use. The vendor is bound to deliver the contents such as they are set forth in the contract, under the modifications hereafter expressed. If the sale of an immovable has been made with a statement of its contents, at the rate of so much the measure, the vendor is obliged to deliver to the purchaser, if he require it, the quantity set forth in the contract. And if the thing is not possible, or if the purchaser does not require it, the vendor is obliged to allow a proportional diminution of the price. If, on the contrary, in such a case, there happen to be a larger quantity than what is expressed in the contract, the purchaser has the option of paying a supplemental price or of abandoning the contract, if the excess be of a twentieth beyond the contents set forth. In all other cases, whether the sale be made of a thing certain and limited, whether it have for object distinct and separate articles, whether it commences by the measure or by designating the thing sold followed by a measurement, the setting forth of such measure gives no ground for an additional amount in favour of the seller for the excess of measure, nor in favour of the purchaser for any diminution of price for less measure, so long as the difference of the real measure from that expressed in the contract is of a twentieth more or less, regard being had to the whole of the things sold, if there be no stipulation to the contrary. Where, according to the preceding article, there is room for augmentation of price for excess of measure, the purchaser has the option either of abandoning the contract or of paying the supplemental price, with interest upon it if he has kept the immovable. In all cases where the purchaser has the right of giving up the contract, the vendor is bound to refund to him beyond the price, if he has received it, the expenses of the contract.

The action for the additional price on the part of the vendor, and for diminution of price, or for cancelling the contract on the part of the purchaser, must be brought within one year,

reckoning from the day of the contract, under penalty of prescription. If two articles have been sold by the same contract, and for one and the same price, with a statement of the measure of each, and there be found less contents in the one, and greater in the other, compensation is made between them so as to make up the true amount; and the action either for supplement or for diminution of price has ground only according to the rules above laid down.

Warranty of title.

The vendor owes to the purchaser the warranty first, of the peaceable possession of the things sold, and, second, against the concealed defects of such things, or rehbitory faults. Although at the time of the sale there has been no stipulation about warranty, the vendor is bound to warrant the purchaser against the eviction he may suffer in the whole or in part of the thing sold, or for the charges claimed upon such things and not declared at the time of the sale. The parties may, by particular agreements, add to such legal obligation or diminish its effects; they may even agree that the vendor shall not be subjected to any warranty. But although it may be said that the vendor shall not be subject to any warranty, he is still liable for such as may result from an act personal to himself; and any agreement to the contrary is null. In case of a stipulation for non-warranty, the vendor, in case of eviction, is bound to restore the price, unless the purchaser knew at the time of sale the danger of eviction, or bought it at his peril and risk.

Where a warranty has been promised, and nothing has been stipulated upon the subject, if the purchaser be evicted, he has the right of demanding against the vendor. 1st. Restitution of the price. 2nd. That part of the profits which he is bound to yield to the owner who evicts. 3rd. The expenses caused by the suit in warranty of the purchaser, and those caused by the original plaintiff. 4th. Lastly, damages, as well as the expenses and legal costs of the contract. Should, at the time of eviction, the thing sold be diminished in value, or considerably deteriorated, either by the negligence of the buyer, or by accidents occasioned by superior force, the vendor is not the less bound to refund the whole of the price. But if the purchaser has derived a profit through the deterioration committed by himself, the vendor has the right of retaining from the price a sum equal to such profit. If, on the contrary, the thing sold happen to be

augmented in value at the time of the eviction, independently even of the act of the purchaser, the vendor is bound to pay him what it is worth beyond the price of sale.

The vendor is bound to reimburse or to cause the purchaser to be reimbursed, by the party who shall evict, of all the repairs and useful ameliorations which he shall have done to the property. If the vendor has sold the property of another in bad faith, he is bound to reimburse the purchaser of all the expenses which the latter shall have laid out upon the property. If the purchaser be evicted of a part only of the thing, and it be of such consequence relatively to the whole, that the purchaser would not have purchased it without the part of which he has been evicted, he may cause the sale to be avoided. If in the case of eviction from part of the property sold, the sale has not been avoided, the value of the part from which the purchaser happens to be evicted is to be refunded to him according to its value at the time of the eviction, and not in proportion to the total price of the sale, whether the thing sold be augmented or decreased in value.

If the heritage sold turn out to be encumbered with burdens non-apparent, without any intimation having been given of them, and they are of such importance that there is ground for presuming the purchaser would not have purchased if he had been informed of it, he may demand to annul the contract, unless he prefers contenting himself with an indemnity.

The warranty for cause of eviction ceases when the purchaser, without summoning his vendor, allows himself to be condemned by a judgment in the last resort, or from which an appeal is no longer receivable, provided the vendor prove that there existed sufficient grounds for causing the demand to be set aside.

The vendor is bound to warranty against any concealed defects in the thing sold which renders it unfit for the use to which it is destined, or which diminish such use so far, that the buyer would not have purchased it, or would have given a less price had he known them.

Warranty
against de-
fектs.

The vendor is not liable for such defects as are apparent, and which the buyer might have found out himself. He is liable for concealed faults, even where he did not know them, unless he has stipulated that he shall not be bound to any warranty. In such cases the buyer has the choice of returning the thing

on being refunded the price, or of keeping the thing on being refunded a part of the price, such as shall be awarded by experienced persons. If the vendor was acquainted with the faults of the thing, he is bound, besides restitution of the price he has received, to pay to the buyer all the damages he has incurred. If the vendor was ignorant of the faults, he is only bound to refund the price, and to reimburse the purchaser of the expenses occasioned by the sale. If the thing which was faulty has perished in consequence of its bad quality, the loss falls upon the vendor, who shall be holden towards the buyer for restitution of the price, and to the other losses explained in the two preceding articles. But any loss occasioned by accident shall be borne by the buyer (a).

Warranty
against
defects.

Austria.—In Austria the seller of a thing for a valuable consideration is held to guarantee the purchaser that the thing is of the quality agreed, or of that supposed to be so by usage, and to guarantee also that it is capable of being used for the purpose required and according to agreement. To describe a thing of a quality other than it is, to conceal its defects or its ordinary burdens, to sell a thing which does not exist, or a thing which does not belong to himself, to declare that a thing is fit for a certain use, and that it is exempted from a certain defect, whilst the vendor knows the contrary, these are fraudulent acts, for which the seller is responsible. When an animal, within twenty-four hours after delivery, becomes ill and dies, there is a presumption that it had such illness before the delivery. The same presumption exists when it is discovered within eight days of the delivery that there is pimple or measles among pigs, rottenness or scab among calves; when within two months these animals suffer from pulmonary worm or hepatitis, and within thirty days horned cattle have the glands; and when within fifteen days horses and beasts of burden are found to be affected by botch, or glanders, or worms, or restiveness, or amaurosis, or nyctalopia. The purchaser loses the privilege of this presumption if he neglects to notify to the seller the defect of the thing as soon as he discovers it. When the purchaser neglects this precaution, he becomes bound to prove that the animal was vicious before the conclusion of the contract. The seller is

(a) French Civil Code, §§ 1604 to 1647.

always allowed to prove that the defect has commenced after the delivery. No warranty is required for the defects which are apparent, or for burdens which are recorded in the public registers, save in cases where there was an express declaration that the thing was free of all defects, and of all burdens. The warranty continues for three years for real property, and for six months for movable property (a).

Italy.—In the Two Sicilies the seller is not liable for latent defects where the goods have been sold in fairs and public markets, except by special agreement (b).

South America : Mexico.—When a merchant engages to deliver certain merchandises, and before their delivery he sells and delivers them to another merchant, the second sale only is valid ; but the seller is bound to indemnify the first buyer. If the goods have been sold by samples, the seller must deliver the goods at the time agreed, and of the same quality as the samples, each party being bound to preserve a sample, and the broker another. That the goods may be considered equal to sample, they must be similar to two out of the three samples. When goods are purchased without samples, and upon their delivery a dispute arises as to their quality, or upon any condition, reference will be made to the contract of sale ; but if the buyer insists that the goods are not of the quality agreed, the subject will be left to the decision of arbitrators named by the parties, or otherwise officially by the tribunal. Whether the goods are sold upon samples or not, if the goods sold are forwarded from one place to another ; if it be found either at the time or after the delivery that their quality or quantity does not agree with what has been stipulated, and that there has been fraud on the part of either party, the contract is cancelled, and the goods must be returned to the seller, who is bound to return the price which he has received (c).

United States of America.—In every sale of a chattel, if the warranty of possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. But if the seller has possession of the article, and he sells it as his own and not as agent for an-

(a) Austrian Code, §§ 923 to 933.

(c) Code of Bilboa, chap. xi.

(b) Two Sicilies Code, § 1495.

other, and for a fair price, he is understood to warrant the title. A fair price implies a warranty of title, and the purchaser may have satisfaction from the seller if he sells the goods as his own, and the title prove deficient.

Warranty of quality.

The seller is not bound to answer for the quality or goodness of the article sold, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he has made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law. If there be no express warranty by the seller, or fraud on his part, the buyer who examines the article himself must abide by all losses arising from latent defects equally unknown to both parties. The rule does not apply to those cases where the purchaser has ordered goods of a certain character, or goods of a certain described quality are offered for sale, and when delivered they do not answer the description directed or given in the contract. In such a case, when the goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, and give him notice to take them back, and thereby rescind the contract, or he will be presumed to acquiesce in the quality of the goods. In the case of a breach of warranty, he may sue upon it without returning the goods, but he must return them, and rescind the contract in a reasonable time before he can maintain an action to recover back the price. An offer to return the chattel in a reasonable time, on breach of warranty, is equivalent in its effect upon the remedy to an offer accepted by the seller, and the contract is rescinded, and the vendee can sue for the purchase money in case it has been paid. But a contract cannot be rescinded without mutual consent, if circumstances be so altered by a part execution that the parties cannot be put *in statu quo*, for if it be rescinded at all it must be rescinded *in toto*.

Effect of a breach of warranty.

The parties to a contract may rescind it at any time before the rights of third persons have intervened; but a resale of the disputed article does not of itself rescind the contract, or destroy the right to damages for non-performance of the contract, to the extent of a loss in a resale, provided the same be made after default and due notice. If the contract remain open and unrescinded, the vendee of the unsound article must resort to his

warranty, unless it be proved that he knew of the unsoundness, and the vendee tendered a return of the article within a reasonable time. In South Carolina and Louisiana, a sale for a sound price is understood to imply a warranty of soundness against all faults and defects, according to civil law ; but this rule in South Carolina is not applied to assist persons to avoid a contract, though made for an inadequate price, provided it was made under a fair opportunity of information as to all the circumstances, and when there was no fraud, concealment or latent defect. If the article be sold by the sample, and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot rescind the sale. Such a sale amounts to a warranty, that the article is in bulk of the same kind, and equal in quality with the sample. If the article should turn out not to be merchantable from some latent principle of infirmity in the sample, as well as in the bulk of the commodity, the seller is not answerable. The only warranty is, that the whole quantity answers the sample.

Implied warranty of soundness from a sound price.

If there be an intentional concealment or suppression of material facts, in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed an unfair dealing, and will vitiate and void the contract. Each party is bound to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation. If one party suffers the other to buy an article under a delusion created by his own conduct, it will be deemed fraudulent, and fatal to the contract. One party must not practise any artifice to conceal defects, or make any representations for the purpose of throwing the buyer off his guard. When a person takes a guarantee from a surety, and conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions, such concealment is held to be fraud, and vitiates the contract.

Duty of mutual disclosure.

If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observations of the vendee. Such a warranty will not cover defects that are plainly the objects of the senses ; though, if the vendor says or does anything whatsoever

No disclosure needed when the defects are open to both parties.

with an intention to divert the eye or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud. A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case, of a fraudulent design. When, however, the means of information relative to facts and circumstances affecting the value of the commodity, be equally accessible to both parties, and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to their facts and circumstances, is not requisite to the validity of a contract. When, however, the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties, and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other as to those facts and circumstances, is not requisite to the validity of a contract. Even against the maxim, *caveat emptor*, the purchaser may provide by requiring the vendor to warrant that which the law would not imply to be warranted ; and if the vendor be wanting in good faith, *fides servanda*, is a rule equally enforced at law and in equity. A mere false assertion of value, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ.

What amounts to a warranty.

An assertion respecting the article sold must be positive and unequivocal, and one on which the buyer places reliance, in order to amount to a warranty ; and if the vendee has an opportunity of examining the article, the vendor is not answerable for any latent defect, without there be fraud, or an express warranty, or such a direct representation as is tantamount to it. An action will lie against a person not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage by trusting the purchaser on the credit of such misrepresentation.

Misrepresentation must be designed to be a ground of action.

Misrepresentation without design is not sufficient for an action. But if a recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge

that he was not of good credit, and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller. If the person stands in the relation of trustee, or *qua* trustee to another agent, factor, steward, attorney, or the like, if he would purchase of his principal or employer any property committed to his care, he must deal with the utmost fairness, and conceal nothing within his own knowledge which may affect the price or value, and if he does, the bargain may be set aside. Bargains between trustee and *cestui que trust* are viewed with great jealousy, and they will not be sustained unless under very unexceptionable circumstances. It is a rule in equity, that all the material facts must be known to both parties, to render the agreement fair and just in all its parts, and it is against all the principles of equity that one party knowing a material ingredient in an agreement should be permitted to suppress it, and still call for a specific performance.

Ignorance of the law, with a full knowledge of the facts, furnishes no ground either in law or equity to rescind agreements or set aside solemn acts of the parties. Acts done and contracts made under mistake, or ignorance of a material fact, are voidable and relievable in law and equity. Equity will give relief in cases of written contracts where there is a plain mistake clearly made out by satisfactory proof, or even fairly and necessarily implied.

(1.) Where the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. The payment or tender of the price is, in such cases, a condition precedent implied in the contract of sale ; and the buyer cannot take the goods or sue for them without payment ; for though the vendee acquires a right of property by the contract of sale, he does not acquire a right of possession of the goods until he pays, or tenders the price. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately

Passing of
title by deli-
very.

entitled to the possession, and the right of possession, and the right of property vest at once in him, though the right of possession is not absolute, and is liable to be defeated, if he becomes insolvent before he obtains possession.

If the seller has even despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*; for though the property is vested in the buyer, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession; and his insolvency without payment of the price defeats that right equally after the *transitus* has begun, as before the seller has parted with the actual possession of the goods. Whether default in payment, when the credit expires, will destroy that right of possession, if the vendee has not before that time obtained actual possession, and put the vendor in the same situation as if there had been no bargain for credit, was left undecided in *Bloxham v. Saunders*, though as between the original parties that consequence would follow.

(2.) To make the contract of sale valid, in the first instance, there must be a delivery, or tender of it, or tender of payment, or earnest given, or a memorandum in writing signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of his goods as he pleases. The provisions of the English Statute of Frauds of 29 Car. II. c. 3, sect. 17, generally prevail in the United States (a).

Statute of
Frauds.

What will the
property pass.

If therefore earnest be given, though of the smallest amount, or there be a delivery or payment in whole or in part, or a note or memorandum of the contract duly signed, the contract is binding, and the property passes to the vendee, with the risk, and under the qualifications already stated. If everything to be done on the part of the vendor be completed, a delivery of part of a cargo, or lot of goods, has, under certain circumstances, been considered a delivery of the whole so as to vest the pro-

(a) The New York Record Statutes, vol. 2, p. 136, sects. 3, 8, apply to the sale of goods, chattels, or things in action, for the price of fifty dollars, or more, and declare that there must be a note or memorandum of such contract in writing *subscribed* by the parties to be charged, or the lawful agent of the party; or the buyer accept and

receive part of the goods, or the evidences, or some of them, of the things in action, or at the time pay some part of the purchase-money. In Connecticut, the price limited is thirty-five dollars or upwards. The Revised Statutes of Massachusetts of 1835 follow the words of the English Statutes of Frauds.

perty. To constitute a part acceptance so as to take the case out of the statute, there must have been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity of the goods, or to deprive the seller of his right of lien. The vendee cannot take the goods, notwithstanding earnest be given, without payment. Earnest is only one mode of binding a bargain, and giving to the buyer a right to the goods upon payment ; and if he does not come in a reasonable time after request, and pay for and take the goods, the contract is dissolved, and the vendor is at liberty to sell the goods to another person.

If anything remains to be done as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer.

But when everything is done by the seller, even as to parcel of the quantity sold, to put the goods in a deliverable state, the property and consequently the risk of that parcel pass to the buyer, and to so much of the entire quantity as requires further acts to be done on the part of the seller, the property and the risk remain with the seller.

The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass. If the goods be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified.

(3.) When no time is agreed on for payment, the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment. If he does deliver freely and absolutely, and without any fraudulent contrivance on the part of the vendee to obtain possession, and without exacting or expecting simultaneous payment, there is a confidence and credit bestowed : and the precedent condition of payment is waived, and the right of property passes. The obtaining goods upon false pretences, under colour of purchasing them, does not change the property. If it was even a condition of the contract, that the seller was to receive upon delivery a note or security for payment at another time, he may dispense with that condition, and it will be deemed waived by a voluntary and absolute delivery, without a concurrent demand

Delivery is
conditional on
payment.

of the security. But if the delivery in that case be accompanied with a declaration on the part of the seller that he should not consider the goods as sold until the security be given, or if that be the implied understanding of the parties, the sale is conditional, and the property does not pass by the delivery as between the original parties; though as to subsequent *bond fide* purchasers or creditors of the vendee, the conclusion might be different. When there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery until he performs the condition, or the seller waives it; and the right continues in the vendor, even against the creditor of the vendee. If the delivery of the goods precedes for a short time the delivery of the note to be given for the price, according to particular usage in that species of dealing, and which usage is known to the buyer, the case falls within the same principle, and the delivery is understood to be conditional. The condition is not deemed to be waived, and the seller will have a right in equity to consider the goods as held in trust for him, until the vendee performs the condition, and gives the note with security; and his right to the goods will be good, as against the buyer, and his voluntary assignee, though not as against a *bond fide* purchaser from the vendee.

Effect of delivery to a servant or agent or carrier.

(4.) Delivery of goods to a servant or agent of the purchaser, or to a carrier, or master of a vessel, when they are to be sent by a carrier, or by water, is equivalent to a delivery to the purchaser; and the property, with the correspondent risk, immediately vests in the purchaser, subject to the vendor's right of stoppage *in transitu*. A delivery by the consignor of goods, on board of a ship chartered by the consignee, is a delivery to the consignee, and the rule is the same as if they were put on board a general ship for the consignee. The effect of a consignment of goods by a bill of lading, is to vest the property in the consignee. A delivery to any general carrier, where there are no specific directions out of the ordinary usage, is a constructive delivery to the vendee, and the rule is the same whether the goods be sent from one inland place to another, or beyond sea. But if there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property and the risk re-

main with the vendor while in the hands of the common carrier. The delivery to the agent must be so perfect as to create a responsibility on the part of the agent to the buyer; and if the goods be forwarded by water, the vendor ought to cause them to be insured, if such has been the usage, and he ought in all cases to inform the buyer with due diligence of the consignment and delivery. Until the party receiving a consignment or remittance made on account of the consignor, has done some act recognising the appropriation of it to a particular specified purpose, and the party claiming under the appropriation has signified his acceptance of it, so as to create a privity, the property and its proceeds remain at the risk, and on the account of the remitter or owner.

(5.) Symbolical delivery will, in many cases, be sufficient and equivalent, in its legal effects, to actual delivery. The delivery of the key of the warehouse in which goods sold are deposited, or transferring them, on the warehouseman or wharfinger's book, to the name of the buyer, is a delivery sufficient to transfer the property. So the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods. There may be a symbolical delivery, when the thing does not admit of actual delivery. The delivery must be such as the nature of the case admits. In the sale of a ship or goods at sea the delivery must be symbolical, by the delivery of the documentary proofs of the title; and the delivery of the grand bill of sale is a delivery of the ship itself. Even the change of marks on bales of goods in a warehouse by direction of the parties has been held to operate as an actual delivery of the goods. Delivery of a sample has been sufficient to transfer the property, when the goods could not be actually delivered until the seller had paid the duties; that fact being known and understood at the time, and when the buyer accepted of the sample as part of the quantity purchased. A destination of the goods by the vendor to the use of the vendee, the marking them or making them up to be delivered, or the removing them for the purpose of being delivered, may all entitle the vendee to act as owner. But the presumption fails when positive evidence contradicts it, as in the case of a refusal on the part of the vendor to part with the goods until payment; and on the part of the vendee to take the goods when

Symbolical delivery.

What amounts to a delivery.

inspected, or the delivery be of a sample which is not part of the bulk of the commodity sold. If the subject matter of the contract does not exist *in rerum natura* at the time of the contract, but remained to be thereafter fabricated out of raw materials, or materials not put together, it is consequently incapable of delivery, and not within the Statute of Frauds; and the contract is valid without a compliance with its requisitions. The case rests entirely on contract, and no property passes until the article be finished and delivered. If the buyer unreasonably refuses to accept of the articles sold, the seller is not obliged to let it perish on his hands, and run the risk of the solvency of the buyer. The usage on the neglect, or refusal of the buyer to come in a reasonable time after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales.

Place of delivery.

(6.) The place of delivery is frequently a point of consequence in the construction of the contract of sale. If no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. If the place intended by the parties can be inferred, the creditor has no right to appoint a different place. But if no place of performance be designated, and none can be clearly inferred from collateral circumstances, it seems to have been admitted that the creditor may designate a reasonable place for the delivery of the articles. If a note be given for cattle, grain, or other portable articles, and no place of payment be designated in the note, the creditor's place of residence at the time the note is given is the place of payment. If the article be not portable, but ponderous and bulky, then the debtor must seek the creditor, or get him to name a place; and if no place, or an unreasonable one, be named, the debtor may deliver the articles at a place which circumstances shall show to be suitable and convenient for the purpose intended, and presumptively in the contemplation of the parties when the contract was made. When a person in the character of bailee promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place where the property is, or at his dwelling-house or place of business, will be sufficient. If the

debtor be present in person, or by his agent, and makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is, that if the article be properly designated and set apart, the debt is thereby discharged. If the debtor be sued, he may plead the tender and refusal, and he will be excused by the necessity of the case from pleading *uncore prist*, and bringing the cumbersome articles into court ; and it is not like the case of a tender of money, which the party is bound to keep good, and on a plea of tender to bring the money into court. On a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to the creditor. The debtor may abandon the goods so tendered ; but if he chooses to retain possession of the goods, it is in the character of bailee to the creditor, and at his risk and expense. With respect to part performance of an entire contract for the sale and delivery of personal property of a given quantity at a specified price and time, or for the performance of certain labour and service, a delivery of a less quantity than that agreed on, or a refusal or omission to perform the entire labour or service without any act or consent of the other party, will not entitle the party who has delivered in part or performed in part to recover any compensation for the goods which have been delivered or the service which has been performed. The entire performance is a condition precedent to the payment of the price, and the court cannot absolve men from their legal engagements, or make contracts for them (a).

Spain.—Where a person purchases an article without having seen it, and where the quality of the goods cannot be determined beforehand, the purchaser has a right to examine them, and to cancel the bargain if they do not suit him, and precisely the same if he has reserved to himself the right of trying the articles purchased. When the sale has been made by sample, or according to the quality usually known in trade, the purchaser cannot refuse to receive the purchased articles, when they agree with the sample, or are of the quality indicated in the contract. In case of refusal, or on account of non-conformity, the goods must be

Verification of
quality.

(a) Kent's Commentaries, vol. ii., p. 618.

examined by experienced persons, who, upon comparing the bulk with the samples, shall determine whether the goods should be received or not. If they should, the sale is complete, and the goods must remain with the purchaser; but otherwise the contract is annulled with damages, if there be occasion for it. Where the seller has not delivered the articles sold at the time agreed upon, the buyer may cancel the contract, or exact damages for the injury occasioned by the delay, although it might have arisen from unforeseen accidents.

Delivery must be complete, and not in part.

The purchaser cannot be compelled to receive the goods which he has purchased, a portion at a time, unless there has been an agreement to that effect, in which case the sale would be irrevocable as regards the goods already received, even though the seller should not deliver the other portion. The buyer, however, would have right to sue for damages.

When the non-delivery of the goods sold proceeds from their loss or deterioration in consequence of unforeseen accidents, and not through the fault of the vendor, the contract is cancelled. If the purchaser refuse without just cause to receive the articles purchased, the vendor has the right to exact the price of them, or to demand the cancelling of the sale. In case of delay to receive the goods, the vendor may deposit in a public place the articles sold. Whatever damages or deterioration may befall the goods sold, after they have been placed at the disposal of the purchaser, will fall upon him, unless there be fraud or negligence on the part of the vendor.

The vendor will bear the damage sustained by the articles sold, even accidentally, in the following cases:—1. When the article is not certain and determinate, which will exclude all confusion. 2. When the buyer has a right to examine and inspect it before delivery. 3. When it is to be delivered by number, weight, or measure. 4. When the sale is made on credit, or when the article is not in a state to be delivered.

Rights of purchaser to the article.

In such case the sale is annulled, and any portion of the price that may have been paid by anticipation must be restored to the purchaser. Should the vendor, after the sale, have changed the articles sold, or given them up to a third party, he would have to deliver other articles of the same quality and quantity, or in default pay the value of them, as may be awarded by experienced persons, who will have

regard to the benefit that the buyer might have derived from them.

After the merchandises have been delivered, the buyer is precluded from raising any complaint for fault of quality, or want of quantity, once he has been enabled to examine the goods, and the delivery has been made according to number, weight, and measure. If, however, the merchandise was sent in bales, or covered packages, the purchaser has eight days from the delivery within which he may make such claim, unless he shall have given to the vendor an attestation, certifying that he has received it correct in quality and quantity. The seller remains liable for six months for any hidden defects in the goods, but after this delay he is free from all responsibility.

Right to examine the goods.

If no period has been fixed, the merchandise should be delivered twenty-four hours after the contract, and the price paid within ten days. The purchaser, however, cannot exact the delivery of the goods before he has paid for them. The expenses for delivery, weighing, and measuring, are paid by the vendor. Those for receiving and transporting are borne by the purchaser.

Time of delivery.

As soon as the goods sold are placed at the disposal of the purchaser he is bound to pay their price, but the vendor has a lien upon them till they are delivered. If any delay occur in the payment of the price, the purchaser must pay to the vendor the legal interest on the amount he owes from the time agreed for the delivery. So long as the articles are in possession of the vendor, he retains over them a preference above all other creditors of the purchaser, namely, a lien for the amount of the price and interest due on it, in consequence of delay in payment. No vendor can refuse to the purchaser an invoice of the merchandise sold and delivered, with a receipt for the price, or of the amount he has received.

Right of lien.

Commercial sales are not void in consequence of fraud. They simply give rise to suits for damages against the contractor who may have practised fraud. Money paid in earnest is considered as part payment, and not as a condition upon the non-fulfilment of which the sale may be cancelled, unless by a contrary agreement it is so expressly stipulated. In every commercial sale the vendor is bound to guarantee the purchaser from all eviction, although the contract should not express it, unless there

Guarantee of title.

be a clause to the contrary. Moreover, an action will always lie for damage and interest, where it is proved that the vendor has acted fraudulently in the sale.

If the purchaser does not give notice to the seller of the demand on evicting, should the possession of the goods be questioned, he will lose all the effects of the guarantee (a).

SECTION V.

DUTIES OF THE PURCHASER.

BRITISH LAW.

Reception of
the goods.

The first duty of the buyer is to receive the goods and to pay the price on delivery or at the time agreed on by the contract. Where no time is fixed by the contract for the reception of the goods, it must be shown that a reasonable time for the performance of it has elapsed before a suit can be instituted for goods sold and delivered (b). But where a time has been fixed, and the same has elapsed, if the buyer refuses to accept the goods, the seller, having done all that was required for his part to render the transfer effectual, may sue the buyer either on the contract or for goods bargained and sold (c), and the proper measure of damage is the difference between the contract price and the market price on the day when the goods are tendered for acceptance and refused (d). If the vendee does not accept the goods at the time appointed, or within a reasonable time, the contract is dissolved and the vendor is at liberty to sell them to any other person (e).

Duty of the
seller to allow
the examina-
tion of the
goods.

When goods are sold by sample, the seller must allow the buyer to inspect the goods in bulk in order to ascertain whether the bulk corresponds with the sample, and before a right of action accrues to the vendor for non-acceptance, a reasonable

(a) Spanish Code, §§ 361 to 381.

C. 221; *Boorman v. Nash*, 9 B. & C. 152.

(b) *Parkinson v. Whithead*, 2 Scott, N. S. 620; *Sansom v. Rhodes*, 6 Bing. N. C. 261; *Stavart v. Eastwood*, 11 M. & W. 197.

(d) *Phillpotts v. Evans*, 5 M. & W. 475; *Chinery v. Viall*, 29 L. J. Ex. 180.

(c) *Alexander v. Gardner*, 1 Bing. N. C. 671; *Fragano v. Long*, 4 B. &

(e) *Langford v. Tiler*, 1 Salk. 113; *Hinde v. Whitehouse*, 7 East, 571.

opportunity of inspecting the goods must have been given (*a*). If the seller refuses to show the bulk the buyer may rescind the contract (*b*).

In a sale of goods by sample, if the bulk of the commodity do not correspond with the sample the vendee may return the goods and rescind the sale, provided he returns them in a reasonable time, and he has not exercised any act of ownership over them (*c*). Even where no provision is made in the contract for the return of the goods, the contract may be rescinded by the mutual consent of both parties; and such an agreement will put an end to the sale as if it had never taken place (*d*).

When the vendor receives and accepts returned goods, if he exercises acts of ownership over them, he is held to have rescinded the sale though he received the same upon protest and without prejudice (*e*).

In a sale of goods, with an express or implied guarantee, when the goods have been received and accepted, and the contract is executed, the vendee has no more right, in the absence of frauds, to rescind the contract, and return the goods should they not answer to the guarantee, but he may sue on the warranty, or give the breach of warranty in evidence in mitigation of damages. But in an executory contract where an article is ordered from a manufacturer who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it, if he discovers the defect, the contract may be rescinded provided he has done nothing more in the meantime than was necessary to give it a fair trial (*f*). If the vendor fails to give a good title, the vendee may rescind the contract (*g*). When an unreasonable time has elapsed for the performance, the vendee has a right to make an abandonment and rescind the contract (*h*).

Where the sale has been obtained by means of fraud, the party grieved has the right to repudiate the contract. Fraud

Right of buyer when goods differ from the guarantee.

Different in an executory contract.

If the vendor fails to give a good title, the vendee may rescind the contract.

When the sale has been

(*a*) *Isherwood v. Whitmore*, 10 M. & W. 757, and 11 M. & W. 347.

(*e*) *Long v. Preston*, 2 Moo. & Payne, 262.

(*b*) *Lorymer v. Smith*, 1 B. & C. 1.

(*f*) *Street v. Blay*, 2 B. & Ad. 463.

(*c*) *Street v. Blay*, 2 B. & Ad. 463; *Okell v. Smith*, 1 Stark. 107; *Sanders v. Jameson*, 2 C. & K. 557.

(*g*) *Souter v. Drake*, 5 B. & Ad. 999; *Purvis v. Rayer*, 9 Price, 488.

(*d*) *Salte v. Field*, 5 T. R. 211.

(*h*) *Lawrence v. Knowles*, 7 Scott, 381.

obtained by
fraudulent
means.

gives the party upon whom it is practised the right of election. If a purchase of goods is effected by means of fraudulent representations on the part of the vendee, the vendor may maintain trover for the goods against the vendee without a previous demand (*a*). If upon the discovery of fraud the vendor elects to rescind and avoid the sale, he must do it within a reasonable time. If he does anything to affirm the sale after a full knowledge of the facts, and if he suffers considerable time to elapse, he will not be entitled to disaffirm the sale and reclaim the goods. So if a vendee after discovering the sale to be fraudulent deals with the property as his own, he cannot recover the purchase money upon subsequently detecting further circumstances of fraud in the sale (*b*).

Fraud or
illegality
excuses per-
formance.

The buyer will be excused from fulfilling his contract when the vendor is guilty of any fraud in the sale, as when he has employed puffers in an auction, without giving notice of his intention to do so, or has given a false description of the goods, or has fraudulently concealed any material things (*c*), or even where he has used some artifice to disguise faults even when the article was sold with all faults (*d*). It is, however, the duty of the buyer on discovering the fraud to lose no time in repudiating the contract, and he would lose his right of objection if, instead of doing so, he should continue to deal with the article (*e*). So when the contract has become illegal, the buyer may excuse himself from performing it. Where a contract which a plaintiff seeks to enforce is, expressly or by implication, forbidden by statute or common law, no Court will lend its assistance to give it effect (*f*).

(*a*) *Thurston v. Blanchard*, 22 Pickford, 18.

(*b*) *Campbell v. Fleming*, 3 Nev. & M. 834.

(*c*) *Howard v. Castle*, 6 T. R. 642 ; *Thornett v. Haines*, 15 M. & W. 367 ; *Smith v. Clark*, 12 Ves. 477 ; *Early v. Garrett*, 9 B. & C. 928.

(*d*) *Baglehole v. Walters*, 3 Camp. 154.

(*e*) *Campbell v. Fleming*, 1 Ad. & E. 40 ; *Chapman v. Morton*, 11 M. & W. 534.

(*f*) *Wetherell v. Jones*, 3 B. & Ad. 225.

SECTION VI.

RIGHTS OF THE SELLER.

BRITISH LAW.

§ 1. *Lien.*

Where nothing is specified as to delivery or payment although everything may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all the risk attendant upon the goods, still there results to the vendor out of the original contract a right to detain the goods until payment of the price (*a*). The vendor has no right to treat the sale at an end and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time. He has only a right of lien till the price is paid (*b*).

No lien can exist where there is no possession of the goods, therefore the lien is lost if the party entitled to it gives up his right to such possession, whether the delivery has been actual or constructive. The delivery of part of the goods sold divests the vendor of the right of lien over the remainder, if made in the progress of, and with a view to the delivery of the whole. If, however, there is an intention to separate the part from the remainder, the lien will continue (*c*).

Where the goods sold remain in the warehouse of the vendor, and he receives warehouse rent for them from the purchaser, it will amount to a delivery of the goods to him, so as to put an end to the vendor's right of lien (*d*). The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods who gave it of his right of lien for their price, even as against the claims of a third person who has *bond fide* purchased them from the original vendee, but once the delivery order is accepted the lien is lost (*e*).

A lien is wholly inconsistent with a dealing on credit, and can Lien incon-

(*a*) *Withers v. Reynolds*, 2 B. & Ad. 882; *Atkinson v. Smith*, 14 M. & W. 695.

(*b*) *Martindale v. Smith*, 1 Q. B. 389.

(*c*) *Slubey v. Heyward*, 2 H. Bl. 504.

(*d*) *Miles v. Gorton*, 4 Tyrwh. 295.

(*e*) *M'Ewan v. Smith*, 2 H. of Lords Cases, 309; *Lackington v. Atherton*, 7 M. & G. 360.

Lien cannot be claimed without possession of goods.

What amounts to a delivery so as to exclude lien.

sistent with
dealing on
credit.

only subsist when payment is to be made in ready money, or where there is a bargain that security shall be given. When the vendor takes a promissory note of the vendee he divests himself of the lien, and should the promissory note remain outstanding in the hands of third parties he cannot revive it (a).

§ 2. *Stoppage in Transitu.*

What is
stoppage in
transitu.

Stoppage in transitu is the right of the vendor to resume the possession of the goods sold and not paid for, so long as they are on their way to the vendee, and prior to his acquiring possession of them, where the vendee has become insolvent. *Stoppage in transitu* differs from lien, in that the right of lien may be exercised only as long as the vendor is in possession of the goods, and ceases the moment he parts with them, and the right of stoppage *in transitu* commences from the moment the vendor parts with the goods, and ceases upon their actual or constructive delivery to the vendee. *Stoppage in transitu* can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual and constructive possession of the consignee, there is an end of the vendor's right over them.

Effect of
stoppage in
transitu.

The effect of a stoppage *in transitu* is not to rescind the contract but only to replace the vendor in the same position as if he had not parted with the possession of the goods. The vendor will still possess a right of lien on the goods for the price, and the vendee a right on the goods upon payment of the price (b). When the property in the goods has never passed by the contract, the seller will, by the exercise of the right of stoppage *in transitu* resume the complete and absolute disposal of the goods, and if the property has already passed to the vendee then the vendor will by the exercise of such right resume only the right of possession over the goods (c).

The right of stoppage *in transitu* supersedes the owner's right of lien for a general balance of accounts due by the consignee, but not the right of lien upon his carriage (d).

(a) *Bunney v. Poyntz*, 1 Nev. & M., 229; 4 B. & Ad. 568.

(b) *Wentworth v. Outhwaite*, 10 M. & W. 436; *Lickbarrow v. Mason*, 2 T. R. 63; 6 East, 27.

(c) *James v. Griffin*, 2 M. & W. 623; *Rhode v. Thwaites*, 6 B. & C. 388.

(d) *Oppenheim v. Russell*, 3 B. & P. 42; *Morley v. Hay*, 3 M. & Ry. 396.

The right of stoppage *in transitu* may be exercised by the consignor, or by the vendor, or by his agent duly authorised (a). A stoppage *in transitu* by an unauthorised person, professing to act for the seller, is inoperative, though ratified by the seller, if such ratification be after the period during which the seller could have stopped *in transitu* (b). The right of stoppage *in transitu* is in the seller, not in the buyer. The buyer may countermand the order, if in time, and with the consent of the seller he may rescind the sale; but if in insolvent circumstances he cannot stop the goods *in transitu* without committing an act of improper preference to the vendor to the prejudice of other creditors.

The right of stoppage *in transitu* may be exercised not only by taking possession of the goods while on their way, but by a notice to the carrier not to deliver the goods. But the notice, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee (c).

The right may be exercised so long as the goods sold remain unpaid for. A partial payment will not put an end to the right. The effect of a partial payment is only to reduce the lien *pro tanto*. Even where credit has been given, and a bill or note has been taken in payment, and the same has not become due, the vendor still preserves his right to stop the goods, if the consignee has become insolvent (d). So where there are mutual accounts, and the consignee of goods becomes insolvent, the consignor may stop them *in transitu* without waiting the final adjustment of accounts (e). But in all cases, to justify the exercise of such a right by which the vendor is allowed to depart from his contract, the vendee must be bankrupt or insolvent.

The right of stoppage *in transitu* ceases upon the arrival How defeated.

(a) Feise v. Wray, 3 East, 97; Ne-
some v. Thornton, 6 East, 17; Hawkes
v. Dunn, 1 C. & J. 519; Cross (*Ex
parte*), 1 Fonb. N. R. 215.

(b) Bird v. Brown, 4 Exch. 786.

(c) Whitehead v. Anderson, 9 M. &

W. 518.

(d) Feise v. Wray, 2 East, 93; Ed-
wards v. Brewer, 2 M. & W. 375.

(e) Wood v. Jones, 7 Dow. & Ry.
126.

and delivery of the goods in the consignee's hands. The goods cease to be *in transitu* when they are in the hands of the vendee as owner, whether that right of ownership has been claimed or exercised by the arrival of the goods at their final place of destination, or by the delivery at the warehouse of the vendee, or by his personally intercepting the goods during their passage (a). A mere demand of the vendee, without any delivery before the voyage has completely terminated, does not deprive the consignor of his right of stoppage (b). Nor will the right of the consignor to stop the goods *in transitu* be divested by the goods, while in their *transitu*, being attached by process of foreign attachment at the suit of a creditor of the consignee (c).

What constitutes a delivery.

The arrival of the goods at the place of destination is the first criterion to judge whether the goods are in the constructive possession of the vendee (d). A constructive delivery to the vendee is sufficient to defeat the right, provided the goods have arrived at the final place of destination (e). An act of marking, or taking samples, or the like, without any removal from the possession of the carrier, though done with the intention to take possession, does not amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep the goods, in the nature of an agent, for custody (f).

Delivery of part.

The delivery of part of a cargo in the progress of and with a view to the delivery of the whole, divests the vendor's right, but the mere delivery of part to the vendee, when the carrier meant to separate that part from the remainder, would not put an end to the right to stop *in transitu* (g).

Where the goods are in the hands of a carrier.

So long as the goods remain in the hands of the carrier as middleman, there is a presumptive evidence that the stoppage *in transitu* is not lost, and circumstances must show that he

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| (a) <i>James v. Griffin</i> , 2 M. & W. 632;
<i>Foster v. Frampton</i> , 6 B. & C. 107;
<i>Wentworth v. Outhwaite</i> , 10 M. & W. 450.
(b) <i>Jackson v. Nichol</i> , 5 Bing. N. C. 519.
(c) <i>Smith v. Goss</i> , 1 Camp. 282.
(d) <i>Dodson v. Wentworth</i> , 6 Jurist, | 1066.
(e) <i>Ellis v. Hunt</i> , 3 T. R. 464.
(f) <i>Bunney v. Poyntz</i> , 4 B. & Ad. 570; <i>Ellis v. Hunt</i> , 3 T. R. 464.
(g) <i>Bunney v. Poyntz</i> , 4 B. & Ad. 570; <i>Tanner v. Scovell</i> , 14 M. & W. 38. |
|---|--|

stands towards the goods in a new character, under a special agreement to hold them as a bailee of the vendee to defeat the right (a). If the vendee is in the habit of using the warehouse of a wharfinger or of a packer as his own, and make that the repository of his goods, and dispose of them there, the *transitus* will be at an end when the goods arrive at such warehouse (b).

When goods are delivered into a ship chartered by the vendee, who afterwards becomes a bankrupt, the vendor's right to stop *in transitu* is lost ; but when they are shipped to the order of the consignor only, the property does not pass, and the stoppage *in transitu* is not defeated (c). The mere delivery of goods on board a vessel, to be delivered to the vendee, does not divest the vendor of his right to stop *in transitu* ; but if they are so placed on board in order that they be transported to a foreign market, for the account of the vendee, the right is lost (d).

When the
goods are
shipped.

The right to stop the goods *in transitu* is lost when the consignee has assigned the bill of lading to a third person for a valid consideration (e). If the bill of lading be merely pledged, the vendor may yet claim the right, and will be entitled to an interest in the goods, subject to the right of the pledgee (f). But if the assignee of the bill of lading know that the consignee was insolvent, and took the assignment of the bill of lading for the purpose of defeating the right of the vendor to stop the goods *in transitu*, then the vendor's right will not be defeated (g).

Right de-
feated by
the transfer
of bill of
lading.

FOREIGN LAWS.

France.—When a sale has been made conditional upon the payment of the goods, if, in the interval between the time of the contract and the time when the payment is to be made, the

Right to de-
tain goods
sold.

(a) *Whitehead v. Anderson*, 9 M. & W. 535 ; *Dixon v. Baldwin*, 5 East, 175 ; *Coates v. Railton*, 6 B. & C. 422 ; *Nicholls v. Le Feuvre*, 2 Bing. N. S. 81.

(b) *Tucker v. Humphrey*, 1 M. & P. 293 ; *Scott v. Petit*, 3 B. & P. 472.

(c) *Wait v. Baker*, 2 Exch. 1 ; *Fowler v. M'Taggart*, cited in *Hodgson v. Ley*, 7 T. R. 442.

(d) *Stubbs v. Lund*, 7 Mass. 457 ;

Fowler v. Kymer, 3 East, 396 ; *Van Castell v. Booker*, 2 Exch. 691.

(e) *Vertue v. Jewell*, 4 Camp. 31 ; *Walmshurst v. Bowker*, 7 M. & G. 883 ; *Lickbarrow v. Mason*, 2 T. R. 63 ; *Turner v. Liverpool Docks Trustees*, in error, 6 Exch. 543.

(f) In the matter of *Westzinthus*, 5 B. & Ad. 817.

(g) *Cuming v. Brown*, 9 East, 506.

purchaser become bankrupt, the seller may refuse to fulfil the contract, unless the assignees should pay the amount on behalf of the bankrupt. This right may be exercised so long as the goods are still in the vendor's hands. But even where the goods are no longer in the vendor's hands, if he has sent the goods to be delivered to the buyer at another place, so long as they are *in transitu*, and not delivered, they may be stopped. This stoppage *in transitu* is an exceptional privilege, granted to the seller who has not received the price of the goods sold. Where the merchant stopping such goods has received bills or notes for the same, which have not been paid, in consequence of the bankruptcy, it must be seen whether, by taking such bills, it was intended to extinguish the original obligation. Where no such intention appears, the stoppage *in transitu* may be exercised. The simple circumstance that the price was paid by a cheque or a bill is not sufficient to destroy the right. As the stoppage *in transitu* can only be effected so long as the thing sold has not been delivered in the warehouse of the buyer, it is necessary to see what is meant by such delivery.

Constructive delivery.

There are things which are not susceptible of a literal delivery, such as the sale of goods in a warehouse, of which the purchaser becomes the lessee. The delivery in such a case consists in putting the purchaser in possession of the same, and as soon as he has established himself in it, the warehouse becomes his own, and the stoppage is at an end. Where the merchandises are in a public place belonging neither to the buyer nor the seller, other circumstances must be taken into account. Should the goods have been left to the risk of the buyer from the time of the contract, if the seller did not bind himself to send them to any other place, it is natural to consider that they are in a place which became as the warehouse of the purchaser. So long as the merchandises are *in transitu*, and before they have entered the warehouse of the buyer, whether they have been sent direct to his warehouse or they have been shipped on board a vessel to his direction, the goods may be stopped. Where they reach the hands of an agent, if he is charged by the buyer to receive and sell them, the *transitus* is at an end. If he is only charged to keep them temporarily, and to forward them to the buyer, the *transitus* continues.

When the goods have been sold before their arrival, upon the invoice and bill of lading, or carriage note, signed by the consignor, and

Right lost when the goods are sold upon invoice and bill of lading.

without fraud, the stoppage *in transitu* is defeated. A sale upon invoice only, or upon a bill of lading only, would not be sufficient. But both complete the sale, the invoice proving that there is a direct sale, the bill of lading giving the title to receive them. There must, however, be no fraud, and it will rest with the tribunal to guard against any abuse of good faith. That the stoppage *in transitu* may be exercised, the goods must be identically the same as those which were sold, and they must not have suffered any change, either in their nature or quality, at least by any human operation. In all cases where the seller may stop *in transitu*, the assignees of the bankrupt have the power to keep the goods by paying the original price of sale to the seller (a).

United States.—This right is that which the vendor, when he sells goods on credit to another, has of resuming the possession of the goods, while they are in the hands of a carrier or middleman, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. The right exists only as between the vendor and vendee ; and as the property is vested in the vendee by the contract of sale, it can be revested in the vendor during its *transitus* to the vendee, under the existence of the above circumstances. This right of stoppage enables the vendor to resume the goods before the vendee has acquired possession, and to retain them until the price be paid or tendered. If the price be paid or tendered, he cannot stop or retain the goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. It assumes its existence and continuance ; and in consequence of that principle, the vendee or his assignees may recover the goods on payment of the price ; and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he is ready to deliver them upon payment. If he has been paid in part he may stop the goods for the balance due to him, and the part payment only diminishes the lien *pro tanto* on the goods detained. There must be actual payment of the whole price before the right to stop *in transitu*, in case of failure of the

Vendor's
right of
stoppage
in transitu.

(a) Pardessus, Droit Commercial, vol. iii. p. 521.

vendee, ceases. Though a bill of exchange has been accepted by the vendor for the price, and endorsed over by him to a third person, even that will not take away the right; and if the bill be proved under a commission of bankruptcy against the vendee, it will only be considered a payment to the extent of the dividend. The right to stop *in transitu* is paramount to any lien of a third party against the purchaser.

Persons entitled to exercise this right.

1. The right extends to every case in which the consignor is the vendor, and it does not extend to a mere surety for the price, nor to any person who does not stand in the character of vendor or consignor, and rest his claim upon a proprietor's right. As between principal and factor the right does not exist; but a factor or agent who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor, as to be entitled to stop the goods. So a principal who consigns goods to his factor upon credit is entitled to stop them if the factor become insolvent, and a person who consigns goods to another to be sold on joint account, is likewise to be considered in the character of a vendor entitled to exercise this right.

The vendor's right is so strongly maintained, that while the goods are on transit, and the insolvency of the vendee occurs, the vendor may take them by any means not criminal; yet the validity of the right depends on the insolvency of the vendee. It is not requisite that he should obtain actual possession of the goods before they come to the hands of the vendee; nor is there any specified form requisite for the stoppage of goods *in transitu*, though it is well settled that the bankruptcy of the buyer is not of itself tantamount to a stoppage *in transitu*. But a demand of the goods of a carrier, or notice to him to stop the goods, or an assertion of the vendor's right, by an entry of the goods at the custom-house, or a claim and endeavour to get possession, is equivalent to an actual stoppage of the goods.

Matters which allow or defeat the right.

2. The *transitus* of the goods, and consequently, the right of stoppage, is determined by actual delivery to the vendee, or by circumstances which are equivalent to actual delivery. There are cases in which a constructive delivery will, and others in which it will not, destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger,

is a constructive delivery to the vendee ; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. It will continue until the place of delivery be in fact the end of the journey of the goods, and they have arrived to the possession or under the direction of the vendee himself. If they have arrived at the warehouse of the packer used by the buyer as his own, or they are landed at the wharf where the goods of the vendee were usually landed and kept, the *transitus* is at an end, and the right of the vendor extinguished. The delivery to the master of a general ship, or of one chartered by the consignee, is a delivery to the vendee or consignee, but still subject to this right of stoppage, which has been termed a species of *jus postliminii*. And yet if the consignee had hired a ship for a term of years, and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute, as much as a delivery into warehouses belonging to him, and it would bar the right of stoppage. The *transitus* is at an end if the goods have arrived at an intermediate place, where they are placed under the orders of the vendee, and are to remain stationary until they receive his directions to put them again in motion for some new and ulterior destination. If the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues notwithstanding such a constructive delivery to the vendee ; but if the goods be delivered to the carrier or agent *for safe custody, or for disposal on the part of the vendee*, and the middleman is, by agreement, converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. So a complete delivery of part of an entire parcel or cargo, with intention to take the whole, terminates the *transitus*, and the vendor cannot stop the remainder. A delivery of the key of the vendor's warehouse to the purchaser, or paying the vendor rent for the goods left in his warehouse, or lodging an order from the vendor for delivery with the keeper of the warehouse ; or delivering to the vendee a bill of parcels with an order on the storekeeper for the delivery of the goods ; or demanding and marking the goods by the agent of the vendee, at the inn where they had arrived at the end of the journey ; or suffering the goods to be marked and resold, and marked again by the under-purchaser, have all been held to

amount to acts of delivery, sufficient to take away the vendor's lien, or right of stoppage *in transitu*. On the other hand, if the delivery be not completed, and some other act remains to be done by the consignor, the right of stoppage is not gone. If the vendee intercepts the goods on their passage to him, and takes possession as owner, the delivery is complete, and the right of stoppage is gone; but if the goods have arrived at the port of delivery, and are lodged in a public warehouse, for default of payment of the duties, they are not deemed to have come to the possession of the vendee, so as to deprive the consignor of his right.

Acts of the
vendee af-
fecting the
right.

3. A resale of the goods by the vendee does not of itself, and without other circumstances, destroy the vendor's right of stoppage *in transitu*. But if the vendor has given to the vendee documents sufficient to transfer the property, and the vendee, upon the strength of them, sells the goods to a *bond fide* purchaser without notice, the vendor would be divested of his right. The delivery of the bill of lading transfers the property to the consignee, and the assignment of it by the consignee by way of sale or mortgage, will pass the property, though no actual delivery of the goods be made, provided they were then at sea. As a general rule, no agreement made between the consignee and his assignee can defeat or affect this right of the consignor; and the consignor's right to stop *in transitu* is prior and paramount to the carrier's right to retain as against the consignee. A factor having only authority to sell, and not to pledge the goods of his principal, cannot divest the consignor of the right to stop the goods *in transitu*, by endorsing or delivering over the bill of lading as a pledge, any more than he could by delivery of the goods themselves by way of pledge; and it is the same thing whether the endorsee was or was not ignorant that he acted as a factor. If the assignee of the bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the assignee is not gone; and any collusion or fraud between the consignee and his assignee will, of course, enable the consignor to assert his right. But the mere fact that the assignee has notice that the consignor is not paid, does not seem to be of itself absolutely sufficient to render the assignment defeasible by the stopping of the cargo in its transit, if the case be other-

wise clear of all circumstance of fraud; though, if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent, as against the rights of the consignor. The buyer, if he finds himself unable to pay for the goods, may, before delivery, rescind the contract with the assent of the seller. But this right of the buyer of rejecting the goods, subsists only while the goods are *in transitu*. After actual delivery, the goods become identified with his property, and cannot, in contemplation of bankruptcy, be restored to the seller; nor can he interfere and reject the goods though in their transit after an act of bankruptcy committed, for this would be to give a preference among creditors (a).

SECTION VII.

SALES BY AUCTION.

BRITISH LAW.

A sale by auction is a sale where goods are offered and sold *Definition* to the highest bidder. The old Acts relating to the duty on auctioneers' licences defined an auction to be a sale of any estate, goods, or effects whatsoever by outcry, knocking down of hammer, by candle, by lot, by parcel, or by any other mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser (b).

An auctioneer is the person by whom such sale is conducted, and whose duty it is to state the conditions of sale, to declare the respective biddings, and to terminate the sale by knocking down the thing sold to the highest bidder. Every auctioneer must take out a licence, renewable annually on the 5th July, for which he is charged £10. An auctioneer is a commissioned agent employed to sell or purchase any kind of property at public auctions, and he may act as such without any written authority, though it is very desirable that the authority should be written, as it would otherwise be difficult to prove the existence of it.

It is usual in sales by auction to have the conditions upon which the sales are to be effected in writing, and printed, and *Conditions of sale should be written or printed.*

(a) Kent's Comment. vol. 2, p. 714.

(b) 19 Geo. 3, c. 56, s. 3; 42 Geo. 3, c. 93, s. 14.

read over by the auctioneer immediately before the property is put up for sale, and in preparing them care should be taken that the same give a distinct comprehension and faithful description of the property. The conditions ought to specify amongst other things the sum at which the property is to be put up, how much is to be advanced at each bidding, the amount of deposit required to be paid down, and the time when the goods are to be received and paid for (a).

(a) The following are the usual conditions of sale:—

SALE OF WOOL.

Conditions of Sale.

1. The highest bidder to be the purchaser; and if any dispute arise between the bidders for any lot, it shall be decided by the broker, unless one of the claimants will advance, in which case the lot shall be put up again.

2. The goods to be weighed off by the warehouse-keepers, and taken away within fourteen days by the buyers, at their own expense, with all faults and defects of whatever kind (including defect or error of description), and to be paid for on or before delivery, in cash, or bank of England notes, without discount.

3. The goods to be free of rent, and at the risk of the vendors from fire, until the expiration of the prompt, unless removed from the warehouses in which they were resting at the time of sale, or transferred for re-housing in the books of the warehouse-keepers.

4. The buyers to pay the brokers one shilling per lot, and to deposit £25 per cent. (if required) at any time during or after the sale.

5. And if any lot or lots remain uncleared after the expiration of the said fourteen days, the before-mentioned deposit to be absolutely forfeited, and the buyer to be further subject to all loss and charges that may accrue on the resale thereof, which it shall be at the option of the broker to effect, either by public sale or private contract.

SALE OF SHIPS.

Conditions of Sale.

The _____ of the ship or vessel

called the _____ now lying in the _____ belonging to the port of _____ of the registered measurement of _____ tons or thereabouts, cause her to be exposed for sale on the conditions following:—

The _____ do consent to and with the buyer, that whosoever bids most and last, in due time after he has declared his name, and the broker has repeated the same, shall be deemed the buyer, and that no person shall advance less than _____ at each bidding.

The purchaser is immediately to pay on account one _____ part of the purchase money, together with two guineas to the broker, to bind the bargain, and the residue within _____ after the sale, or at the time of the delivery of the bill of sale, whichever may first happen.

On payment of the whole of the purchase money a legal bill of sale shall be made out to the purchaser at his expense, and the vessel, with what belongs to her, shall be delivered, according to the inventory which has been exhibited and is hereunto annexed, the said inventory shall be made good as to quantity only.

The vessel and stores to be taken from the place and in the condition in which they now lie, without any allowance for weights, lengths, quantities, any defects or errors in description whatsoever.

But in case any default shall be made by the purchaser in the payments aforesaid, the money paid in part shall be forfeited to the sole use of the present proprietors, and they shall be at liberty to put up and sell the said ves-

If either party be guilty of fraud, or of deceitful misrepresentations, the sale is invalid, and the party grieved may refuse to comply with the contract (a). Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation (b).

Effect of deceit and misrepresentation.

The conditions of the sale by auction, printed and posted up under the auctioneer's box, or in the auctioneer's room, form part of the terms of the contract, and are binding upon the parties as a sufficient notice to the purchaser of the conditions of sale (c). The printed conditions cannot be varied by parol evidence of the verbal statements of the auctioneers at the time of the sale either as to the parcels or qualities of the subject matter of sale.

It is the duty of the auctioneer to obtain the best price he can by means of competition, and as the authority entrusted to him is personal, he cannot employ another person, even his own clerk, to sell the property without the owner's consent. He must read the substance of the conditions of sale before the sale commences, and should any alteration have been made since they were published, the same should be communicated to the

Duties of the auctioneer.

sel again, either by public or private sale, and the deficiency, if any, arising from such re-sale, together with all expenses attending the same, shall be made good by the said defaulting purchaser, who shall be responsible for all losses or charges that may be incurred in consequence of non-compliance on his or their part with this agreement, and neither the broker nor any of the present proprietors, his or their heirs, executors, administrators or assigns shall be anyways accountable or liable to be sued either at law or equity for the said money paid in part and forfeited as aforesaid.

If any difference shall arise at the sale, the said vessel shall be put up again.

London. 18

I have this day the said vessel and stores, subject to the above-mentioned conditions of sale, for the sum of pounds.

Witness

Received of the sum of pounds as deposit on the above.

(a) Fuller v. Abrahams, 6 Moore, 316; Norfolk v. Worthy, 1 Camp. 340.

(b) Flight v. Booth, 1 Bing. N. C. 377; Leach v. Mullett, 3 C. & P. 115; Dobell v. Hutchinson, 3 A. & E. 355; Dykes v. Blake, 4 Bing. N. C. 463.

(c) Menard v. Aldridge, 3 Esp. 271.

company and reduced into writing. The practice at a sale by auction is that at the time and place appointed the auctioneer, from his desk or rostrum, reads aloud the conditions on which the property will be transferred to the highest bidder; and he then puts up the lots in succession, upon which those who are desirous of purchasing bid one after another, each succeeding offer being higher than the preceding one, and the highest bidder is declared the purchaser, which is signified to the company by the knocking down of a small portable hammer (*a*). The bidder must be a person capable of contracting. Therefore the bidding of an idiot, lunatic, or other person labouring under a defect in their understanding, may be avoided. The auctioneer himself is incapacitated from bidding (*b*).

What is a bidding? A bidding may be withdrawn.

A bidding at an auction is a mere offer to purchase, the knocking down of the hammer constitutes the consent of the seller, and the conclusion of the bargain. Therefore at any time before the knocking of the hammer the seller may withdraw his goods, and the bidder may retract his offer (*c*). It is necessary, however, in such case that the retraction be loud enough to be heard by the auctioneer, otherwise it is not sufficient (*d*).

Employment of puffers illegal.

The seller may employ a person to attend the sale and bid on his account, so that the property may not be sold under value; but he cannot employ more than one person for the purpose. If more are employed to make fictitious biddings it would be illegal. And if an auctioneer inserts in the conditions of sale by auction that the property is to be sold "without reserve," he by so doing contracts with the highest *bond fide* bidder that the sale shall be without reserve (*e*). In Scotland the seller cannot legally be a bidder, either directly or by employing another person to bid for him, unless he shall have expressly reserved a right to do so in the conditions of

(*a*) *Lowe & W.* 2.

(*b*) *Ex parte Hughes*, 6 Ves. jun. 617; *Coles v. Trecottick*, 9 Ves. jun. 250.

(*c*) *Warlow v. Harrison*, 5 Jur. N. S. 313; *Payne v. Cave*, 3 T. R. 148; *Routledge v. Grant*, 4 Bing. 653; *Cooke v. Oxley*, 3 T. R. 654.

(*d*) *Jones v. Nanny*, M'Clel. 39.

(*e*) *Wheeler v. Collier*, M. & M. 125; *Howard v. Castle*, 6 T. R. 642; *Bramley v. All*, 3 Ves. jun. 624; *Thornett v. Haines*, 15 M. & W. 367; *Warlow v. Harrison*, 29 L. J. Q. B. 14; *Robinson v. Wall*, 16 L. J. Ch. 401.

sale, and shall have publicly announced such reservation at the time of the sale (*a*).

Sales by auction are within the Statute of Frauds, and a memorandum of the bargain not annexed to the catalogue is not sufficient to satisfy the statute. The auctioneer effecting a sale by auction, or his clerk taking down the bidding in the presence of the purchaser, is the authorised agent of both the vendor and the purchaser, and his signature in the books binds both parties, and is sufficient to satisfy the statute. When, however, the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only, and his signature cannot bind the buyer (*b*). If on a sale by auction the same person is declared to be the highest bidder for several lots, a distinct contract arises for each lot; and if each of them is under £10 the statute will not apply, although the amount of the whole purchase may be much greater than £10 (*c*).

Where a deposit has been paid to an auctioneer he becomes a stakeholder for the same, and he cannot part with it either to the vendor or to the purchaser so long as any dispute exists regarding it; and if the vendor fails to make a title to the property sold, the deposit may be recovered of the auctioneer (*d*).

The auctioneer or the vendor may enforce the contract provided he has on his part performed all the conditions precedent required by the contract. And the purchaser may, in case of non-performance, sue either the auctioneer or the principal, though it is best in either case that the proceedings should be instituted by or against the principal (*e*).

The auctioneer is entitled to his commission, and also to all the expenses of advertising, catalogues, warehouse rent, &c., and he has a lien for the same on any goods of his employer which may be in his possession (*f*). If, however, through neg-

Sales by auction within the Statute of Frauds.

In a sale by auction each lot is a distinct contract.

Responsibility of auctioneer for deposit.

Enforcement of the contract.

(*a*) See Second Report of Mercantile Law Commission, 1855.

(*b*) *Kenworthy v. Schofield*, 2 B. & C. 945; *Hinde v. Waterhouse*, 7 East, 558; *Emmerson v. Heelis*, 2 Taunt, 38; *Meux v. Carr*, 1 H. & N. 484.

(*c*) *Emmerson v. Heelis*, 2 Taunt, 38; *James v. Shore*, 1 Stark, 426; *Lewin*

v. Guest, 1 Russ. 330.

(*d*) *Burrough v. Skinner*, 5 Burr. 2639; *Harrington v. Hoggart*, 1 B. & Ad. 577; *Edwards v. Hodding*, 5 Taunt, 815.

(*e*) *Henderson v. Barnewall*, 1 Y. & J. 387; *Atkins v. Amber*, 2 Esp. 493.

(*f*) *Capp v. Topham*, 6 East, 392.

ligence or unskilfulness he fails to execute his duty to the benefit of his principal, he may lose his right to any remuneration (a).

**Responsibility
of auctioneer
for lessee.**

It is the duty of the auctioneer to take the same care of the goods sent to him for sale as he would of his own, and, if any loss or damage arise to them through his default or negligence, he is responsible for the same to his employer; but he is not liable for any loss or damage which may accidentally happen (b). The auctioneer is not responsible for the purchase money of the property sold, unless the same has been paid over to him.

FOREIGN LAW.

**Rights of
auctioneers.**

United States.—An auctioneer has not only possession of the goods which he is employed to sell, but he has an interest coupled with that possession. He has a special property in the goods, and a lien upon them for the charges of the sale, and his commission, and the auction duty. He may sue the buyer for the purchase money, and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk. If the auctioneer has notice that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of sale. So, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages on its non-performance.

**Withdrawal of
the bidding.**

A bidding at an auction may be retracted before the hammer is down. Every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to, and that assent is signified on the part of the seller by knocking down the hammer.

**Employment
of puffers.**

As regards the employment of puffers, the decisions of the Courts seems to be, that the employment of a bidder by the owner would or would not be a fraud, according to circumstances tending to show innocence of intention, or a fraudulent design. If he was employed *bond fide* to prevent a sacrifice of

(a) *Curtis v. Barclay*, 5 B. & C. 141; (b) *Malthy v. Christie*, 1 Esp. 340; *Man v. Shiffner*, 2 East, 529; *Drinkwater v. Goodwin*, Cowp. 251. *Coggs v. Bernard*, 2 Ld. Raym. 917.

the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. So, it will be a void sale if the purchaser prevails on the persons attending the sale to desist from bidding, by reason of suggestions by way of appeal to the sympathies of the company.

CHAPTER XI.

BILLS OF EXCHANGE.

INTRODUC-
TORY OBSER-
VATIONS.
Utility of
bills.

BILLS of exchange are the most useful of all commercial instruments, and have greatly contributed to the extension of trade by facilitating commercial operations, economising capital, assisting credit, and promoting the circulation of wealth. They represent money, merchandise, and labour, and are themselves a merchandise upon which large gains and losses are realised. Economically and commercially they fulfil most useful functions, whilst they are indispensable for the transmission of funds from town to town, and from country to country, and they act as securities for the numerous and complicated transactions of trade.

Origin of
bills.

The origin of bills of exchange is not accurately ascertained. They were unknown to the ancients. In Greece and Rome there were money-changers, and they even caused money to pass from place to place,—as did Cicero, when he sent his son to Athens, to study,—but they did so by letters of credit. It was not till the middle age that the instrument now known as “bill of exchange” was introduced. Some writers ascribe the invention to the Jews. When banished from France, where they had left their property deposited in the hands of their friends, they found no other mode to recover that money than by making use of travellers and pilgrims to whom they gave letters, in a concise style, for the purpose. They afterwards initiated in this new industry the merchants of Amsterdam, and thence it spread throughout Europe. Other writers attribute the invention to the Ghibelines, who, when chased from Florence by the Guelphs, having taken up their residence at Amsterdam, began there to trade in bills of exchange, which they called *Polizza di Cambio*. It is, however, probable that bills of exchange were never invented in their present perfect form, but were suggested by

a variety of causes, and subjected to gradual improvements. Though known as far back as in the thirteenth and fourteenth centuries, it is probable that their form was very different, and that they did not settle down into the present model or uniform instrument till long after. We know, moreover, that they were not made payable to order till long after the use had become almost universal.

In England bills of exchange must have been known as early as A. D. 1367, inasmuch as King Edward I., in that year, ordered certain money collected in England for the Pope not to be remitted to him in coin or bullion, but by way of exchange (*a*). In 1381, bills of exchange were expressly referred to in an Act of Parliament of Richard II.

Introduction
of bills in
England.

SECTION I.

NATURE AND REQUISITES.

BRITISH LAW.

A bill of exchange is an open letter of request, addressed by Definitions. one person to a second, desiring him to pay, at a certain time therein named, a sum of money, to himself, or to a third person, or to any other to whom himself or that other person shall order it to be paid, or to the bearer. A promissory note is a written engagement by one person to pay another person therein named, or to any other to whom he shall order it to be paid, absolutely and unconditionally, a certain sum of money at a time specified therein. By the statute of Anne (*b*), promissory notes were put on the same footing as bills of exchange, and by the statute of William III. (*c*), inland bills were regarded as foreign bills, except that they need not be protested for non-payment.

The person who makes the bill is called the drawer, the person Designation
of parties in
the bill. to whom the bill is addressed is called the drawee, and the person in whose favour it is drawn is the payee. If the drawee

(*a*) Rymer Fœdera, vol. ii. p. 1042. In 1394 an ordinance was passed in Barcelona on bills of exchange; and in 1462, Louis XI. issued the first decree on the subject in France. Baldus, an Italian jurist, names bills of exchange as far back as 1328, and in India they were known at a considerably earlier time.

(*b*) 3 & 4 Anne, c. 9.

(*c*) 9 & 10 Will. 3, c. 17.

accepts the bill, he is called the acceptor. The person who makes the note is called the maker, and the person in whose favour the note is made is called the payee. When a bill or note is endorsed by the payee, the person so endorsing it becomes the endorser, and the person to whom it is endorsed the endorsee.

Difference
between bills
of exchange
and promis-
sory notes.

While a promissory note continues in its original shape of a promise by a person to pay another, it bears no similitude to a bill of exchange. It is when it is endorsed that the resemblance begins; for then it becomes an order by the endorser upon the maker of the note to pay the endorsee. As soon as a note is endorsed by the payee, the endorser stands in the capacity of a drawer, the maker of the note as the acceptor, and the endorsee as the payee. If it be ambiguous whether an instrument be a bill or note, the party holding it is entitled to treat it either as one or the other (*a*). And an instrument which appears, on common observation, to be a bill of exchange, may be treated as such, although words may be introduced into it for the purpose of deception which might make it a promissory note (*b*). And an instrument in the form of a bill of exchange, but not addressed to any one, may be treated as a promissory note (*c*).

The bill or
note must be
in writing.

The bill or note must be in writing and on paper, or on substances analogous to it, but may be written in ink or pencil (*d*). The body of the bill or note may be in printed letters, but the signature must be in the handwriting of the party executing it, or, if it be signed with his mark, it must be verified by some person attesting it at his request.

Form of bills
and notes.

The following is the common form of bills and notes; but no precise words are necessary to be used in bills or notes, provided there be an order or a promise to pay in an absolute manner, and at all events (*e*).

- (*a*) *Edis v. Bury*, 6 B. & C. 433.
- (*b*) *Lloyd v. Oliver*, 18 Q. B. 473; *Allan v. Mawson*, 4 Camp. 115; *Milner v. Thompson*, 3 M. & G. 576.
- (*c*) *Fielder v. Marshall*, 30 L. J. N. S. C. P. 158.
- (*d*) The imperfection of this mode of writing, its being so subject to obliterations, and the impossibility of

proving it when it is obliterated, render this mode of writing particularly objectionable. *Geary v. Tysic*, 5 B. & C. 234; *Closson v. Hearn*, 4 Verm. U. S. 11; *Brown v. Butchers' Drovers' Bank*, 6 Hill N. Y. R. 443.

- (*e*) *Chadwick v. Allan*, Stra. 706; *Peto v. Reynolds*, 7 Exch. 410.

FORM OF AN INLAND BILL.

Two months after date (*time of payment*), pay to Mr. (*payee's name*), or order (or to the order of) Mr. (*payee's name*), One hundred pounds (*sum in full*), for value received or in account.

(Drawer's name).

To Mr. (*drawee's name and place of residence*).

Payable at (place of payment).

FORM OF A PROMISSORY NOTE.

Two months after date (*time of payment*), I promise to pay Mr. (*payee's name*) or order, One hundred pounds (*sum in full*), for value received.

B. B. (*Maker's name*).

The sum must be in money, and, if not otherwise stated, it is *sum*. presumed to be the money of the place where the bill or note is payable (*a*). The sum must be a specific one, and any expression qualifying it under an uncertainty renders the instrument void. Thus a promise to pay a sum of money, "with all other sums that may be due" (*b*), or "and all fines according to rule" (*c*), or "and the demands of a sick club," would not be valid as a promissory note (*d*). The sum is usually expressed in words at length in the body of the bill or note, and in figures at the top of it, and where a difference appears in the amount between the figures at the top and the words in the body of the instrument, the amount expressed in words prevails. Where, however, there is doubt as to the amount on the face of the instrument, no extrinsic evidence is allowed to explain it (*e*). But if there be simple inaccuracy in the statement of the sum, if otherwise intelligible, it will not vitiate the bill or note (*f*).

(a) Sibree v. Tripp, 15 M. & W. 23; Anon., Buller, N. S. 272; *Ex parte* Imeson, 2 Rose, 225.

(b) Smith v. Nightingale, 2 Stark. 375; Barlow v. Broadhurst, 4 Moore, 471.

(c) *Ayrey v. Fearnside*, 4 M. & W. 168 : *Firbank v. Bell* 2 B. & Ald. 36.

(d) *Bolton v. Dugdale*, 4 B. & Ad. 619; *Cushman v. Haynes*, 20 Pick. U. S. 176.

(c) *Saunderson v. Piper*, 5 Bing. N. C. 425.

(f) *Rex v. Post*, Bayl. Bill, 8; *Phipps v. Tanner*, 5 C. & P. 488.

Bills and notes for less than twenty shillings.

Bills and notes for the payment of any sum of money less than twenty shillings are void (*a*). Bills or notes made in England, being negotiable or transferable for the payment of twenty shillings and less than five pounds, or on which such sum shall remain undischarged, must specify the name and place of abode of the person to whom and to whose order the bill or note is payable, attested by one subscribing witness, and bear date before or at the time of drawing or issuing, and be made payable within twenty-one days after the day of the date, and is not transferable or negotiable after the time thereby limited for payment (*b*).

Date.

The date should be clearly expressed, and, to avoid erasions or alterations, it should be written in words. The date is not necessary in a bill or note, except where it is payable at a certain time after date, and if there be no date when so payable, the time will be computed from the day the bill or note was issued or made, which may be proved by parol or other circumstantial evidence (*c*). But the date of the bill or note is always *prima facie* evidence of the time when it was issued (*d*). A mere omission, or a clear mistake of the date, may be corrected without avoiding the instrument, but any alteration in the date except with the consent of the acceptor, would invalidate the instrument (*e*). A bill or note, except where expressly provided by statute, would be valid, though it be either antedated or postdated (*f*). But postdating a bill or note, in order to make it payable at a longer interval, though it does not now affect the stamp duty, would render the bill or note invalid (*g*). Bills or notes for more than twenty shillings and less than five pounds, or on which more than twenty pounds and less than five pounds remain undischarged, must bear date before or at the time of

(*a*) 48 Geo. 3, c. 88, s. 2.

(*b*) 17 Geo. 3, c. 30, s. 1, made perpetual by 27 Geo. 3, c. 16.

(*c*) Armit v. Breame, 2 Ld. Raym. 1076; Giles v. Bourne, 6 M. & S. 73; De la Courtier v. Bellamy, 2 Show. 422; Mayne v. French, 3 B. & P. 173; Anderson v. Weston, 6 Bing. N. C. 296; Sinclair v. Baggaley, 4 M. & W. 312; Smith v. Batten, 1 M. & Rob. 341; 18 & 20 Vict. c. 80, s. 10.

(*d*) Anderson v. Weston, 6 Bing. N. C. 296; Harrison v. Clifton, 17 L.

J. 238.

(*e*) Brutt v. Peard, Ry. & Mood. 38; Fitch v. Jones, 5 E. & B. 244; Master v. Miller, 4 T. R. 320; 2 House of Lords, 140; Birchfield v. Moore, 23 L. J. 261, Q. B.; Gardner v. Walsh, 5 E. & B. 83; Bathe v. Taylor, 15 East, 412; Walton v. Hastings, 4 Camp. 223; Outhwaite v. Luntley, 4 Camp. 179.

(*f*) Pasmore v. North, 18 East, 517.

(*g*) Serle v. Norton, 9 M. & W. 309; Field v. Woods, 7 Ad. & E. 114.

drawing or issuing thereof, and not on any day subsequent thereto (*a*).

The bill or note should always specify the place where it is drawn or made, although it is not essential to the validity of the bill or note, except in the case of bills under five pounds (*b*). A bill of exchange or promissory note is usually drawn or made payable either at sight or on demand, or at the expiration of any number of days or months after sight ; at the fixed day of the month, or at the end of a certain number of days, months, or years, or at the expiration of a certain number of days, weeks, months, or years after date ; at one or more usances, or it may be on a certain known public event, such as a fair or market, or by instalments at different times. Where no time is fixed for payment, the bill or note is held payable on demand (*c*). The time of payment must be certain, and not contingent ; it matters not how distant be the time provided it be a time that must happen (*d*). Thus a bill or note would be valid if payable at any time after the death of an individual, or on the drawee or maker's coming of age (*e*). But where the event is doubtful or contingent, as "if living at the time," or "provided I marry," or "when realised," the bill or note would be invalid (*f*). Bills or notes under £5 must be made payable within the space of twenty-one days from the date, and no bill or note for £5 can be made or negotiated payable on demand except by bankers, under special statutes (*g*).

The name of drawer or maker must be subscribed, and there ought to be no uncertainty about him. The name of the drawer is usually written at the bottom of the bill, but it is not indispensable, and may be written in any part in the body of the bill (*h*). The name must be in the handwriting of the individual, but may be even in printed letters, if the party is in the habit

(*a*) 17 Geo. 3, c. 70 ; 7 Geo. 4, c. 6.
(*b*) *Walter v. Haynes, Ry. & M.* 149.

(*c*) *Boehm v. Sterling, 7 T. R. 427 ; Whitlock v. Underwood, 2 B. & C. 157.*
(*d*) *Colehan v. Cooke, Willes, 396.*
(*e*) *Colehan v. Cooke, Willes, 396 ; Ex parte Mitford, 1 Bro. C. C. 398 ; Ex parte Barker, 9 Ves. 110 ; Roffey v. Greenwell, 10 A. & E. 222 ; Goss v. Nelson, 1 Burr. 226.*

Name of drawer.
(*f*) *Kingston v. Long, 4 Doug. 19 ; Roberts v. Peake, 1 Burr. 323 ; Haydock v. Lynch, 2 Ld. Raym. 1563 ; Morgan v. Jones, 1 C. & J. 162 ; Richardson v. Martyr, 25 L. T. Q. B. 64 ; Alexander v. Thomas, 16 Q. B. 333.*
(*g*) 17 Geo. 3, c. 30 ; 7 Geo. 4, c. 6 ; 9 Geo. 4, c. 65.
(*h*) *Taylor v. Dobbins, 1 Str. 399 ; Elliott v. Cooper, 1 Str. 609 ; Cowie v. Stirling, 6 E. & B. 333.*

of using the same (*a*). A note may be made by two or more persons jointly. If signed by several persons, as "we promise," the note is joint only. If signed by two or more persons, as "I promise," the note is several as well as joint. That a note be joint and several, it must be expressly stated to that effect (*b*).

Name of payee.

A bill or note may be payable to an individual, or to his order, or to bearer; but the name of the individual intended must be sufficiently clear and capable of being identified. Where the name of the payee is uncertain at the time when the note was made, the note would be payable on a contingency, and is void (*c*). A promissory note payable to the maker's own order is a promise to pay to the person, to whom the maker should afterwards indorse it (*d*). A bill of exchange drawn and issued in blank without the name of the payee may be filled up by the *bona fide* holder with his name (*e*). A bill or note payable to a fictitious payee or his order is void as between the original parties who put the instrument into circulation, yet a *bona fide* holder may recover upon it against all the parties who knew the fictitious character of the transaction (*f*).

Order or promise to pay.

To constitute a bill or note, there must be an order or a promise to pay absolutely and unconditionally. A mere acknowledgment of debt, or an I. O. U., or any paper importing a desire to pay as a matter of favour and not of right, is not a promissory note (*g*).

Payable at all events.

A bill or note must be payable at all events, and not subject to any condition or contingency (*h*). Thus, a promise to pay would not be valid as a promissory note if it contains conditional words, such as "provided the terms mentioned in

(*a*) Schneider *v.* Norris, 2 M. & S. 286.

(*b*) March *v.* Ward, Peake, 130; Clerk *v.* Blackstock, Holt, 474; Sayer *v.* Chaytor, 1 Lutw. 695; Galway (Lord) *v.* Mathew, 1 Camp. 403; Dalrymple *v.* Fraser, 15 L. J. 193, C. P.

(*c*) Cowie *v.* Stirling, 6 E. & B. 333; Yates *v.* Nash, 29 L. J. C. P. 306.

(*d*) Brown *v.* De Winton, 6 C. B. 338; Gay *v.* Lander, 6 C. B. 336; Hooper *v.* Williams, 2 Exch. 13.

(*e*) Crutchley *v.* Clarence, 2 M. & S. 90; Atwood *v.* Griffin, 1 R. & M. 425;

Crutchley *v.* Mann, 5 Taunt. 529.

(*f*) Vere *v.* Lewis, 3 T. R. 152; Benet *v.* Gibson, 3 T. R. 51; Collis *v.* Emmet, 1 H. Bl. 313; Gibson *v.* Hunter, 2 H. Bl. 187.

(*g*) Fisher *v.* Leslie, 1 Esp. 426; Gould *v.* Coombs, 1 C. B. 543; Little *v.* Slackford, M. & M. 171; Childers *v.* Boulnois, D. & R. 8; Ashby *v.* Ashby, 3 M. & P. 186.

(*h*) Kingston *v.* Long, 4 Doug. 9; Roberts *v.* Peake, 1 Burr. 325; Worley *v.* Harrison, 3 Ad. & E. 669.

certain letters shall be complied with," or provided "he shall leave me sufficient or I shall be otherwise able to pay it," or "if I marry within two months," or "four years after date if I am living" (a). Nor can the bill or note be made payable out of a particular fund, as "out of the balance due," or "on the sale of produce immediately when sold," or "out of the proceeds of a shipment," or "out of any half-pay." The bill must be payable generally and at all events (b).

Bills or notes drawn or made in any part, and payable in any other part of the British islands, viz., Great Britain, Ireland, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent, are inland bills and notes (c).

Bills drawn in the United Kingdom and payable in any foreign country, or drawn in any foreign country and payable in the United Kingdom, are foreign bills. Though the bill was written and accepted in England, if it be transmitted abroad for the signature of the drawer, and it is there drawn, the bill is a foreign bill.

Foreign bills are usually issued in sets of several parts, each part containing a condition that it shall be payable only so long as all the other parts remain unpaid ; thus, the first is payable only "second and third unpaid," the second "first and third unpaid," and the third "first and second unpaid," but the whole set constitute but one bill. All the copies of the set must otherwise be identically the same. When a bill is drawn in a set each part ought to be delivered to the person in whose favour it is made (d). The drawer cannot refuse to deliver the second or third of exchange when required.

FOREIGN LAWS.

France.—A bill of exchange, or *lettre de change*, must be drawn from one place upon another ; it must be dated, it must specify the sum to be paid, the name of the person who is to pay, the time and place where the payment is to be made, and

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| (a) <i>Palmer v. Pratt</i> , 9 Moore, 358 ;
<i>Carlos v. Fancourt</i> , 5 T. R. 482 ; <i>Ex parte Tootel</i> , 4 Ves. jun. 372 ; <i>Beardesley v. Baldwin</i> , 2 Stra. 1151. | Hill v. Halford, 2 B. & P. 413.
(c) 19 & 20 Vict. c. 97, s. 7.
(d) <i>Holdsworth v. Hunter</i> , 10 B. & C. 454 ; <i>Kearney v. The West Grenada Mining Company</i> , 5 Week. Reg. 200 ; 1 H. & N. 413. |
| (b) <i>Dawkes v. Lord de Lorraine</i> , 2 W. Bl. 782 ; <i>Stevens v. Hill</i> , 5 Esp. 247 ; | |

Requisites of
lettres de change.

the name of the person in whose favour it is drawn. The bill may be drawn in favour of a third person, or of the drawer himself, provided it be made to order. It must also indicate the value given for it, whether in specie, in merchandise, on account, or in any other manner. A bill of exchange must be in writing. If the bill is drawn in a set it must specify it. A bill of exchange wanting any of these requisites is only a simple promise.

Must be drawn from one place upon another. The first condition to the validity of a bill of exchange in France is, that it be drawn from one place upon another, and the reason is, that, otherwise, the various contingencies of abundance or scarcity of money and other risks attending the contract of exchange would be altogether wanting. The date includes the day when and the place where the bill is drawn. The time is required to establish the capacity of the drawer either in respect of his age or in respect of his solvency. To antedate a bill is a misdemeanor. The place is required to prove that the first condition of the bill has been fulfilled. The sum to be paid must be precise. It may be expressed in cyphers or in words. The name of the drawee should be clearly expressed. It is usual to write it below the bill. The drawer cannot himself be the party to pay the bill, otherwise it will no longer be a bill of exchange. A person may draw upon his commission agent, or upon his house in another place when he has two houses of trade. But he could not draw upon his clerk, or upon his wife, where there is a community of goods between them. A bill of exchange must state the time when it will be paid. It must be payable on the expiration of a certain number of days, weeks, or months, or after one or many usances, or at so many days, weeks, or months, after sight. The place where the payment will be made must be set forth. Where no place is indicated by the party himself the drawer will intend it to be payable at the domicile of the drawee. The bill of exchange must express the name of the party to whom it must be paid. The bill must be made to order; if made only in favour of the payee, he will be entitled to exact the payment, but he cannot indorse the bill to another. The bill may be payable to the order of the payee, or of a third person, or of the drawer himself. Though the words "to order" are not inserted, it will be sufficient if there be equivalent words. The value received, and in what kind, must be stated. The words "valeur reçue comptant"

A person cannot draw upon himself.

are sufficient. The words "valeur en moi-même" are not sufficient.

A promissory note, or "billet à ordre," is an engagement by which one person binds himself to pay a certain sum to another, or to whomsoever becomes the legitimate owner of the note. The note must be dated, must state the sum to be paid, the name of the person in whose favour he has signed it, the time when the payment must be made, the value given in kinds, merchandise, on account, or in any other manner. The promissory note signed by a person not in trade must be written *in extenso* in his own hand, and must express the sum in words. But there is no distinction between the billet or note signed by a person in trade or not in trade.

Requisites of
billet à ordre.

United States of America.—A bill of exchange is a written order or request, and a promissory note a written promise by one person to another for the payment of money, absolutely, and at all events. A bill or note is not confined to any set form of words. A promise to *deliver* or to be *accountable*, or to be *responsible* for so much money, is a good bill or note ; but it must be exclusively and absolutely for the payment of money. It is essential that the bill carry with it a personal credit given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event or fund. The payment must not rest upon any contingency except the failure of the general personal credit of the person drawing or negotiating the instrument. If the event on which the instrument is to become payable be fixed and certain, and must happen, it is a good bill, and it is of no consequence how long the payment is to be postponed. The instrument must be made payable to the payee, and to his *order* or *assigns*, or to *bearer*, in order to render it negotiable. It must have negotiable words on its face, showing it to be the intention to give it a transferable quality. Without them it is a valid instrument as between the parties, and is entitled to the allowance of the three days of grace, and may be declared on as a promissory note within the statute. But if it wants negotiable words, it cannot be transferred or negotiated, so as to enable the assignee to sue upon it in his own name. If the name of the payee or indorser be left blank, any *bond fide* holder may insert his name as payee. It is usual to insert the words *value received* in a bill or note, but they are unnecessary,

A bill carries
with it a per-
sonal credit.

Maker's
name.

and value is implied in every bill, note, acceptance, and indorsement. These words are not usual in cheques, which are negotiable like inland bills, and are governed by the same rules. Nor is it necessary that the maker should subscribe his name at the bottom of the note ; and it is sufficient if the maker's name be in any part of the note. A note wanting the usual subscription would be deemed imperfect, and it would, in point of fact, destroy its currency. If the note be payable to B. or *bearer*, it need not be indorsed, and it is the same in effect as if the name of B. had been omitted. The bearer may sue in his own name, and if his right and title and the consideration be called in question, he must then show that he came by the note *bond fide*, and for a valuable consideration. So a bill or note payable to a fictitious person may be sued by an innocent indorsee as a note payable to bearer ; and such a bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payee was fictitious was known to the acceptor (a).

Time of pay-
ment.

Germany.—The essential conditions of a bill of exchange are,—The expression “bill of exchange,” or if the bill is drawn in a foreign language, a word of equal import. The sum to be paid. The name of the person, or of the firm to whom, or to whose order payment ought to be made. The time of payment which can only be fixed at a specified day, at sight, or at a determined time after sight, after presentation, at a fixed time after the day that the bill of exchange has been drawn, at a fair, or at a market. The signature of the drawer, or that of his commercial house. The designation of the place, the day, the month, and the year where and when the bill of exchange had been drawn. The name of the person, or of the firm, who ought to pay it, or the drawee, and the indication of the place where the payment ought to be effected ; the place will be stated side by side with the name, or with the firm of the drawee, unless a different place has been indicated for the payment than the domicile of the drawee (b).

Buenos Ayres.—A bill of exchange is a written order by which a person orders another to pay a sum of money. Its essential requisites are the designation of the place, day, month, and year when it is issued ; the sum to be paid, and in what

(a) Kent's Commentaries, vol. iii., p. 3.

(b) German Law on Bills of Exchange, § 4.

currency; the time and place of payment; the name of the person who is to pay it, and to whom. If the name of the payee is in blank, the holder may put his name on it. The bill must also state whether it has been issued in a set of three, or as a single bill. It must contain the signature of the drawer either in his own name, or in the name of his house of trade, or of the person who has power to sign for him. A bill of exchange must be drawn to order, in order that it may be transferable. The clause, "value received," is not indispensable. The want of it will produce no injury to third parties; it will only affect the relation between the drawer and acceptor. The clauses, "value on account," and "value understood," render the acceptor responsible for the value of the bill in favour of the drawer, to bind him to the payment in the form and time agreed upon. These clauses establish in favour of the drawer the presumption that he has not received the value until the acceptor has arranged his accounts with him. This presumption cannot be opposed to third parties, and may be removed by producing evidence to the contrary (*a*).

Denmark.—A bill of exchange is an instrument by which a person who is called the *drawer*, undertakes formally to send a sum of money by means of another person who is called the *drawee*, into another place, to the party who may be the lawful holder of the instrument. No denizen can draw bills of exchange upon himself, not even payable in another town than that of his residence; such bills would only be equivalent to promissory notes. An instrument drawn out in the form of a bill of exchange, but not truly a bill of exchange, to be presented and paid in another place, will not have the same force as a bill of exchange, and the offender shall pay half the amount of the bill as a fine, the half of which will be for the informer, and the other half for the Treasury (*b*).

Who can
make a bill
or note.

Holland.—A bill of exchange is an instrument by which the drawer charges a person to pay in another place than that of the date of the bill, either at sight, or at a certain time after sight, to the party designated in it, or to his order, the sum expressed in it, with an acknowledgment of value received, or value on account (*c*).

(*a*) Buenos Ayres Code, §§ 775—780. (*c*) Dutch Code, §§ 100—103.

(*b*) Danish Ordinance of May 18, 1825.

Italy.—The requisites of bills of exchange are the same as those expressed by the French Code. Bills of exchange drawn from one place of the kingdom upon a foreign place may be issued by any person, even non-merchants. But bills drawn from one place of Italy to another can only be issued by a merchant upon another merchant (a).

Definition of a bill. *Portugal*.—A bill of exchange is the title of a contract of exchange. It may be defined to be a letter dated from any place, by which the party who signs it, and who is called the drawer, charges the party to whom it is written, and who is called the drawee, to pay in another place, either at sight, or at a fixed time, to a designated person, who is called the bearer, or to his order, to the party in whose favour it is indorsed, a sum of money therein stated, which the drawer acknowledges to have received from the payee, or for which he has given him credit, by the words "value received," or "value in account" (b).

Promissory notes. *Russia*.—A bill of exchange is drawn by the maker either upon himself or upon another person. In the first case it is a promissory note, in the latter it is a bill of exchange. The essential requisites of promissory notes are the designation of the place and the date, the time of maturity, the amount of the bill, the kind of money, and the name of the party to whom or to whose order the payment ought to be made; the drawer himself may be such person. The signature of the drawer, or that of the firm, and in default of a person authorised to this effect by a special procuration, is requisite. The note should show that the obligation is a promissory note, and also the value furnished, and the same must be written on stamped paper prescribed by Government. The use of a blank signature, instead of the bill itself, upon paper stamped for bills of exchange, is forbidden. The essential requisites of bills of exchange are, the name of the party who has to make payment, the domicile or place of payment, and a statement in the body of the bill, showing whether it has been drawn as a single bill, or whether it is the first, second, third, &c., of a set, or a copy. If the bill of exchange has been drawn in a foreign currency, it must declare the rate of exchange. A bill of exchange wanting in any such conditions whilst preserving the character of an obligation, can

Bills of exchange.

(a) Sardinian Code, §§ 118—122.

(b) Portuguese Code, §§ 321—324.

only, by a decree of the Tribunal of Commerce, be dealt with in case of dispute, by the law on bills of exchange. Besides the essential conditions above mentioned, it is requisite to state the sum in figures and in words, and whether the payment must be made after or without a letter of notice. The omission of these two clauses would not avoid the bill, although the payee might demand the avoidance of it (a).

Spain.—A bill of exchange ought to contain the following requisites:—The date. The time of payment. The name of the drawer. The sum to be paid, with an indication of the specie. The value given for in cash, goods, value understood, or on account. The name of the payee. The name and domicile of the drawee. The signature of the drawer or his attorney. A public notary may intervene in the drawing up of a bill of exchange, and secure the authenticity of the signature of the drawer. The clauses of value on account, or value received, render the payee responsible to the drawer for the amount, who may exact the payment of it in the form and time agreed upon among them, by the contract of exchange. Bills of exchange payable in the place where they are drawn, are only equivalent to simple promises, and the acceptances as securities only. The drawer may draw the bill to his own order, by expressing that he keeps the value of it. No alteration can be made upon a bill of exchange, but with the consent of the drawer and the payee. Where the drawer, acceptor, or indorsers of a bill of exchange, are not merchants, they are only under the jurisdiction of the civil tribunals, and can only be forced to pay according to civil law; unless it be for a commercial operation, the existence of which may be proved by the bearer; yet any of the parties who is a merchant would be bound to the payment according to commercial law (b).

Requisites of bills.

Where the parties are not traders.

Sweden.—The bill of exchange ought to contain,—The date and place where it has been signed. Whether it be the first, second, third, &c. The time of payment. The name of the party to whom payment must be made. The amount of the bill mentioned in words and figures. By whom and how the value has been furnished. The domicile of the drawee, and that where payment is to be made. The signature of the drawer or maker of the bill.

(a) Russian Code, §§ 294—298.

(b) Spanish Code, §§ 426—434.

Four parties take part in a bill of exchange :—1st, The *payee*, or the party who gives the value and receives the bill ; 2nd, The *drawer* or *maker of the bill*, namely, the party who receives the funds to pay them over upon another place, and who issues the bill ; 3rd, The *holder*, or the party who, by the fact of his holding of the bill or by indorsement, has authority to receive the amount ; 4th, The *drawee* or *acceptor*, or the party who executes the exchange. Three persons only take part in a bill of exchange when the bill is drawn especially in favour of the payee, without inserting the words "to order," or when the drawer gives order on another place to pay to his attorney, or to his own order. Two persons only are nominated in a bill when the drawer draws upon himself a bill of exchange for paying or reimbursing the amount to another person in another place. In all these cases the bill of exchange is valid (*a*).

SECTION II.

STAMPS.

BRITISH LAW.

Bills or notes subject to stamp duties.

Bills and notes made and payable in any part of the United Kingdom, and foreign bills before they are presented for payment and negotiated in the United Kingdom, are subject to stamp duties. Bills and notes made and payable in the United Kingdom must be written on paper previously stamped ; the commissioners not being allowed to stamp any paper with any stamp after the bill has been written out (*b*). Any person making, or causing to be made, signed, or issued, or accepting or paying, or causing to be accepted or paid, any bill of exchange, draft, or order, or promissory note for the payment of money liable to stamp duties, without the same being duly stamped, is subject to a penalty of £50 for every offence (*c*).

Adhesive stamps on foreign bills.

Foreign bills need not be stamped before they are presented

(*a*) Swedish Ordinance on Bills of Exchange of February 1, 1748. C. B. 888 ; Jardine *v.* Payne, 1 B. & Ad. 670 ; Cundy *v.* Marriott, 1 B. & Ad.

(*b*) 55 Geo. 3, c. 184 ; 31 Geo. 3, c. 25, s. 19 ; Steadman *v.* Duhamel, 1 696 ; Green *v.* Davies, 4 B. & C. 240. (*c*) 55 Geo. 3, c. 184, s. 11.

for acceptance, unless they have been indorsed or negotiated in this country (*a*). The stamping of foreign bills is effected by means of adhesive stamps attached to the bills before they are presented for payment, or before they are indorsed and negotiated in the United Kingdom, the stamps being cancelled by the holder writing his name or that of the firm, or the initials of the same, and the date and year in which he does so cancel the stamp (*b*).

And any person who presents for payment, or who pays, indorses transfers, or negotiates a foreign bill, without the proper stamp affixed thereon, and any person who ought to cancel such stamp refuses, or neglects so to do, is subject to the penalty of £50 ; and no person who takes or receives such bill, either on payment or as a security, or by purchase or otherwise, is entitled to recover thereon, or to make it available for any purpose whatever, unless at the time he took and received the bill there shall be such stamp affixed and cancelled (*c*). The duty of cancelling the stamp affixed on a foreign bill of exchange is equally imposed on both the holder and the transferee of the bill (*d*).

Any person who draws and issues, or who transfers or negotiates within the United Kingdom, otherwise than in a complete set and duly stamped, any bill purporting to be drawn in a set and payable out of the United Kingdom ; and any person who takes or receives such bill within the United Kingdom, either in payment or in security, or by purchase or otherwise, without having transferred or delivered to him, duly stamped, the whole number of bills of which the set purports to consist, is not entitled to recover thereon, or make it available for any purpose whatsoever (*e*).

Instruments for which stamps have been used of an improper denomination or rate of duty, but of equal or greater value, are valid and effectual, except in cases where the stamp used is specially appropriated to any other instrument by having its name on the face thereof (*f*). Bills and notes stamped with an improper stamp, but of equal or greater value, may be re-

Penalty for
not affixing
the proper
stamp, or not
canceling the
same.

Stamp duty
on bills drawn
in sets.

Deeds not in-
validated by
stamps of in-
proper deno-
mination or
rate of duty,
except in cer-
tain cases.

(*a*) *Sharples v. Rickard*, 2 H. & N. 57.

(*c*) 17 & 18 Vict. c. 83, s. 5.

(*b*) 17 & 18 Vict. c. 83, s. 4 ; 16 & 17 Vict. c. 59, as to allowing the initials only to be sufficient.

(*d*) *Pooley v. Brown*, 31 L. J. C. P.

134.

(*e*) 17 & 18 Vict. c. 83, s. 6.

(*f*) 55 Geo. 3, c. 184, s. 10.

stamped by the commissioners on payment of the duty and a penalty, and when so re-stamped they are received in evidence (a).

What sum determines the stamp.

The sum which determines the amount of stamp duty is the principal sum mentioned in the note, and not a sum compounded of principal and interest (b). So the amount of the stamp upon a bill or note depends on the date expressed on the face of the bill or note, not on the time when it was actually issued (c).

INLAND BILLS.

Stamp duties on inland bills.

The following are the stamp duties chargeable on inland bills and notes, drafts or orders, for the payment to the bearer or to order at any time, otherwise than on demand, of any sum of money :—Not exceeding £5, 1d.; exceeding £5 and not exceeding £10, 2d.; exceeding £10 and not £25, 3d.; exceeding £25 and not £50, 6d.; exceeding £50 and not £75, 9d.; exceeding £75 and not £100, 1s.; exceeding £100 and not £200, 2s.; exceeding £200 and not £300, 3s.; exceeding £300 and not £400, 4s.; exceeding £400 and not £500, 5s.; exceeding £500 and not £750, 7s. 6d.; exceeding £750 and not £1000, 10s.; exceeding £1000 and not £1500, 15s.; exceeding £1500 and not £2000, £1; exceeding £2000 and not £3000, £1 10s.; exceeding £3000 and not £4000, £2 (d); and when the sum exceeds £4000, then for every £1000 or part of £1000 of the money thereby made payable, 10s. (e).

Inland bills not made payable on demand or to order.

Inland bills, drafts, or orders for the payment of any sum of money, though not made payable to the bearer on demand or to order, pay the same duties as bills of exchange for the like sum payable to the bearer or order, if the same shall be delivered to the payee or some person on his or her behalf.

Inland bills for monthly or weekly payments.

Inland bills, drafts, or orders for the payment of any sum of money, weekly, monthly, or at any other stated periods, pay the same duty as bills payable to bearer or to order on demand, if made payable to the bearer or to order, or if delivered to the payee or some person on his or her behalf, whether the total amount of the money thereby made payable

(a) 37 Geo. 3, c. 136, s. 5; Kaiser v. Grout, 29 L. J. Exch. 20.

(b) Pruessing v. Ing., 4 B. & Ald. 204.

(c) Williams v. Jarrett, 5 B. & Ad. 32.

(d) 16 & 17 Vict. c. 59.

(e) 28 & 24 Vict. c. 15.

shall be specified therein, or can be ascertained therefrom, or shall be indefinite (a).

The following instruments are to be deemed and taken to be inland bills, drafts, or orders :—

Drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his or her behalf.

Receipts given by any banker or bankers, or other person or persons, for money received, which shall entitle, or be intended to entitle, the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons. Bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf (b).

Documents or writings usually termed letters of credit, or whereby any person to whom any such document or writing is or is intended to be delivered or sent, shall be entitled or be intended to be entitled to have credit with, or in account with, or to draw upon any other person for or to receive from such other person any sum of money therein mentioned (c).

Bills, drafts, or orders for the payment by any banker or person acting as a banker, of any sum of money, though not made payable to the bearer or to order, and whether delivered to the payee or not ; and writings or documents entitling or entitled to entitle any person whatever to the payment from or by any banker of any sum of money, whether the person to whom payment is to be made shall be named or designated therein or not, or whether the same shall be delivered to him or not ; as if the same had been made payable to bearer or not.

(a) 55 Geo. 3, c. 184.

(b) Ibid.

(c) 16 & 17 Vict. c. 59.

Provided always, that any one document or writing, although directing the payment of several sums of money to different persons, shall be chargeable with stamp duty as one order only (a).

Any such document within the last-mentioned Act, sent or delivered by the drawer to the banker, and not to the person to whom payment is to be made, or to any one on his behalf, is to be chargeable only with one penny, notwithstanding the payment is directed to be made at any time after the date thereof.

The following exceptions are made to the law relating to duties on drafts on bankers :—

Exceptions to
duties on
drafts on
bankers.

Any draft or order drawn by any banker upon any other banker, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

Any letter written by a banker to any other banker, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.

Warrants or orders for the payment of any annuity granted by the Commissioners for the Reduction of the National Debt, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

Drafts or orders drawn by the Accountant-General of the Court of Chancery in England or Ireland (b).

FOREIGN BILLS.

Duties on
foreign bills.

Foreign bills of exchange drawn in but payable out of the United Kingdom, if drawn singly, or otherwise than in a set of three, are charged the same duty as on inland bills of the same amount and tenor. If drawn in sets of three or more, the rate for every bill of each set is as follows :—

Where the sum payable shall not exceed £25, 1d.; exceeding £25 and not exceeding £50, 2d.; exceeding £50 and not £75, 3d.; exceeding £75 and not £100, 4d.; exceeding £100 and

(a) 23 & 24 Vict. c. 15.

(b) Ibid.

not £200, 8d.; exceeding £200 and not £300, 1s.; exceeding £300 and not £400, 1s. 4d.; exceeding £400 and not £500, 1s. 8d.; exceeding £500 and not £750, 2s. 6d.; exceeding £750 and not £1,000, 3s. 4d.; exceeding £1,000 and not £1,500, £5s.; exceeding £1,500 and not £2,000, 6s. 8d.; exceeding £2,000 and not £3,000, 10s.; exceeding £3,000 and not £4,000, 13s. 4d.; and where it exceeds £4,000, then 3s. 4d. for every £1,000, and part of £1,000 (*a*).

Foreign bills of exchange, draft, or order, drawn or indorsed out of the United Kingdom for the payment of money on demand, pay the same duty as on an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable (*b*).

Foreign bills
payable on
demand.

Foreign bills of exchange drawn out of the United Kingdom, and payable within the United Kingdom otherwise than on demand, pay the same duty as on inland bills of the same amount and tenor (*c*).

Foreign bills of exchange drawn out of the United Kingdom, and payable out of the United Kingdom, but indorsed or negotiated within the United Kingdom, pay the same duty as on foreign bills drawn within the United Kingdom, and payable out of the United Kingdom (*d*).

The following instruments are exempted from the preceding and all other stamp duties :—

All bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of England.

Exemptions
from duties on
foreign bills.
Bank post
bills.
Commissariat
orders.

All bills, orders, remittance bills, and remittance certificates drawn by commissioned officers, masters, and surgeons of the navy, or by any commissioner or commissioners of the navy, under the authority of the 35 Geo. 3, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn pursuant to any former Act or Acts of Parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy. All

Victualling
bills.

(*a*) 16 & 17 Vict. c. 59; and 23 & 24 Vict. c. 15.

(*c*) 16 & 17 Vict. c. 59.

(*d*) Ibid.

(*b*) 23 Vict. c. 15.

drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within fifteen miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory notes.

Bills for land forces.

All bills for the pay and allowance to Her Majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms prescribed, or to be prescribed, by Her Majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army dépôt, or by the paymaster of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorised to perform the duties of the paymastership during the vacancy, or the absence, suspension, or incapacity of any such paymaster as aforesaid, save and except such bills as shall be drawn in favour of contractors or others, who furnish bread or forage to Her Majesty's troops, and who by their contracts or agreements shall be liable to pay the stamp duties of the bills given in payment for the articles supplied by them.

PROMISSORY NOTES.

**Duties on
promissory
notes which
may be re-
issued.**

Promissory notes for the payment to the bearer on demand, which may be re-issued after payment thereof as often as shall be thought fit, are charged as follows:—Promissory note of any sum of money not exceeding £1 1s., 5d.; exceeding £1 1s. and not exceeding £2 2s., 10d.; exceeding £2 2s. and not £5 5s., 1s. 3d.; exceeding £5 5s. and not £10, 1s. 9d.; exceeding £10 and not £20, 2s.; exceeding £20 and not £30, 3s.; exceeding £30, and not £50, 5s.; exceeding £50 and not £100, 8s. 6d.

The issuing of any such note for a less sum than five pounds is prohibited (7 Geo. 4, c. 6); and such notes can only be issued by a licensed banker (*a*).

Promissory notes for the payment in any other manner than

(*a*) 55 Geo. 3, c. 184.

to the bearer on demand, not re-issuable after being once paid, are charged as follows :—Promissory notes for any sum of money not exceeding £5, 1d.; exceeding £5 and not exceeding £10, 2d.; exceeding £10 and not £25, 3d.; exceeding £25 and not £50, 6d.; exceeding £50 and not £75, 9d.; exceeding £75 and not £100, 1s. (a).

These notes cannot lawfully be re-issued after being once paid.

Promissory notes for the payment either to the bearer on demand, or in any other manner than to the bearer on demand, not re-issuable after being once paid, are charged as follows :—

Duty on promissory notes which cannot be re-issued.

Promissory notes for any sum of money exceeding £100 and not exceeding £200, 2s.; exceeding £200 and not £300, 3s.; exceeding £300 and not £400, 4s.; exceeding £400 and not £500, 5s.; exceeding £500 and not £750, 7s. 6d.; exceeding £750 and not £1000, 10s.; exceeding £1000 and not £1500, 15s.; exceeding £1500 and not £2000, £1; exceeding £2000 and not £3000, £1 10s.; exceeding £3000 and not £4000, £2; and where the same exceeds £4000, then 10s. for every £1000 or part of £1000 of the money thereby made payable (b).

These notes cannot lawfully be re-issued after being once paid.

Foreign Promissory Notes made or purporting to be made out of the United Kingdom for the payment within the United Kingdom of any sum of money, are charged the same duty as on inland bills of exchange for the payment, otherwise than on demand of money of the same amount (c).

The following instruments are to be deemed and taken to be promissory notes, within the true intent and meaning of the Stamp Acts :—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer, or to order; and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the

(a) 17 & 18 Vict. c. 83.

24 Vict. c. 111.

(b) 17 & 18 Vict. c. 83; and 23 &

(c) 23 & 24 Vict. c. 111.

hands of any banker or bankers, which shall contain an agreement or memorandum, importing that interest shall be paid for the money so deposited.

The following instruments are exempted from the duties on promissory notes :—

**Exemptions
from duties on
promissory
notes.**

All notes promising the payment of any sum or sums or money out of any particular fund which may or may not be available ; or upon any condition or contingency, which may or may not be performed or happen ; where the same shall not be made payable to the bearer or to order ; and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall, nevertheless, be liable to the duty which may attach thereon as agreements or otherwise.

Promissory notes for the payment of money issued by the governor and company of the Bank of England are exempted from the preceding and all other stamp duties (a).

FOREIGN LAWS.

**Rates of
duties.**

France.—A bill of exchange must be written on stamped paper. The stamp duties on bills are determined by the law of 1860, which imposes the following duties on all bills of exchange, promissory notes, cheques, and all other negotiable instruments :—Bills of 100 frs., and under, 5 cents. ; exceeding 100 frs. to 200 frs., 10 cents. ; exceeding 200 frs. to 300 frs., 15 cents. ; exceeding 300 frs. to 400 frs., 20 cents. ; exceeding 400 frs. to 500 frs., 25 cents. ; exceeding 500 frs. to 1,000 frs., 50 cents. ; exceeding 1,000 frs. to 2,000 frs., 1 fr. ; exceeding 2,000 frs. to 3,000 frs., 1 fr. 50 cents. ; exceeding 3,000 frs. to 4,000 frs., 2 frs. ; and so progressively following the same progression, and without fractions. Any person receiving from the maker a bill or note not stamped, is bound to cause it to

(a) 17 & 18 Vict., c. 83.

be stamped within the fortnight of its date, and, in any case, before he negotiates it. This stamping will be subjected to a charge of 15 cents for 100 frs., or fractions of 100 frs., which will increase with the amount of the bill. Bills coming from abroad, or from colonies, where no stamp duties have been established and payable in France, must be stamped before they are negotiated, accepted, or paid, at the same rates of duties. In case of contravention of this law, the drawer, acceptor, payee, or first indorser of the instrument not stamped will be liable to a penalty of 6 per 100 frs. As regards foreign or colonial bills payable in France, the first indorser residing in France, and, in the absence of an indorser, the holder will be liable to the fine of 6 per cent. If the contravention consists only in the use of a stamp of less amount, the fine will be charged on the sum for which the duty has not been paid. The holder of a bill of exchange not stamped will have no right of action, in case of non-acceptance, against the drawer, and where it was accepted, he will have his right only against the acceptor and drawer, if the latter does not prove that he had provided for it at maturity. The holder of any other instrument subject to stamp, and not stamped, will have a right of action against the maker only. Any stipulation to the contrary will be of no effect. All the parties on the bill will be jointly liable for the payment of the stamp duty and fines, but the holder will pay such duty and fines with a right to exercise his claim against the other parties. No person, company, or public establishment can receive payment, or cause payment to be received, for any instrument not stamped, under a penalty of a fine of 6 per cent. of the amount received. Any mention in the bill, or any agreement to the effect that the bill shall be returned without expense, will be invalid, if it relate to instruments not stamped. The present law is applicable to bills of exchange, promissory notes, and other instruments signed in France, and payable out of France. The exemption of stamp duty granted to duplicate of bills is maintained. Nevertheless, if the first of exchange, duly stamped, is not joined to the one in circulation, the latter must be stamped according to the present law.

Duties on
foreign and
colonial bills.

SECTION III.

CONSIDERATION.

Words "value received" not material.

Bills presumed to be on good consideration, except the contrary be shown.

Want of consideration good defence as between immediate parties.

It is the general practice in bills and notes to insert the words "value received," but they are not material (*a*). Every bill and note is presumed to be honest in its inception and course, and an adequate consideration is always presumed, whether expressed or not (*b*). In order, therefore, to impeach the plaintiff's title, on the ground of want of consideration, it is incumbent on the defendant to prove that there was no consideration for the bill, either to himself or to any of the parties between him and the plaintiff.

Where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, then it is for the defendant to prove that he had no value for the bill. But where the bill is connected with some fraud, or a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, or that it has been clandestinely taken away, or has been lost or stolen, then the holder must show that he gave value for it, and the *onus probandi* is cast upon the plaintiff (*c*).

As between the immediate parties, that is, between the acceptor and drawer, the drawer and payee, and payee and indorsee, want of consideration is a good defence to an action on a bill or note, a valuable and sufficient consideration being necessary to support every contract (*d*). So where the drawee has accepted the bill or note for accommodation of the drawer he cannot recover upon it (*e*). But as between the parties and third persons holding the bill or note for value, no evidence of want of consideration or other grounds is admitted to impeach the apparent value received (*f*).

(*a*) The words "value received" import value received from the payee. In calling upon the drawee to pay his order, the drawer intends to put the drawee in mind of the duty which he owes from having received value for it.

(*b*) *White v. Ledwick*, 4 Doug. 247; *Grant v. Da Costa*, 3 M. & S. 251; *Scott v. Laing*, M. S. 1535; *Brown's Executors v. Thom's Representatives*, M. S. 1536.

(*c*) *Mills v. Barber*, 1 M. & W. 425;

Hall v. Featherstone, 3 H. & N. 286.

(*d*) *Jackson v. Warwick*, 7 T. R. 121; *Barber v. Backhouse, Peake*, 61; *Knight v. Hunt*, 5 Bing. 432.

(*e*) *Thomas v. Fenton*, 2 C. B. 68; *Crofts v. Beale*, 11 C. B. 172; *Kearns v. Durell*, 6 C. B. 596.

(*f*) *Collins v. Martin*, 1 B. & P. 651; *Masters v. Ibberson*, 8 C. B. 100; *Robinson v. Reynolds*, 2 Q. B. 196; *Bramah v. Roberts*, 3 Bing. N. C. 963.

A total failure of the consideration where the party has been deprived entirely of all benefit of the thing for which the bill was given would also constitute a valid defence as between the parties (*a*).

When the consideration given was only partial, there will be a want of consideration for the surplus ; provided the quantum to be deducted on that account be liquidated and in the nature of a certain debt (*b*). Where, however, there is a failure of consideration, it furnishes only a distinct and independent cause of action. So in an action on a bill of exchange accepted for the price of goods, the defendant cannot give in evidence that the goods were of a bad quality, but is driven to a cross action (*c*).

A consideration is either a direct advantage granted by the drawer or payee to the drawee or maker of the bill or note, or to a third person by his desire, for some detriment, loss, responsibility, or service sustained by the drawer or payee for the sake or at the instance of the drawee or maker. A consideration must be valuable, legal, and sufficient. A consideration founded on natural affection, or mere love or gratitude, would not be a sufficient consideration to support a bill or note (*d*). Forbearance, or an agreement to suspend a judgment of a just debt ; and even forbearance of a debt due by a third person would be a sufficient consideration (*e*). Future services may be a valid consideration, provided there be a contract for such services, which may be enforced by the giver of the note if the recipient omits to perform (*f*).

And though mere moral consideration would not be sufficient (*g*), a pre-existing debt, even where the debt is barred by

Partial or
total failure of
consideration

What is a good
consideration.

Moral con-
sideration not
sufficient.

(*a*) *Stephen v. Wilkinson*, 2 B. & Ad. 326. 501 ; *Fisk v. Cox*, 18 John, U. S. R. 145 ; *Blogg v. Pinkers*, 1 M. & R. 125.

(*b*) *Moggridge v. Jones*, 14 East, 486 ; *Spiller v. Westlake*, 2 B. & Ad. 155 ; *Mann v. Lent*, 10 B. & C. 877.

(*c*) *Tye v. Gwynne*, 2 Camp. 347 ; *Solomons v. Turner*, 1 Stark. 51 ; *Morgan v. Richardson*, 7 East, 482 ; *Fleming v. Simpson*, 1 Camp. 40 ; *Sully v. Frean*, 10 Exch. 535 ; *Trikey v. Larne*, 6 M. & W. 278 ; *Jones v. Jones*, 9 M. & W. 84 ; *Warwick v. Nairn*, 10 Exch. 762.

(*d*) *Holliday v. Atkinson*, 5 B. & C.

501 ; *Fisk v. Cox*, 18 John, U. S. R.

145 ; *Blogg v. Pinkers*, 1 M. & R.

125.

(*e*) *Baker v. Walker*, 14 M. & W. 465 ; *Percival v. Frampton*, 2 C. M. & R. 180 ; *Trueman v. Fenton*, Cowp. 544 ; *Brix v. Braham*, 1 Bing. 281 ; *Balfour v. The Sea Fire Life Assurance Company*, 3 C. B. N. S. 300.

(*f*) *Hulse v. Hulse*, 17 C. B. 711.

(*g*) *Littlefield v. Shee*, 2 B. & Ad. 811 ; *Eastwood v. Kenyon*, 11 A. & E. 438.

the statute of limitation (*a*), a debt incurred during infancy when the bill or note is accepted after full age (*b*), and the debt of another person for a bill payable at a future day, would support a bill or note (*c*).

Illegal consideration.

Bill illegal if granted under duress.

A consideration is illegal if it violates the rules of religion or of morality, and if in contravention of public policy or in violation of law. Immoral considerations are prostitution (*d*), future illicit cohabitation (*e*), or sale or publication of libellous and indecent prints or pictures. Illegal considerations are contracts for general restraint of trade (*f*), restraint of marriage (*g*), marriage brokerage (*h*), evasion of the revenue (*i*); impeding or traversing the course of justice (*k*), sale of public offices (*l*), gaming (*m*), and gaming policies on ships or lives (*n*).

A bill or note would be void if granted under duress, fraud, or imposition, or whilst the drawee or maker was intoxicated (*o*).

SECTION IV.

CUSTOMARY CLAUSES IN FOREIGN BILLS.

A bill of exchange is often drawn on account of a third person, with the expressions, "valeur en compte avec M. P.", or "laquelle somme vous payerez au compte de M. P."; but in such cases the party for whose benefit or account the bill is drawn acquires no direct liability on the bill, though he may be bound to

- (*a*) *Swift v. Tyson*, 16 Peter Am., R. 1; *Hyeling v. Hastings*, 1 Ld. Raym. 389; *Dean v. Crane*, 6 Mod. 309; *Quantock v. England*, 5 Burr. 2630.
- (*b*) *Stevens v. Jackson*, 6 Taunt. 106; *Harrison v. Clifton*, 17 L. J. Exch. 233; *Harrison v. Cotgreave*, 4 C. B. 562; *Roberts v. Bethell*, 12 C. B. 71.
- (*c*) *Popplewell v. Wilson*, 1 Stra. 264.
- (*d*) *Girardy v. Richardson*, 1 Esp. 13.
- (*e*) *Binnington v. Wallis*, 4 B. & Ald. 651; *Gibson v. Dickie*, 3 M. & S. 463; *Beaumont v. Reeve*, 8 Q. B. 483.
- (*f*) *Tallis v. Tallis*, 1 E. & B. 391; *Price v. Green*, 16 M. & W. 346.
- (*g*) *Lowe v. Peers*, 4 Burr. 2225; *Baker v. White*, 2 Vern. 215; *Hartley v. Rice*, 10 East, 22.
- (*h*) *Hall v. Potter*, 3 Lev. 411; *Roberts v. Roberts*, 3 P. Wms. 66.
- (*i*) *Nerot v. Wallace*, 3 T. R. 17; *Fallowes v. Taylor*, 7 T. R. 475; *Edgecombe v. Rodd*, 3 East, 294.
- (*k*) *Richardson v. Mellish*, 2 Bing. 229.
- (*l*) *Willison v. Patteson*, 7 Taunt. 440; 5 & 6 Ed. 6, c. 19; 49 Geo. 3, c. 126; 53 Geo. 3, c. 129.
- (*m*) 8 & 9 Vict. c. 109, s. 17; *Parsons v. Alexander*, 5 E. & B. 263.
- (*n*) 19 Geo. 2, c. 37; 14 Geo. 3, c. 48.
- (*o*) *Duncan v. Scott*, 1 Camp. 100; *Ree v. Marquis of Headfort*, 2 Camp. 574; *Pitt v. Smith*, 3 Camp. 33; *Gregory v. Fraser*, 3 Camp. 454.

indemnify the drawer for the liability incurred on his behalf (*a*). The words, "au besoin," or, in case of need to Messrs. ——, are often inserted in bills of exchange as an indication to the holder to present the bill for payment to such parties in case the drawee should refuse the same. Foreign bills are often drawn with words such "as per advice," or "without further advice." In the former case, if the drawee has received no advice, he is justified in refusing acceptance till he receives it.

SECTION V.

ALTERATIONS IN BILLS AND NOTES.

Any material alteration on a bill or note after it is issued, as in the date, sum, or time of payment, vitiates the instrument, except as against the parties consenting to the alteration (*b*). Thus, altering the word "date" into "sight" (*c*), or changing the place of payment (*d*), or adding "and interest at 6 per cent." (*e*), are sufficient to invalidate a bill or note. So if a joint note be altered into a joint and several, any of the makers objecting, would be discharged, even if the other party consented to the alteration (*f*).

A material alteration vitiates the instrument.

Any material alteration made on a bill or note after it is issued, although with the consent of the parties, makes it a new bill or note, requiring a new stamp, though no fresh stamp could be imposed on it. But that such alteration may vitiate the bill under the Stamp Acts, the bill must be complete and ready to pass into the hands of other parties and available for exchange.

A material alteration renders the instrument a new bill.

When the alteration is immaterial, as where it consists merely in the correction of a mistake, or in furtherance of the apparent intention of the parties, the bill or note will not be invalidated either at common law or under the Stamp

An immaterial alteration does not invalidate the contract.

(*a*) Nougier, *Traité des Lettres de Change*, p. 178.

197; M'Kintosh *v.* Haydon, Ry. & M. 362; Desbrow *v.* Weatherley, 6 C.

(*b*) Master *v.* Miller, 4 T. R. 320; Davison *v.* Cooper, 13 M. & W. 343; Outhwaite *v.* Luntley, 4 Camp. 179; Walton *v.* Hasting, 4 Camp. 223; Trapp *v.* Spearman, 3 Esp. 57.

& P. 758; Taylor *v.* Moseley, 6 C. & P. 273; Burchfield *v.* Moore, 3 E. & B. 683.

(*c*) Long *v.* Moore, 3 Esp. 155, 1 Taunt. 20.

(*e*) Warrington *v.* Easley, 2 E. & P. 763.

(*d*) Cowie *v.* Halsall, 4 B. & Ald.

(*f*) Perring *v.* Hone, 4 Bing. 28; Nicholson *v.* Revill, 4 A. & E. 675.

Acts (*a*). Thus, changing the words "twenty pound" into "twenty pounds," or inserting the words "or order," if omitted by mistake, are immaterial alterations, not avoiding the bill or note.

SECTION VI.

IRREVOCABILITY OF BILLS.

A bill of exchange once issued cannot be revoked. The engagement of the drawer is absolute and irrevocable, and he is not excused from the nonperformance of it unless prohibited by the laws of this country. No hindrance interposed to the drawee for the payment of the bill would absolve the drawer from the liabilities arising from the bill (*b*).

SECTION VII.

BRITISH LAW.

PARTIES TO BILLS AND NOTES.

All persons may be parties to bills.

Infants.

All persons capable of contracting, and not legally disqualified, may be parties to bills and notes.

An infant or a person under twenty-one years of age cannot bind himself by bill or note even for necessaries (*c*). If, however, he accepts a bill after he becomes of age, he would be liable, though the bill was drawn when he was an infant (*d*). A bill or note made by an infant during his infancy may be ratified when he becomes of age, but such ratification must be in writing, signed by the party to be charged thereon (*e*). If one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only

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| <p>(<i>a</i>) <i>Kershaw v. Cox</i>, 3 Esp. 246 ;
 <i>Byrom v. Thompson</i>, 11 A. & E. 31 ;
 <i>Farquhar v. Southee</i>, 1 M. & M. 14 ;
 <i>Sanderson v. Symonds</i>, 1 B. & B. 426 ;
 <i>Marson v. Petit</i>, 1 Camp. 82.
 (<i>b</i>) <i>Mellish v. Simeon</i>, 2 H. Bl. 378 ;
 <i>Tooting v. Hubbard</i>, 3 B. & P. 201 ;
 <i>Pollard v. Herries</i>, 3 B. & P. 340.</p> | <p>(<i>c</i>) <i>Harrison v. Cotgreave</i>, 5 D. & L. 159 ; 4 C. B. 562 ; <i>Roberts v. Bethell</i>, 12 C. B. 778 ; <i>Williamson v. Watts</i>, 1 Camp. 552.
 (<i>d</i>) <i>Stevens v. Jackson</i>, 4 Camp. 164 ; <i>Harrison v. Cliften</i>, 17 L. J. Ex. 233.
 (<i>e</i>) 9 Geo. 4, c. 14, s. 15.</p> |
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in the name of both (a). An infant may sue on a bill or note drawn, made, or indorsed in his favour (b).

A married woman cannot bind herself by drawing, accepting, or indorsing bills or notes, without authority from her husband (c). Where, however, she is treated as a *feme sole*, as where she is separated from her husband, or has obtained a judicial separation, or is divorced from her husband, or has a separate maintenance, she may bind herself by bills or notes (d). Where a *feme sole* has become liable on a bill or note, if she marries the husband becomes responsible upon it, and must be sued jointly with her (e). And when a bill or note is payable to a *feme sole*, if she marries it becomes her husband's property, and she cannot indorse it over while she is covert, except as agent to her husband (f). The husband may both negotiate it and sue upon it, in the joint names of himself and his wife (g).

In all partnerships for trading purposes each partner is Partners. presumed by law to have authority to draw, make, indorse, or accept bills and notes in the name of the firm for partnership affairs (h). The mutual authority of partners to bind each other by bills and notes is, however, limited to partnerships for trading purposes. Partners not in trade have no authority as regards third persons, to bind the firm by bills and notes (i). Thus, unless it can be shown that it is necessary, or that it is usual, the members of a mining (k), farming concern (l), or attorneys acting as partners, cannot bind the rest by drawing or accepting bills (m). But in all cases where this mutual authority is presumed to exist, any private stipula-

Married women.

Liability of the husband for bill made by a *feme sole* before marriage.

Mutual liability of partners for bills, unless they are unnecessary for the business.

(a) *Burgess v. Merill*, 4 *Taunt.* 468; *Glossop v. Coleman*, 1 *Stark.* 25.

(b) *Warwick v. Bruce*, 2 *M. & S.* 205; *Holliday v. Atkinson*, 5 *B. & C.* 501; *Teed v. Elworth*, 14 *East*, 210.

(c) *Marshall v. Rutton*, 8 *T. R.* 545; *Barlow v. Bishop*, 1 *East*, 432; *Cotes v. Davis*, 1 *Camp.* 485.

(d) *Marshall v. Rutton*, 8 *T. R.* 545; *Lewis v. Lee*, 3 *B. & C.* 291; *Hulme v. Tenant*, 9 *Ves.* 189; *Stewart v. Lord Kirkwall*, 3 *Madd.* 387.

(e) *Mitchinson v. Hewson*, 7 *T. R.* 348.

(f) *Rawlinson v. Stone*, 3 *Wils.* 5; *Barlow v. Bishop*, 1 *East*, 432.

(g) *M'Nerlage v. Holloway*, 1 *B. & Ald.* 218; *Sherrington v. Yates*, 12 *M. & W.* 861.

(h) *Mason v. Rumsey*, 1 *Camp.* 384; *Headley v. Bainbridge*, 3 *Q. B.* 316; *Bramah v. Roberts*, 3 *Bing. N. C.* 963.

(i) *Headley v. Bainbridge*, 3 *Q. B.* 321.

(k) *Dickinson v. Valpy*, 10 *B. & C.* 138.

(l) *Greenslade v. Dower*, 7 *B. & C.* 635; *Davidson v. Stanley*, 2 *M. & G.* 721.

(m) *Levy v. Pyne*, C. & M. 423.

tion in the deed that one partner shall not draw, indorse, or accept bills for the firm will not affect third persons, except such as had special notice of such limitation (*a*).

To be binding
on partners,
the bill must
be signed in
the name of
the firm.

In order that a partner may bind the firm by his signature in a bill or note, he must sign it in the name of the firm. Where one of two partners signs a bill in his own name, the partnership is not bound, though the proceeds were carried to the partnership account (*b*). Where, however, the name of the individual partners is that of the firm, the signature must be taken as that of the firm (*c*). And where a partner indorses a bill or note in a name differing from that of the partnership, the firm is not responsible, unless the name, though inaccurate, yet substantially describes the firm, or there be evidence of the consent of the firm to such variation (*d*). And where a person not a partner accepts a bill drawn on the partnership, and in its name, he may, by making others believe that he is a partner, acquire a personal liability on the bill so accepted (*e*).

Joint-stock
companies.

Joint Stock Companies.—The directors or members of joint-stock companies, unless expressly authorised by the charter of incorporation or by the deed, have no power to bind the company by bills or notes. That joint-stock companies may be bound by bills or notes, the same must be signed by some persons acting under the express or implied authority of the company. Bills drawn or accepted by directors of joint-stock companies must be drawn and accepted by and in the names of the directors, and by them expressed to be on behalf of the company (*f*). When the company is trading with limited liability, the officers signing the bills or notes in behalf of the company must add the word "limited" after the name (*g*). Banking companies of more than six persons, carrying on the business of banking in London, or within sixty-five miles thereof, may draw, accept, or indorse bills not being payable on demand (*h*). Banking companies residing at a

- (*a*) *Lord Galway v. Mathew*, 10 East, 263; *Shirreff v. Wilks*, 1 East, 48.
- (*b*) *Emly v. Lye*, 15 East, 7.
- (*c*) *South Carolina Bank v. Case*, 8 B. & C. 435.
- (*d*) *Williamson v. Johnson*, 1 B. & C. 146; *Faith v. Richmond*, 11 A. &
- E. 339; *Kirk v. Blurton*, 9 M. & W 284.
- (*e*) *Gurney v. Evans*, 3 H. & N. 122.
- (*f*) *Aggs v. Nicholson*, 1 H. & N. 165; 25 & 26 Vict. c. 89, s. 47.
- (*g*) 25 & 26 Vict. c. 89, ss. 41, 42.
- (*h*) 7 & 8 Vict. c. 32, s. 26.

greater distance than sixty-five miles from London, may issue their notes, payable on demand, at the place where they are issued, and also in London, or at any other place at which such bill or note is made payable for the sum of £5 or upwards, but such bill or note cannot be re-issued in London, or within sixty-five miles thereof (a). Banking companies of six or fewer than six persons, existing under the Act of 1824, as banks of issue, may issue notes for any sum not less than £5, payable to bearer on demand, or to order, not exceeding seven days' sight or twenty-one days' date, on un-stamped paper, except within the City of London, or three miles thereof (b).

Corporations.—The right of corporations other than banking corporations to draw, accept, or indorse bills or notes, depends on the terms of the charter under which they are constituted. Where no provision exists to that effect, if the nature of their constitution is such as to render the drawing of bills necessary for the purpose of the corporation, then it would be implied that they possessed authority to do those acts without which the corporation could not exist (c). A general power to transact all matters requisite for the management of the affairs of the corporation would not imply the power to make or indorse bills or notes (d).

A person may draw, accept, or indorse bills or notes by his Agents. agent or attorney. The power of an agent to draw, accept, or indorse bills or notes so as to charge his principal, may result from some general or implied authority, or from a clear and distinct evidence of his assent or acquiescence (e). But a power to transact all business does not authorise the agent to negotiate bills or to indorse them on account of the principal; nor does an authority to draw import in itself an authority to indorse bills or notes (f).

An agent acting with a limited authority, and for a particular Agent acting with limited

(a) 3 & 4 Will. 4, c. 98, s. 2.

(e) Saunderson *v.* Griffith, 5 B. &

(b) 9 Geo. 4, c. 23, s. 1; 20 & 21

C. 915.

Vict. c. 49; 7 & 8 Vict. c. 32, ss. 10
—12.

(f) Fearn *v.* Filica, 7 M. & G. 513;

(c) Harmer *v.* Steele, 4 Exch. 1; 14
M. & W. 831.

Murray *v.* East India Company, 5 B.

& Ald. 204; Higg *v.* Smith, 1 Taunt.

(d) Mayor of Ludlow *v.* Charlton, 6
M. & W. 821.

347; Robinson *v.* Yarrow, 7 Taunt.

457; Lee *v.* Zagury, 8 Taunt. 114.

authority
cannot bind
principal by
bill.

purpose, has no authority to bind the principal by bills or notes. So an agent deputed to superintend a mine, and the local concerns thereof, would not be authorised to accept bills in the name of the company even for necessary purposes of the mine (*a*). So a power of attorney giving the agent full powers as to the management of a certain real property and authorising him to do all lawful acts concerning the principal's business, does not authorise the agent to indorse bills of exchange in the name of the principal (*b*). So the secretary of a company has no general authority to accept bills and notes in their names (*c*).

How an agent
should sign.

That an agent may not contract a personal liability on the bill or note he must sign it in the name of the principal. A man who puts his name to a bill thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another or by procuration of another (*d*). The proper mode of signing per procuration is either to use the name of the principal only or to sign A. B. (the principal) by or by the procuration of C. D. the agent (*e*). The acceptance or indorsement of a bill expressed to be "per procuration" is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the payee or indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority (*f*).

An agent signing on behalf of a company trading with limited liability, must add the word "limited" after the name of the company, in default of which he becomes liable to a penalty of £50, and personally liable for the amount of the bill unless the same is duly paid by the company (*g*).

Aliens.

An alien enemy could not acquire in a transfer a valid right by bill or note. But though the right of an alien enemy during war to sue on a bill or note is suspended, it would revive on the restoration of peace (*h*). An alien friend has the same right

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| (<i>a</i>) Brown <i>v.</i> Byers, 16 M. & W. 252. | 721 ; Mare <i>v.</i> Charles, 5 E. & B. 978. |
| (<i>b</i>) 1 Y. & C. 394. | (<i>f</i>) Alexander <i>v.</i> Mackenzie, 6 C. B. 766 ; Stagg <i>v.</i> Elliott, 31 L. J. N. S. C. P. 260. |
| (<i>c</i>) Neale <i>v.</i> Turton, 4 Bing. 149 ; Nichols <i>v.</i> Diamond, 9 Exch. 154. | (<i>g</i>) Penrose <i>v.</i> Martyn, 28 L. J. Q. B. 28 ; 19 & 20 Vict. c. 47, s. 31. |
| (<i>d</i>) Leadbitter <i>v.</i> Farrow, 5 M. & S. 349. | (<i>h</i>) Duhammel <i>v.</i> Pickering, 2 Stark. 90. |
| (<i>e</i>) Davidson <i>v.</i> Stanley, 2 M. & G. | |

to make, accept, draw, or indorse a bill or note as a native-born subject.

A neutral may enforce the payment of bills and notes though Neutrals given to him in an enemy's country (a).

Persons in holy orders may be parties to bills and notes, Ecclesiastica, though they are prohibited from trading (b).

A bill or note drawn, made, or indorsed by an imbecile or a Lunatics, lunatic, or by a person in a complete state of intoxication, can not be enforced (c).

FOREIGN LAWS.

France.—All persons legally competent to contract may be parties to a bill of exchange. Bills of exchange signed by married women, and by single women who are not traders, have no other force than as simple promises. Bills signed by minors not traders, are void as against them (d). Bills signed by non-traders are equivalent to simple promises.

Germany.—Everyone who can bind himself by contract may be a party to a bill of exchange. The obligee of a bill is responsible in his person and property for the fulfilment of his obligation, though there are exceptions in different States, upon the liability of various classes of persons to imprisonment for debt (e). Extent of responsibility contracted by bills.

Russia.—Every person who is not legally disqualified to contract may bind himself by bills. Married females, and women not separated from their parents, cannot bind themselves by bills without the permission of their husband or of their parents. The parties authorised by law to engage in bills are merchants of the three classes, gentlemen registered in the corporation or guild of merchants, foreign merchants, burgesses, or foreigners belonging to guilds of different crafts in the metropolis, and peasants trading under a patent (f). Who may be parties to bills.

Spain.—Where neither the drawer, acceptor, or indorsee of a bill of exchange is a merchant, the obligation contracted is governed only by the civil law, and the parties are under the jurisdiction of the civil tribunals. If, however, it be proved that Bills issued by non-traders.

(a) *Houriet v. Morris*, 3 Camp. 303.

eavan v. M'Donnell, 9 Exch. 309;

(b) *Hankey v. Jones*, Cowp. 745;

Campbell v. Hooper, 24 L. J. Ch. 644.

Ex parte Meymot, 1 Atk. 196; 57 Geo. 3, c. 59; 1 & 2 Vict. c. 106, s. 29.

(d) *French Code de Commerce*, §§ 113, 114.

(c) *Alcock v. Alcock*, 3 M. & G. 268; *Molton v. Camroux*, 4 Exch. 17;

(e) *German Law on Bills of Exchange*, §§ 1, 2.

(f) *Russian Code*, § 299.

the bill was given for a commercial operation, then whoever of the parties is a merchant will be bound to pay according to the requirement of commercial law. A party who signs a bill as the attorney of the drawer, the acceptor, or of an indorsee ought to express that he signs it in that capacity above his signature, and prove his authority (a).

SECTION VIII.

BRITISH LAW.

INDORSEMENT.

Bills payable
to order or
bearer are
transferable.

All bills or notes payable to the order of the payee, or to bearer, are transferable by indorsement and delivery (b). But bills and notes *not* containing a direction or promise to pay to the order of the payee or bearer are in England and Ireland not transferable, so as to give to the assignee a right of action thereon, though if the words of transfer are omitted by mistake they may be supplied. In Scotland, however, bills or notes so made, without the words "or order," are transferable (c). A promissory note payable to the maker's own order is not a negotiable instrument, but when a note in that form is indorsed in blank, and put in circulation by the maker, it becomes in effect a note payable to bearer (d).

The transfer
may be made
by indorse-
ment or by
simple de-
livery.

A bill or note may be transferred by indorsement in full or in blank, by restrictive or conditional indorsement, or by simple delivery without indorsement. An indorsement in full is where the bill is transferred to a given person or his order ; an indorsement in blank is where the signature of the payee only is put on the back, or on any part of the bill or note. By an indorsement in blank, the property in the bill passes as effectually as by an indorsement in full, and where a bill is so indorsed it is committed to the holder to hand it over to a third person to sue upon it in his behalf (e).

- (a) Spanish Code of Commerce, §§ 434, 435.
- (b) 3 & 4 Anne, c. 9 ; 7 Anne, c. 25.
- (c) Plimley v. Westley, 2 Bing. N. C. 249 ; Smith v. Kendall, 6 T. R. 123 ; Grant v. Vaughan, 3 Burr. 1516 ; Chrichton v. Gibson, Jan. 1726, 1 Ross, Lead. Cases.
- (d) Brown v. De Winton, 6 C. B. 336 ; Absolom v. Marks, 11 Q. B. 19 ; Flight v. Maclean, 16 M. & W. 51.
- (e) Law v. Parnell, 7 C. B. N. S. 282.

The negotiability of a bill or note may be restrained by a special indorsement in favour of a particular person, or for a special purpose, and if so restricted all subsequent holders are bound by the restriction (a). The restricted indorsee may sign the bill or note, but he would only give the subsequent indorsee a right of action for the benefit of the restraining indorser (b).

The negotiability of a bill may be restrained.

Where a bill or note is, however, originally made payable to order or bearer, an exclusive indorsement, or an indorsement without the words "or order" would not restrain its negotiability (c). So where the bill or note has been indorsed in blank, its negotiability cannot be restrained by a special indorsement (d).

But if made payable to order or bearer, negotiability cannot be restrained.

There is no valid transfer without the delivery of the instrument (e).

Delivery necessary to complete the transfer.

No special words are requisite for an indorsement. The signature of the payee in any part of the bill or note will constitute an indorsement (f). The indorsement may be made either on the back or on the face of the bill or note, and even on a separate paper attached to the bill or note. A bill or note may be indorsed in ink or in pencil (g) by the payee, or indorsee's own signature, or by his mark, if he cannot write (h). An indorsement of a bill or note of twenty shillings and under must have the date and the name of the indorser attested by one witness (i).

Form of the indorsement.

A bill or note is usually indorsed after acceptance, and before payment, and is negotiable *ad infinitum* until it has been paid or discharged on behalf of the acceptor (k). The indorsement may be made even before the bill or note is complete, or even before the bill is accepted, except in the case of bills or notes of less than £5 (l).

When indorsement may be made.

Where a bill is indorsed after acceptance has been refused,

(a) *Ancher v. The Bank of England*, 2 Doug. 687; *Treuttel v. Barandon*, 8 Taunt. 100; *Sigourney v. Lloyd*, 8 B. & C. 622.

bury v. Parkinson, 18 L. T. 198, C. B.; *Young v. Glover*, 21 Jur. 687, C. B.; *Rex v. Lampton*, 5 Price, 428.

(b) *Murrow v. Stewart*, 8 Moore, P. C. 267.

(f) *Peacock v. Rhodes*, Doug. 633.

(c) *Edie v. The East India Company*, 2 Burr. 1216.

(g) *Geary v. Physic*, 5 B. & C. 234.

(d) *Walker v. Macdonald*, 2 Exch. 331; *Smith v. Clarke*, 1 Esp. 180.

(h) *George v. Surrey*, M. & M. 516.

(e) *Cox v. Troy*, 5 B. & Ald. 474; *Bromage v. Lloyd*, 1 Exch. 32; *Sains-*

(i) 17 Geo. 3, c. 30; 27 Geo. 3, c. 76.

v. Langstaffe, 2 Doug. 514; 17 Geo. 3, c. 30, s. 1.

(k) *Allen v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390.

(l) *Russell v. Langstaffe*, 2 Doug.

514; 17 Geo. 3, c. 30, s. 1.

Indorsement
after refusal of
acceptance.

but before it is due, the party taking it, without notice of any suspicious circumstances and *mala fide*, would not be affected by the taker, but if he had notice of the dishonour he could not recover (a). A bill or note may be transferred even after it has become due, in which case the indorsement is held to be equivalent to the drawing of a bill payable at sight (b).

Indorsement
after ma-
turity.

Where, however, the bill or note is indorsed after maturity, the indorsee will be held to have taken it subject to all the defences which could have been made by any previous holder. After a bill or note is due it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives full consideration for it, he takes it on the credit of the indorser, and subject to the equities with which it may be encumbered, those equities, however, which affect the bill itself, and not any collateral claims existing between the collateral parties to it (c). Thus the want of consideration between the original parties would not be such equity as will bar the indorsee from maintaining an action on a bill or note (d).

Right of the
indorsee in
such a case.

The indorsee is in all respects put in the place of the indorser, and if the person who indorsed the bill or note could himself have maintained an action on it, so could the indorsee notwithstanding the bill was indorsed after it became due (e). Once, however, the bill or note has been paid it can no longer be transferred, so as to render any of the parties liable who would otherwise be discharged (f).

Who may in-
dorse.

Whoever has the absolute property in a bill or note made payable to himself, or to his order, may assign it as he pleases, and thereby transfer the right to the assignee to maintain an action thereon (g). The right to transfer would be acquired by a person having a legal interest in the bill or note, even although

(a) O'Keef v. Dunn, 6 Taunt. 335 ; 5 M. & S. 282 ; Goodman v. Hervey, 4 A. & E. 870 ; Crossley v. Ham, 13 East, 498 ; Brown v. Davis, 3 T. R. 80 ; Raphael v. The Bank of England, 17 C. B. 161.

(b) Mitford v. Walest, 1 Ld. Raym. 575 ; Dehers v. Harriott, 1 Show. 163 ; Bohem v. Stirling, 7 T.R. 480 ; Sturtevant v. Forde, 4 M. & G. 101.

(c) Ashurst v. Official Manager of the Bank of Australia, 27 L. J. 168 ; O'Keef v. Dunn, 5 M. & S. 282 ; Tinson

v. Francis, 1 Camp. 19 ; Holmes v. Kidd, 28 L. J. Exch. 112 ; Whitehead v. Walker, 10 M. & W. 696, & 19 & 20 Vict. c. 60, extends the same law to Scotland.

(d) Carruthers v. West, 9 M. & W. 506 ; Carr v. Jowell, 16 C. B. 674.

(e) Chalmers v. Lanion, 1 Camp. 383.

(f) Bartrum v. Caddy, 9 A. & E. 275 ; Beck v. Robley, Bailey on Bills, 125 ; 14 B. C. 89.

(g) Stone v. Rawlinson, Willes, 562.

he was not specially named (*a*). And every person having possession of a bill or note has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill, and such transfer will be valid where the party received the bill *bond fide* and for value (*b*).

When a bill or note has been intrusted to an agent for a particular purpose the property in the bill would not pass to the agent, and he could not give a valid right to any person cognisant with the fact of his limited authority (*c*).

No property passes where a bill is intrusted for a particular purpose.

Where, however, the indorsee was ignorant of the circumstances, and took the bill *bond fide*, either absolutely or as a pledge, the transfer would be operative (*d*). So where bills are indorsed to a banker to the customer's account, subject to the lien of his banker for his cash balances, the banker has no right to negotiate such bills unless the balance of the account is in his favour (*e*).

When a bill or note is made payable or indorsed to a *feme sole*, if she afterwards marries, the right to transfer vests in her husband, and he alone may effect a valid transfer (*f*). If, however, the bill is made payable or indorsed to a married woman it is better that she should indorse it also, though the indorsement of the husband might be sufficient to pass the title (*g*). On the death of the holder, the right to transfer a bill or note vests in the executor or administrator; but to avoid personal responsibility they must indorse it in their capacity as executors or administrators (*h*).

Transfer of bill held by a feme sole in case of marriage.

In case of death.

A bill or note made payable, or indorsed to several persons not in partnership, must be indorsed by all of them collectively; but if they are partners in trade, the transfer of one would be the transfer of all (*i*). The transfer of a bill or note by a bankrupt,

Transfer of bills in favour of several persons not partners.

(*a*) *Jungbluth v. Way*, 1 H. & N. 71.

v. Pavia, 9 Ex. 690.

(*b*) *Marston v. Allen*, 8 M. & W. 504.

(*f*) *Connor v. Martin*, 1 Stra. 516;

(*c*) *Lloyd v. Howard*, 15 Q. B. 995; *Buchanan v. Findlay*, 9 B. & C. 738; *Uther v. Rich*, 10 A. & E. 784.

Miles v. Williams, 10 Mod. 245; *Darwin v. Prince*, 6 Week. Rep. 171.

(*d*) *Raphael v. The Bank of England*, 17 C. B. 161; *De la Chauvette v. The Bank of England*, 2 B. & Ad. 385.

(*g*) *Barlow v. Bishop*, 1 East, 432; *Mason v. Morgan*, 2 Ad. & E. 30.

(*e*) *Ex parte Barkworth in re Harrison*, 2 De Gex & Jones, 194; *Thompson v. Giles*, 2 B. & C. 422; *Collins v. Martin*, 1 B. & P. 648; *Treuttel v. Barandon*, 8 Taunt. 100; *Fairclough*

(*h*) *King v. Thom*, 1 T. R. 487; *Rawlinson v. Stone*, 3 Wils. 1; *Prestwick v. Marshall*, 7 Bing. 565; *Cotes v. Davis*, 1 Camp. 485.

(*i*) *Carwick v. Vickery*, Doug. 653; *Jones v. Radford*, 1 Camp. 83; *Beeeman v. Duck*, 11 M. & W. 251.

even after a secret act of bankruptcy, would convey a valid title where the transferee took it *bond fide* and for value (*a*) ; but the transfer would be invalid if made by way of fraudulent preference to any creditor (*b*).

Transfer by an insolvent. So any delivery or payment of bills or notes by an insolvent to a creditor within three months before the insolvent's imprisonment, or before his filing a petition for protection, would be void (*c*).

Rights of indorsee. By the indorsement the holder acquires an insurable interest in the bill or note (*d*) ; but he has no lien on the fund at the hands of the drawee to cover the bill or note (*e*). On the bankruptcy, however, of the drawer and acceptor, the arrangement of property between the two estates may indirectly render such an equity available (*f*). So where there is an agreement that certain specific property shall be held as security for, or appropriated to, the payment of the bill or note, the indorsee would have a right to such property (*g*).

Rights of indorsee against acceptor, drawer, and indorsers. The indorsee may sue the acceptor, the drawer, and indorsers separately and at the same time (*h*). When, however, the indorsee has given no consideration for the bill or note, or where he received it for a particular purpose, or he knew of any circumstance affecting his right to enforce payment, he could not maintain an action on the bill or note against the acceptor (*i*). So where the indorsee received the bill or note from a bill broker, with the knowledge or reasonable ground of suspicion that he had no right to pledge or indorse such bills, he could not hold it against the right owner, unless by local usage such broker has acquired the right to pledge or dispose of such property (*k*).

Liability of indorser. The indorser engages that the bill or note shall be duly paid

(*a*) 12 & 13 Vict. c. 106, s. 133.

(*b*) Cumming *v.* Baily, 6 Bing. 363; Bagnall *v.* Andrew, 7 Bing. 217.

(*c*) Herbert *v.* Wilcox, 6 Bing. 203; Thompson *v.* Jackson, 3 M. & G. 621; Jackson *v.* Thompson, 2 Q. B. 887; Biliter *v.* Young, 6 E. & B. 1.

(*d*) Tasker *v.* Scott, 6 Taunt. 284.

(*e*) *Ex parte* Waring, 2 Rose, 182; *Ex parte* Perfect, 1 Mont. 25; *Ex parte* Prescott, 1 Mont. & Ayrt. 316; *Ex parte* Copeland, 2 Mont. & Ayrt. 177.

(*f*) *Ex parte* Waring, 2 Rose, 182.

(*g*) *Ex parte* Hobhouse, 3 Mont. & Ayrt. 269; Cazenove *v.* Prevost, 5 B. & Ald. 70.

(*h*) Edward *v.* Jones, 2 M. & W. 414.

(*i*) Hatch *v.* Searles, 24 L. J. Ch. 22; Delauney *v.* Mitchell, 1 Stark. 439; Evans *v.* Kymer, 1 B. & Ad. 528; Treuttel *v.* Barandon, 1 Moore, 543; Bell *v.* Ingestre, 12 Q. B. 317.

(*k*) Haynes *v.* Foster, 2 C. & M. 237; Foster *v.* Pearson, 1 C. M. & R. 849.

at maturity, and that, if it is not so paid, upon due notice of dishonour, he will pay the amount (*a*). Every indorsement is a new bill ; and so long as a bill is in circulation, and such indorsements are made, all the indorsers and every one of them are affected with the same liability of the original drawer (*b*). In a promissory note, however, where the maker stands in the capacity of an acceptor, liable in the first instance, the indorser does not stand in the relation of maker relatively to his indorsee, but is only liable in default of the maker (*c*).

The indorser may free himself from any responsibility by the indorsement by annexing to it the words "without recourse," or other expressions of a similar import ; and the indorsee of such a bill or note taking it under such an agreement could not sue the indorser (*d*). An indorsement admits every prior indorsement, and the indorser cannot deny the indorsement of the payee to him (*e*).

When a bill is transferred without indorsement, the transferor incurs no liability on the bill or note, either towards the person to whom he delivers it or to any other (*f*). But if he is not subject to the obligations he is not entitled to the advantages of such a transfer. Thus, if he delivers it without his indorsement upon any other consideration, antecedent or concomitant, the nature of the transaction and all circumstances regarding the bill must be inquired into, in order to ascertain whether he is subject to any responsibility. If the bill be delivered and received as an absolute discharge he will not be liable, if otherwise he may be ; but the mere fact of receiving such a bill does not show that it was received in discharge (*g*).

In any case the transfer of a bill or note without indorsement would be held to guarantee his title to the instrument and the validity of the signatures. If the holder of the bill knew it to be bad, or that the signatures were not genuine when he trans-

Indorsement without recourse.
Liability on transfer without indorsement.

(*a*) *Gibbs v. Fremont*, 9 Exch. 25 ;
Macgregor v. Rhodes, 25 L. J. Q. B. 320.

436.

(*b*) *Plimley v. Westley*, 2 Bing. N. C. 249 ; *Heylyn r. Adamson*, 2 Burr. 669 ; *Ballingalls v. Gloster*, 3 East, 481 ; *Penny v. Jones*, 1 C. M. & R. 441.

(*c*) *Gwinnell v. Herbert*, 5 Ad. & E.

(*d*) *Pike v. Street*, 1 M. & M. 226.

(*e*) *Macgregor v. Rhodes*, 25 L. J. Q. B. 318.

(*f*) *Swinyard v. Bowes*, 5 M. & S. 62 ; *Van Wart v. Woolley*, 3 B. & C. 446.

(*g*) *Ibid.* ; *Bishop v. Rowe*, 3 M. & S. 362.

ferred it, the consideration would entirely fail, and he would have to refund the money (*a*).

Bill transferred for antecedent debt does not destroy the liability on the contract.

When bills or notes are delivered for an antecedent debt, or for the payment of goods purchased at the time, unless the transferor expressly exonerates himself from all further liability, he may be sued for the antecedent debt, or for the consideration in default of payment (*b*). Where, however, the transfer of such bills or notes is intended to operate as a sale, or where the same are given in exchange for other bills or notes, or where there was an express agreement that the transferee should run all risks, then no action could be maintained against the assignor in default of payment (*c*).

FOREIGN LAWS.

Effect of regular and irregular indorsements.

France.—The property of a bill of exchange is transferred by means of an indorsement. The indorsement must be dated, must express the value given, and state the name of the party to whose order the bill has passed. An indorsement wanting in any of the requirements of the preceding article would not affect the transfer, but act as a simple procuration. An indorsement including all the conditions of the code is called *regular*, one which does not include all of them is called *irregular*. The indorsement is irregular if the indorser has put no more than his name on the back of the bill. When the indorsement is irregular, the bearer cannot fill it up with what is wanting. As an irregular indorsement has only the effect of a simple procuration, the creditors of the indorser can at all times arrest the amount of the bill in the hands of the drawee. The drawee himself, when he is creditor of the indorser, can set his own claims against those of the bearer. The indorser may, so long as the bill has not been paid, and the bearer has not transferred it to another person by a regular indorsement, recall the procuration, and hinder the bearer from receiving the payment. Nevertheless, if the bearer proves that he has given to the indorser the value, the indorser can-

(*a*) *Fenn v. Harrison*, 3 T. R. 359; *Young v. Cole*, 3 Bing. N. C. 724. *ner v. Stone*, 1 D. & L. 759; *Young v. Cole*, 3 Bing. N. C. 724.

(*b*) *Sayer v. Wagstaff*, 5 Beav. 415; *Owenson v. Morse*, 7 T. R. 65; *Timmins v. Gibbins*, 18 Q. B. 722; *Tur-* *(c) Hornblower v. Proud*, 2 B. & Ald. 327; *Robson v. Oliver*, 10 Q. B. 704; *Fydell v. Clark*, 1 Esp. 447.

not take advantage of the irregularity of the indorsement, and as against him the bearer is held to be a regular proprietor of the bill. The bearer stands as agent towards third parties, and in that capacity he is responsible for his neglect to the indorsers. The holder of a bill indorsed with an irregular indorsement has the right to demand the acceptance from the drawee, and even receive payment and give a valid acquittance. The irregular indorsee has the right to pass the bill with a regular indorsement, and is responsible on the bill in the same manner as a regular indorsee. The indorsement cannot be antedated (a).

United States.—A valid transfer may be made by the payee or his agent, and the indorsement is an implied contract that the indorser has a good title, and that the antecedent names are genuine, that the bill or note shall be duly honoured or paid, and if not, that he will on due protest and notice take it up. In the case of a bill made or indorsed to a *feme sole*, who afterwards marries, the right to indorse it belongs to the husband. So the assignee of an insolvent payee, or the executor or administrator of a deceased payee, is entitled to indorse the paper. If a bill be made payable to a mercantile house consisting of several partners, an indorsement by any one of the partners is deemed the act of the firm. So an infant payee or indorsee may by his indorsement transfer the interest in the bill to any subsequent holder against all the parties on the bill except himself. The bill cannot be indorsed for a part only of its contents, unless the residue has been extinguished, for a personal contract cannot be apportioned, and the acceptor made liable to separate actions by different persons.

Blank indorsements are common, and they may be filled up at any time by the holder, even down to the moment of trial, in a suit to be brought by him as indorsee; but no other use can be made of a blank indorsement in filling it up than to point out the person to whom the bill or note is to be paid. A note indorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself, or any other person, assignee of the bill. Even a bond made payable to bearer passes by delivery, in the same manner as a bank-note

(a) French Code of Commerce, §§ 136—139.

payable to bearer, or a bill of exchange indorsed in blank. The holder may strike out the indorsement to him though full, and all prior indorsements in blank except the first, and charge the payee or maker. When the indorser takes up the note, he becomes the holder as entirely as though he had never parted with it. There is no necessity for any negotiable words in the indorsement. An indorsement to A. B. without adding to "order," is a good general indorsement, but to give effect to an indorsement there must be delivery. A bill originally negotiable continues so in the hands of the indorsee, unless the general negotiability be restrained by a special indorsement by the payee. He may stop its negotiability by a special indorsement, but no subsequent indorsee can restrain the negotiable quality of the bill.

The first indorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged or fraudulently circulated. If a bank-note or cheque be indorsed it will bind the indorser to any sum or time of payment which the person to whom he intrusts the paper chooses to insert in it. This only applies to the case in which the body of the instrument is left blank. If negotiable paper, regularly filled up, be indorsed in blank, the indorser is holden only in the character of indorser, and according to the terms and legal operation of the instrument.

In the case of blank indorsements possession is evidence of title ; but if the indorsements be all filled up, the first indorsee cannot sue without showing that he had taken up the bill or note. The acceptor or maker is liable only to the last indorsee. The prior indorsers have parted with their interest in the paper and are presumed to have received a valuable consideration for it. But if the last indorsee protests the bill for non-payment, and if it be paid by a prior indorser, the latter acquires, by such payment, a new title to the instrument.

Liability of acceptor to indorsee.

Though the holder of paper fairly negotiated be entitled to recover, and to shut out almost every equitable defence, yet the rule applies only to the case of negotiable paper taken *bona fide* in the course of business before it falls due. If taken after it is due and payable, the presumption is against the validity of the demand, and the purchaser takes it at his peril, and subject to every defence existing against it, before it was negotiated.

A note payable on demand, and indorsed within seven days after it was made, is deemed as indorsed in due season to close all inquiry into the origin of the note. And when a note is negotiated in season it may afterwards pass from one indorsee to another, after it is due, and the holder will be equally with the first indorsee protected in his title. There is no certain time in which a bill or note, payable at sight or a given time thereafter, or on demand, must be presented for acceptance. It must not be locked up for any considerable time; it must be presented for payment within a reasonable time; but, if put into circulation, the validity of a late presentation depends upon circumstances. A negotiable instrument may be indorsed so as to exempt the indorser from liability, as if the indorser should add, *at his own risk, or without recourse.* In that case the maker or acceptor and prior indorsers would be holden according to the rules and usages of commercial paper, but the immediate indorser would be exempted from responsibility by the special contract. If the bill or note be negotiated after it is due, and be thereby opened to every equitable defence, yet a demand must be made upon the drawee or maker within a reasonable time, and notice given to the indorser in order to charge him, equally as if it had been a paper payable at sight, or negotiated before it was due (a).

Germany.—The payee can transfer the bill to another by indorsement. Nevertheless, if the drawer have forbidden the transfer of the bill, by inserting the words "not to order," or other words of similar import, the indorsement produces no right of exchange.

By the indorsement all the rights resulting from the bill are transferred to the indorsee, and especially that of again indorsing it. The bill of exchange may also be validly indorsed to the drawer, drawee, acceptor, or to a former indorser, and by them further transferred by indorsement.

The indorsement must be written either on the bill itself, upon a copy thereof, or upon a slip attached to the bill (*alonge*). An indorsement is valid if the indorser writes merely his name or that of his firm upon the back of the bill, or of the copy, or on the slip (*blank indorsement*). Every holder of a bill is the holder.

(a) Kent, *Commentaries* vol. iii. p. 110, 9th Ed.

entitled to fill up the blank indorsement. But he may transfer it further by indorsement without filling it up. The indorser is bound to every subsequent holder for the acceptance and payment; but if the indorser has added "without responsibility or recourse," or a similar reserve, he is free from all responsibility.

Restrictive indorsement.

The indorser who forbids the transfer of the bill by inserting the words "not to order," or other equivalent ones, is free from all recourse from any subsequent indorser and holder.

When a bill is indorsed after the time allowed for protesting it for non-payment, the holder acquires a right against the acceptor in respect to his acceptance, and a right of recourse against all those who have indorsed the bill after the expiry of that period. If, however, the bill has been protested for non-payment previous to the indorsement, the indorsee has no other recourse than that of his indorser against the acceptor, the drawer, and such as have indorsed the bill previous to protest being taken. In this case the indorser is free from liability, (*Wechsel-massige*). If in the indorsement there are inserted the words "to be cashed," "per procuration," or other forms expressing a power of attorney, the indorsement carries no right of property in the bill; it, however, entitles the indorsee (*indossatar*) to demand payment, to protest, and to give notice to the party preceding him, or to his indorser, of non-payment in order to raise action on the bill, or to claim it from the bank of deposits. Such an indorsee can transfer these rights to another by a further indorsement per procuration, but a bill so indorsed cannot be again transferred by an ordinary indorsement, though the indorsement per procuration should contain the words "to order."

Brazil.—Incomplete indorsements and blank indorsements are allowed, but that they may be valid they must at least contain the date and the signature of the indorser; it is then presumed that the bill is passed to order with value received (a).

Buenos Ayres.—When the indorser writes his name only on the back, it is presumed that he indorses it to the order of the bearer, and that it contains an acknowledgment of the money received. Indorsements in blank, and not containing the neces-

(a) Brazilian Code of Commerce, §§ 360—364.

sary requisites, have only the force of simple procurations, to the effect of authorising the bearer to exact payment or to have the bill protested. If the bill was to order, then the holder may substitute another mandatory by a new indorsement, with the same effect. If a bill irregularly indorsed has arrived from a foreign country, the bearer may demand payment of the bill. A false indorsement does not transmit the property in a bill, and vitiates all subsequent indorsements, except the action of the bearer against the indorser (*a*).

Italy.—The law is the same as in France. An indorsement is considered regular when it contains the words, the date, or "value as above," or "as on the back." The indorsement made after the bill has become due is an irregular indorsement. It is prohibited not only to antedate but to postdate the indorsement (*b*).

Netherlands.—The indorsement which does not contain every particular required by the code is an irregular indorsement, and produces only a simple procurement. The indorsee of a bill can re-indorse the bill only when the preceding indorsement is to his order. The indorsement given in blank by the simple signature of the indorser on the back of the bill, is a regular indorsement, which is deemed to imply the receipt of the value and signed to the order of bearer. The bearer, who becomes the owner of the bill with a blank indorsement, may transfer it by a regular indorsement (*c*).

Blank indorsement.

Portugal.—The indorsement is complete or in blank. A complete indorsement must contain all the particulars as indicated by the Portuguese code. An incomplete indorsement, or an indorsement given in blank, must have the date, and be signed by the indorsee. It is then presumed that the bill has passed to the order of the holder, and that the value has been given. The indorsement, which contains only the signature of the indorser, is an irregular indorsement, and has only the effect of a simple procurement. The mandatory may substitute by indorsement another mandatory, but he cannot make a regular indorsement. The indorsement of bills already due, or of bills not presented in time for acceptance, and of bills not drawn to

Effect of a complete or irregular indorsement.

(*a*) Buenos Ayres Code of Commerce, §§ 149—152.

§§ 801—812.

(*b*) Sardinian Code of Commerce,

§§ 133—139.

order, produces no other effect than that which results from the ordinary cession of debts (*a*).

Russia.—A bill of exchange or promissory note may be transferred to another person, by the latter to a third, and so successively. And such transfer is effected by indorsement. If the back of the bill is quite filled up, permission is given to add to the bill of exchange a slip of blank paper, in such a manner that the last indorsement shall be commenced on the bill, and terminated on the slip which is added to it. The indorsement may be complete or incomplete. By means of a complete indorsement the property of a bill of exchange is transferred; by an incomplete indorsement the party is simply authorised to receive the money. The first of such indorsements is termed indorsement by transfer, and the second indorsement by procuration. Both such indorsements ought to be signed by the indorser or his representative; if not, such indorsements are void. The indorsement by transfer should state, 1st, the name of the person to whom, or to whose order the bill of exchange is to be paid; 2nd, if the value has been received or carried to account, and if the indorser thinks it necessary, he may, moreover, announce from whom such value has been received; 3rd, the place, the year, the month, and the day of indorsement. The indorsement is, however, valid, even if it does not state the place, the year, the month, and day. Blank indorsements are permitted for every kind of bills of exchange, but only where there is an understanding among the parties interested, and under their own responsibility. The bill of exchange may be transferred and indorsed before or after presentation and acceptance. It is forbidden to antedate an indorsement, under penalty of rendering the bill invalid, and of responsibility in case of fraud. The holder of a bill of exchange is called the bearer. If the bill of exchange is not accepted, or if it is not paid by the drawee designated therein, the indorsers are all responsible, to the full extent of their property, for payment to the bearer as well as the drawer himself. The responsibility of the indorsers towards the bearer does not cease, even when the bill has been declared void. If one of the indorsements is discovered to be false, the other indorsements continue to be

(a) Portuguese Code of Commerce, §§ 350—360.

valid. But the indorsement with the words, "without recourse," Indorsement without recourse. relieves such indorser from all responsibility in case of non-payment. He who obtains a bill of exchange by virtue of simple procuration, and on account of another party, is responsible towards the subsequent indorsers if he indorses it; but as regards his employer, he is responsible only in case of having guaranteed for its solvency by a *del credere* commission (a).

Spain.—The indorsement must contain the following items: Requisites of an indorsement. the name and surname of the indorsee; the value received in account in cash, or in merchandise; the name of the party on whose account the indorsement has been made; the date, and the signature of the indorser or of his attorney. The omission of any one of these particulars other than the name of the indorser and indorsee, does not annul the indorsement, but makes it have the effect of a simple procuration. Indorsements in blank are void, and give no right to any one to demand the payment (b).

Sweden.—Inland bills may be lawfully indorsed in blank; Foreign bills cannot be indorsed in blank. but bills of exchange drawn from a foreign country upon a place in the kingdom cannot be indorsed in blank. The indorsement must be regular, and contain the name of the indorsee, the date, the value received, and the signature of the indorser. The drawee is not bound to accept the bill not duly indorsed. The irregular indorser is responsible for the injury he has caused. The indorsement has often the effect, not of transferring the property, but simply to confer on the indorsee the power to demand the acceptance or payment. This power may be revoked by the indorser, except the bearer can prove that he has given value for the bill (c).

SECTION IX.

BRITISH LAW.

PRESENTMENT FOR ACCEPTANCE.

The holder of a bill of exchange has the right to present it for acceptance. Presentment for acceptance is necessary when Right of holder to present a bill for acceptance.

(a) Russian Code, §§ 309—322.

(c) Art. 3—9, Ordinance of 21 Jan.

(b) Spanish Code of Commerce, §§ and 1 Feb. 1748.

When necessary. the bill is drawn payable at sight, or at a certain period after sight, in order to determine the time when it will become due (*a*). If the holder of a bill so payable at sight, or a certain time after sight, neither presents it nor puts it in circulation, he is guilty of laches, and cannot recover upon it (*b*).

When unnecessary. Where, however, the time of maturity is certain, or when the bill is payable on demand, the holder is not bound to present it for acceptance (*c*), although it is in all cases advisable to present such bill for acceptance, inasmuch as an additional security is thereby obtained (*d*). So it is the duty of an agent receiving a bill payable at any specific time to present it at once for acceptance, in order to fix the liability of the drawee in the bill should the affairs of the drawer meanwhile become deranged (*e*).

Want of funds in the drawee's hands is no excuse. And though want of funds in the drawee's hands might excuse presentment, in order to charge the drawer of an unaccepted bill, some actual evidence of a demand to accept must be proved (*f*). But once acceptance is refused, the holder may sue the drawer on the bill, and he is not bound again to present it or to return the bill (*g*).

To whom the bill should be presented. The bill should be presented to the drawee himself. If he refuses it, or if he cannot be found, then if the bill specifies another person to whom it should be presented "in case of need," or, "*au besoin*," it should be presented to him (*h*). If the bill is drawn on two or more persons in partnership, presentment to one is presentment to all; but if they are not in partnership, the bill must be presented to each of them separately.

Presentment must be in a reasonable time and reasonable hours. In all cases presentment should be made in a reasonable time, and the limit of such reasonable time will depend on the particular circumstances of the case (*i*). Presentment must

(*a*) *Muilman v. D'Eguino*, 2 H. Bl. 565.

(*b*) *Muilman v. D'Eguino*, 2 H. Bl. 565; *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, R & M. 389; *Dixon v. Nuttall*, 1 C. M. & R. 307.

(*c*) *O'Keef v. Dunn*, 6 Taunt. 304.

(*d*) *Claxton v. Swift*, 2 Show. 496.

(*e*) *Van Wart v. Woolley*, 3 B. & C. 489; *Bell's Principles of Scots Law*, § 336.

(*f*) *Cheek v. Roper*, 5 Esp. 175.

(*g*) *Hickling v. Hardy*, 7 Taunt. 312.

(*h*) *Chitty on Bills*, p. 180.

(*i*) *Muilman v. D'Eguino*, 2 H. Bl. 565; *Mellish v. Rawdon*, 9 Bing. 416. In determining the question of reasonable time for presentment, not the interests of the drawer only, but those of the holder, must be taken into account; the reasonable time expanded

also be made within reasonable hours. Thus, presentment to a banker must be before banking hours, and presentment to a tradesman any time during the day or evening (*a*).

The presentment should be made at the place of business or of residence of the drawee, without regard to the place where the bill or note is made payable. If the drawee cannot be found at his usual residence, the holder may consider him as absconded, but if he has only changed place, the holder must make due diligence to find him out (*b*). The party may have the whole day to view the bill, and deliberate to accept it or not.

FOREIGN LAWS.

France.—The holder of a bill of exchange drawn from the continent and European islands and payable in the European possessions of France either at sight or at one or several days or months, or usances of sight, must demand payment or acceptance within six months of its date, under penalty of losing his rights against the indorsers, and even against the drawer if the latter has made due provision. Bills of exchange drawn from the ports of the Levant and Northern Coasts of Africa upon the European possessions of France, and reciprocally from the continent and European islands upon the French establishments in the ports of the Levant and the Northern Coasts of Africa, must be presented within eight months of their date. Bills of exchange drawn from the Western Coast of Africa, up to and including the Cape of Good Hope, must be presented within one year. It is also one year for bills of exchange drawn from the continent and from the islands of the West Indies upon the European possessions of France, and reciprocally from the continent and European islands on the French possessions and French establishments in the West Coast of Africa, in the continent and islands of the West Indies. Bills of exchange drawn from the continent and islands of the East Indies on the European possessions of France, and reciprocally from the con-

Time allowed
for present-
ment.

in putting the bill into circulation, which is for the interest of the holder, is to be allowed; and the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. B. Parke in

Radkessen v. Mullick, 9 Moore, C. L. 67.

(*a*) Barclay v. Bailey, 2 Camp. 517; Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 M. & S. 28.

(*b*) Collins v. Butler, 2 Str. 1037; Bateman v. Joseph, 12 East, 432.

tinent and European islands upon the French possessions or French establishments on the continent and islands of the East Indies, must be presented within two years. The same forfeiture of rights would arise where the holder of a bill of exchange at sight, at one or several days, months, or usances of sight, drawn from France, from French possessions and establishments, and payable in foreign countries, does not demand the payment or acceptance within the time above specified for each of the respective distances. The above delays of eight months, one year, and two years are doubled in time of maritime war. These regulations do not prejudice any contrary stipulation which may exist between the holder, the drawer, and the indorsers.

A special regulation adopted by French Guiana, by Ordinances of the Governor, of the 1st October, 1820, decides that as regards bills of exchange drawn from French Guiana upon another place of the same colony, the holder must require the acceptance within three months. And the time is extended to six months for bills drawn from the islands above wind ; to one year for those drawn from islands under wind, North America and Europe ; to three years for those drawn from the West Indies on French Guiana (a).

United States.—There is no precise time fixed by law in which bills payable at sight, or a certain number of days after sight, must be presented to the drawer for acceptance, though there must not be any unreasonable delay, for that might discharge the drawer and indorser. A bill payable on a day certain after date, or on demand, need not be presented for acceptance before the day of payment or demand, and if not presented previously for acceptance, the right to require acceptance becomes merged in the right to demand payment ; but if presented before it becomes due, and acceptance be refused, it is dishonoured, and notice must then be given forthwith to the parties whom it is intended to charge. There is a distinction between the owner of the bill and his agent. Though the owner is not bound to present the bill payable at a day certain for acceptance before the day, the agent employed to collect the bill or to get it accepted and paid, or accepted, must act with due diligence to have the bill accepted as well as paid. He has not the discre-

Presentation
for accept-
ance of bills
on demand.

Duty of agent
to present bills
payable on a
day certain.

(a) French Code of Commerce, § 160.

tion or latitude of time given to the owner, and for any unreasonable delay on his part he would be held responsible for all damages which the owner may have sustained by reason thereof (a). A bill payable at sight, or at so many days after sight, as well as a bill payable on demand, must be presented in a reasonable time, or the holder will have to bear the loss proceeding from his default (b).

Germany.—The holder of a bill of exchange is entitled forthwith to present it for acceptance, and if acceptance is refused, to have the bill protested. Bills of exchange payable at fairs are alone exempted from such a formality. Such bills can only be presented and protested at the times fixed by the regulations in force when the fair is held. The mere possession of a bill entitles the holder to present it for acceptance, and to protest it for non-acceptance. The holder is bound to present the bill for acceptance when the bill is drawn at a certain time after sight; a bill so drawn must, under penalty of losing all right of recourse against the drawer and indorser, be presented for acceptance within the period specified therein, and if no period be mentioned, within two years after the date. If an indorsement specifies that the bill must be presented for acceptance within a specified time, the indorser is discharged of all obligation if the bill is not presented within such a period. When the acceptance of a bill payable at a certain time after sight is refused, or if the drawee refuses to date his acceptance, the holder must, under penalty of losing his recourse against the indorser and the drawer, get the bill protested for non-acceptance. The day of the protest serves in such a case for the day of presentation. If no protest has been made, and the acceptor has omitted to date his acceptance, the time of payment will be calculated from the last day of the time allowed for presentation (c).

Denmark.—The holder of a bill payable at a certain time after date must send it for acceptance in good time to have it presented before it becomes due. A bill payable at sight, or at a certain time after sight, must be presented within three months from its date if the bill is drawn from a place

(a) *Allen v. Suydam*, 17 Wendell, 368; *The Bank of Scotland v. Hamilton*, Bell's Com. vol. i. p. 409, note.

(b) *Kent's Commentaries*, vol. iii. p.

101, 9th Ed.

(c) *German Law on Bills of Exchange*, §§ 17—19.

of the kingdom, and within six months if it be drawn from a foreign country. Bills drawn from Iceland or the Feroe Islands, and those drawn upon these countries from places out of Europe, must be presented within the year. Bills drawn from the kingdom on the East Indies, or from the East Indies on Denmark, must be presented within two years. The presentation for acceptance cannot be made on Sundays or holidays, and if the time for presentation expired on such a day it would be extended to the first working day.

Italy.—Bills of exchange drawn from and in any inland place, either at sight, or at one or more days, or months, or usances of sight, must be presented within three months of their date. The time is extended to six months if the bill is drawn from foreign States of the continent or islands of Europe upon the kingdom ; to eight months for bills drawn from ports in the Levant, and Northern coast of Africa ; to one year for bills drawn from the West coast of Africa, up to and including the Cape of Good Hope, as well as for those drawn from the continent and islands of the West Indies ; and to two years for bills drawn from the continent and islands of the East Indies. The same time is allowed for bills drawn from the interior of the kingdom, and payable in the above countries. The time is doubled in case of maritime war (a).

Time allowed
for present-
ment for ac-
ceptance.

Netherlands.—Bills of exchange payable at a certain time after sight must be presented for acceptance. The presentation for acceptance is also required when the condition is imposed by the drawer, but it is optional for bills payable at a certain time after date. The holder of a bill drawn upon any place of the kingdom of the Netherlands must present it for payment, if payable at sight, or for acceptance if payable at a certain time after sight, within the time hereafter expressed from the date of the bill, under penalty of losing his recourse against the indorser, and the drawer if the latter proves that he has made provision with the drawee. The time specified is as follows :—Six months for bills drawn from the continent and islands of Europe ; eight months for bills drawn from ports in the Levant and northern coasts of Africa ; one year for bills drawn from the west coasts of Africa, up to and including the Cape of Good Hope, as well

(a) Sardinian Code, § 174.

as from the continent of North and South America (with the exception of the portion designated hereafter), and from the islands of the West Indies; two years for bills drawn from the coasts of South and North America situated in the Pacific Sea and beyond Cape Horn and the islands of that sea, as well as from the continent of Asia and the islands of the East Indies. Such times are doubled, in cases of maritime war, as regards bills drawn from the European islands and places above mentioned, with the exception of bills drawn from the continent. The above regulations are applicable reciprocally to bills of exchange drawn at sight or at a certain time after sight from the kingdom of the Netherlands, or the places above designated. The time for the presentation of bills drawn from and on any place in the interior is three months. If by any accident the bill sent for acceptance before the end of the time granted for presentation does not arrive in time, it must be presented for acceptance the day after its arrival, if the holder resides in the same place as the drawee. The presentation must take place within eight days of its reception, if the drawee is domiciled in another place (a).

Norway.—Every bill of exchange payable at a certain time after date, must be presented for acceptance in good time. When it is payable at sight, or at a certain time after sight, the bill must be presented sufficiently early so that the payment may be made within six months from the date of the bill, if it is payable in Europe; and within one year of its date if it is payable in other parts of the world. If the bill has not been presented within the times specified by law, the holder must stand as a simple mandatory of the drawer (b).

Portugal.—The holder of a bill of exchange drawn from the continent, the European Islands of Azores and Madeira, and payable in the kingdom of Portugal either at sight, or at a certain time after sight, must demand acceptance or payment within three months of its date. The time is extended to six months for bills drawn beyond the Cape of Good Hope, from the continent of South America and North America, and to one year for those drawn beyond the Cape of Good Hope and Cape Horn. The time is doubled in time of maritime war. Bills

(a) Dutch Code of Commerce, § 116. (b) Norway Regulations of 1681, and Law of 1842.

drawn from any place in the kingdom of Portugal and the Algarves, upon any place in the same kingdom, must be presented within thirty days from the date. If the bill is not presented within the time fixed by law the holder loses his rights against the indorser, and against the drawer when he can prove that he had made provision with the drawee. If the bill is sent in good time to be presented for acceptance or payment, but does not arrive there in consequence of an accident or of a superior force, the holder preserves his rights against the drawer and indorser, provided he presents the bill and protests it if necessary, on the morning after its arrival at the latest. It is the same if, the roads being intercepted, the post arrives later (a).

Russia.—The holder must present for acceptance the bill payable at sight, or at a certain time after sight, within forty-eight hours of its reception. The time is prolonged till the first working day if it falls on a Sunday or a feast day. If it falls on a Sunday and the holder is a Jew the time is also prolonged. The holder has the right to fix the time within which the bill must be presented for acceptance from the date of the bill. In want of special indication, the presentation must take place within twelve months from the date of the bill. If the bill is not presented either in the conventional time, or in the time prescribed in the instrument, or within the legal time, the holder loses the rights on the bill, and is considered simply as an ordinary creditor. Nevertheless, if the bill could not be presented in time, in consequence of superior force, or delay of the post, or any other circumstances, independently of the will of the holder, the latter has then the right to present the bill as soon as possible, even after it has become due. Especially if the drawee has become insolvent the holder may exercise his rights against the drawer and indorsers, and the latter cannot object to the non-presentation in due time. But if the insolvency happened only after the bill became due, and the drawer prove that he had made provision in due time with the drawee, then the holder cannot go against the drawer and indorsers, and the rights of the drawer against the drawee pass to the holder (b).

What will excuse presentation.

Time allowed for presentation for acceptance.

Spain.—Bills drawn from the Peninsula and from the Balearic Islands upon any other place, and payable at any time after

(a) Portuguese Code of Commerce, § 337. (b) Russian Code, §§ 324—337.

sight, must be presented for acceptance within forty days from their date. Bills at sight must be presented within the same time. Those drawn from the above-named places, and payable at more than thirty days' date, must be presented for acceptance within the thirty days. Such periods are doubled for bills drawn between the Peninsula and the Canary Islands. Bills of exchange drawn between the Peninsula and the Spanish Antilles, or any other point beyond seas, situated ~~beyond~~^{near} Cape Horn and of Good Hope, must be presented for acceptance or payment within six months from their date, whether the bill was payable at a certain time after sight or of date. The time is one year for places beyond sea, or beyond the two Capes. The holder of the bill who sends it for acceptance or payment beyond sea must always send two copies by different ships, and if it be found that the ships by which the first and second were sent had suffered some accident which had delayed their voyage, the time runs only from the time when the accident was known at the place where the drawer resides. The same is when the loss of the ship is presumed for want of news. Bills drawn in foreign countries, or places of the Spanish territory, must be presented for acceptance or payment within the time indicated in them, unless they are payable at a certain time after date, and within forty days after their arrival in the country if they are payable at a certain time after sight. If the bills are not presented within such times the holder loses all right of recourse in the Spanish tribunals. Bills drawn from the Spanish territory upon foreign countries must be presented in the forms prescribed by the laws in force in the countries where they must be paid. The holder of the bill who does not demand the acceptance within the fixed time, loses his right against the indorsers in case of non-payment by the drawee. The same forfeiture of rights takes place as against the drawer if he prove that on the day when the bill became due he had made provision for it in the hands of the drawee (a).

Sweden.—A bill of exchange payable at a certain time after sight, and drawn from and on any part of the kingdom, must be presented for acceptance by the holder within three months of its issue. If the bill is drawn from a foreign country, upon a

Time for pre-sentation for bill drawn on or from Spanish territory.

(a) Spanish Code, §§ 483—485.

place of the interior, the holder must send it for acceptance by the first post, except there be special agreement, whatever be the time it becomes due. The holder is responsible for the injury which he may cause by delay or neglect, except in case of superior force. A bill of exchange drawn from a foreign country on any place in this country, by the drawer himself, need not be presented for acceptance so long as it rests in the hands of the payee, but as soon as the latter has indorsed it, the holder must present it. If the payee sends the bill to a third person to present it for acceptance, the agent, if he bound himself to do it, or if he is accustomed to do such a service, must present it as soon after the arrival of the post. If he does not wish to take the trouble, he must return the bill to the payee by the first post, otherwise he is regarded as having accepted the order, and becomes responsible as such (a).

Laws of Swiss cantons.

Switzerland.—In Geneva the law is the same as in France, with the addition, that the forfeiture pronounced by Act 160 of the Code of Commerce takes place against the holder of a bill of exchange at one or more days, months, or usances of sight, drawn from the canton of Geneva, and payable in foreign countries, who has not demanded the payment or acceptance within the time prescribed for each of the respective distances.

Ale and Solern.—Bills of exchange, payable at a certain time after sight, must be presented for acceptance. *Zurich.*—The acceptance may be exacted on bills of exchange payable at a certain time after date as well as on those payable at a certain time after sight. *St. Gall, Berne, and Lucern.*—The holder must present the bill for acceptance as soon as he receives it, and before it is due. If the holder receives it on a Sunday or Monday he must present it the same Monday before five o'clock in the evening, or the Tuesday before mid-day at the latest. If the letter arrives on the Tuesday, he has time till the Wednesday evening; if on the Wednesday, till the Thursday evening; if on the Thursday, till the Friday evening; if on the Friday, till the Saturday evening; and lastly, if on the Saturday, till the Monday evening. Bills of exchange post-dated or ante-dated must be presented within the time indicated, taking no account of the date indicated in the bill.

(a) Swedish Law of 1748.

SECTION X.

ACCEPTANCE.

BRITISH LAWS.

An acceptance is an engagement to pay the bill when due (a). Acceptance must be in writing. The acceptance of both inland and foreign bills must be in writing on the bill, and signed by the acceptor, or some person authorised by him (b). The drawee is not bound to accept a bill drawn upon him, unless he has contracted an express or implied obligation to that effect, in which case he would only be liable to the drawer for the refusal of acceptance (c). In no case, however, can a person contract any liability on a bill or note, except by his signature on the same.

Where the drawer dies before the bill is accepted, the authority to accept is held to be countermanded, and the acceptance should be refused, inasmuch as the drawing does not operate as an assignment of the funds in the hands of the drawee (d). Where the drawee is found to be an infant, or a married woman, the holder may refuse his or her acceptance, and has a right to treat the bill as dishonoured.

No person can be the acceptor of the bill of exchange except the drawee of the bill, or some one who accepts it for the honour of the drawer, as provided by the expression "in case of need at Messrs. —," &c. (e). The bill must be accepted by the drawee himself, or by some person duly authorised by him, though the holder may refuse the acceptance by an agent (f). The acceptance per procuration is in fact a notice to the holder that the party so accepting acts under an authority from his principal, and imposes upon the holder the duty of ascertaining that the party so accepting is acting within the terms of such authority (g).

Where a bill is drawn on two or more persons partners in Bills draw upon partner

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| (a) Russell <i>v.</i> Phillips, 14 Q. B. 891; Clarke <i>v.</i> Cock, 4 East, 72. | (g) Alexander <i>v.</i> Mackenzie, 6 C. B. 766; Attwood <i>v.</i> Munninga, 7 B. & C. 283; Owen <i>v.</i> Van Uster, 10 C. B. 318; Nichols <i>v.</i> Diamond, 9 Exch. 154; Davidson <i>v.</i> Stanley, 2 M. & G. 721; Mare <i>v.</i> Charles, 5 B. & E. 978; Coore <i>v.</i> Callaway, 1 Esp. 116; Richards <i>v.</i> Barton, 1 Esp. 269. |
| (b) 19 & 20 Vict. c. 97, s. 6. | |
| (c) Smith <i>v.</i> Brown, 6 Taunt. 446; Laing <i>v.</i> Barclay, 1 B. & C. 398. | |
| (d) Gibson <i>v.</i> Minet, 1 H. Bl. 586. | |
| (e) Polhill <i>v.</i> Walters, 3 B. & Ad. 114. | |
| (f) 19 & 20 Vict. c. 97, s. 6. | |

or upon several parties not partners. trade, the acceptance of one is the acceptance of all. But if the drawees are not partners, the bill must be accepted by all the drawees; and if one of them only accepts, the bill should be protested, unless the one who accepted acted as the special agent of the others (*a*).

Acceptance must be given in a reasonable time. The drawee must accept the bill in a reasonable time within twenty-four hours after presentation, and if he does not accept it within that time, the holder may treat it as dishonoured (*b*).

A bill may be accepted, even before it is drawn, by signing a blank bill duly stamped, and delivering the same to another for the purpose of filling it up and using it, the acceptor rendering himself in this case liable for any sum the party may have written upon it which is covered by the stamp (*c*). A bill may also be accepted after it has become due, and the effect of such an acceptance is to render the bill payable on demand (*d*).

Acceptance may be absolute or conditional, qualified or partial, but the holder may refuse to take a conditional or qualified acceptance varying from the tenor of the bill; and if he takes it, he discharges all the parties in the bill. Where the acceptor gives a conditional acceptance contingent on the fulfilment of a certain condition, as, for example, payable on giving up a bill of lading, it is binding on the holder of the bill, upon presenting it for payment, to give up the bill of lading (*e*).

Place of payment. Where a bill is accepted payable at the house of a banker or other place, without further expression, it is deemed a general and unqualified acceptance; but where the acceptor expresses in his acceptance that he accepts the bill payable at a banker's house or other place *only*, and not otherwise, or elsewhere, such acceptance is deemed a qualified acceptance, and the acceptor would be discharged by the non-presentation of the bill at such a place (*f*).

By the acceptance the drawee becomes primarily liable to pay the bill, and the drawer and indorsers are only collaterally liable on his default (*g*).

(*a*) Jenkins *v.* Morris, 16 M. & W. 877.

(*b*) Ingram *v.* Forster, 2 Smith, 243, 244.

(*c*) Montague *v.* Perkins, 17 Jur. 557; Temple *v.* Pullen, 4 Exch. 389; Armfield *v.* Allport, 27 L. J. Exch. 42.

(*d*) Wynne *v.* Raikes, 5 East, 514; Billing *v.* Devaux, 3 M. & G. 565.

(*e*) Smith *v.* Vertue, 30 L. J. C. P. 56 (N. S.).

(*f*) 1 & 2 Geo. 4, c. 78, s. 1; Sebag *v.* Abitbol, 4 M. & S. 462; Turner *v.* Hayden, 4 B. & C. 1.

(*g*) Heylyn *v.* Adamson, 2 Burr. 674; Dingwall *v.* Dunster, Doug. 249; Smith *v.* Knox, 3 Esp. 47; Philpot *v.* Bryant, 4 Bing. 720.

So long as the bill is in the hands of the drawer or payee, the acceptor may resist the payment of the bill, if he has accepted without value or for accommodation; but if it has passed to a third person, who has given value for it, the plea of want of consideration will fail (*a*). And the fact that such *bond fide* holder for value knew that the bill was accepted for the accommodation of the drawer or payee is not a sufficient answer by the acceptor to an action by the holder (*b*).

Nothing will discharge the acceptor but payment or release. But a release in a composition deed would not cover a bill or note which the creditor had previously indorsed for value (*c*). A release of one of two or more joint acceptors would operate as a release to all (*d*), but mere forbearance or omission to demand time would not be a discharge to the other (*e*).

Upon the refusal of the drawee to accept, or upon his offer to accept the bill in a qualified manner, it is the duty of the holder, within a reasonable time, to give notice of non-acceptance to the drawer or indorser against whom he intends to resort (*f*). Even where the bill did not require to be presented for acceptance, if it be presented and dishonoured, due notice must be given (*g*).

Death, bankruptcy, or known insolvency of the party to whom notice should be given, are no excuses for want of notice of non-acceptance (*h*). Where, however, the drawer or indorser has absconded, or is in prison, or where there are insuperable

(*a*) *Southall v. Rigg*, 11 C. B. 481; *Kearns v. Durell*, 6 C. B. 596; *Sparrow v. Chisman*, 9 B. & C. 241; *Charles v. Marsden*, 1 Taunt. 224; *Stein v. Yglesias*, 1 C. M. & R. 565.

(*b*) *Smith v. Knox*, 3 Esp. 46; *Fentum v. Pocock*, 5 Taunt. 192; *Jewell v. Parr*, 13 C. B. 909; *Parr v. Jewell*, 16 C. B. 684; *Lazarus v. Cowie*, 3 Q. B. 459; *Pooley v. Harradine*, 7 E. & B. 431; *Rayner v. Pussey*, 28 L. J. Exch. 132.

(*c*) *Margetson v. Aitkin*, 3 E. & B. 388; *Harrhy v. Wall*, 1 B. & Ald. 103; *Cranley v. Hillary*, 2 M. & S. 120.

(*d*) *Nicholson v. Revill*, 4 A. & E. 675.

(*e*) *Perfect v. Musgrave*, 3 Price, 111; *Price v. Edmunds*, 10 B. & C. 578; *Wright v. Simpson*, 6 Ves. 774; *Strong*

v. Foster, 17 C. B. 201.

(*f*) *Turner v. Leach*, 4 B. & Ald. 451; *Roscow v. Hardy*, 12 East, 434. The object of such a notice is not merely to enable the drawer to withdraw his effects from the hands of the drawee, but to provide for payment of the bill thus suddenly cast upon himself, and to make prompt arrangements suited in this unexpected emergency. *Rucker v. Hiller*, 3 Camp. 118; *Tindal v. Brown*, 1 T. R. 167; *Darbishire v. Parker*, 5 East, 2.

(*g*) *Roscow v. Hardy*, 2 Camp. 458.

(*h*) *Russell v. Langstaff*, Doug. 514; *Esdaile v. Sowerby*, 11 East, 114; *Ex parte Johnson*, 1 Mont. & Ayrt. 622; *Ex parte Bignold*, 2 Mont. & Ayrt. 633.

Right of the
drawee in case
of want of
value.

What will dis-
charge the ac-
ceptor.

Non-accept-
ance and its
consequences.
Notice.

What will ex-
cuse notice.

obstacles to the sending of such notice, as a sudden illness or death of the holder, or a war, then the want of immediate notice may be excused, and the same may be sent as early as possible (*a*). The sending of notice of non-acceptance is also excused when the day happens to be a festival day, as Christmas Day or Good Friday, or other fast-day appointed by the State, or where the holder is prohibited by his religious duties from attending to business (*b*). Notice of dishonour to the drawer is not necessary where he had no effects in the hands of the drawee, and he had no right to expect that the bill would be accepted.

Foreign bills
must be pro-
tested.

On the non-acceptance of a foreign bill the holder must, besides giving notice, protest the bill in the usual legal manner by means of a notary, and the protest should be made at the place where the acceptance should have been given ; or if the bill was drawn to a place, and payable at another, at either of those places (*c*). The protest should be made on the day when the acceptance is refused, and within business hours (*d*). But it is not requisite for the holder to protest any inland bill for non-acceptance in order to preserve his rights against the drawer and previous indorsers (*e*).

Time when the
notice should
be sent.

The notice must be sent within reasonable time after the acceptance is refused, the holder being required to use diligence in communicating the fact to the party against whom he means to resort (*f*). Where the parties are in the same town, each party should have a day to give notice, and it is sufficient if the notice be sent so as to be received the day following that of the dishonour, or following that on which he receives intelligence of such dishonour (*g*). Where the parties are at a distance, the notice should be sent not later than by the mail of the following day ; or if there be no mail on that day, the mail of the subsequent day (*h*).

(*a*) *Crosse v. Smith*, 1 M. & S. 545 ;
Bowes v. Howe, 5 Taunt. 30 ; *Allen v. Edmunson*, 2 Exch. 719 ; *Malwin v. St. Quintin*, 1 B. & C. 652.

(*b*) *Rothschild v. Currie*, 1 Q. B. 48 ; *Lindo v. Ainsworth*, 2 Camp. 602.

(*c*) *Mitchel v. Baring*, 10 B. & C. 4 ; *Rothschild v. Currie*, 1 Q. B. 43.

(*d*) *Rothschild v. Currie*, 1 Q. B. 43.

(*e*) *Windle v. Andrews*, 2 B. & Ald. 696.

(*f*) *Tindal v. Brown*, 1 T. R. 188 ; *Rowe v. Tipper*, 13 C. B. 256.

(*g*) *Scott v. Lifford*, 9 East, 347 ; *Smith v. Mullett*, 2 Camp. 208 ; *Rowe v. Tipper*, 13 C. B. 255.

(*h*) *Geill v. Jeremy*, M. & M. 61 ; *Hawkes v. Salter*, 4 Bing. 715 ; *Bray v. Hadwen*, 5 M. & S. 68 ; *Wright v. Shadecross*, 2 B. & Ald. 501.

The notice should be sent simultaneously to all the parties on whom the holder intends to resort, and in order to charge an earlier party to a bill by notice of dishonour from himself, the holder must send him the notice as promptly as if to his own immediate indorser (a). The notice must be sent by the holder or his agent, or by any party on the bill except the drawee, and the notice by one enures in favour of all (b). Notice should be given to all the parties liable on the bill, if the holder intends resorting against them all. If the holder gives notice to his immediate indorser only, his power of recourse is then restricted to him (c). Any one of the parties in the bill may, by his conduct, dispense the holder from the necessity of giving notice of non-acceptance (d).

To whom and
by whom the
notice should
be sent.

Upon the non-acceptance of the bill, the holder acquires a right of immediate payment from the parties liable to him ; and he has a right to recover the principal sum, damages, and interest (e).

An acceptance *suprad* protest, or after the bill has been ^{Acceptance} *suprad* protest. protested for non-acceptance by the drawee, or an acceptance for honour, is held not as an absolute, but as a conditional acceptance, the acceptor engaging to pay the bill, if it be not paid by the drawee himself. After refusal by the drawee to accept the bill, any person may accept it for the honour either of the drawer, or of any of the indorsers, the holder being at liberty to receive or to refuse such an acceptance. But the acceptor *suprad* protest is liable to pay the bill only where the same on its becoming due has again been presented to the drawee for payment, and was duly protested for non-payment. After the second presentment and protest for non-payment the bill must be again presented to the acceptor *suprad* protest not later than the day after the bill has become due, and if the acceptor *suprad* protest, or for honour, resides in any town or place other than the place where the bill was made payable, the holder must forward such bill the day after it became due. When the acceptor *suprad* protest pays the bill *suprad* protest, he must

(a) *Rowe v. Tipper*, 10 C. B. 256.

(d) *Phipson v. Knoller*, 4 Camp.

(b) *Newen v. Gill*, 8 C. & P. 367 ; 185.

Chapman v. Keane, 3 Ad. & E. 193 ;
Harrison v. Roscoe, 15 M. & W. 231 ;
Lysaght v. Bryant, 9 C. B. 46.

(e) *Ballingall v. Gloster*, 3 East, 481 ;
Bishop v. Young, 9 B. & P. 83 ;
Pollard v. Herries, 3 B. & P. 335 ;
Tastet v. Baring, 11 East, 265.

(c) *Rowe v. Tipper*, 10 C. B. 249.

declare, in the presence of a notary, and before payment, that he pays *suprà* protest, causing such declaration to be duly entered in the notarial register (*a*). The acceptor of a bill *suprà* protest for the honour of the drawer, or of any of the indorsers, has a remedy against him for the payment of the bill (*b*).

FOREIGN LAWS.

The word
"accepted"
must be
added.

Protest for
non-accept-
ance.

France.—The acceptance of a bill of exchange must be written, and expressed by the word *accepted*. If the bill is drawn at one or more days or months of sight, the acceptance must be dated, and in the want of date, the bill would be payable at the time expressed in it, computing the time from the date of the bill. Although it is prudent to add the word "accepted," the acceptance may be expressed in other words, provided there be no doubt whatever as to the intention of the drawee. The acceptance of a bill payable in another place than that where the acceptor resides, indicates the domicile where the payment must be made or the acts carried on. The acceptance cannot be conditional, but may be restricted to the sum accepted. In this case the holder is bound to protest the bill for the surplus. A bill of exchange must be accepted on presentation, or at the latest within twenty-four hours of the presentation. After the twenty-four hours, unless it be returned either accepted or non-accepted, the party so returning it is responsible for damage towards the bearer (*c*). The refusal of acceptance is established by an act called protest for non-acceptance. Upon the notification of the protest of non-acceptance, the indorser and the drawer are respectively bound to give security for the payment of the bill when it becomes due, or to pay the amount with the costs of protest and re-exchange. The security given by the drawer or by the indorser protects only the party secured. The protest must be drawn up by a notary or by an usher. It must be made at the domicile of the drawee, or at his last known domicile, and at the domicile of the persons indicated to pay in case of need. In case of absence of the drawee, or of false indi-

(*a*) *Geralopulo v. Wieler*, 10 C. B. 690. (*c*) *French Code of Commerce*, §§ 121—125.

(*b*) *Smith r. Nissen*, 1 T. R. 269.

cation of domicile, the protest is preceded by an act proving the endeavours made by the officer to find out the drawee. The protest contains the literal copy of the bill. It must state the presence or absence of the drawee, and the motive of the refusal to pay. The protest for non-acceptance is required in all cases the bill must be presented for acceptance, and if the protest has not been made within the time provided by law, the holder loses his right against the indorsers and against the drawer, if he can prove to have made due provision. When a bill has been protested for non-acceptance, it may be accepted by a third person for honour of the drawer, or of any one of the indorsers. The fact of the intervention is stated in the protest, and the party intervening must put his name either in the protest or in the bill. The party accepting for honour must give notice of his intervention to the party in whose honour he has accepted. The holder of the bill preserves all his rights against the drawer and indorsers in consequence of the want of acceptance by the drawee himself, notwithstanding the bill has been accepted by intervention (a).

Acceptance
for honour.

United States.—The acceptance may be by parol or in writing, and general or special. Though a bill comes into the hands of a person with parol acceptance, and he takes it in ignorance of such an acceptance, he may avail himself of it afterwards. If the acceptance be special, it binds the acceptor *sub modo* and according to the acceptance. But any acceptance varying the absolute terms of the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance which the holder is not bound to receive, and if he does receive it, the acceptor is not liable for more than he has undertaken.

Requisites of
an accept-
ance.

A promise to accept, made before the acceptance of the bill, will amount to an acceptance in favour of the person to whom the promise was communicated, and who took the bill on the credit of it. A letter written a reasonable time before or after the date of the bill, describing it, and promising to accept of it, is, if shown to the person who afterwards takes the bill upon the credit of that letter, a virtual acceptance, and binding upon the person who makes the promise.

An acceptance once fairly and fully made and consummated

(a) French Code of Commerce, §§ 126—128.

It may be implied or express.

cannot be revoked ; but to render it binding, the acceptance must be a complete act and an absolute assent of the mind ; for though the drawee writes his name on the bill, yet, if before he has parted with the bill or communicated the fact, he changes his mind and erases his acceptance, he is not bound. The acceptance may be impliedly as well as expressly given. It may be inferred from the act of the drawee in keeping the bill a great length of time, contrary to his usual mode of dealing ; for this is giving credit to the bill and inducing the holder to consider it accepted.

If the bill be accepted in a qualified degree only, and not absolutely according to the tenor of it, the holder may assent to it, and it will be a good acceptance *pro tanto* ; or he may insist upon an absolute acceptance, and for the want of it protest the bill. It is in the discretion of the holder whether or no he will take any acceptance varying from the terms of the bill.

Liability of the acceptor.

The acceptor of a bill is the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment, or a release. He is bound to an innocent indorsee, though he accepted without consideration, and for the sole accommodation of the drawer.

Accommodation paper.

Accommodation paper is governed by the same rules as other paper. These are the strict obligations of the acceptor in relation to the other parties to the bill, and they do not apply in all their extent as between the drawer and the party who indorses or lends his name to the bill as surety for the accommodation of the drawer. In such a case the party who indorses is not entitled to damages from the drawer beyond what he has actually sustained.

If the acceptor alters the bill on acceptance, he vacates it as against the drawer and indorser ; but if the holder acquiesces in such alteration and acceptance, it is a good bill as between the holder and acceptor.

Acceptance for honour.

A third person, after protest for non-acceptance by the drawee, may intervene, and become a party to the bill in a collateral way, by accepting and paying the bill for the honour of the drawer, or of a particular indorser. His acceptance is termed an acceptance *suprad* protest, and he subjects himself to the same obligations as if the bill had been directed to him ; but the bill must be duly presented to the drawee at maturity, and

if not paid, it must be duly protested for non-payment, and due notice given to the acceptor *suprad* protest to make his liabilities as such acceptor absolute. He has his remedy against the person for whose honour he accepted, and against all the parties who stand prior to that person, on giving due notice of the dishonour of the bill.

If he takes up the bill for the honour of the indorser, he stands in the light of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties; and he can, of course, sue the drawer and indorser.

The acceptance *suprad* protest is good, though it be done at the request and under the guarantee of the drawee, after his refusal, and the party for whose honour it is paid is equally liable. There can be no other acceptor after a general acceptance by the drawee. A third person may become liable on his collateral undertaking, or guaranteeing the credit of the drawee, but he will not be liable in the character of acceptor. When the bill has been accepted *suprad* protest, for the honour of one party to the bill, it may, by another individual, be accepted, *suprad* protest, for the honour of another. The holder is not bound to take an acceptance *suprad* protest, but he would be bound to accept an offer to pay, *suprad* protest. The protest is necessary, and should precede the collateral acceptance or payment; and if the bill, on its face, directs a resort to a third person, in case of a refusal by the drawee, such direction becomes part of the contract.

The demand of acceptance of a foreign bill is usually made by a notary, and, in case of non-acceptance, he protests it. The protest must be made at the time, in the manner, and by the persons prescribed, in the place where the bill was payable. It is sufficient, however, to note the protest on the day of the demand, and it may be drawn up in form at a future period. No protest is necessary on inland bills; yet in some states it seems to be required. The Act of the State of Kentucky prescribes it. It is also necessary in Virginia, and the omission to give notice of the protest of an inland bill causes the loss of interest, and damages. After the protest for non-acceptance, immediate notice must be given to the drawer and indorser in order to fix them; and the omission would not be

Protest for
non-accept-
ance.

cured by the bill being presented for payment as well as non-acceptance. The drawer or indorser may be sued forthwith upon the protest for non-acceptance without waiting until the bill is also presented for payment and refused, and the holder will be entitled to his interests and costs, and like damages as in case of non-payment. In the States of Massachusetts, Connecticut, New York, Maryland, Virginia, North Carolina, and South Carolina, protest and notice of non-acceptance are necessary over and above protest and notice of non-payment; yet the Supreme Court of the United States held, that in an action on a protest for non-payment on a foreign bill, protest for non-acceptance, or a notice of the non-acceptance, need not be shown, inasmuch as they were not required by the customs of merchants in this country. This decision has been followed in Pennsylvania; protest for non-payment is sufficient (a).

The acceptance must be on the bill.

Germany.—The acceptance must be written upon the bill itself. Whatever term may be used, if it be signed by the drawee, it is equivalent to an unqualified acceptance, so far as there is not a formal refusal, or any restriction. The simple signature by the drawee of his name, or that of his firm, is likewise an unqualified acceptance. The acceptance once written on the bill cannot be withdrawn. The drawee can limit his acceptance to a part of the sum drawn for in the bill; but any other restriction is equivalent to a refusal of acceptance, though the acceptor is bound for the limited amount he has accepted for. By his acceptance the acceptor becomes bound to pay the bill when due. The acceptor becomes bound towards the drawer for the effect of his acceptance, but acquires no right against him. If another place than the domicile of the drawee is indicated for the payment, the drawer must state through whom payment will be made; otherwise it is held that the drawee will himself pay the bill at the place indicated. The drawer of a domiciled bill may prescribe that the bill shall be presented for acceptance, and the non-observance of these instructions would produce a loss of rights against the drawer and indorsers (b).

Protest necessary for partial or non-acceptance.

If the bill be not accepted, or is only partially so, or under certain restrictions, the indorsers and the drawer are bound,

(a) Kent's Commentaries, vol. iii. p. 117. (b) German Law on Bills of Exchange, §§ 21—24.

after the protest for non-acceptance, to give security to the holder for the amount for which the bill was not accepted, and for the expenses caused by the non-acceptance, in order to secure the payment when the bill falls due. The indorsers and drawer may, however, deposit, at their own cost, the sum due in a court of justice or other public establishment empowered to receive such deposits. The payee and every indorsee are authorised by the possession of the protest for non-acceptance, to claim security from the drawer and preceding indorsers. The party exercising his recourse is not bound in such a case to follow the order of the indorsement, nor to abide by his choice once made; nor is he bound to produce his bill, and to prove that he himself has been called to furnish security to the subsequent indorsers. The security is available not only to the party who has exercised his recourse, but also to all who follow him, should they also exercise a similar recourse. These parties are entitled to further security only when they have reason to object to the nature and value of the security deposited. The deposited security must be restored as soon as the bill has been accepted in full, or if no action for payment has been instituted against the party within one year from the day the bill fell due, or when payment has been made, and the bill is settled and annulled. Even when the bill is accepted in full or in part, security may be demanded of the acceptor for the sum if he is in a state of bankruptcy, or has suspended payment; or if, after the delivery of the bill, an execution has been issued against him, or an order has been issued for his arrest. If in such cases a security is not given by the acceptor, and the bill is protested, and if the persons designated to pay in case of need refuse to accept, even upon protest, the holder and every indorser are entitled to claim security from the preceding indorsers on presentation of the protest (a).

Security may
be demanded
when the ac-
ceptor is
bankrupt.

Denmark.—The law is the same in Denmark as in Sweden, with the following additions. If certain persons are indicated in the bill to pay in case of need, the holder must present the bill to them in case of non-acceptance by the drawee. He must go first to the party indicated by the drawer, and afterwards to those indicated by the indorsers, according to the order of the indorsements. If one of the set has been sent for acceptance, and the other has been put in circulation, it should

Presentation
for acceptance
in case of
need.

(a) German Law on Bills of Exchange, §§ 25—29.

be stated in the bill in whose hands the first is, and where it may be had. The holder of the first of exchange, accepted but not indorsed, must send it to the holder of the bill indorsed, when the latter proves that he is the lawful owner. If the day of payment arrives and the accepted bill has not been claimed by the holder of the indorsed bill, then the holder of the accepted bill may demand, if the bill is to be paid in Copenhagen, that the amount of the bill be deposited at the National Bank of Deposit. In default of this deposit he must protest the bill. If the payment is to be made in another place of the kingdom, the owner of the accepted bill may demand that the amount of the bill be sent to the Bank of Copenhagen, but he must pay the expense of transmission. The deposit must take place in the same manner, if on the day of payment all the copies are not presented, or if the accepted copy does not contain the authority for the owner of the bill to receive the amount. In case of non-payment, the owner must protest the bill within the time fixed by law for presentation, or at the latest twenty-four hours after. The protest may be made from eight o'clock in the morning to eight o'clock in the evening (a).

Acceptance
cannot be
recalled.

Netherlands.—The acceptance must be clearly expressed in the bill itself, and must be written and signed by the acceptor. The drawee cannot retract, annul, erase, or cancel the acceptance once he has written it on the bill, *even before* the bill is issued ; if he does it he would still be bound to the payment of it. Nor can he hinder the circulation of such a bill by arresting it in the hands of the bearer. A bill of exchange must be accepted on presentation, or, at the latest, twenty-four hours after it, without distinguishing Sundays from other days. If the bill is not returned within the time, either accepted or not, the drawee who has kept it is responsible for damages towards the holder. Should the drawee have received the necessary funds for the payment of the bill, he would be bound to accept it under penalty of paying all the costs and damages to the drawer. The promise to accept is not the same as an acceptance, though it may give a right of action to the drawer for damages for the refusal to fulfil the promise. These damages consist in the expenses of protest and re-exchange. The accept-

(a) Ordinance of 18th May, 1825, §§ 17—20.

ance of a bill gives to the holder the right to exact payment from the acceptor, even where the signature of the drawer is found to be false (*a*). When the drawee refuses acceptance it is the duty of the holder to protest the bill. The holder of the protested bill must notify the protest to his indorser within five days if both reside in the same place. If they do not reside in the same place the holder is bound under penalty of damages to send a copy of the protest, duly certified, at the latest by the first post which leaves after the five days. If there be no regular post, it must be sent by the first occasion which presents itself after the five days. Each indorser is bound within the same time from the day of the notice, and under the same responsibility, to send a copy of the protest to the preceding indorser, and so from one to the other till it reaches the drawer. If the holder consents, on demand of the drawee, not to protest or not to give notice, he loses his rights against all the indorsers, and even against the drawer, if the latter proves that he had made provision. The holder in such a case would have his rights against the drawee only. If he does it on the demand of the drawer, or of one of the indorsers, he loses his rights against the subsequent indorsers, but preserves them against the drawer and preceding indorsers. Upon the notification of the protest the drawer and indorsers are respectively bound to give security for the payment of the bill when due, or to pay the amount with expenses (*b*).

The bill must
be protested
for non-ac-
ceptance, and
notice of the
same given.

Norway.—The drawee must decide to accept or not within twenty-four hours after presentation. The acceptor cannot change the mode of payment, nor the place where it is to be made, without the consent of the holder. He cannot accept conditionally. If the bill is not accepted it must be protested. Should the drawee refuse to accept, the payee must protest the bill within the time fixed by law for the presentation for acceptance. If the bill reaches him too late to present and protest it in time, he must notify the same to the drawer. The holder must notify the protest to all against whom he wishes to go. The notice must be sent forty-eight hours after the protest to the drawer and indorsers residing in the town where the protest has been made; and by the first or second post to those

The accept-
ance must
not be con-
ditional.

Protest for
non-accept-
ance.
Notice.

(*a*) Dutch Code of Commerce, §§ (*b*) Ibid. §§ 175—188.
112—121.

residing in another place. The holder of a bill protested for non-acceptance may demand immediate payment from the drawer and indorsers (*a*).

Portugal.—The acceptance must be clearly expressed in the bill itself, and must be signed. The promise to accept a bill is not the same as an acceptance. On all other points relating to the acceptance the law is the same as in Spain. The drawee may accept for honor, and for that purpose he is preferred above all others. The holder may himself accept for honor, and give himself the preference upon other parties. As to other persons, preference should be given, 1st, to those who are charged to accept by the drawer, or by the payee, who might offer spontaneously to accept for them; 2nd, to those charged by the holder, or by those who wish to accept for him; 3rd, to those who are charged by any one of the indorsers, or who wish to accept for him. The parties specially charged to accept for honor are preferred to those who have received no order to that effect. If the parties offering to accept are not entitled to the preference indicated by law, the holder has then the choice (*b*).

The word
“accepted”
must be on it.

Duty of the
holder to pro-
test in case of
refusal.

Russia.—The drawee must within twenty-four hours of the presentation declare to the holder if he accepts or refuses the acceptance. The acceptance is expressed by the word “accepted” written on the bill itself, followed by the signature of the acceptor. The acceptance must be dated if the bill is payable at sight, or at a certain time after sight. The acceptor cannot withdraw his acceptance, unless he discovers and proves at the time the fraud of the holder. The bill of exchange must be protested by the holder in case of refusal of acceptance on the part of the drawee, and where the drawee is absent or is insolvent. The protest must be made within twelve months of the date of the bill, unless another time is specified. When the bill reaches the holder by extraordinary means he cannot protest it before the arrival of the regular post, so as to allow the necessary time to the drawee to get the notice. Nevertheless, the protest may be made immediately if the bill has become due (*c*).

Spain.—A bill of exchange payable at sight is not subjected

- (*a*) Regulation on Bills, §§ 16—21. (*b*) Portuguese Code, §§ 333—353.
 (*c*) Russian Code, §§ 331—347.

to the formality of acceptance, it is payable on presentation. The drawee is bound upon the presentation of the bill to declare if he accepts or not. If the drawee does not accept he must state to the holder the motive of his refusal. If he accepts he must express it in the bill itself in such words as "I accept," or "we accept." The acceptance must be written. The date is only required in bills drawn at one or more days or months of sight. If the acceptance of a bill, payable at a certain time after sight, is not dated, the bill is due at the time fixed, computing from the day when it had been drawn ; and if, according to this presumption, the bill had already become due, the bill must be paid the day after the presentation. If the bill is payable in another place than that where the acceptor resides, the acceptance should indicate the place where payment is to be made. The acceptance must be given or refused the same day when the bill is presented for the purpose. The drawee cannot under any pretext retain the bill in his hands ; and if he let the day pass without restoring it he is deemed to have accepted, even though he had not intended it, and becomes responsible for the payment. The acceptance has the effect of binding the acceptor to the payment of the bill when it is due, and he cannot avert the effect of it even if he has not received any funds. It would, however, be different if it were proved that the bill is false, and in that case the acceptor could refuse the payment even as against a *bond fide* holder. The drawer is responsible for the acceptance and for the payment of the bill when it is due towards the holder and all the indorsers. The drawer and indorsers are responsible towards the holder. In case of non-acceptance it is the duty of the holder to protest the bill.

The protest must be made on the day after the presentation, and if it be a holiday, on the first working day. It must be drawn up before 3 o'clock in the afternoon, and the officer must keep it till sunset to give time to the drawee. After sunset the protest is delivered to the holder. The act of protest is drawn up by the notary and two witnesses, inhabitants of the place ; but the witnesses must not be in the service of the notary. The holder is not dispensed from protest in case of the death or bankruptcy of the drawee. The protest must be notified to those who are liable on the bill. In defect of this notice the holder would lose his rights against them. The notice must be

Requisites of
an accept-
ance.

Effect of an
acceptance.

Protest for
non-accept-
ance.

given within the time prescribed for the presentation for acceptance. In case of refusal of acceptance by the drawee any one may accept the bill for honor. The party so accepting must notify the same to the party for whose honor he has accepted. The acceptance has the effect of binding the party to pay the bill in the same manner as if it had been drawn upon himself. But the holder may demand from the drawer and indorsers either a security or the payment of the bill (*a*).

Drawee not bound to accept.

Duty of the holder to protest in case of refusal.

Bill may be accepted for honor.

Sweden.—When the bill is presented for acceptance the drawee must declare within twenty-four hours if he will accept or not. If he does not accept within this time he is deemed to have refused. The drawee is not bound to accept the bill unless he is legally bound towards the drawer. The acceptance cannot be demanded on a Sunday or holiday. It is expressed by the word "accepted" written on the bill itself, and followed by the signature. The acceptor is bound to pay the bill even when the drawer has become bankrupt before the acceptance. The wife cannot accept for her husband, nor the agent for his principal, without an express authority, notice of which has been given to the tribunal. In case of refusal of acceptance the holder must protest the bill in twenty-four hours. The protest is made in towns by a notary, or a magistrate and a witness; and in the country by a municipal notary and two witnesses. A protest may be made from 9 o'clock in the morning to 6 in the evening. The holder must notify the protest to his indorser, and he cannot go against another indorser without giving him notice in the twenty-four hours after he gets the protested bill. A bill of exchange protested for non-acceptance by the drawee may be accepted by a third party for the honor of the drawer or of one of the indorsers. The fact of its being an acceptance for honor must be stated on the bill, and the acceptor must show for whom he accepts. The holder then delivers to him the act of protest, and the acceptor for honor pays him the expense. The party offering to accept for the honor of the drawer is preferred to the party offering to accept for the honor of the indorser, and generally preference is given to the party who discharges most persons. But when a person is indicated in the bill to have recourse to in case of

(*a*) Spanish Code of Commerce, §§ 455—465, and 511—533.

need, then he is preferred above all others. When the bill has been accepted under protest for honor the drawee can no longer recall his refusal to accept, or offer to give also his acceptance, unless the person who has accepted for honor consents to it, being reimbursed of the expense of protest, besides a commission of half per cent. The holder may refuse an acceptance for honor, and exercise his recourse against the drawer and indorsers. He may also, even in receiving such acceptance, exact from the drawer and indorsers a security for the payment of the bill when due (*a*).

Drawee cannot recall his refusal, once the bill was accepted for honor.

Switzerland. Bale.—The acceptance cannot be revoked even in case of error. If a person accepts by mistake several copies of the same bill, he may exercise his rights against the party who has made a double use of the bill, but not against the lawful holders. The drawee who has accepted a bill is responsible for the effect of his acceptance for one month after the bill is due. After this time the holder ceases to enjoy the rights attached to bills of exchange, and acquires only a civil debt. The drawer and indorsers of a bill are jointly responsible for the acceptance and payment of a bill, unless the indorser has put some expression in the indorsement freeing himself from any responsibility. If any person is nominated to accept and pay "in case of need," the holder must present the bill to him after having protested it. *Zurich.*—The acceptance may be asked upon a bill payable at a certain time after date, as well as upon a bill payable after sight. It must be written and signed by the hands of the acceptor or his agent. A verbal acceptance, or an acceptance sent by letter, does not produce any effect.

SECTION XI.

PRESENTMENT FOR PAYMENT.

BRITISH LAW.

It is the duty of the holder to present the bill for payment at the time the bill becomes due, where such a time is specified, and if no time be specified, within a reasonable time after the receipt of the bill (*b*).

Bill must be presented for payment.

The bankruptcy, insolvency, or death of the drawee, or his

What will excuse presentation.

(*a*) Swedish Ordinance of 1748. (*b*) Appleton *v.* Sweetapple, 1 T. R. 269.

removal from his place of business, does not excuse presentment, though want of effects in the hands of the drawee will excuse presentment (*a*). And where such presentment was rendered impossible by the existence of war, the holder will be excused, provided he presented the bill for payment as soon as practicable (*b*).

Where the
bill should be
presented.

Bills accepted, generally payable at the house of a banker or other place without further expression, may be presented for payment either at the acceptor's residence or at the banker's; but bills accepted, payable at a banker's house or other place only, and not otherwise or elsewhere, must be presented at the banker's house (*c*). Where a bill is thus accepted in a qualified manner, and such qualification is embodied in the body of the bill, if presentation be made at any other place than therein indicated, the acceptor will be discharged (*d*). In all cases, however, presentment at the place named in the acceptance is held sufficient (*e*).

By whom and
to whom pre-
sentment
should be
made.

Presentment must be made by the holder or by his agent duly authorized and competent to give a legal receipt for the money (*f*). The presentment should be made to the drawee in person, if possible, at his residence or at the place especially designated for payment. It is the duty of the holder to find out the residence of the drawee, but if the house be found shut it will be sufficient if presentment be made at the door of his former residence (*g*). In the absence of the drawee himself, presentment to his wife or agent will be sufficient (*h*). If the drawee is dead presentment should be made to his personal representative, and when there is no representative the bill should be presented at the house of the deceased (*i*).

(*a*) Russell *v.* Langstaff, 2 Doug. 514; Robson *v.* Olliver, 10 Q. B. 704; Howe *v.* Bowes, 16 East, 112; Terry *v.* Parker, 6 Ad. & E. 502; Orr *v.* Muggins, 7 East, 361.

(*b*) Patience *v.* Townley, 2 Smith, 223.

(*c*) 1 & 2 Geo. 4, c. 78, s. 1.

(*d*) Halstead *v.* Skelton, 5 Q. B. 86; Sebag *v.* Abitbol, 4 M. & S. 462; Turner *v.* Hayden, 4 B. & C. 1; Rhodes *v.* Gent, 5 B. & Ald. 244.

(*e*) De Begareche *v.* Pillin, 3 Bing. 476; Shelton *v.* Braithwaite, 8 M. &

W. 252; Wilmot *v.* Williams, 7 M. & G. 1017; Bailey *v.* Porter, 14 M. & W. 44.

(*f*) Robarts *v.* Tucker, 16 Q. B. 560.

(*g*) Collins *v.* Butler, 2 Stra. 1087; Bateman *v.* Joseph, 12 East, 433; Hyne *v.* Allely, 4 B. & Ald. 624; Sands *v.* Clarke, 8 B. & C. 751.

(*h*) Cromwell *v.* Hynson, 2 Esp. 509; Giles *v.* Bourne, 2 Chitty, R. 300; Rowe *v.* Young, 2 B. & B. 165.

(*i*) Caunt *v.* Thompson, 7 C. B. 400.

Presentment must be made on the very day when the bill or note falls due. Presentment before or after is not sufficient (*a*). The time of maturity in this country is computed according to the Gregorian Calendar, called the new style (*b*), though the old style is still adhered to in the countries where the Greek church predominates. In computing the time, the day of the date or of the acceptance of the bill or note is always excluded (*c*). When the foreign bill is drawn at usance, or at so many usances, the duration of such usances depends on the custom of trade, and they are calculated exclusive of the day of the date of the bill (*d*). In bills and notes payable at one, two, or more months after date or sight, the month is computed at a calendar month, and not a lunar month (*e*). When the month in which the bill is dated is longer than the following month the rule is not to go to the third month. In bills payable at so many days after sight, the days are computed from the day of acceptance, but exclusive of the same (*f*). Bills or notes payable at usances or after date, or after sight, or even at sight, are only payable after the expiry of three days of grace (*g*). But no days of grace are allowed on bills payable on demand (*h*). Bills and notes falling due on a Sunday, Christmas Day, Good Friday, or any other great holiday or day of thanksgiving appointed by royal proclamation, are payable the day before, and must be presented on that day (*i*). Bills and notes payable on demand must be presented within a reasonable time after receipt, the holder being required to use due diligence in obtaining payment, having regard to the surrounding circumstances and opportunities (*k*).

Presentment for payment should be made at a reasonable hour of the day; if at a banker's house, within banking hours (*l*), and if at the counting house or residence of the drawee, at any time within the day, even up to eight o'clock. Government

When presentment must be made.
Computation of time.

Bills falling due on Sundays and holidays.

Presentation of bills payable on demand.

Presentment should be made at reasonable hours.

(*a*) *Wiffen v. Roberts*, Esp. 261.

Lester v. Garland, 15 Ves. 248.

(*b*) 24 Geo. 2, c. 23.

(*g*) *Brown v. Harraden*, 4 T. R. 148;

(*c*) *Bellasis v. Hester*, 1 Ld. Raym.

Leftley v. Mills, 4 T. R. 170.

280; *Hague v. French*, 3 B. & P. 173; *Armitt v. Breame*, 2 Ld. Raym. 1082.

(*h*) *Moyser v. Whitaker*, 9 B. & C. 409; *Sutton v. Toomer*, 7 B. & C. 416.

(*d*) For a table showing the different usances, see at the end of this chapter, p. 480.

(*i*) 6 & 7 W. 4, c. 58.

(*e*) *Cockell v. Gray*, 3 B. & B. 187.

(*k*) *Darbishire v. Parker*, 6 East, 3;

(*f*) *Campbell v. French*, 6 T. R. 212;

Rowe v. Tipper, 13 C. B. 249.

(*l*) *Parker v. Gordon*, 7 East, 385;

Elford v. Teed, 1 M. & S. 28.

bills, cheques, drafts, and orders, must be presented at the Bank of England before 3 o'clock (*a*).

What will
excuse pre-
sentment.

To excuse presentment for payment, absolute impossibility must be proved, and even when the instrument cannot be produced, request or presentment should be made to the acceptor.

FOREIGN LAWS.

Time of ma-
turity.

France.—The maturity of a bill of exchange drawn at one or more days, one or more months, or one or more usances of sight, is regulated by the date of the acceptance, or by that of the protest for non-acceptance. That of a bill drawn at one or more days, one or more months, or one or more usances of date, is regulated by the date. A bill payable at sight becomes due on its presentation. An usance is of thirty days, and it runs from the day following the date of the bill. The months are such as are fixed by the Gregorian Calendar. A bill payable at a fair is due on the eve of the day fixed for the close of the fair, or on the day of the fair, if it last only one day. If the bill becomes due on a holiday, it is payable the day before. All delays of grace, favour, usage, or local custom for the payment of bills of exchange are abrogated.

Days of grace
abolished.

In calculating when a bill becomes due, one should omit the date of the bill, which does not count, and go on to and including the corresponding day of the week, the month, or the year, which is the day of maturity. Thus a bill dated the 3rd January, payable at three months date, will become due the 3rd of April. A bill dated 29th June, payable at two months, will become due the 29th August, because in the first case the three months commence on the 4th January; in the second, the two months commence on the 30th June. If the month in which the bill becomes due, being shorter than that in which it is dated, does not offer a day corresponding to that date, the time fixed is the last day of this month. Thus a bill signed on the 31st December, at two months, will become due the 28th or 29th February, according as the year is or is not leap year. The inverse, however, does not take place, when the month in which the bill becomes due is composed of a greater number of days than that in which it is dated. Thus where a bill is signed the last day of the month,

(a) *Wilkins v. Jadis*, 2 B. & Ad. 189; *Morgan v. Davison*, 1 Stark. 114; *Barclay v. Bailey*, 2 Camp. 117.

if the corresponding day when it becomes due is not the last day of the month, the time will not be put off till that day of the month. It will become due on the day corresponding to the date. Thus a bill dated on the 28th February, at two months, will become due on the 28th April, although the month of April is composed of a greater number of days than that of February. If, on the other hand, a bill is made payable at three months from the end of February, it will become due at the 31st of May. The usances are so many series of thirty days, the first Usances. of which is the day following the date of the bill. When the bill is made payable at so many weeks, it will become due on the last of these weeks on the day corresponding to the date ; when it is payable at the fourth or at the half of the year, the meaning is at three or six months ; if at several years, the bill will be due on the days and months corresponding to the date ; except that when the year when the bill was issued, or that in which it becomes due, is leap year, the same rule will be pursued as it obtains as regards the month of February. A bill payable in the course of the week, or of the month, becomes due at the last day of the week, or of the month ; and a bill payable in the middle of a month composed of an unequal number of days will become due at the end of the greatest half. When a certain time has been granted to the debtor, the creditor cannot deprive him of it ; the whole of the last day belongs to him to discharge his debt, and the creditor cannot do any act proving his refusal till the following day. As a general rule, when a bill becomes due on a holiday, it becomes due the day before, and the debtor can only be prosecuted on the day after the holiday.. Whether the bill has been accepted or not, whether provision has been made or not, the holder must present the bill for payment to the drawee, even where since his refusal the bill had been accepted for honor (a).

United States.—If the bill has been accepted, demand of payment must be made when the bill falls due ; and it must be made by the holder or his agent upon the acceptor at the place appointed for payment, or at his house or residence, or upon him personally, if no particular place be appointed, and it cannot be made by letter through the post-office. If there be

(a) Pardessus, Droit Commercial, vol. i. p. 514.

no particular and certain place identified and appointed, other than the city at large, and the party has no residence there, the bill may be protested in the city on the day appointed without inquiry, for that would be an idle attempt. The general principle is that due diligence must be used to find out the party and make the demand.

If the party has absconded, that will, as a general rule, excuse the demand. If he has changed his residence to some other place within the same state or jurisdiction, the holder must make endeavours to find it, and make the demand there; though, if he has removed out of the state, subsequent to the making of the note, or accepting the bill, it is sufficient to present the same at his former place of residence. If there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of date; and the presumption is, that the maker resides where the note is dated, and that he contemplated payment at that place. But it is presumption only, and if the maker resides elsewhere within the state when the note falls due, and that be known to the holder, demand must be made at the maker's place of residence.

When demand
must be made.

If a bill or promissory note be made payable at a particular place, the demand must be made at the place, because the place is made part and parcel of the contract. If, however, the place appointed be deserted and shut up, it amounts to a refusal to pay, and a demand would be inaudible and useless; or if the demand be made upon the maker elsewhere, and no objection be made at the time, it will be deemed a waiver of any future demand. But if the person at whose place or house the note or bill is made payable, be the holder of the paper, in that case it has been held by the Supreme Court of the United States, to be sufficient for the holder to examine the accounts, and ascertain that the party who is to pay them has no fund deposited. The maker or acceptor is in default by not appearing and paying, and no formal demand is necessary. If the defendant was ready to pay at the time and place designated in the note for payment, it is matter of defence, and will go to discharge him from interests and costs. If a bill of exchange, though drawn generally, be accepted, payable at a particular place, it is a special or qualified acceptance, which the holder is not bound to take, but if he does take it, the demand must be made at the

Qualified ac-
ceptance.

place appointed, and not elsewhere, in order to charge the drawer or indorser.

Three days of grace apply equally, according to the custom of merchants, to foreign and inland bills, and promissory notes, and as between the indorser and indorsee of a negotiable note ; and the acceptor or maker has within a reasonable time of the end of business or bank hours of the third day of grace (being the third day after the paper falls due) to pay. The maker or acceptor is entitled to the uttermost convenient time allowed by the custom of business of that kind in the place where the bill is presented, and he is not entitled to any future time.

If the third day of grace falls on Sunday, or a great holiday, as the 4th of July, or a day of public rest, the demand must be made on the day preceding. The three days of grace apply equally to bills payable at sight, or at a certain time ; but a bill or note payable on demand, or where no time of payment is expressed, is payable immediately on presentment, and is not entitled to the days of grace. A bill payable at so many days' sight, means so many days after legal sight or acceptance ; and when the time is to be computed by days, as so many days after sight, the day of the date of the instrument is by the modern practice excluded from the computation.

It is equally unseasonable to demand payment before the expiration of the third day of grace, as after the day. The demand must be made on the third day of grace, or on the second, if the third day be a day of public rest, and in default of such demand the drawer of the bill, and the indorser of the note, are discharged. If, however, a note be made for negotiation at a bank where custom is to demand payment, and to give notice on the fourth day, that custom forms a part of the law of the contract, and the parties are presumed to agree to be governed in that case by the usage. The same rule applies when a bank, by usage, treats a particular day as a holiday, though not legally known as such, and made demands and gave notice on the preceding day ; the parties to a note discounted there, and cognisant with the usage, are bound by it.

Though a bill payable at a given time has never been presented to the drawee for acceptance, the demand upon the drawee for payment is to be made on the third day of grace, for by the usage of the commercial world, which now enters into

every bill and note of a mercantile character, except where it is positively excluded, a bill does not become due on the day mentioned on its face, but on the last day of grace (*a*).

Time of maturity.

Germany.—A bill of exchange is payable on the day established in the instrument itself. If the time of payment has been fixed for the middle of the month, the bill will be payable on the 15th of that month. A bill issued at sight is payable on presentation. Such a bill must be presented for payment at the time specified in the instrument, and in the absence of any specific indication within two years of its date under penalty of forfeiting the right of recourse against the drawer and indorsers. If an indorser has added to his indorsement a special time when presentation should be made, his obligation on the bill ceases, in case the bill has not been presented within that time. Bills of exchange payable at a fixed time after sight, or after date, will fall due, if the time is fixed by the day, on the last day of the time ; and in calculating such time, the day on which the bill payable after date has been issued, or the bill payable after sight has been presented for acceptance, will not be included. If the term is fixed by weeks, months, or a space of time which embraces several months (year, half-year, a quarter of a year), the bill will fall due on that day of the week or of the month which corresponds by its denomination, or by its number, to the day of issuing or presentation ; if that day be wanting in the month of payment, the time of payment is the last day of the month. The expression “half a month” will be considered equivalent to fifteen days. If the bill be issued at one or several complete months, and half a month, the fifteen days will be calculated at the end. Days of grace are not allowed. If the bill be issued after date in a country where the old style is still maintained, without any declaration in the bill that it is dated in the new style, or if the bill be dated in both styles, the day of payment will be calculated from that day of the new style which corresponds to the day appearing by the old style as the day of issue. Fair or market bills will be payable at the time of payment fixed by the law of the fair or market-place, and where the same is not specified, on the day preceding the legal end of the fair or market. If the fair

Days of grace abolished.

(*a*) Kent's Comment. vol. iii. p. 117.

or market be limited to a single day, the bill is payable on that day (*a*).

Denmark.—A bill of exchange payable at several months after date, becomes due the day and month corresponding to that of its acceptance, or that of the date when it has been drawn, without regard to the number of days included in the month. Half-months are always computed as fifteen days. Bills of exchange payable at a certain number of days are computed from the day of their date or acceptance, to the day of maturity, including Sundays and holidays. The holder of a bill has a right to exact payment from the acceptor of the bill, on the day of maturity, by delivering the bill to him received. The acceptor who pays a bill of exchange before maturity is responsible for any irregularity in the payment, even should no irregularity be apparent in the bill. Eight days of grace are granted to the acceptor; but if he does not discharge during this time, the holder may put off two days more before protesting the bill for non-payment. When the last day of grace is a Sunday or a holiday, the bill ought to be paid the next working day. Where the acceptor belongs to a religious body observing other festival days than those legally adopted in the country, he cannot obtain another delay for payment. If the second of the additional days that the holder may grant before protesting falls on a Sunday or a festival day, the protest ought to be made the preceding working day, without regard to the days of grace granted to the acceptor. Bills of exchange at sight are payable twenty-four hours after acceptance (*b*). Time of maturity.
Days of grace.

Holland.—The maturity of a bill drawn at one or several days or months, or at one or several usances, is fixed by the day of the acceptance, or by the date of the protest in case of non-acceptance, but the time runs from the following and not from the same day. The usance is of thirty days, running from the day following the date of the bill. But in bills of exchange not payable at sight, the thirty days commence from the day after their date. A bill of exchange payable at a fair, is due the day previous to the close of the fair, or on the day of the fair, if it lasts one day only. If the day of payment of a bill payable at a specific time falls on a Sunday, it is payable on the next day. A

(*a*) German Law on Bills of Exchange, §§ 30—35. (*b*) Danish Code, §§ 48—55.

bill of exchange is considered due the moment the drawee becomes bankrupt, and the holder may have it protested. But the drawer and indorser may delay the payment till the bill falls due, by giving security (a).

Time of maturity.

Portugal.—A bill of exchange payable at a specific time is payable on the day when it becomes due at change hours, or until sunset, if it be not an exchange day. A bill of exchange payable at sight is payable on presentation, within the same hours. A bill of exchange is deemed to become due the moment the drawee becomes bankrupt, in which case the holder may have it protested at once. Yet the drawer and indorsers may, in such a case, by giving security, postpone the payment till the bill becomes due. If a bill of exchange has been issued on a set of many copies, and the drawee has accepted several of them, he is bound to pay all those accepted copies which may be in the hands of different holders, though he would have a right of recourse against those who have made double use of the bill.

Lost bills.

The acceptor is not bound to pay a bill which has been lost to the party who presents it, unless the latter can prove his right to it, and unless he gives sufficient guarantee for the security of the acceptor. The naked holder of a bill may have it protested in any case where the law requires it, and demand payment of it by giving security, if he can prove by writing that the bill was sent to him to get cashed. The holder of a bill who had received payment, as well as all the preceding indorsers, are responsible towards the party who paid it for the validity of the preceding indorsements. The acceptor is not bound to pay, if the holder does not give up the bill which bears his acceptance, duly discharged, except where the bill was lost. In case of part payment, the acceptor may demand that the same shall be noted in the bill, and that a receipt of the sum be given to him, but he has no right to ask that the bill be given up (b).

Russia.—A bill of exchange payable at sight is not due until twenty-four hours after its presentation for acceptance. The maturity of a bill of exchange payable at one or several days after sight, is presumed to have arrived after the expiration of the last of the days indicated in the bill, not including the day of presentation, from which date the days must be reckoned.

(a) Dutch Code of Commerce, §§ 149—154. (b) Portuguese Code, §§ 370—395.

The maturity of a bill payable at so many days or months after date, is considered to have arrived after the expiration of the last day. A bill of exchange payable at usance, is due fifteen days after its presentation for acceptance. The maturity of a bill of exchange at twelve months takes place in the following year, on the same day, and in the same month, when the bill was signed. If it be leap-year, and the bill bears date the 29th of February, it shall fall due on the 28th February in the following year. For bills of exchange coming from abroad, the maturity is calculated according to the new calendar, and for those coming from the interior, according to the old one. Generally speaking, if the bill falls due on a holiday, or royal *fête*, it is payable on the next day. The same rule is prescribed as regards the Saturday amongst the Jews. If it so happen that there are several blank days following each other, the bill will fall due on the day after the first blank day. And bills which fall due on the following days are then payable, although they should be blank days. All these regulations relative to maturity apply equally to both kinds of bills. The days of grace are reckoned from the morning of the day which follows that on which the bill becomes due; and they are, on bills of exchange payable at sight, three days, and on bills payable on a specific day, ten days, including holidays. If the last day of grace falls on a holiday, that day would not be reckoned. The same rule is observed as respects the Jews for Saturdays. Days of grace are not granted on bills of exchange payable at fairs, nor on those whose acceptance has been refused (a).

Sweden.—After a bill of exchange has become due, six days Days of grace. of grace, including Sundays and holidays, are granted for the payment ; if the day the bill falls due is Sunday, the bill is payable the day preceding. Such days of grace are optional as regards the maker or drawee. A bill of exchange payable at sight, or at two or three days after presentation, does not enjoy days of grace ; it must be paid on the day it falls due, or, at the latest, within twenty-four hours. A bill of exchange payable at half a month, is due on the 15th ; it enjoys the days of grace. A bill of exchange payable after date, or at a certain period after its maturity, enjoys only such days of

(a) Russian Code, §§ 350—363.

grace as may remain to run, computing from the day of maturity (a).

SECTION XII.

PAYMENT.

BRITISH LAW.

Who should pay.

Payment of bills and notes may be made by the drawee or maker, or by any party with his consent, and by the acceptor for honour or under protest. Payment by the acceptor or maker is a satisfaction as to all parties (b), and payment by the drawer is held as made for the benefit of the acceptor, though the drawer preserves his right against him (c).

To whom payment should be made.

Payment should be made to the real proprietor of the bill, or his agent duly authorised (d). Where the payee is a minor, payment should be made to his guardian, and if a married woman, the discharge of her husband is necessary (e). Under any circumstances the possession of the instrument is *prima facie* evidence of the holder's right to receive payment (f). Payment *bond fide* made to a thief or finder, or to a *bond fide* holder of a bill stolen or found, is a valid payment (g). But when notice has been given of the loss, payment should not be made without proper caution, by calling upon the finder, or any other person, to establish a clear title or give adequate security (h). Payment to a bankrupt, with notice of his having committed an act of bankruptcy, is void (i). But if made without notice, it would be valid.

When payment should be made.

Payment should be made when the bill becomes due, and not before. Payment made under exceptionable or suspicious circumstances, such as before the bill became due, or long after it is due, will not discharge the payer. The party has

(a) Swedish Ordinance, chap. 8.

(b) Burbridge *v.* Manners, 3 Camp. 193; Attenborough *v.* Mackenzie, 25 L. J. Ex. 244.

(c) Williams *v.* James, 15 Q. B. 498.

(d) Favenc *v.* Bennett, 11 East, 40; Coore *v.* Callaway, 1 Esp. 115.

(e) Barlow *v.* Bishop, 1 East, 432; Baker *v.* Bank of Australasia, 1 C. B.

N. S. 515.

(f) Robarts *v.* Tucker, 16 Q. B. 560.

(g) Raphael *v.* Bank of England, 17 C. B. 161; De la Chaumette *v.* Bank of England, 2 B. & Ad. 385; Pierson *v.* Hutchinson, 2 Camp. 211; Bevan *v.* Hill, 2 Camp. 381.

(h) Da Silva *v.* Fuller, Sel. Ca. 238.

(i) Kitchen *v.* Bartsch, 7 East, 53.

the whole day, and till the last moment of it, to pay the bill or note, though, in the case of foreign bills, the holder may insist upon payment being made within business hours, to enable him to send notice of dishonour, if necessary, on the same day (a).

The payment must be made in money, and not in goods or bills (b). The reception by the holder of a cheque upon another banker, or even of a country banker's note, though payable on the same day, discharges the drawers and indorsers (c).

If the holder gives time to the acceptor of the bill or maker of this note, the drawer and other parties in this bill or note would be thereby discharged (d). When, however, there are two or more joint acceptors, the giving time to one of them would not discharge the other acceptors, unless the security was accepted in satisfaction of the prior demand, or that injury was thereby caused to the other parties (e). But a release to one of two or more joint acceptors would discharge all the other parties in the instrument, unless there was a special reservation to sue the other parties (f). The holder may receive part payment from the acceptor or indorser, without prejudice to his rights against the other parties, provided he does not release or give time for the payment of the residue (g).

The person paying is entitled to a receipt of payment, which is usually indorsed on the back of the bill or note (h).

When a bill is paid under mistake of facts, the money may be recovered back as being paid without consideration, provided the mistake be discovered in the morning of the day payment is made, and notice thereof be given to the holder of the bill in time to enable him to give notice of dishonour to the prior parties (i).

(a) *Tassel v. Lewis*, 1 Ld. Raym. 743.

210; *Lodge v. Dicas*, 3 B. & Ald. 611.

(b) *Howard v. Chapman*, 4 C. & P. 508.

(f) *Cheetham v. Ward*, 1 B. & P. 630;

Nicholson v. Revill, 4 A. & E. 675.

(c) *Robinson v. Hawksford*, 9 Q. B. 52; *Lichfield Union v. Greene*, 1 H. & N. 884.

(g) *Gould v. Robson*, 8 East, 576; *Walwyn v. St. Quintin*, 1 B. & P. 652.

(d) *Philpot v. Bryant*, 4 Bing. 717; *English v. Darley*, 2 B. & P. 61.

(h) 43 Geo. 3, c. 126, s. 5.

(e) *Bedford v. Deakin*, 2 B. & Ald.

(i) *Milnes v. Duncan*, 6 B. & C. 671; *Wilkinson v. Johnson*, 3 B. & C. 435.

How the bill should be paid.

What will discharge the drawer and indorsers.

The payment should be received.

Payment made under mistake.

FOREIGN LAWS.

**How and when
should pay-
ment be made.** *France.*—A bill of exchange ought to be paid in the money indicated therein. The party who pays a bill before it becomes due, is responsible for the validity of the payment. But where

**When the bill
is issued in a
set.**

a person pays a bill at maturity, and without opposition, he is presumed to be validly discharged. The holder of a bill of exchange cannot be forced to receive payment of it before maturity. The payment of a bill of exchange made upon a second, third, fourth, &c., is valid, when the second, third, fourth, &c., bear that such payment annuls the effect of the others. He

**Payment of
lost bill.**

who pays a bill of exchange upon a second, third, fourth, &c., without receiving back that upon which his acceptance is inserted, does not effect his own discharge as against the party bearing his acceptance. No opposition can be offered to the payment of a bill except in case of the loss of the bill of exchange, or of the bankruptcy of the holder. In case of loss of a *non-accepted* bill of exchange, the party to whom it belongs is entitled to sue for payment upon a second, third, fourth, &c. If the lost bill of exchange was accepted, the payment cannot be exacted upon a second, third, fourth, &c., except by an ordinance of the judge, and upon security being given. Should the party who has lost the bill, whether it was accepted or not, not be able to produce the second, third, or fourth, he may demand payment of the bill by obtaining an ordinance of the judge, upon his establishing his claim to the sum by his books, and giving security for the same.

**Protest of a
lost bill.**

In case of refusal of payment upon demand, the proprietor of a lost bill of exchange will still preserve all his rights by protesting the bill. The protest ought to be made the day after the maturity of the lost bill; and it ought to be notified to the drawer and indorsers in the forms and times prescribed for the notification of protest.

The owner of a lost bill of exchange, ought, in order to procure the second, to address himself to his immediate indorser, who is bound to lend him his name and aid in proceeding towards his own indorser; and thus ascend, from indorser to indorser, to the drawer of the bill. The owner of the lost bill must bear the expenses. The responsibility of the surety ceases

after three years, if within this period no demands or judicial pursuits have been made.

Payments made to account on a bill of exchange, go so far to Part payment. extinguish the obligation on the drawer and indorsers. The holder is bound to get the bill protested for the surplus.

The judges cannot grant any delay for the payment of a bill of exchange (*a*).

Germany.—The holder of the bill must prove himself to be the owner of the same by a connected series of indorsements going down to his own name. The first indorsement must, therefore, be signed with the name of the payee, and every following indorsement with the name of the party designated by the preceding indorsement as indorsee. If a further indorsement follows a blank indorsement, it will be understood that the issuer of the former has acquired the bill by the blank indorsement. Any indorsement properly cancelled is regarded as if it was not written, provided the same has been cancelled by the proper party. The payer is not bound to examine the authenticity of the indorsements. If a bill be issued for a specie of coin that has no circulation at the place of payment, or for a standard which has no corresponding coin, the bill may be paid in the money of the country, according to its value on the day of payment, provided the drawer did not expressly require the payment of the bill to be made in the species of coin therein designated, by his employing the word "effective," or any other expression to the same effect. The holder of the bill is not entitled to refuse partial payment if offered to him, even when the bill was accepted for the whole sum. The drawee is only bound to pay on the delivery of the bill received. When he makes a partial payment, he can only request that payment to be acknowledged on the bill, and a receipt given to him, or a copy of the same. If the payment of a bill is not demanded on the day of payment, the acceptor is entitled, after the time appointed for the protest for non-payment has elapsed, to deposit at the risk and expense of the holder, the amount of the bill in a court of justice or other establishment authorised to receive such deposits of money. It is not necessary to summons the holder before such deposit is made (*b*).

Holder must prove himself the owner of the bill.

In what money it should be paid.

Partial payment may not be refused.

(*a*) French Code, §§ 143—157.

(*b*) German Law, §§ 36—40.

In what money
the bill should
be paid.

Holland.—A bill of exchange must be paid in the money indicated in the bill. If, however, the money alluded to is not legally current in the kingdom, and no mention of its course has been made in the bill, payment must be made in the national coin, at the course of exchange of the time when the bill falls due, and of the place where it is payable; and if there be no course of exchange in that locality, then according to that of the commercial place nearest to that where the bill is to be discharged. If the money expressed in a bill of exchange has by legal enactment increased or decreased in value in the place where it is payable, between the time the bill was issued, and the time when it falls due, then the payment of the bill, and, in case of non-payment, the right of recourse against the drawer and indorsers, are regulated according to the value of the money when the bill was issued. The rule of the civil code on the subject being that the obligation which results from a loan of money is never more than the sum stated in the contract. And that if there has been any augmentation or diminution of specie before the time of payment, the debtor is bound to pay the sum lent only, and in the specie in course at the time of payment. The same regulations are applicable, if the value of the specie should be increased or decreased before the bill of exchange was issued, where the drawer was not in a position to know such change in value. The party who pays or discounts a bill before it becomes due, is responsible for the validity of the payment. The regulations in case of a lost bill are the same as those in the French and Portuguese codes (a).

Payment of
lost or stolen
bills.

Spain.—A bill of exchange should be paid in the money indicated in the bill. If it be issued in money of a special currency, it must be converted into the coin of the country where it is payable. No refusal can be made to the payment of a bill of exchange, excepting in case of loss or theft of the bill, or bankruptcy of the holder. In such cases, a well-known person may, during the remainder of the day of presentation, order the payment to be delayed; but notice of the objection must be given on the same day.

Should a well-known person induce the debtor on a bill of exchange to stop the payment of the amount for any of the pre-

(a) Dutch Code of Commerce, §§ 149—174.

ceding causes, the payment shall be deferred during the entire day of presentation, unless notice of objection shall have been given. The holder of a bill who claims payment is compelled, if the drawee or maker exacts it, to prove his identity.

Anticipated payments are valid on bills of exchange not yet fallen due, with or without discount, unless the debtor has become bankrupt within the fifteen days which have preceded the payment. No partial payment can take place without the consent of the holder. In such case the bill may be protested for the amount not paid, and the holder shall keep it in his hand, noting upon it the sum paid, and giving a separate receipt.

The holder of another copy than the one on which acceptance has been demanded, cannot exact the payment of it unless he guarantee the value by giving security. If the acceptor should demur to it, the bill should be protested for non-payment. The guarantee ceases as soon as the liability on the acceptance lapses through prescription. Bills not accepted can only be paid after their maturity, and not before, on a second, third, or other copy. No payment can be validly made on copies of the bills delivered by the indorsers, unless the bearer adds to it one of the copies delivered by the drawer. He who has lost a bill of exchange, whether accepted or not, and cannot exhibit any other copy of it, can only demand of the debtor to deposit the amount of it. In case of refusal to pay, the owner of the lost bill preserves his rights by an act of protest, in the same form as a protest in default of payment. If the lost bill had been drawn out of the kingdom, or beyond the seas, and the holder proves his ownership by his books, and the letters of the person from whom he received the bill, or by the certificate of the broker who is concerned in the negotiation, he may demand the amount by giving a sufficient security, to continue in force till the presentation of the copy of the bill given to him by the drawer (a).

(a) Spanish Code, §§ 494—510.

SECTION XIII.

PROTEST FOR NON-PAYMENT.

BRITISH LAW.

Foreign bills
must be pro-
tested for non-
payment.

When the drawee neglects or refuses to pay a foreign bill when due, the holder must cause the bill to be duly protested ; the protest being a formal declaration of a new presentment for payment by a public notary, who thereupon makes a minute consisting of his initials, the month, and the year, and the reason for non-payment.

Who should
protest.

The protest should be made out by a notary-public, or if there be no notary in or near the place where the bill is payable, by an inhabitant in the presence of two witnesses (*a*). Every consul at any foreign port or place, has power to do all such notarial acts as any notary-public may do (*b*). And any person residing at any place distant more than ten miles from the Royal Exchange, in the City of London, who shall have been previously admitted as attorney or solicitor, may be a notary-public (*c*).

Where and
when the bill
should be
protested.

The bill must be protested for non-payment at the place where the dishonour occurred (*d*), and though the noting should be done on the very day of refusal, the protest may be drawn any day after by the notary, dating it the day when the noting was made (*e*). The protest of any bill or note must be stamped, the following being the duties :—Protest of any bill not amounting to £20,—2s. ; amounting to £20, and not amounting to £100,—3s. ; amounting to £100, and not amounting to £500,—5s. ; amounting to £500 or upwards,—10s.

Inland bills
need not be
protested.

An inland bill need not be protested (*f*), and in Scotland a protest of inland bill is no longer necessary, except where it is intended to proceed by summary diligence (*g*).

(*a*) Bailey on Bills, p. 263.

(*b*) 6 Geo. 4, c. 87, s. 20.

(*c*) 3 & 4 Will. 4, c. 70, s. 2.

(*d*) Mitchell v. Baring, 10 B. & C. 4.

(*e*) Geralopulo v. Wieler, 10 C. B.

690 ; Chaters v. Bell, 4 Esp. 48.

(*f*) 19 & 20 Vict. c. 60, s. 13.

(*g*) Bonar v. Mitchell, 4 Exch. 415.

FOREIGN LAWS.

France.—The drawer, indorsers, and securities, are responsible for the payment of the bill, because they have not only sold a credit, but they have promised that the same shall be paid by the drawee. But as each of them has promised to pay only in case the drawee should not pay, it is necessary to give proof of such a refusal, and to show the cause of it, whether it be death, absence, or bankruptcy. The special act which furnishes this proof is the protest. The protest may be effectually done by a notary or usher without witnesses. It must contain a literal copy of the bill, and note the presence or absence of the party who was to have paid, and the motive of his refusal, if he gives any. When the officer has presented himself at proper hours he may leave the protest with whomsoever he finds in the house. Should the drawee pay after the protest he would have to pay the expense. The notaries are required to leave an exact copy of the protest with the parties themselves, and to enter it in a special register kept in due form. The protest for non-payment must be made the day after the bill became due, the whole of that day being granted to the holder to take necessary steps to obtain the payment. If the day following the day of maturity is Sunday or holiday, the protest must be made the day after. The object of the protest is to show that the holder has taken care to have the bill presented for payment the day it became due, and that the same was refused. If it be proved that the holder did not present the bill on the day of maturity, and that the drawee failed the day following, or the day when the protest was made, he would lose all right of recourse. The officer must present himself to the drawee, whether he has accepted the bill or not. If the bill has been accepted payable at another place than the domicile of the drawee, the protest must be made at the place so indicated. When the bill has been accepted by a third party for honour, the protest must be made both at the domicile of the drawee and in that of the third party. Where there are persons indicated to pay the bill in case of need, the protest must be also made at the domicile of such persons. All these steps must be taken in the same day, but the holder is only required to take due diligence. Where the notary charged to protest does not

Duties of notaries.

Where the protest should be made.

find the person in his house, it is sufficient if he makes due note of it in the protest. The protest is necessary even where the bill is drawn upon a bankrupt, and it must be notified to the drawee at the domicile indicated in the bill, when the bill becomes due. It would not be sufficient to address it to the assignees. If there be nobody, or if the party be dead, it must still be made. If the drawer has written on the bill "return without protest," or "without expense," then the protest is not necessary, and it is sufficient if the holder informs the drawer that the bill was not paid. It is for the tribunal to appreciate the circumstances of the case whether superior force has hindered the holder to protest the bill on the day after it became due, or whether the bill reached him too late for the purpose (a).

United States.—In default of payment in whole or in part, protest may be forthwith made by a notary at the place of payment, and under the formalities prescribed at that place as in the case of protest for non-acceptance, and it must be made on the last day of grace (b).

Who must make the protest.

Germany.—The protest must be made by a notary, or by an usher, and they may act even without witnesses. The protest must contain a verbal copy of the bill, and of all the indorsements; the name of the parties for whom and against whom the protest is made; the demand made to the party, and his answer, or a statement that the party could not be seen; the place and date where the demand was made; in case of acceptance or payment for honour, by whom and for whom, and how the acceptance or payment was made; and, lastly, the signature of the notary or usher, with his seal of office. Where the demand must be made upon several parties, one protest only is sufficient. It is the duty of the notaries and ushers to enter the protests which they make in a special register, and in order of date. In Frankfort the protest can only be made between nine and twelve in the morning, and two and five in the afternoon. In Prussia, between nine in the morning and six o'clock in the evening (c).

Holland.—The refusal of payment must be proved by a pro-

(a) French Code of Commerce, §§ 162, 163, 173, 174, and 175; Pardessus Droit Commercial, tom. 1, p. 514. (b) Kent's Commentary, vol. 3, p. 122. (c) German Law. §§ 41—43, and 88.

test to be made the day after the bill has fallen due, and if that day be a holiday the same must be made on the following day.

The protest should be made at the residence of the drawee. If the bill be made payable at another place, or by another person,

Where should the protest be made.

the protest should be made at the other place, and against such other person. If the drawee is quite unknown, and his residence cannot be discovered, the protest should be made at the post-office of the place where the bill should be paid, and if there be no post-office, at the office of the local authorities. The protest should be made against each person indicated in the bill who refuses payment. The protest should be made by a notary or by the greffier of the district judge, assisted by two witnesses. The notaries are bound to leave an exact copy of the protests, and to enrol them by order of date in a particular register, and if it be required of them, to deliver one or more copies of the protest to the interested parties. The holder of a protested bill is bound to give notice of the protest to his indorser within five days if they both reside in the same district.

Notice of the protest.

And if they do not reside in the same district the holder is bound to send to his indorser a copy of the protest at the latest on the first post-day after the five days have expired, and if there be no regular post, by the first opportunity after such five days. Every indorser is bound in the same period of time reckoning from the date of the protest, to give notice of it, or to send it to his own indorser (a).

Spain.—A bill of exchange must be protested for non-acceptance or non-payment. The protest for non-acceptance must be made on the day following the presentation of the bill. If the day when the protest should be made is not a working day it should be made on the day following. Every protest, whether for non-acceptance or non-payment, should be drawn up by a public or royal notary, and before two witnesses. The protest should be made against the drawee at his residence, if the person can be found there. If he is not there, notice of the protest should be given to his clerks, or in default to his wife, his children, or his servants, taking care to leave a copy of the protest for the person against whom the protest is made. The protest should be made in the place indicated in the bill, or in

When should the protest be made.

Where it should be made.

(a) Dutch Code, §§ 180—184.

default of the place, at the actual residence of the drawee or otherwise at his last abode. If the domicile of the drawee cannot be found, the proceedings should be taken against him at the offices of the municipality, where copy of the protest should be sent. Notice of the protest given to the drawee enures to the benefit of all the parties named in the bill. When the bill names certain parties to be applied to in case of need, the protest should state the answer given by such parties, as well as if they have accepted or paid. All the protests on a bill of exchange should be made in order of date, and on a single deed, and the notary should give to the holder a certified copy of the protest as well as the original. The protest should be made before three o'clock in the afternoon. The notaries should keep the bill and protest in their hands till after sunset, in order to give the drawee time to pay. The death or bankruptcy of the drawee does not excuse the holder from protesting the bill (*a*).

Sweden.—The protest should be made on working days between nine o'clock in the morning and six o'clock in the evening, by a public notary if there be one in the place, or otherwise by a municipal notary and witnesses. The protest should contain a literal copy of the bill and indorsement, the demand to pay, the motives of refusal, and the exceptions offered by the notary in the name of the plaintiff. If the drawee cannot be found, the protest should be made at his house. The holder must protest the bill even when the drawee is dead or has become bankrupt (*b*).

SECTION XIV.

NOTICE OF NON-PAYMENT.

BRITISH LAW.

Notice of dishonour must be given.

Besides protesting the bill in case of non-payment, the holder must send notice of dishonour to all parties against whom he means to proceed. Notice means notification of the fact of the bill having been dishonoured after the pre-

(*a*) Spanish Code of Commerce, §§ 511—525. (*b*) Swedish Law of 1816.

sentment took place (*a*). Showing the party's knowledge of the fact that the bill will not be paid at maturity, is not sufficient. There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence (*b*).

No precise form of words is necessary for such a notice, but it must state the nature of the bill, and inform the party to whom it is sent that the bill had become due, that it was presented, and that it was dishonoured (*c*). It is not necessary in such a notice to state on whose behalf payment is demanded, or where the bill is lying (*d*). A notice may be given by writing or by parol (*e*).

(*a*) *Per B. Alderson, Burgh v. Legge, 5 M. & W. 422.*

(*b*) *Per B. Parke, ibid.*

(*c*) *Hartley's case, 4 B. & C. 339; Allen v. Edmundson, 2 Exch. 719; Caunt v. Thompson, 7 C. B. 400; Chard v. Fox, 14 Q. B. 200; Stockmann v. Parr, 11 M. & W. 809.*

(*d*) *Woodthorpe v. Lawes, 2 M. & W. 109.*

(*e*) *Housego v. Cowne, 2 M. & W. 348.*

The following notices have been held insufficient :—

"This is to give you notice that a bill drawn by you and accepted by Josiah Bateman for £47 18s. 9d. due July 19, 1835, is unpaid and lies due at Mr. Furze's, 65, Fleet-street."

"A bill for £29 17s. 3d. drawn by Ward on Hunt, due yesterday, is unpaid; and I am sorry to say, the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to-day."

"William Howard's acceptance for £21 4s. 4d. due on Saturday is unpaid; he has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible." (*Furze v. Sharwood, 2 Q. B. 388.*)

"I give you notice that a bill for £— drawn by you upon, &c., lies at, &c., dishonoured." (*Beauchamp v. Cash, D. & R. 3.*)

"This is to inform you that the bill

I took of you, £15 2s. 6d., is not took up, and 4s. 6d. expense, and the money I must pay immediately. My son will be in London on Friday morning." (*Messenger v. Southey, 1 M. & S. 76.*)

The following notices have been held sufficient :—

The attorney of an indorsee of a bill who had received notice of dishonour, wrote to the drawer as follows—

"I am requested to apply to you for payment of £35 9s. 6d., the amount of an over-due acceptance drawn by you and accepted by E. M., and to inform you, that unless the same be paid to me, with noting, interest, and 5s. for this application, before eleven to-morrow, proceedings will be taken without further notice." (*Wathen v. Blackwell, 6 Jur. 738, Exch.*)

"I hereby give you notice that a bill of exchange for £50 at three months after date, by A. upon and accepted by B. and indorsed by you, lies, &c., dishonoured." (*King v. Bickley, 2 Q. B. 419.*)

"Your draft upon C. for £50, due 3rd March, is returned to us unpaid, and if not taken up this day proceedings will be taken against you for the recovery thereof." (*Robson v. Curlew, 2 Q. B. 421.*)

"We beg to inform you that your indorsement of J. C.'s acceptance of £40, due the 17th June, 1842, remains due, with interest and expenses, as

What it should contain.

How it should be sent. If a notice of dishonour be posted by the holder in due time, he is not prejudiced if through mistake or delay of the post-office it be not delivered in due time (*a*). If the notice sent to the drawer of a bill arrives too late through indiscretion, it is for the party to say whether the holder used due diligence to find the drawer's address (*b*). Evidence must be given that the letter was put into the post-office (*c*). The post-office mark raises a presumption that the notice of dishonour was sent at that time, but it is not conclusive (*d*). It may, however, be sent by the post or by a special messenger (*e*). Notice of dishonour of foreign bills may be sent by the first regular ship bound for the place, and even by a chance ship bound elsewhere if it may reach sooner.

When it should be sent. Notice must be given within a reasonable time, and what that time is must depend upon the circumstances of particular cases (*f*). The time for giving notice is the departure of the post on the day following that on which the party receives the intelligence of the dishonour (*g*). The party need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference. The next post after the day on which he receives the notice is soon enough (*h*). When both parties reside in the same place, or in London, each party should have a day to give notice (*i*). But if the notice of dishonour is sent by post on the day on which the party ought to receive it, it must be proved affirmatively that the letter was put in in time to reach the party that day, according to the course of the post (*k*). The post-office mark is not conclusive evidence of the time when a letter is posted (*l*). Notice of dishonour of a bill or note may be given the same day it becomes due, as soon as the acceptor

Time allowed for the notice.

also other bills, and to which we request your immediate attention." (*Baily v. Porter*, 14 M. & W. 44.)

"B.'s acceptance to J., £500, due 12th of January, is unpaid. Payment to Robarts, &c., is requested before four o'clock." (*Paul v. Jones*, 28 L. J. Exch. 148.)

(*a*) *Woodcock v. Houldsworth*, 16 M. & W. 124.

(*b*) *Siggers v. Brown*, 1 M. & Rob. 520.

(*c*) *Hetherington v. Kemp*, 4 Camp. 194.

(*d*) *Stocken v. Collins*, 7 M. & W. 516.

(*e*) *Pearson v. Cranlan*, 2 Smith, 404.

(*f*) *Darbishire v. Parker*, 6 East, 3.

(*g*) *Williams v. Smith*, 2 B. & Ald. 500.

(*h*) *Geill v. Jeremy*, 1 M. & M. 62.

(*i*) *Smith v. Mullett*, 2 Camp. 208.

(*k*) *Fowler v. Hendon*, 4 Tyrw. 1002.

(*l*) *Stocken v. Collins*, 7 M. & W. 515.

or maker has refused payment (*a*). Each party into whose hands a dishonoured bill may pass is allowed one entire day for the purpose of giving notice (*b*). The holder of a bill of exchange is excused for not giving notice of its dishonour in the usual time, where the day on which he should regularly have given the notice happens to be a public festival, during which he is strictly forbidden by his religion to attend to any secular affairs (*c*).

A notice of dishonour need not be given by the holder ; it may be given by any one who is a party to the bill (*d*), but not by a stranger (*e*). A party who had himself been already discharged by the *laches* of the holder is also excluded (*f*). Notice to the drawer by any party to the bill, enures to the benefit of all (*g*). If the bill is in the hands of an agent or banker, he may give notice as if he were himself the real holder.

Who should
give the
notice.

Notice should be given to all persons who are parties to the bill, and more especially to those from whom the holder expects to be indemnified. The notice may be given to an agent, and may be left verbally with the drawer's wife. In case of bankruptcy of the drawer, or of an indorser, notice must be given to the bankrupt, or to the trustee vested with his estate on behalf of his creditors (*h*). If the bankrupt has absconded, and no assignees are yet appointed, and a messenger is in possession, notice should be given to such messenger or to the petitioning creditor (*i*). If the party be dead, notice should be given to his personal representatives (*k*). When several persons are liable together on a bill, notice to one is equivalent to notice to all (*l*). *Prima facie*, the drawer of the bill, and every indorser thereof antecedent to the holder thereof at the time of the dishonour, are all entitled to notice, because each of them is presumed to be entitled to bring an action upon paying it (*m*).

To whom it
should be
given.

- (*a*) Burbridge *v.* Manners, 3 Camp. 193.
 (*b*) Bray *v.* Hadwen, 5 M. & S. 70.
 (*c*) 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 19; Lindo *v.* Unsworth, 2 Camp. 601.
 (*d*) Harrison *v.* Ruscoe, 15 M. & W. 234.
 (*e*) Stewart *v.* Kennett, 2 Camp. 178.

- (*f*) Harrison *v.* Ruscoe, 15 M. & W. 234.
 (*g*) Wilson *v.* Swabey, 1 Stark. 34.
 (*h*) Rohde *v.* Proctor, 4 B. & C. 324.
 (*i*) Thompson on Bills, p. 500.
 (*k*) Byles on Bills, p. 228.
 (*l*) Bignold *v.* Waterhouse, 1 M. & S. 259.
 (*m*) Turner *v.* Stones, 1 D. & L. 130.

Where it
should be
sent.

The notice should be sent to the place of business or to the residence of the party. Going to the counting house during business hours, and finding no one there to receive the notice, is equivalent to a dispensation of notice (*a*). But going and knocking at the door is not equivalent to actual notice. Sending a notice by post, putting it through the door, or delivering a verbal notice by a person found there, would be sufficient (*b*).

What will
excuse a want
of notice.

It would be no excuse for the omission of due notice to a party entitled to it that he has sustained no injury or prejudice by the want of notice. The omission is sufficient to discharge him from all liability (*c*). Notice need not be sent where there exists a previous agreement with the party entitled to it, by which it is rendered unnecessary (*d*).

Acknowledg-
ment of lia-
bility.

So it may be omitted where the party entitled to notice dispenses with it, either by an express or implied consent, or by payment or part payment, or acknowledgment of liability (*e*). So the drawer of a bill, who has no effects in the hands of the acceptor, and who has no right upon any other ground to expect that the bill will be paid, is not entitled to notice of its dishonour (*f*). But if he at any time had effects in the hands of the drawee, or he had reasonable ground to expect that the bill would be honoured on the strength of a consignment, he is then entitled to notice (*g*).

Ignorance of
the place of
residence of
the party en-
titled to
notice.

When the holder of a bill does not know where the party entitled to notice is to be found, he will be excused for not giving regular notice of dishonour, provided he uses reasonable diligence to discover the residence of the party (*h*). And if, after a lapse of time, the owner discovers such residence, he has still the same time to give notice as in the first instance (*i*). A physical or moral impossibility will be a sufficient excuse for omitting to give notice. And no notice is necessary when the

(*a*) *Allen v. Edmundson*, 2 Exch. 723; *Crosse v. Smith*, 1 M. & S. 554.

(*b*) *Allen v. Edmundson*, 2 Exch. 723.

(*c*) *Dennis v. Morrice*, 3 Esp. 158.

(*d*) *Phipson v. Kneller*, 4 Camp. 285.

(*e*) *Rabey v. Gilbert*, 3 L. T. N. S. 752.

(*f*) *Bickerdike v. Bollman*, 1 T. R. 406; *Kemble v. Mills*, 2 Scott, N. R. 121.

(*g*) *Rucker v. Hiller*, 3 Camp. 216.

(*h*) *Bateman v. Joseph*, 2 Camp. 461; *Chapcott v. Curlewis*, 2 M. & Rob. 484.

(*i*) *Firth v. Thrush*, 8 B. & C. 387.

instrument is of no value for want of a stamp (*a*), or when the bill is not negotiable (*b*).

FOREIGN LAWS.

France.—The exercise of the rights of the holder against the drawer and indorsers depends upon the regularity of the protest. The holder may act either against the drawer and each of the indorsers or collectively against them. If he goes against them individually, whether against his own indorser or against any other he might prefer, he must give notice to him of the protest, and if he does not pay cause him to be summoned to court within fifteen days from the date of the protest. If the party resides more than five myriamètres distant from the place where the bill was payable, the time is extended by one day for every $2\frac{1}{2}$ myriamètres exceeding the five myriamètres. If the excess is less than that, the additional time would not be granted. If the distance is more than five myriamètres, and yet less than ten, the time should be calculated as if there were really ten myriamètres. The only point is, that the summons must be made within the fortnight. If the last day is a blank day, no further delay is granted. If the bill was payable in Corsica, in the island of Elba or Capraja, in England, or in the neighbouring States of France, the time within which the drawer and indorsers may be summoned is two months. It is four months for bills which are payable in other States of Europe; six months for those which are payable in the East or on the Northern coasts of Africa; one year for those which are payable on the Western Coasts of Africa, to and including the Cape of Good Hope, and in the West Indies; two years for those which are payable in the East Indies. These respective periods of six months, one year, and two years, are double in time of maritime war; but no further delay is granted in consequence of minority or other causes. Once the holder has protested the bill, and summoned the parties within the prescribed time, whatever may render the drawer insolvent is at their risk. Should the holder neglect to resort in time against his immediate indorser, he cannot act against the drawer, or any of

Protest and summons of the parties individually in case of non-payment.

Time allowed for the summons.

(*a*) *Cundy v. Marriott*, 1 B. & Ad. 696. (*b*) *Plimley v. Westley*, 2 Bing. N. C. 249.

the parties
liable to the
bill.

the previous indorsers, claiming so many fifteen days as each indorser would have had against the preceding party. This time is only granted as regards each party against whom he wishes to go, so that if the holder wishes, for whatever cause, to proceed against the drawer, or against the first indorser, without suing the others, he must go against him within the fortnight from the day after the protest, with the increase of time according to distance. Two things are necessary to be done: the notice and protest, and the summons to court. The time within which the notice of the protest must be given is limited by that of the summons. A copy of the protest must be sent with the notice, so that each party may know all that relates to the pursuit against them. If the holder act against the parties collectively, he has, as regards each party, the time above indicated, so that if one reside within the distance of five myriamètres, and another beyond that distance, each should receive the notice and the summons within the time calculated, according to the distance of his domicile. If the protest has been communicated amicably in due time, and if the party who received this notice promised to pay, asking to avoid any legal steps being taken, he cannot afterwards object to the want of such steps. The non-observance of these formalities constitutes laches, and the holder will lose all his rights of recourse against the parties, except in the following cases. First, where the drawer does not prove that he had funds in the hands of the drawee; inasmuch as the delay or want of protest could not possibly do him any injury, and the loss of rights on that account would be an injustice; and, secondly, where the drawer or indorsers have received sums on account, or have recovered things which constituted part of the fund for the payment of the bill (a).

To whom it
should be
sent.

Where.

United States.—The holder must not only show to have made a demand, or due diligence, to get the money from the drawee of the bill or cheque, or from the maker of the note, but he must give reasonable notice of his default to the drawer and indorsers to entitle himself to a suit against them. Notice to one of several partners, or to one of several joint drawers or indorsers, is notice to them all. The notice must be

(a) *Pardessus, Droit Commercial, vol. i. p. 523.*

sent by the first direct and regular conveyance. This means, by the first mail that goes after the day next to the third day of grace ; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice *may* be sent on Thursday, but *must* be put into the post-office, or mailed, on Friday, so as to be forwarded as soon as possible thereafter ; and if the parties live in the same town, the rule is the same, and the notice must be sent by the penny post, or placed in the office on Friday. Reasonable diligence and attention is all that the law exacts, and it is now settled, that each party into whose hands a dishonoured bill may pass shall be allowed one entire day for the purpose of giving notice. If the demand be made on Saturday, it is sufficient to give notice to the drawer or indorser on Monday, and putting the notice by letter into the post-office is sufficient, though the letter should happen to miscarry. Nor is it necessary to send the notice by the public mail. The notice may be sent by a private conveyance or special messenger, and it would be a good notice though it should happen to arrive a little behind the mail. Where the parties live in the same town, and within the district of the letter-carrier, it is sufficient to give notice by letter through the post-office. If there be no penny post that goes to the quarter where the drawer lives, the notice must be personal, or by a special messenger sent to the dwelling-house ; and it is necessary in that case, that the notice be personally given to the party to be charged, or at his dwelling-house or place of business, and the duty of the holder does not require him to give notice at any other place.

By what
means.

The notice in all cases is good, if left at the dwelling-house of *Where.* the party, in a way reasonably calculated to bring the knowledge of it home to him ; and if the house be shut up by a temporary absence, still the notice may be left there. If the parties live in different towns, the letter must be forwarded to the post-office nearest to the party, though, under certain circumstances, a more distant post-office may do.

The notice must specify that the bill is dishonoured, and the design of it is, that the drawer may be enabled to secure his claim against the acceptor, and the indorser against the maker, but there is no precise form of the notice. It is sufficient that it state the fact of non-payment, and it is not necessary to state

What it
should con-
tain.

expressly, for it is justly implied that the holder looks to the indorser.

Who is to give notice. The party receiving notice is bound to give notice likewise to those who stand behind him, and to whom he means to resort for indemnity ; and if a second indorser, on receiving notice of the dishonour of the bill, should neglect to give the like notice with due diligence, to the first indorser, the latter would not be liable to him. It is not necessary in the case of notice of non-acceptance or non-payment of a bill, that a copy of the bill and protest should accompany the notice. It is sufficient to give notice of the fact.

What will excuse notice. There are many cases in which notice is not requisite, or the want of it is waived. If the drawee refuses to accept because he has no effects of the drawer on hand, notice to the drawee is not necessary. Notice is requisite if the want of it would produce detriment, as if in case notice had been given and the bill taken up, the drawer would have had his remedy over against some third person ; or if it was drawn with a *bond fide* expectation of assets in the hands of the drawee, as upon the faith of consignments not come to hand, or upon the ground of some fair mercantile agreement. The exception applies only to the drawer, and not to the indorser of a bill drawn without funds. Neither the insolvency of the drawer, or drawee or acceptor, or the fact that the drawer has absconded, does away with the necessity of a demand of payment and notice to the drawer or indorser ; nor does knowledge in the indorser, when he indorsed the paper, of the insolvency of the maker of the note or drawee of the bill, do away with the necessity of notice in order to charge him. In case of bankruptcy of the party entitled to notice, the holder is bound to give notice to the assignee. If the notice of non-acceptance or non-payment be not given, or a demand on the maker of a promised note be not made, yet a subsequent promise to pay by the party entitled to notice will amount to a waiver of the want of demand or notice, provided the promise was made clearly and unequivocally and with full knowledge of the fact of a want of due diligence on the part of the holder (a).

Protest necessary. *Germany.*—In order to proceed against the drawer and

(a) Kent's Commentary, vol. iii. p. 133.

indorser, it is requisite to prove that the bill has been presented for payment, and that the presentation and non-payment are embodied in a protest made in due time. The protest may be made the same day when the bill became due, but cannot be made later than the second working day after it. The request not to protest the bill often inserted by the words "without protest," "without expenses," &c., is considered a dispensation of the protest, though not a dispensation to present the bill in due time. It is with the obligee of the bill to prove that the bill was not presented in due time. Nor does such a request dispense with the obligation to pay the charges of protest. A bill payable at the residence of other parties must be presented for payment at the residence of such parties, and if no other parties are named, it must be presented to the drawee himself, at the place of his residence; and if the payment is not made, the bill must be protested at that place. If the bill is not duly protested at the residence of the parties indicated in the instrument, the right of recourse is lost not only against the drawer and indorsers, but against the acceptor also. But except in the above case the right against the acceptor will not be lost by the non-presentation of the bill or the want of a protest. The holder of a bill protested for non-payment is bound to give a written notice to his immediate indorser of the non-payment within two days after the protest, and it is sufficient if he can prove to have posted the letter within that time. Every person on whom notice has been served must in the same way notify the protest to the preceding holder within the same time, which is calculated from the day the notice has reached him. The holder who omits to give notice is liable for all the damages which may thereby arise to the other indorsers, and loses his rights against these parties. If the indorser has transferred the bill without indicating any place, the notice must be sent to the one preceding him. The holder or indorser who does not give notice is responsible for the damage or loss suffered, in consequence of the want of notice, to those who have preceded him, or those who have been passed by. He also loses his right to demand from them interest and charges, and can only demand the amount of the bill. To prove that the notice has been sent to the drawer or preceding indorser without delay it is sufficient to produce a certificate of the post office showing that a letter from

Notice of protest necessary.

the party concerned has been posted to him, unless it be shown that such letter was of a different tenor from the one alleged to have been sent (a).

SECTION XV.

PROVISION.

BRITISH LAW.

No right at law
for provision.

The holder of a bill has no right of action against the drawee for any provision made by the drawer for the payment of the bill, and he can maintain no action at law unless there has been acceptance. Yet in equity the drawer of a bill of exchange drawn against certain specified goods deposited with the acceptor is entitled as against the acceptor to have the proceeds of such goods applied in the first instance in payment of the amount of the bill. And the drawer may transfer this right to the indorsee, who may then maintain a suit to have the proceeds of the goods in the hands of the acceptor applied accordingly (b).

Right of holder
where goods
are appropri-
ated to the
payment.

So where goods, consigned to another house, are appropriated to the payment of bills drawn upon them, and the consignees accept the consignment with positive directions to that effect, they cannot set up their general lien upon such goods for any balance due to them by the consignor (c).

FOREIGN LAWS.

What is
provision.

France.—The provision is any sum or effects which are or ought to be in the hands of the drawee or of the acceptor for the payment of a bill of exchange when it falls due. Provision is held to have been made when on its becoming due the drawee

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| <p>(a) German Law on Bills of Exchange, §§ 41—47.
(b) Inman <i>v.</i> Clarke, 1 Johns. 768; <i>Ex parte</i> Waring, 19 Ves. 345; <i>Ex parte</i> Parr, Buck's Banks Cases, 191; <i>Ex parte</i> Gledstane, M. D. & De G.</p> | <p>109; Cazenove <i>v.</i> Prevost, 5 B. & Ald. 70; Thayer <i>v.</i> Lister, 4 L. T. Ch. 50 (N. S.).
(c) Frith <i>v.</i> Forbes, 31 L. J. Ch. 793, and 32 L. J. Ch. 10.</p> |
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owes to the drawer or payee a sum at least equal to the amount of the bill. And it has been decided that provision has been made even when the effects destined to the payment of the bill of exchange are not realised when the bill becomes due, and that the holder may, if he does not wish to sue immediately the drawer, claim these effects as against the creditors of the drawer. Should the drawee become bankrupt before he has accepted the bill, the holder may claim the provision previously made in the hands of the drawee, whether in effects or in money, exclusively devoted to the payment of the bill, though if the drawee was simply a debtor of the drawer, the provision is destroyed by the bankruptcy. In case of bankruptcy of the drawer where the bill has been accepted, the provision belongs to the holder, because the acceptance is given under the tacit condition that the provision shall be realised. And it is the same where the provision has been especially devoted to the payment of the non-accepted bill.

Where the bill has not been accepted, and there was no special dedication of the effects to the payment of the bill, there the creditors of the drawer could not claim the provision in the hands of the drawee so as to dispossess the holder of his right, but the drawee could set his own rights against both the rights of the drawer and holder (a).

Portugal.—The same law prevails in Portugal. If the provision has been made with the drawee, and the bill is protested for non-acceptance, the holder has the right to demand from the drawer the cession of his rights against the drawee for the amount of the bill, and any documents in support of such rights. The drawer is bound to guarantee the payment of the bill even when the protest has not been duly made, if the provision had not been made before the bill became due. Where, on the contrary, the drawer has made provision, he is discharged from all responsibility (b).

Russia.—If the bill is protested for non-acceptance or non-payment, and the drawer proves that when the bill became due the drawee had funds in his hands sufficient, or that he owed him money, the holder would then have no right against the drawer and indorsers, but he may exercise against the drawee all the rights which belonged to the drawer. If, on the contrary,

(a) French Code, § 115 to 117.

(b) Portuguese Code, § 328—332.

the provision has not been made, then the holder may sue the drawer and indorsers for payment (*a*).

Spain.—The drawer must provide for the bill. The provision is deemed as made where the drawee owes to the drawer, or to the party in whose favour the bill is drawn, a sum equal to the amount of the bill. If the drawer does not prove that he had made due provision for the bill, or that he was expressly authorised by the drawee to draw the bill for a specific sum, he would have to pay all the expenses caused by the non-acceptance or non-payment.

SECTION XVI.

REMEDIES ON BILLS AND NOTES.

BRITISH LAW.

Who may sue. The right to sue on a bill or note may be exercised by the holder or any of the indorsers, or any person having interest in, or possession of, the instrument, and entitled at law to receive its contents (*b*).

Right of trustees to sue on a bill. And when a bill is made payable to a person as trustee for another, he has a right to sue upon it. So an indorsee may sue on a bill on behalf of the drawer, even after he has been paid by him (*c*). But once an indorser has paid his indorsee, he cannot sue on the bill in the indorsee's name without his consent (*d*).

Indorsers and indorsees. Not only the holder of the bill when dishonoured, but any one of the indorsers, has a right to sue; though if the action is instituted by the preceding indorsers, all the subsequent names after that of the plaintiff must be struck out before trial (*e*).

Husband and wife. The husband has a right of action on a bill or note made payable to his wife during coverture (*f*), though he may join her with him (*g*). But if it was given to her whilst she was a *feme sole*, the husband must join (*h*), and if she dies, her adminis-

(*a*) Russian Code, § 328.

(*b*) Emmett *v.* Tottenham, 8 Exch. 884; Jungbluth *v.* Way, 1 H. & N. 71.

(*c*) Williams *v.* James, 15 Q. B. 498.

(*d*) Coleman *v.* Bredman, 7 C. B. 871.

(*e*) Walwyn *v.* St. Quintin, 1 B. & P.

658.

(*f*) Gaters *v.* Madeley, 6 M. & W. 423.

(*g*) Philliskirk *v.* Pluckwell, 2 M. &

S. 393.

(*h*) Sherrington *v.* Yates, 12 M. &

W. 855.

trator, and not her husband, has the right of action (*a*). If the husband dies before he has reduced the bill into possession, the right of action upon it would revert to his wife (*b*).

Where a bill is payable to a firm, all the members of it must join, even though any of them may not have a partnership interest in it (*c*).
 Where a bill is payable to a firm.
 Who may be sued.

The *bond fide* holder may sue any person whose name was on the bill at the time when the instrument came into his hands, including in it the acceptor and drawer, and all the prior indorsers.
 Who may be sued.

Where the bill is made or accepted by a *feme sole*, and she marries, her husband must be joined with her; though, if the wife dies before the bill is paid, the husband is not liable for it.
 Bills payable to *feme sole*.

A corporation for trading purposes may be sued on a bill of exchange, provided it be for a purpose within the powers granted by the charter or Act of Parliament. Although in general a corporation can only contract by writing under the common seal, it is allowed to issue bills where the nature of its trading would render it indispensable for it to do so (*d*). Joint-stock companies are to be sued in the name of their officers.

Provided the action be instituted within six months after the bill has become due, an action on a bill of exchange, or promissory note, may be by writ of summons (*e*). Under this Act the plaintiff, on filing an affidavit of personal service of the writ, or an order for leave to proceed, and a copy of the writ, may at once sign final judgment. Upon application, however, within the period of twelve days from such service, the judge may give leave to the defendant to appear to such writ, and to defend the action, provided he either pays into Court the sum indorsed on the writ, or makes an affidavit satisfactory to the judge, disclosing a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.
 Summary procedure in England.

(*a*) Hart *v.* Stephens, 6 Q. B. 937.

(*d*) Manchester Waterworks Comp.

(*b*) Gaters *v.* Madeley, 6 M. & W.

3 L. & Ald. 1.

423.

(*e*) 18 & 19 Vict. c. 67.

(*c*) Guidon *v.* Robson, 2 Camp. 302.

In Ireland.

A similar procedure has been introduced in Ireland by the Act to facilitate the remedies on bills of exchange and promissory notes by the prevention of frivolous or frititious defences to actions thereon (*a*).

In Scotland.

In Scotland the remedy known as "summary diligence" is competent on all bills, whether inland or foreign. Upon registration of the protest in the books either of the Court of Session or of the Sheriff Court, to whose jurisdiction the debtor is subject, a warrant and execution may take place without any previous writ. But a charge or requisition of payment must be given to the debtor six free days before the warrant for requisition can be put in force; and at any time before the execution is completed, a judge being one of the Lords of Session, may, if he sees fit, in the exercise of a sound discretion, stay the execution until the merits of any objection or defence which may be stated by the debtor shall be decided by the Court of Session; and such interim stay of diligence, if it be ordered, may also, in the discretion of the judge, be allowed either unconditionally or only on condition of the debtor's finding security for the debt or assigning the amount in bank (*b*).

Sum recoverable.

The holder may recover the whole sum which is payable on the face of the bill or note, even although he may not himself have given full value for it, or have received part payment from a prior indorser (*c*). But though the acceptor is liable to the full amount of the bill as between himself and third persons, he is only liable for the sum for which the acceptance was given as between himself and the drawer (*d*). If the sum stated in words in the body of the bill or note differs from that specified in figures in the margin, the former is the sum recoverable and not the latter (*e*).

Bills payable by instalments.

In a bill or note payable by instalments, if the instrument contain a clause, that on failure of payment of any one instalment the whole shall become due, the holder on the non-payment

(*a*) 24 & 25 Vict. c. 43.

(*b*) Statute 1681, c. 20, as to foreign bills; and Statute 1696, c. 36, as to inland bills; and further extended by 12 Geo. 3, c. 72. See Report of Royal Commissioners on the assimilation of Mercantile Laws, 1855.

(*c*) Wiffen v. Roberts, 1 Esp. 261;

Walwyn v. St. Quintin, 1 B. P. 658; Johnson v. Kennion, 2 Wils. 262.

(*d*) Darrell v. Williams, 2 Stark. 166; Barber v. Backhouse, Peake, 61; Reid v. Furnival, 1 Cr. & M. 538.

(*e*) Saunderson v. Piper, 5 Bing. N. C. 425.

of any one instalment may recover the whole amount ; but if the bill do not contain such a clause, the holder can only recover the amount of the unpaid instalment (*a*).

By usage of trade and under the 3 & 4 Will. 4, c. 42, s. 28, Interest interest may be recovered from the time the bill or note becomes due ; in inland bills £5 per cent. is the rate allowed, but in foreign bills the measure of damage is the rate of interest, at the place where the bill was drawn or indorsed (*b*). In case of bankruptcy, interest may be recovered at the rate of four per cent. up to the time of filing the petition (*c*). The acceptor of a bill or maker of a note, as well as the drawer and indorsers, are also liable to the interest on a bill or note. On a bill or note payable at a certain time after date or after sight, the interest may be recovered from the acceptor or maker from the day when the bill or note became due, without proof of any demand ; and on a bill payable on demand from the day when demand was made. But the drawer or indorser is only liable to pay interest from the day when he has received notice of dishonour (*d*).

Besides the principal sum and interest, the holder of a foreign Re-exchange. bill is entitled to recover the expenses of noting and protesting, and also the re-exchange. Re-exchange is the expense incurred in consequence of the dishonour of the bill in a foreign country, in order to reimburse the party on whom the loss has fallen, by *retraite* or other bills drawn upon the place of the original drawer or indorser's domicile, or such an amount of English money as will enable the holder to purchase the required amount of foreign currency at the rate of exchange upon the day of dishonour including the interest and necessary expenses of the transaction. The theory and practice as regards re-exchange was explained as follows in the recent case of *Suse v. Pompe*, 30 L. J. C. P. 75. The case was as follows :—A Liverpool firm drew upon a house at Vienna the sum of £750 sterling, at the exchange of 11 fl. 5 cents. new Austrian currency per pound sterling, as per indorsement, and indorsed

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| (<i>a</i>) <i>Carlon v. Kenealy</i> , 12 M. & W. 189 ; | <i>Ashford v. Hand</i> , Andr. 370 ; | <i>p. 439 ; Anon. 3 Bing. 193.</i> |
| <i>Robinson v. Bland</i> , 2 Burr. 1077. | | (<i>c</i>) 12 & 13 Vict. c. 106, s. 180 ; |
| (<i>b</i>) <i>Gibb v. Freemont</i> , 9 Exch. 31 ; | <i>Gougan v. Banks</i> , Chitty on Bills, | <i>Keene v. Keene</i> , 27 L. J. C. P. 88. |
| | | (<i>d</i>) <i>Upton v. Lord Ferrers</i> , 5 Ves. 801 ; <i>Farquhar v. Morris</i> 7 T. R. 124. |

the same. The bill having been dishonoured, and the value of the florin having fallen between the indorsing of the bill and its becoming due, the plaintiffs claimed to be entitled to the option of demanding either the price of the bills when they were indorsed to them, or the amount of re-exchange, that is, the value of the florin at the time of the maturity of the bill. In giving judgment, Mr. Justice Byles said, 'The contract of the indorser is an engagement by which, if the drawee shall not at maturity pay the bill, he, the indorser, will on due notice pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Apply this contract to the present case. The holder is entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. He has, in effect, bought from the indorser so many Austrian florins to be received in Vienna on that day. It should seem to follow, that on non-payment by the drawee, the holder is entitled as against the indorser to as much English money as would have enabled him in Vienna on that day to purchase as many Austrian florins as he ought to have received from the drawee, and further, to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money, is to draw in Vienna on the indorser in England a bill at sight for as much English money as will purchase the required amount of Austrian florins at the actual rate of exchange on the day of dishonour, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin *recambium*, in Italian *ricambio*, in French and English re-exchange. The bill itself is called in French *retraite*. This bill for re-exchange being negotiated at Vienna, puts into the pocket of the holder at the proper time and place the exact sum which he ought to have received from the drawee. On this bill for the re-exchange the holder, of course, has not at Vienna the acceptance of the indorser, on whom it is drawn, but holds as his security the original bill, with the indorser's indorsement thereon. If the indorser pays the re-exchange bill, he has fulfilled his engagement of indemnity; if not, the holder sues him on the original bill, and will be entitled to recover in that action what the indorser ought to have paid, that is to say,

the amount of the re-exchange bill. Although in English practice the re-exchange bill is seldom drawn, yet the theory of the transaction is as we have above described it, and settles the principle on which the damages are to be computed, although no re-exchange bill be in fact drawn. If the indorser was held liable for the amount which his indorsee gave for the bill, when that amount is more than the drawee ought to have paid, the contract of the indorsee would be extended, and he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making of the contract : for a portion of these damages the holder must have sustained, though the contract had been performed by the drawee paying the bill.

FOREIGN LAWS.

France.—That the holder may preserve his rights against the drawer and indorsers, he must cause the bill or note to be regularly protested for non-payment. The holder may proceed either against the drawer and each of the indorsers, or against them all collectively. If he means to sue either his own indorser or any of the parties to the bill individually, he must cause a notice of the protest to be regularly sent to him, and in case of non-payment, cause him to be sued within fifteen days after the date of the protest. If he resides beyond five myriamètres of the place where the bill was payable, the time allowed will be increased by one day for every two myriamètres and a half in excess of the five myriamètres. If the distance be less than five myriamètres in excess, the day will still be granted. If the distance be less than five, and more than ten myriamètres, it will be counted as ten. But in all cases the writ must be issued within the fifteen days. If the protested bill was payable in Corsica, in the Island of Elba or Capraja, in England, or in the neighbouring states of France, the time within which the drawer and indorsers residing in France must be sued is two months. It is four months for bills payable in other states of Europe ; six months for those payable in the Levant and northern coasts of Africa ; one year for those payable on the western coasts of Africa, to and including the Cape of Good Hope, and in the West Indies ; two years for those payable in the East Indies. All such times are doubled in case of maritime war. Once the holder has put himself

right by protesting and suing within the prescribed time, he is no longer responsible for anything which might render the drawee insolvent. If the holder, who has protested the bill, neglects to sue his indorser within the prescribed time, he cannot go against the drawer or prior indorsers, taking advantage of the additional time which these would have. If the holder wishes to sue the drawer or first indorser, without suing the intermediate ones, he must summon him within the fifteen days from the date of the protest, except the additional time according to distance. The formalities necessary are, the intimation of the protest, and the summons to court. If the holder omits these, he loses all his rights against those towards whom they should have been observed. This extinction of rights is, however, averted, when it is proved that the drawer had no funds in the hands of the drawee, or that he has suffered no loss in consequence of the want of protest. Nor can the drawer oppose the rights of the holder for his neglect, where he has received some money on account, or where he has stopped the property, which

What may be recovered.

was intended for the extinction of the bill. The holder has the right to recover from each party in the bill the amount of the bill, besides interest from the day of the protest, for non-payment and expenses. But another mode of redress is open to the holder, which he may choose, as he finds most profitable. He has the power to draw, from the place where the bill was payable, upon the drawer or indorsers, another bill of exchange. This new bill is called *retraite*. The *retraite*, by the law of 1848, includes the principal amount, the expense of protest and of legal notice, the interest, the loss of exchange, the stamp duty. The re-exchange for continental France is one-fourth per cent. for the chief places of the department; one-half per cent. for the chief places in the district; three-quarters per cent. for all other places. In no case there is a re-exchange in the same department. These various items must be indorsed on the back of the bill, and signed by the drawer only. Whenever a person has, upon proceedings taken against him, paid the amount of the bill or note, he may proceed against all those who are parties to the bill or note, and so, from one to the other, from each in turn, acquire all the rights against the remaining parties. All these actions are founded upon the same rights, and subject to the same exceptions, each indorser being,

for the exercise of his rights, considered as the true holder, to whose rights he has legally succeeded (*a*).

United States.—The engagement of the drawer and indorser of every bill is, that it shall be paid at the proper time and place ; and if it be not, the holder is entitled to indemnity for the loss arising from the breach of contract. The general law merchant authorises the holder of a protested bill immediately to re-draw from the place where the bill was payable, and in the same direct or circuitous way, as the case may be or require, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays. His indemnity requires him to draw for such an amount as will make good the face of the bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and broker's commission, and the current rate of exchange at the place where the bill was to be demanded or payable, on the place it was drawn or negotiated. The law does not insist upon an actual re-drawing, but it enables the holder to recover what would be the price of another new bill at the place where the bill was dishonoured, or the loss on the re-exchange ; and this it does by giving him the face of the protested bill, with interest and the necessary expenses, including the amount or price of the re-exchange. But the indorser of a bill is not entitled to recover of the drawer the damages incurred by the non-acceptance of the bill, unless he has paid them, or is liable to pay them. Nor is the acceptor liable for the extra charges on the re-exchange. He is only chargeable for the sum specified in the bill, with interest, according to the rate established at the place of payment. The claim for the re-exchange is against the drawer, who undertakes to indemnify the holder, if the bill be not paid, and the re-exchange is the purchase of a new bill on the country where the drawer of the protested bill lives. In the United States, certain rates of damage have been fixed by usages or by statute, in lieu of re-exchange, which prevent the necessity and difficulty of proving the price of re-exchange. The revised Statutes of 1830 provided that upon bills drawn or negotiated within the state upon any person, at any place within the six

Measure of
damages.

New York.

(a) French Code, §§ 164—181 ; Pardessus, Droit Commercial, vol. iii. p. 523, and following.

states of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the district of Columbia, the damages to be allowed and paid upon the usual protest for non-acceptance or non-payment to the holder of the bill as purchaser thereof, or of some interest therein for a valuable consideration, shall be three per cent. upon the principal sum specified in the bill ; and upon any person at any place within the states of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent. ; and upon any person in any other state or territory of the United States, or at any other place on or adjacent to this continent and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the Western Atlantic Ocean, or in Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice of non-acceptance and non-payment. But the holder will be entitled to demand and recover interest upon the aggregate amount of the principal sum specified in the bill, and the damages from the time of notice of the protest for non-acceptance, or notice of a demand and protest for non-payment. If the contents of the bill be expressed in the money of account of the United States, the amount due thereon, and the damages allowed for the non-payment, are to be ascertained and determined, without reference to the rate of exchange existing between New York and the place on which the bill is drawn. But if the contents of the bill be expressed in the money of account or currency of any foreign country, then the amount due, exclusive of the damages, is to be ascertained and determined by the rate of exchange, or the value of such foreign currency at the time of the demand of payment.

Massachusetts.

In Massachusetts, bills drawn or indorsed in that state, and payable without the limits of the United States, and duly protested for non-acceptance or non-payment, are settled at the current rate of exchange and interest, and five per cent. damages ; and if the bill be drawn upon any place beyond the Cape of Good Hope, twenty per cent. damages. The rate of damages in Massachusetts on inland bills payable out of the state, and drawn or indorsed within the state, and duly protested for non-acceptance or non-payment, is two per cent. in addition to the contents of the bill, with interest and costs if payable in

any other New England state or New York ; and three per cent. if payable in New Jersey, Pennsylvania, Delaware, or Maryland ; and four per cent. if payable in Virginia, District of Columbia, North Carolina, South Carolina, or Georgia ; and five per cent. if payable in any other state of the United States, or territories thereof.

In Connecticut, the rule of damage on bills returned, protested, and drawn upon any person in New York, is two per cent. upon the principal sum. If in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or the District of Columbia, three per cent. ; if on North or South Carolina, Ohio, or Georgia, five per cent. ; if on any other state or territory of the United States, eight per cent., together with lawful interest on the aggregate amount of such principal sum, and damages from the time of notice of the protest.

In Pennsylvania, by statute of 1821, five per cent. damages were allowed upon bills drawn upon any person in any other of the United States except Louisiana, and if on Louisiana or any other part of North America except the north-west coast of Mexico, ten per cent. ; if on Mexico, the Spanish Main, or the islands on the coast of Africa, fifteen per cent. ; and twenty per cent. upon protested bills on Europe ; and twenty-five per cent. upon other foreign bills, in lieu of all charges except the protest, and the amount of the bill is to be ascertained and determined at the rate of exchange.

In Maryland, the rule by statute in 1785 is fifteen per cent. damages, and the amount of the bill ascertained at the current rate of exchange, or the rate requisite to purchase a good bill of the same time of payment upon the same place.

In Virginia and South Carolina, the damages, by statute, are fifteen per cent.

In North Carolina, by statute, in 1828, and revised in 1837, damages on protest bills, drawn or indorsed in that state, and payable in any other part of the United States, except Louisiana, are six per cent. ; payable in any other part of North America, except the north-west coast of America, or in the West India Islands, ten per cent. ; payable in South America, the African Islands, or Europe, fifteen per cent. ; and payable elsewhere, twenty per cent.

- Georgia.** The damages in Georgia, by statute, in 1827, or bills drawn on a person in another state, and protested for non-payment, are five per cent.; and on foreign bills protested for non-payment, are ten per cent., together with the usual expenses and interest; and the principal is to be settled at the current rate of exchange.
- Alabama.** The damages on bills drawn in the state of Alabama, on any person resident within the state, are ten per cent.; and on any person out of it, and within the United States, are fifteen per cent.; and on persons out of the United States, twenty per cent. on the sum drawn for, together with incidental charges and interest.
- Louisiana.** In Louisiana, in 1838, the rate of damages upon the protest for non-acceptance or non-payment of bills of exchange drawn on and payable in foreign countries, was declared by statute to be ten per cent.; and in any other state in the United States, five per cent., together with interest on the aggregate amount of principal and damages. On protested bills, drawn and payable within the United States, the damages include all charges, such as premiums and expenses and interest on those damages, but nothing for the difference in exchange.
- Tennessee.** The damages in Tennessee, by statute, in 1827, on protested bills, over and above the principal sum, and charges of protest, and interest on the principal sum, damages and charges of protest from the time of notice are three per cent. on the principal sum, if the bill be drawn upon any person in the United States; and fifteen per cent. if upon any person in any other place or state in North America bordering on the Gulf of Mexico, or in the West Indies; and twenty per cent. if upon a person in any other part of the world. These damages are in lieu of interest, and all other charges, except the charges of protest, to the time of notice of the protest and demand of payment.
- Kentucky.** In Kentucky, the damages on foreign bills protested for non-acceptance or non-payment, are ten per cent.
- Mississippi.** In Mississippi, the damages on inland bills within the state protested for non-payment are five per cent.; if drawn on any person resident out of the United States, ten per cent.; no damages on protested bills drawn on a sister state.
- Missouri.** In Missouri, the damages on bills of exchange drawn or

negotiated within the state, and protested for non-acceptance or non-payment, as against the drawer and indorser, are four per cent. on the principal sum ; if drawn on any person out of the state, but within the United States, ten per cent. ; if out of the United States, twenty per cent. ; the same rate of damages as against the acceptor on non-payment.

The damages in Indiana and Illinois on foreign bills are ten Indiana per cent. ; and on bills drawn on any person out of the state, and within the United States, are five per cent., in addition to the cost and charges.

In Ohio, the damages on protested bills drawn on persons ^{Ohio.} residing within the United States, but not in Ohio, are six per cent. ; and if out of the United States, twelve per cent. over and above the principal and interest of the bill (a).

Germany.—The holder of a bill of exchange protested for non-payment may either sue all the parties bound, or one or more of them, without losing his rights against the others. He is not bound to sue the parties according to the order of the indorsement. The sum claimable by the holder consists of—1st. The amount of the bill unpaid, and the interest at six per cent. per annum, from the day that it fell due. 2nd. The cost of protest and other charges. 3rd. A commission of one-third per cent. In case the person upon whom recourse is taken resides in a different place from that where payment ought to be made, the above sums must be paid at the exchange of a bill at sight drawn from the place of payment to the domicile of the party against whom recourse is taken. If there be no course of exchange at the place of payment, that of the nearest place will be conformed to. At the request of the party liable in recourse, the rate of exchange must be proved, either by a note of exchange delivered by the public authority, or by the attestation on oath of an exchange broker, or if this cannot be had, by the attestation of two merchants.

The indorser, who has paid for the bill, or who has received it as a remittance, may exact from every preceding indorser, or from the drawee—1st. The reimbursement of the sum, or of the equivalent of the remittance made to him, and six per cent.

(a) Kent's Comment. vol. iii. p. 158.

interest per annum, to be computed from the day of payment. 2nd. The charges. 3rd. A commission of one-third per cent. When the person upon whom recourse is taken resides in another place from the domicile of the holder, the foregoing sums will be estimated according to the rate of a bill of exchange at sight, drawn from the place of residence of the holder upon that of the party liable; and if there be no course of exchange upon this place, then the course of the place nearest thereto shall be taken. When a certificate of the course is wanted, the same rules as above will be observed.

Where the holder is to exercise his rights against a person dwelling abroad, he is not precluded by the preceding rules from charging such higher rates as are customary at that place. The holder may draw for the amount a bill of exchange on the indorser. In this case he may add to the original amount the brokerage for the negotiation of the bill, and the cost of the stamp. The bill so drawn must be payable at sight. The indorser upon whom the bill is so drawn is entitled to the delivery of the bill and of the protest. Every indorser who has satisfied his preceding indorser, can cross out his own name and those of the preceding indorsements. The liability on a bill of exchange extends over the drawer, acceptor, indorsers, and every party whose name is on the bill. The holder can sue every one of them for the whole amount of his claim; and it is at his option which of the parties he will sue first (a).

Holland.—The law of Holland on this point has been almost entirely reproduced in Portugal, under which country the same will be found fully stated (b).

Italy.—The law is the same as in France (c).

Protest for
non-payment.

Portugal.—The holder must cause the bill to be protested in case of non-payment the day after the bill has become due, and on the receipt of the notice of protest the indorser and drawer are respectively bound to pay the bill with the expenses of protest and re-exchange. The protest must contain a copy of the bill, the demand to pay, the presence or absence of the drawee or maker, the motives of refusal to pay, the date, and the sig-

(a) German Law, §§ 49—55, and
81—83.

(b) Dutch Code, §§ 175—203.
(c) Sardinian Code, §§ 174—183.

nature of the notary and witnesses. The notary must leave a copy of the protest and duly enrol the same and according to date. The holder of a protested bill must give notice of the protest to the indorser within five days if they all reside within the same district. If they do not live in the same district, the holder must send such notice, at the latest, on the first post day after the five days have expired; and if there be no regular post, by the first known opportunity after such five days. Every indorser is bound to give notice of the protest within the same period of time. All the parties in the bill are collectively responsible towards the holder, but the holder has the option of suing them collectively or individually. The holder of a protested bill may, in case of bankruptcy, demand the whole amount from any of the parties in the bill. And whatever he receives from any one of them will discharge *pro tanto* the other parties. If the holder enters into an arrangement with the drawer or acceptor, he will lose his recourse against all the indorsers; if he arranges with one of the indorsers, he will discharge all the subsequent indorsers, but still preserve his rights against the prior ones, the drawer and acceptor. If he arranges with the drawer, the acceptor who received no funds would be entirely discharged, but the acceptor who has received funds will continue responsible. If the arrangement has been concluded with the acceptor who was provided with funds, all recourse against the drawer's liability will cease. The holder of a bill who has not protested it for non-payment in due time loses all recourse against the drawer and indorsers, but not against the acceptor. And the drawer would be protected also, if he can prove that he had provided for the bill. When a bill, sent in due time, arrives after it has fallen due, in consequence of some accident, the result of superior force, the holder will preserve his right, provided he presents the bill the day after its arrival, and he protests it in case of non-payment. The holder of a bill which has been protested or lost may require payment from the drawer on his giving his bond and guarantee, and proving that he is the rightful owner (a).

Russia.—After the expiration of the days of grace, the plaintiff or his attorney may address, with the bill and protest, a petition to the division of the administration of the police,

Judicial steps
after protest.

(a) Portuguese Code, §§ 396—422.

stating the name, surname, and residence of the debtor, and the residence of the plaintiff, or of his attorney. In any town where there reside an inspector of police, the bill of exchange may be addressed for recovery to the inspector of police residing in the place of the debtor. In towns where no police administration exists, the bill of exchange should be presented to the municipal authorities, or the chief of police. In the provinces, and in the country, the bill should be sent to the commandant, or his representatives, in order to obtain recovery. These authorities will act according to the law in force for the recovery of bills of exchange. On the same day, or the next day at the latest, of the presentation of the demand, the police will summon the debtor to appear before them. If he has disappeared, they will order his arrest, and send the bill of exchange to the Tribunal of Commerce, that he may be pursued as an insolvent.

What will arrest proceedings.

If, upon the summons, the defendant appears, the bill is presented to him, and the payment demanded. The proceedings can only be stayed where the debtor declares that the signature is false, in which case the affair is taken before the criminal court, and the plaintiff and defendant are kept under surveillance. When he proves by a certificate emanating from a tribunal that the bill had been paid, if there has only been a payment on account, the proceedings will continue only for the balance of the amount. When the bill of exchange has been drawn by a person who has no right to issue it, the matter in this case is taken before the Tribunal of Commerce.

Such proceedings are not interrupted by any other exceptions which may be produced relating to the issue of the bill, the conditions essential to it, and other matters, supported by the books, accounts, or correspondence.

Imprisonment for debt.

The police will obtain payment by means of an execution on the debtor's moveables; and, in case of insufficiency, by seizing and selling his immoveables. The public sale of such effects, whether moveable or immoveable, must be completed in two weeks, or a month at most, unless the Tribunal of Commerce has reason to delay the same. During the suit the debtor is bound to give a bond or guarantee that he will not quit his residence. If not, he will be imprisoned. If there is reason to suspect that the bond is not sufficiently sure, and that the defendant may depart, the tribunal shall decide, if necessary, to issue a warrant

for his arrest. When, through the insufficiency of moveables, execution is taken against other property, the debtor shall be subjected to arrest until the sale be terminated, unless the plaintiff consents to liberate him upon security. If the other immoveable property be insufficient to pay the amount of the bill, the debtor shall be imprisoned, even though he had been liberated upon bail, and he shall be proceeded against as an insolvent debtor, subject to the following modifications, if the bill of exchange be of a small value. The preceding rules apply to bills of exchange, the amount of which do not exceed 4000 roubles. If the produce of the sale of all his property does not cover the debt, the debtor, without being formally declared in a state of bankruptcy, may be arrested at the request of the plaintiff, although up to that period he had remained at liberty under bail. Imprisonment for debt may continue two months, if the balance of the debt amounts to 100 roubles ; four months for sums from 100 to 250 roubles ; six months from 250 to 1000 roubles ; and two years for sums from 1000 to 6000 roubles. In these, as well as in all cases where the debtor is arrested, the creditor is bound to furnish him with his board, every month in advance, without which the imprisonment ceases. For one and the same bill of exchange a debtor can only be imprisoned once, for amounts of trifling importance. After the debtor has been set free proceedings may be issued against him, to recover any property he may have in future, at any time within the period fixed for civil prescription, dating from the falling due of the bill of exchange.

The amount realised by the sale of the debtor's property is divided proportionably among the creditors who have presented their bills of exchange before the close of the sale. Any dispute which this division may give rise to shall be subjected to the examination and decision of the municipal councillors, according to the rules established in this respect.

If the bill of exchange is not paid at maturity the holder should have it protested. If the drawee accepted the bill after protest the holder shall apply to receive the payment. In case of non-acceptance and non-payment, an account of the charges must be sent to the drawer, or one of the indorsers, at the choice of the holder, and the holder may reimburse himself by means of a new draft.

Re-exchange. The re-exchange comprises the principal of the protested bill, interest at one-half per cent. per month, charges, and the difference of the exchange. If the bill is drawn against the drawer, the re-exchange is regulated according to the course of exchange at the place where the bill is payable, instead of upon the place where it has been drawn; but when the holder draws on one of the indorsers, the re-exchange is regulated by the course of exchange of the place where the bill has been originally sent, or the one where it has been indorsed, upon the place where it should be paid.

Retraite. The new draft is accompanied by an account of the return, which includes—1st. The principal of the protested bill of exchange, and the interest of one-half per cent. per month. 2nd. The expenses of protest, and other legitimate expenses, such as bank commission, brokerage, stamped papers, and postage of letters. 3rd. The name of the person on whom the new draft has been directed. 4th. The course of exchange, if the account has been made in Russian money. The account of return should be certified by a bill broker, and, in default, by two merchants. The account of return is accompanied by the protested bill of exchange, by the protest itself, or a copy of the protest duly legalised, where the new draft is drawn against one of the indorsers. A certificate is also joined to the account, proving the course of exchange of the place where the bill was payable, upon the place whence it was drawn. It is forbidden to accumulate re-exchanges in the return account, which accompanies the new draft, by which the indorser reimburses upon himself the preceding indorsers. Each of them should only pay to the other a re-exchange, and at the end the drawer pay only a single re-exchange.

Interest. Interest on the principal of the bill protested for non-payment is due from the date of the protest. But the interest on the costs of protest, of re-exchange, and on other legitimate expenses, is due, reckoning only from the day of demand in court (a).

Spain.—The holder of a bill protested for non-payment may proceed either individually against the drawer and each of the indorsers, or collectively against them all, each indorser being

(a) Russian Code, §§ 396—424.

entitled to the same rights against the drawer and preceding indorsers. The holder may sue the drawer and indorsers, or the drawee, without distinction. Nevertheless, once he has commenced a suit against one of them, he cannot proceed against the others, except in case of the insolvency of the defendant. If the holder sues the acceptor before the drawer and indorsers, he must give them notice of the protest within the same period as is prescribed for the presentation of bills for acceptance. The indorsers to whom such notice has not been given are discharged from all responsibility, even when the acceptor shall have become insolvent. It will be the same thing as regards the drawer when he can prove that he made provision in proper time. If by an execution against the property of the debtor, the holder can only obtain a portion of his credit, he may sue the other parties in the bill for what remains due to him until he is entirely reimbursed. Should the party sued become bankrupt, the holder may sue successively the other responsible parties ; and if they all become bankrupt, he will have the right to receive from each party the dividend corresponding to his credit, until his debt is completely satisfied. When an indorser has paid a protested bill, he enters into all the rights of the holder against the drawer, the preceding indorsers, and the drawee. The drawer, as well as every indorser of a protested bill, may, as soon as the protest has been made known to him, require the holder to receive the amount, with the lawful expenses, and he is entitled to the bill, the protest, and statement of debt. Bills of exchange confer an executory right to exact, as the case may be, from the drawer, the drawee, or the indorsers, the payment, reimbursement, deposit, and security of the amounts.

Execution may be put in force on the presentation of the bill and protest, and without any other evidence than the judiciary Summary proceedings. recognisance made of his signature by the drawer or indorser. As regards the drawee, who has offered no exception to the validity of the acceptance when the bill was protested, execution may be ordered simply on presentation of the accepted bill, or of the protest, which proves that it has not been paid. The only exceptions admissible against summary execution are that the bill is false, or that it was paid, or that it was compensated by a liquidated and executory account, or the prescription of

the bill, as well as the forbearance, or release of the debt, which must be proved either by public or private deed acknowledged in court. No other exception can stay the execution. The judges cannot grant any delay for the payment of bills of exchange. Whatever sum the holder may receive from the party he has sued will go towards the discharge of the other parties responsible for the payment of the bill. The interest upon the principal sum is calculated from the day of the protest (*a*).

Re-exchange.

Sweden.—When a bill of exchange has been protested for non-acceptance or non-payment, the holder may ask payment from the drawer or from the indorsers who are solidarily responsible, but if one of the indorsers has lost his recourse against those who precede him, the holder also loses his right towards them. If the acceptor has become bankrupt before the day the bill fell due, the holder may, after protest, demand payment from the drawer or from the indorsers. In payment of a returned bill, the holder may demand from the drawer or from the indorsers the amount of the bill, interest at one-half per cent. per month, reckoning from the day of maturity, the reimbursement of the cost of protest, postage of two letters, brokerage of one-eighth per cent. where a broker has been employed; and, if it has been proved that the funds had been provided in several places, all other necessary expenses. If the sum is specified in foreign money, it shall be paid, in case of a rise, at the rate of exchange of the day of payment, and in case of a decline, at the rate of exchange of the day of emission. In case of non-payment, the holder must summon the drawer and the indorsers within six weeks, if he is domiciled in the same department; and within three months, if he is domiciled in another.

The holder who neglects to get the acceptance of the bill or to demand payment and summons the parties as above, loses all recourse on the indorsers and drawer; but if the drawer had not provided funds with the acceptor, he remains responsible. An indorser who pays a bill of exchange enters in the same right as the party to whom he pays it, but only towards the indorsers who precede him. In case of non-payment, he has

(*a*) Spanish Code, §§ 534—547.

three months' time to summon him, and if he neglects it he protest loses his right of recourse. All protests must be made between the hours of nine o'clock in the morning and six o'clock in the evening, in the towns, by a notary, or magistrate, and a witness; and in the country, by a sworn officer and two witnesses. It is requisite that all of them should know how to write. A verbal-process of the protest shall be drawn out, containing the entire copy of the bill of exchange, the demand of the holder, the answers, his exceptions, the time and place, and the signature of the officer and witnesses.

If the drawee cannot be found, the protest shall be made at his house. The holder shall thus preserve his rights, having on his charge to give notice in fifteen days at the latest to the competent authorities. The holder must equally protest, if the drawee is dead or has become bankrupt (a).

SECTION XVII.

STATUTE OF LIMITATION.

BRITISH LAW.

All actions of debt grounded upon any lending or contract without specialty must be brought within six years of the cause of such action and not after. But if any person entitled to the action shall at the time of the cause of action accrued be an infant, or a *feme covert, non compos mentis*, or beyond the sea, then such person may bring the action within six years after his full age, *discoverture, sound memory, enlargement, or return from beyond the seas*. But the Statute of Limitation does not destroy the debt; it only bars the remedy (b).

Time of limitation on actions on debt.

The Statute begins to run from the time the cause of action has accrued. Therefore upon a bill payable after date, it begins to run from the time it became due (c). Upon a bill payable by instalments with a clause that if the first instalment

From what time it begins on bills of exchange.

(a) Swedish Law of 1835, §§ 30—39.

(c) *Quantock v. England*, 5 Burr. 2628; *Williams v. Jones*, 13 East, 450 *Chapple v. Durston*, 1 C. & J. 1.

(b) 21 James 1, c. 16.

is not paid the whole shall become due, the Statute will run from the first default (*a*), and upon a bill payable at sight, or at a specific time after sight, the Statute commences from the presentation, or from the day it became payable after the presentation (*b*). But on a bill payable on demand, the Statute runs from the date of the bill and not from the date of the demand. If a bill was never accepted, and dishonoured at the time of payment, the Statute will run from the day the acceptance was refused (*c*).

Acknowledgment must be in writing to take the case out of the statute.

In case of two or more joint contractors.

Part payment.

Issue of writ.

In all actions grounded upon any simple contract, no acknowledgment or promise by words only is deemed sufficient evidence of a new and continuing contract, whereby to take any case out of the operation of the Statute of Limitation, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by, or in some writing signed by the party chargeable thereby, or by an agent duly authorised (*d*). The written acknowledgment must contain a clear and unqualified promise to pay the debt. If the promise is conditional it must be shown that the condition has been fulfilled (*e*). And where there are two or more joint contractors, or executors, or administrators, of any contract, such joint contractor, executor, or administrator, does not lose the benefit of the Statute so as to be chargeable in respect, or by reason only of written acknowledgment or promise made and signed by any other or others of them (*f*). Even part payment by one or more joint contractors, or executors, or administrators, only bars the person making it of the benefit of the Statute (*g*). But indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made, is deemed sufficient proof of such payment so as to take the case out of the operation of the Statute (*g*). By issuing a writ of summons within the six years against the parties liable, and

(*a*) *Wittersheim v. Lady Carlisle*, 1 H. Bl. 631; *Hemp v. Garland*, 4 Q. B. 519.

(*b*) *Holmes v. Kerrison*, 2 Taunt. 323; *Sturdy v. Henderson*, 4 B. & A. 592; *Sutton v. Toomer*, 7 B. & C. 416; *Dixon v. Nuttall*, 1 C. M. & R. 307.

(*c*) *Carter v. Ring*, 3 Camp. 459;

Megginson v. Harper, 2 C. & M. 322. (*d*) 9 Geo. 4, c. 14, and 19 & 20 Vict. c. 97, s. 13.

(*e*) *Laing v. Mackenzie*, 4 C. & P. 463; *Tanner v. Smart*, 6 B. & C. 603. (*f*) 9 Geo. 4, c. 14.

(*g*) 19 & 20 Vict. c. 97, s. 14.

renewing the same every six months, the effect of the Statute is obviated (a).

FOREIGN LAWS.

France.—Prescription is a means whereby a debtor may avoid fulfilling his obligation on the ground that a certain time has elapsed from the day when such engagement could be exacted, but the debtor may after the debt is due do some act in order to keep in force the rights of the creditor. It would be invalid to renounce the prescription so as render the right of action perpetual and imprescriptible, but one may stipulate that the prescription fixed by law shall be of shorter duration. The time of prescription varies very much according to different kinds of debts. Where there are several joint debtors, whatever bars the right against one bars it against the others also. The prescription may be interrupted by an acknowledgment given by the debtor properly certified. The acknowledgment operates as a renewal of the debt, which is prescribed after the lapse of thirty years. Part payment interrupts the prescription, and even a statement of debt sent by the debtor would be sufficient. In bills of exchange the rights of the holder against the drawee, drawer, and indorser, cease after the lapse of five years, which commence the day after the bill became due if no act has been taken by the holder to obtain payment. If any proceeding has been taken, the time will commence from the day of the last act of demand or proceedings, without prejudice to any other circumstance which might interrupt or suspend the prescription. Should the holder obtain a judgment against any of the parties to the bill, he will then preserve his right of action for thirty years against the party upon whom judgment was issued (b).

United States of America.—The time fixed for the prescription of suits differs in different States. All personal actions upon any lending or contract without specialty, must be brought within three years after the cause of action or suit in North Carolina and Tennessee; within five years in Illinois, Kentucky, Louisiana, Missouri, and Virginia; within six years in

(a) 15 & 16 Vict. c. 76, s. 11.

Pardessus, Droit Commercial, Vol. ii.

(b) French Code of Commerce, § 189; pp. 299, 304, 506.

Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhodes Island, and South Carolina (*a*).

Germany.—The liability of the acceptor prescribes in three years from the time the bill became due. The right of recourse of the holder against the drawer and indorsers prescribes in three months, if the bill was payable in Europe, except in Iceland and the Faroe Islands ; in six months if it be payable in Asia or Africa, in the countries of the Mediterranean or the Black Sea, or in the islands of these seas ; in eighteen months if it be payable in a country out of Europe, or in Iceland or the Faroe Islands. The prescription begins to run from the date of the protest. The rights of the indorser against the drawer and indorsers prescribe at the same time as above. The prescription is interrupted if an action be instituted, but only as respects those against whom the suit is directed (*b*).

Denmark.—All actions relating to bills of exchange are prescribed in four years, reckoned from the date of the protest (*c*).

Holland.—Debts proceeding from bills of exchange are prescribed at the end of ten years, reckoning from the day of their falling due. Actions against the indorsers and the drawer of a bill of exchange protested for non-payment, if the latter can prove that he had made provision for it, are prescribed as follows :—In fifteen months for bills of exchange drawn in the kingdom payable in the shipping ports of the Levant or the northern coast of Africa ; in eighteen months for places on the northern coast of Africa, up to and including the Cape of Good Hope, on the continent of North and South America, except as follows, and the islands of the West Indies ; in two years for places on the coast of North and South America situated on the Pacific Ocean beyond Cape Horn and the islands on that ocean, as well as on the continent of Asia and the East Indies. Such times are doubled in time of maritime war. The prescription commences against the holder of the bill from the day of its falling due, and against each indorser from the day he was summoned to pay, or if there had been no action, from the day he voluntarily paid (*d*).

(*a*) *Bouvier's Law Dictionary*.

(*c*) *Ordinance of 1825, § 73*.

(*b*) *German Law, §§ 77—80.*

(*d*) *Dutch Code, §§ 206 and 207.*

Italy.—All actions relating to bills of exchange and promissory notes signed by traders; merchants, or bankers, for commercial purposes, are prescribed after five years from the date of the protest ; or where there has been neither protest or any judicial act, from the day the bill became due (a).

Portugal.—The obligation by bills of exchange ceases by the prescription of five years as regards the indorsers and drawer who has provided funds in the hands of the drawee. But only thirty years after as regards a civil action against the drawer who has not provided such funds. Those who avail themselves of the prescription of five years must affirm on oath that they are not debtors ; widows, heirs, successors, or assignees, must affirm that they *bond fide* believe that they owe nothing (b).

Russia.—Prescription in bills of exchange commences in two years from the date of the protest (c).

Spain.—Every action upon a bill of exchange is extinct four years after it has become due, whether the bill has been protested or not, provided before the expiration of this time no action has been instituted (d).

(a) Sardinian Code, § 204 ; Two
Sicilies Code, § 195.

(b) Portuguese Code, § 423.

(c) Russian Code, § 388.
(d) Spanish Code, § 557.

TABLES OF USANCES

BETWEEN LONDON AND OTHER PLACES.

A USANCE BETWEEN LONDON AND		
Aleppo, sometimes accounted as treble usance		1 calendar month after date.
Altona	1	do. do.
America (North)		Said to be 60 days.
Amsterdam		1 calendar month after date.
Antwerp	1	do. do.
Bahia		None.
Barcelona		60 days after date.
Berlin		14 days after sight.
Bilboa		2 calendar months after date.
Bordeaux		30 days after date.
Brabant		1 calendar month after date.
Brazil		None.
Bremen		1 month after date.
Bruges		1 calendar month after date.
Buenos Ayres		None.
Cadiz.		2 calendar months after date.
Constantinople and Smyrna		31 days after date.
Dantzig		14 days after acceptance.
Flanders		1 calendar month after date.
France		30 days after date.
Frankfort on the Maine		14 days after acceptance.
Florence, sometimes account- ed as treble usance		30 days after date.
Genoa		3 calendar months after date.
Geneva		30 days after date.
Germany		30 days after date.
Gibraltar		2 months after sight.
Hamburgh		1 calendar month after date.
Holland and the Netherlands	1	do. do.
Italy		3 months after date.
Leghorn	3	do. do.
Leipsig		14 days after acceptance.
Lisbon		60 days after date.
Lisle		1 calendar month after date.
Lucca, sometimes		3 months after date.
Madrid and all Spain, ex- cept Cadiz		60 days after date.
Malta		30 days after date.
Middleburgh		1 calendar month after date.
Milan	3	do. months do.
Naples	3	do. do. do.
Netherlands	1	do. month do.
Oporto		60 days after sight.
Palermo		3 calendar months after date.
Paris		1 calendar month after date.

A USANCE BETWEEN LONDON AND	
Petersburgh	None.
Portugal	60 days after date.
Rio de Janeiro, Bahia, and other parts of Brazil	None.
Rome	3 calendar months after date.
Rotterdam	1 do. do.
Rouen	1 do. do.
Seville	60 days after date.
Smyrna	31 days after date.
Spain	60 days after date.
Sweden	30 days after sight.
Switzerland	30 days after sight.
Trieste, same as Vienna.	3 calendar months after date.
Venice	14 days after acceptance.
Vienna	31 do. do.
West Indies	3 calendar months after date.
Zante	1 do. do.
Zealand	

USANCES BETWEEN PARIS AND OTHER PLACES.

Names of Towns or States.	Usances.
Aix-la-Chapelle	30 days.
Aleppo	None.
Altenburg	14 days.
Altona (Holstein)	14 days.
Anhalt, Bernburgh, and Coethen	14 days.
Augsburg (Bavaria)	15 days after acceptance. 8 days half-usance. 23 days an usance and half. 30 days two usances.
Austria	15 days.
Baden	30 days.
Bavaria	15 days.
Belgium	30 days.
Berlin	See Prussia.
Botzen (Bolzano)	See Milan.
Bremen (free town of)	1 month.
Brunswick	14 days.
Calcutta	6 to 12 months' sight.
Cologne	30 days.
Constantinople	None.
Cracow	30 days.
Denmark	None.
Dantzig	15 days.
Florence	30 days.
Frankfort on the Maine	15 days from the acceptance or protest.
Genoa	30 days.
Great Britain	1 calendar month after date.

Names of Towns or States.	Usances.
Greece	30 days.
Hamburgh	{ 14 days from the day of the acceptance for bills drawn at sight.
Hanover	14 days after acceptance.
Holland	{ 30 days running from the day of date for bills drawn at sight.
Hungary	14 days.
Ionian Islands	30 days.
Leipzig	{ 14 days from the day following the ac- ceptance, with the exception of bills at sight.
Leghorn	3 days.
Lombardo-Venetian	30 days.
Lubeck	None.
Lucca	30 days.
Luxemburg	30 days.
Malta	30 days.
Mayence	30 days.
Mecklenburgh, Schwerin and } Strelitz	14 days after acceptance.
Milan	30 days.
Modena	30 days.
Nassau	14 days.
Norway	None.
Nuremburg (Bavaria)	{ 15 days ordinary usance. 30 days double usance. 24 days usance and half.
Odessa	15 days.
Offenbach (Hesse Darmstadt)	15 days.
Oldenburgh	14 days.
Palermo	15 days.
Piedmont	30 days.
Portugal	30 days.
Prague	{ 14 days after acceptance. 28 days double usance.
Prussia	15 days after presentation.
Ragusa (Dalmatia)	15 days.
Riga (Livonia)	15 days.
Rome (Roman States)	30 days.
Rostock	14 days.
Russia	15 days after the presentation.
Sardinia	30 days.
Saxony	14 days.
Saxe-Altenburgh	15 days from the day after the acceptance.
Saxe-Coburg-Gotha	Ibid.
Saxe-Weimar	14 days after the acceptance.
Smyrna	See Constantinople.
Stuttgard	14 days.
Sweden	None.
Spain	30 days.

Names of Towns or States.	Usances.
Switzerland .	Berne . . . 15 days.
	Fribburgh . . . 30 days.
	St. Gall . . . { 15 days. Tessino . . . { 30 days, 2 usances after sight.
	Vaud . . . 30 days.
	Zurich . . . 15 days.
	Two Sicilies . . . 2 months.
Tuscany	30 days.
United States	None.
Venice	6 days.
Wallachia	None.
Wurtemburg	14 days.

INTERNATIONAL USANCES.

BETWEEN AMSTERDAM AND	
Brabant, France, Flanders, Holland, or Zealand.	{ 1 calendar month.
Italy, Spain, and Portugal	2 do. do.
Frankfort, Nuremberg, Vienna, and other places of Germany, Hamburg, and Breslau	14 days after sight, 2 usances 28 days, and half usance, 7 days.
BETWEEN AMSTERDAM, ANTWERP, ROTTERDAM, AND	
Germany and Switzerland	14 days after sight.
Dantzig, Konigsberg, and Riga	30 do. do.
England and France	1 month after date.
Italy, Spain, and Portugal	2 do. do.
BETWEEN HAMBURGH, ALTONA, AND	
Germany	14 days after sight.
France and Holland	1 month after date.
Italy, Spain, and Portugal	2 do. do.
BETWEEN LEGHORN AND	
Holland, Spain, and Hamburg	2 months after date.
Lisbon	3 do. do.
Paris	1 do. do.
BETWEEN LISBON, OPORTO, AND	
Spain	15 days after sight.
Holland and Germany	2 months after date.
Italy	3 do. do.
France	60 days after sight.
BETWEEN PALERMO AND	
most other places except London	21 days after sight.
BETWEEN VIENNA, HOLLAND, AND	
Hamburg	2 months after date.

CHAPTER XII.

ON CHEQUES.

INTRODUCTORY.

A BANKER'S cheque is an instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance ; in the ordinary course it is never accepted ; it is not intended for circulation ; it is given for immediate payment ; it is not entitled to days of grace ; and though it is, strictly speaking, an order upon a debtor, by a creditor, to pay to a third person the whole or part of a debt, yet in the ordinary understanding of persons it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid in a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, and not elsewhere, who has no right to insist on immediate presentment at that place. Whilst moreover a bill of exchange must be presented for payment in due time, in order that the holder may preserve his rights against the drawer ; a cheque need not be presented for payment at any specific time, if presented within six years, and no loss has been occasioned (*a*).

Form.

A cheque is a bill of exchange addressed to a banker, and payable to a certain person or bearer on demand. The common form of cheques is as follows, but no precise form of words is essential, the only requisites being that it be directed to a banker, that it be dated, that it contain the sum, and that it be signed by the party drawing :—

(*a*) Per Baron Parke in *Ramcharn* 9 Moo. P. C. 69 ; *Keene v. Beard*,
Mullick v. Luchmeechund Radakissen, 29 L. J. C. P. 287.

£100.

London, January, 1863.

Messrs. London and Westminster Bank.

On demand Pay A. B., or Bearer, the sum of One Hundred
Pounds. C. D.

A cheque must be stamped. All drafts or orders for the payment of money to the bearer or order on demand must be stamped. The exemption for drafts drawn upon a banker transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, has been abolished (*a*). As in the case of other drafts or receipts, an adhesive stamp is used for the purpose, and the person by whom such cheque is given, or such draft or order signed or made, must, before the instrument is delivered out of his hands, cancel or obliterate the stamp so used by writing thereon his name or the initial letters of his name, so as to show clearly that such stamp has been made use of, and so that the same may not be again used. If any person who makes or signs such draft with any adhesive stamp, does not *bond fide* effectually cancel or obliterate such stamp, he forfeits the sum of ten pounds. If any person fraudulently gets off or removes, or causes to be removed, from any paper whereon any draft is written, any adhesive stamp, or if any person affix or use any such stamp so gotten off or removed from any draft or order, or if any person is concerned in any fraudulent act or contrivance, with intent to defraud Her Majesty of the duty so granted, every person so offending shall forfeit the sum of twenty pounds (*b*). A cheque not properly stamped is not admitted in evidence (*c*).

A cheque drawn for less than twenty shillings is absolutely void (*d*). The restrictions placed to the issue of cheques for twenty shillings and less than five pounds, has been removed (*e*). The amount must be expressed in the known current coins of the country, and not in foreign money (*f*), nor can the banker offer any money other than the lawful money of the realm. A cheque being made payable to bearer is transferable without indorsement by mere delivery, but it may be

(*a*) 21 & 22 Vict. c. 20, s. 1; 17 &
18 Vict. c. 83.

(*d*) 48 Geo. 3, c. 88, s. 2.

(*b*) 16 & 17 Vict. c. 59, s. 45.

(*e*) 17 & 18 Vict. c. 83, s. 9.

(*c*) Sweeting *v.* Halse, 9 B. & C. 365.

(*f*) Kearney *v.* King, 2 B. & Ald.

303; Sprowle *v.* Legge, 1 B. & C. 18.

Crossing. indorsed so that an indorsee may be sued thereon by the holder (a). For convenience of trade, cheques are often crossed with the name of a banker or with a blank formula, "— & Co.", the purpose of which is to make the cheque payable only to or through the hands of a banker. This custom had long obtained, but a case having occurred (b) where the validity of such a restriction was questioned, a statute was passed, which premising that it would conduce to the ease of commerce, the security of property, and the prevention of crime, if drawers or holders of drafts on bankers payable to bearer or to order on demand, were enabled effectually to direct the payment of the same to be made only to or through some bankers, it was enacted : That in every case where a draft on any banker made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words "and company" in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the sum shall be payable only to or through some banker (c).

**Obliteration
or alteration
of crossing.**

A farther difficulty afterwards arose, a cheque having been crossed or altered by a subsequent holder (d), as to the liability of the banker in paying a cheque so altered (e) : and another statute was passed to the following effect (f) : First, that whenever a cheque upon any banker payable to bearer or to order on demand shall be issued crossed with the name of a banker or with two transverse lines with the words "and company," or any abbreviation thereof, such crossing shall be deemed a material part of the cheque, and shall not be obliterated, or added to, or altered by any person after the issuing thereof ; and the banker upon whom such cheque shall be drawn shall not pay such cheque to any other than the banker with whose name such cheque shall be so crossed, or, if the same be crossed without a banker's name, to any other than a banker.

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| (a) Keene v. Beard, 29 L. J. C. P.
287. | (d) Stewart v. Lee, M. & M. 158. |
| (b) Bellamy v. Marjoribanks, 7 Exch.
389. | (c) Simmons v. Taylor, 2 C. B. N. S.
528. |
| (c) 18 & 19 Vict. c. 25. | (f) 21 & 22 Vict. c. 79. |

Secondly, that whenever any such cheque shall have been issued uncrossed, or shall be issued with the words "and company," or any abbreviation thereof, and without the name of any banker, any lawful holder of such cheque, while the same remains so uncrossed, or crossed with the words "and company," or any abbreviation thereof, without the name of any banker, may cross the same with the name of a banker; and wherever any such cheque shall be uncrossed, any such lawful holder may cross the same with the words "and company," or any abbreviation thereof, with or without the name of a banker, and any such crossing shall be deemed a material part of the cheque, and shall not be obliterated, or added to, or altered by any person after the making thereof; and the banker upon whom such cheque shall be drawn, shall not pay such cheque to any other than the banker with whose name such cheque shall be so crossed. Thirdly, if any person shall obliterate, add to, or alter any such crossing with intent to defraud, or offer, utter, dispose of, or put off with intent to defraud, any cheque on a banker whereon such fraudulent obliteration, addition, or alteration has been made, knowing it to have been so made, such person shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the sea for life, or to such other punishment as is enacted and provided for those guilty of forgery of bills of exchange; and Lastly, that any banker paying a cheque which does not at the time when it is presented for payment plainly appear to be or to have been crossed as aforesaid, or to have been obliterated, added to, or altered as aforesaid, shall not be in any way responsible, or incur any liability, nor shall such payment be questioned by reason of such cheque having been so crossed as aforesaid, or having been so obliterated, added to, or altered, and of his having paid the same to a person other than a banker, or other than the banker with whose name such cheque shall have been so crossed, unless such banker shall have acted *mala fide*, or been guilty of negligence in so paying such cheque.

A cheque may be transferred at any time, and, being payable on demand, it is never overdue, and, therefore, a party taking a cheque after any fixed time from its date does not do so at his peril. On this as on other points cheques differ from bills of

Time when it
may be trans-
ferred.

:

exchange (*a*). Yet a cheque being intended to be presented for payment without delay, the holder must present it not later than within banking hours of the day after he received it. Where the holder pays the cheque into his banker's, he must do so on the same day he has received it, in order to allow the banker till the next day to present it for payment. Nor would it make any difference were the cheque to pass through the clearing house. The practice is, that each banker sends to the clearing house the cheques upon other bankers which he receives in the course of the day; they are delivered to a clerk of the firm on which they are drawn, each house having a clerk in attendance there for the purpose, and he enters them in a book to the credit of the banker paying them in. When the clock of the clearing house strikes four, no more cheques are taken, and at the end of the day the clerks settle their balances. If a cheque comes too late for the clearing house, it is usually sent to the bankers on whom it is drawn, and they mark it with their initials, which is considered as an undertaking to pay it the next day, it not being usual for bankers to pay each other after four (*b*). Where a banker receives a cheque upon another banker he is bound to pay it at the clearing house the same day, if there be time, but he also has till the next day to present the cheque. If the place of presentment be at a distance, the holder should send the cheque by post not later than the day after he received it, and then his agent has the following day to present it for payment (*c*). And this rule applies not only as between the parties to the cheque, but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer presentment to a later period, can be inferred (*d*). Cheques drawn by the Treasury on the Bank of England must not be presented after three o'clock. Whatever be the effect of a delay on the presentment as against the immediate transferror, the drawer's liability is not discharged, unless actual damage has arisen from the delay (*e*).

Acceptance.

A cheque is never accepted, though the marking of a cheque

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| (a) Rothschild <i>v.</i> Corney, 9 R. & C.
388. | (d) Hare <i>v.</i> Henty, 30 L. J. C. P.
302. |
| (b) Robson <i>v.</i> Bennett, 2 Taunt. 388. | (e) Robinson <i>v.</i> Hawksford, 9 Q. B.
52; Laws <i>v.</i> Rand, 27 L. J. C. P. 76. |
| (c) Rickford <i>v.</i> Ridge, 2 Camp. 537. | |

has a similar effect as the accepting a bill, provided the banker writes on it the word "accepted," or his initials.

Where the cheque is payable to bearer, the banker may pay the amount of the cheque to the lawful holder, whether by indorsement or otherwise, and in order to facilitate the payment of cheques it is enacted, "that any draft or order drawn upon a banker for the sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the sanction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof" (a). If, however, the customer had no funds in the hands of his bankers at the time of presentment, the bankers should ascertain the genuineness of the signature both of the drawer and indorser before paying the cheque. If the customer pay into his bank a cheque, the mere fact of the banker receiving it without observation, and keeping it till the following day, does not imply a promise to pay it, and he is held to have received it as agent of the bearer (b).

In the payment of cheques it is expected of the banker to use due prudence and caution. If he be guilty of gross negligence in paying a forged cheque, or a cheque with the sum altered, he would do it at his peril, and he could not charge the customer with it (c). If, however, the customer was himself guilty of gross neglect, the banker would be exonerated (d). Cheques are within the meaning of the words "bills of exchange," and therefore the Bills of Exchange Act applies also to them (e). The cheque, when paid, should be restored by the banker to his customer who has drawn it, the cheque being considered the property of the drawer when paid (f). It is the duty of the banker to cancel the cheque on payment thereof (g).

(a) 16 & 17 Vict. c. 59, s. 19.

(c) Eyre v. Waller, 29 L. J. Exch.

(b) Boyd v. Emmerson, 2 A. & E. 246; 18 & 19 Vict. c. 67.

(f) Warwick v. Rogers, 5 M. & G.

184; Kilby v. Williams, 5 B. & A. 816; De Bernales v. Fuller, 14 East, 590.

348;

Partridge v. Coates, Ry. & M.

156.

(c) Hall v. Fuller, 5 B. & C. 750.

(g) 55 Geo. 3, c. 184, s. 19; Morley

(d) Young v. Grote, 4 Bing. 253.

v. Culverwell, 7 M. & W. 174.

To whom payment should be made.

CHAPTER XIII.

ON BANKING.

INTRODUC-
TORY.

ALTHOUGH the commerce of banking is of very ancient origin, having been introduced into this country by the Lombards, whatever legislation exists on the subject, it sprung almost entirely from the monopoly granted to the Governor and Company of the Bank of England (*a*). At first the monopoly of this company was absolute, a statute having been passed enacting that no other bank, or any corporation, society, fellowship, or institution in the nature of a bank, should be established by Act of parliament within the kingdom (*b*). A few years after, another Act was passed forbidding any other body politic or partnerships of more than six persons in England to borrow, owe, or take up any money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof (*c*), and in 1742 it was provided that no other bank should be established by Parliament (*d*). This close monopoly continued as late as 1826. In that year, however, it was limited to London and within a district of sixty-five miles round it, the Bank of England being then allowed to establish branches in any part of England (*e*). In 1833, banking companies in the country were allowed to draw bills on London payable on demand. And banking companies, exceeding six persons, were allowed to be formed in London and within a district of sixty-five miles thereof; but they were precluded from issuing notes payable on demand, and Bank of England notes were made a legal tender any where but at the Bank of

(*a*) 5 & 6 Will. & M. c. 20.

(*d*) 15 Geo. 2, c. 13, s. 5.

(*b*) 8 & 9 Will. & M. c. 20.

(*e*) 7 Geo. 4, c. 46.

(*c*) 7 Anne, c. 7, s. 61.

England or its branches. Thus the law continued till 1844, when the existing law regarding the issue was established (a).

SECTION I.

NATURE OF BANKING.

A banker is one who deals in and with money. The name of *Definition.* banker is made by statute to apply to all corporations, societies, partnerships, and persons, and every individual person carrying on the business of banking, whether by the issue of bank notes or otherwise, except the Governor and Company of the Bank of England (b).

The business of banking consists in receiving deposits of *Business of* money upon which interest may or may not be allowed, in making advances of money principally in the way of discounting bills, and in effecting the transmission of money from one place to another.

Banks are divided into public and private. A public or a *Public and* joint-stock bank is one composed of a large number of partners or shareholders and administered by a certain number of them as directors elected from their own body. A private bank is one having few partners, who attend personally to its management (c). To carry on the business of a banker, with power to *License.* issue unstamped promissory notes or bills of exchange, a licence is required, with a stamp duty of £30, a separate licence being required in respect of every town or place where any such unstamped promissory notes or bills of exchange are to be issued or drawn ; but where any banker issues such notes or bills at more than four different towns or places, then, after taking out three distinct licences for three of such towns or places, he is entitled to have all the rest of such towns and places included in a fourth licence (d). Bankers authorised to issue or draw unstamped promissory notes and bills in England, and unstamped notes in Ireland, must, in lieu of the duties on such notes and bills, pay 3s. 6d. duty for every £100, and

*Composition
duty for
unstamped
notes.*

(a) 7 & 8 Vict. c. 32.

(c) Gilbart on Banking, p. 2.

(b) Ibid. s. 11.

(d) 9 Geo. 4, c. 22, s. 2.

also for the fractional part of £100, of the average amount or value of such notes and bills in circulation during every half-year (a).

SECTION II.

RELATION OF BANKERS TO CUSTOMERS.

The relation of banker and customer is a relation of debtor and creditor.

The relation between a banker and customer who pays money into the bank is the ordinary relation of debtor and creditor (b). The money which a customer deposits with his banker, and which is usually spoken of as the customer's money at his banker's, is money lent to the banker, with which the banker may do what he pleases, the only obligation which he contracts being to return an equivalent, by paying a similar sum to that deposited with him, when he is asked for it. Such relation does not partake of a fiduciary character, nor bear analogy to the relation between principal and factor or agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed agent. And consequently the Statute of Limitation runs against this debt as against any other simple contract debt (c).

As the banker is not a trustee for the sum deposited with him, but only debtor to his customer for the same, where money is ordered to be paid to a third person, no right is thereby transferred to the payee against the banker, and in case of non-payment the customer is the proper party to sue (d).

Right of customer to the balance in his credit.

Banker may constitute himself agent or trustee.

The customer, on the other hand, has a perfect command over the balance in his credit, and may command payment of the same at sight, or order it, or any portion of it, to be carried to the account of any other person by cheque or otherwise (e). A banker, however, may by special agreement constitute himself agent or trustee of his customer, as where the banker undertakes to negotiate or sell exchequer bills or to receive interest for it on his behalf, or to receive money to invest in stock, or orders to appropriate the customer's balance or any part of it

(a) 9 Geo. 4, c. 23, England; and
9 Geo. 4, cc. 23 & 80; and 5 & 6 Vict.

c. 82, Ireland.

(b) 7 & 8 Vict. c. 32, s. 11.

(c) Foley v. Hill, 2 H. L. Cas. 36;
Pott v. Clegg, 16 M. & W. 321.

(d) Malcolm v. Scott, 5 Exch. 610.

(e) Watts v. Christie, 11 Beav. 551.

to a specific purpose. In all these cases the banker becomes the trustee of his creditor (*a*).

The obligation on the part of the banker is to pay the customer's cheques. And he would be liable to damages should he refuse to pay a cheque presented to him, within banking hours, bearing the genuine signature of a customer who has sufficient funds in the bank at the time to cover the amount so drawn (*b*), provided such funds were received at the bank in a reasonable time before presentation (*c*). Nor could the banker refuse to honour the customer's draft if there had been a course of dealing among them, and sufficient value had been put into his hands as would justify the drawer in the belief that the draft would be honoured. Where there is such a course of dealing it will amount to an evidence of agreement between the parties, and could not be put an end to without distinct notice (*d*).

Obligation of
banker to pay
customers' cheques.

But where the customer has committed an act of bankruptcy the banker's duty is to refuse to honour his cheque, and to hold his balance at the bank to the credit of the bankrupt's assignee (*e*).

Bankruptcy
of customer.

It is the duty of the banker to be acquainted with the customer's signature, and he might be responsible for the consequences of any irregularity or loss caused by his negligence in this respect.

Banker should
know the
customer's
signature.

SECTION III.

LIABILITY OF BANKERS FOR DEPOSITED SECURITIES.

Where securities are deposited with a banker for a specific purpose, or undue bills are entrusted with him in order that he may receive the proceeds when due, they continue the property of the customer; and if the banker should become bankrupt, such bills or securities would not pass to his assignees, the banker in such case acting as factor or agent for his customer (*f*). Nor would it make any difference if the banker

Deposit of
securities for
specific pur-
poses.

- (*a*) Foley *v.* Hill, 2 H. L. Cas. 36. Exch. 129.
- (*b*) Rolin *v.* Steward, 14 C. B. 595. (*c*) Vernon *v.* Hankey, 2 T. R. 119.
- (*c*) Whitaker *v.* Bank of England, 6 C. & P. 700; Marzetti *v.* Williams, 1 B. & Ad. 415. (*f*) Belcher *v.* Campbell, 8 Q. B. 11; *Ex parte* Dumas, 1 Atk. 233; Zinch *v.* Waller, 2 W. Bl. 1156; Jombard *v.* Woollet, 2 My. & C. 402.
- (*d*) Cumming *v.* Shand, 29 L. J.

When undue
bills are
bought or
discounted.

entered such bills or securities as cash, unless the customer has assented to their being so considered (a). Where, however, the banker has bought the bills or discounted them, then as the price of them becomes the property of the customer, so the instruments themselves become the banker's (b).

Bills received from a customer and simply noted by the banker in the customer's account as received, and not carried to his credit as "cash," are termed "short bills," and, except by special agreement, the property in them is not changed by depositing them with the bank (c).

Deposit of
securities for
safe keeping.

A special statute (d) exists making it criminal on bankers to misapply securities deposited with them for safe custody, or for any special purpose, as follows :—

Converting of
securities by
the banker for
his own use a
misdemeanor.

If any money, or security for the payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall in violation of good faith, and contrary to the purpose so specified, in anywise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award. And if any chattel, or valuable security, or any power of attorney, for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be entrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith, and contrary to the object and purpose for which such chattel, security, or power of attorney shall

(a) *Giles v. Perkins*, 9 East, 12; (c) *Giles v. Perkins*, 9 East, 72;
Ex parte Sargeant, 1 Rose, 153. *Ex parte Pease*, 1 Rose, 232.

(b) *Thompson v. Giles*, 2 B. & C. (d) 7 & 8 Geo. 4, c. 29, ss. 49, 50.

have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned (a). Provided that nothing, however, hereinbefore mentioned relating to agents shall affect any trustee in or under any instrument whatever, or any mortgage of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due or payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

Provided that nothing in this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon against any banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity which any party, aggrieved by any such offence, might or would have had if this Act had not been passed; but, nevertheless, the conviction of any such offender shall not be received in evidence in any action at law or suit in equity, against him; and no banker, merchant, broker, factor, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this Act, in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on

(a) 7 & 8 Vict. c. 29, s. 50.

oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit, or proceeding, which shall have been *bond fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt (a).

Reasonable diligence only expected as to the keeping of such securities.

Where securities are deposited with a banker for safe keeping it is his duty to take reasonable care of them, proportioned to the value of the article, and the danger of loss, and he is bound to take the same care of the deposited goods as he takes of his own. In case of loss, the depositary will not be chargeable unless he be guilty of gross negligence (b).

SECTION IV.

RIGHTS OF BANKER.

Right of lien.

Bankers have a lien upon all the effects and securities in their hands, as bankers, belonging to their customer for their advances; but the same does not attach on securities placed in their hands for a special purpose (c), or on his plate deposited in his chest with them for safe custody (d); nor can they avail themselves of trust deeds deposited in their hands as security for advances, when the security comprised in them is subject to a trust (e). Bankers have no lien on the deposit of a partner on his separate account for a balance due to the bank from the firm (f).

FOREIGN LAW.

France.—Banking operations consist generally in undertaking the receipt and payment of money, in receiving deposit of money,

(a) 7 & 8 Geo. 4, c. 29, s. 52. It was under this Act that the bankers Strahan, Paul, and Bates, charged with having fraudulently disposed of a number of Danish bonds which had been deposited with them for safe custody, and for the purpose of receiving the dividends upon them, for the use of their customers, were convicted, and sentenced to fourteen years' transportation.

(b) *Foster v. Essex Bank*, 17 Mass. 479.

(c) *Branda v. Barnett*, 12 Cl. & F. 787.

(d) *Ex parte Eyre*, 10 Phill. 235; *O'Connor v. Majoribanks*, 4 M. & G. 435.

(e) *Manningford v. Toleman*, 1 Coll. Ch. 670.

(f) *Watts v. Christie*, 11 Beav. 546.

in opening to depositors, credits, which authorise them to draw up to the amount of the sum deposited, in exchanging mercantile instruments, and in discounting them for cash. The agency of bankers is not deemed gratuitous but for a remuneration, and their responsibility to their customers is regulated by rules of § 1992 of the Civil Code. Bankers must have a license which costs 500 francs (£20). The character of a banker does not depend upon the existence of a "Bourse" in a town, but upon the accumulation of banking business, and not as credits, acceptances, and remittances, accidentally or simply received in furtherance of his own business, but for banking operations. Nor is it sufficient to constitute a banker to speculate in money by drawing or remitting from place to place where the range of his operations is so limited that they do not extend to the principal places of France and to foreign countries. A banker has a right to charge a commission besides the legal interest upon the balance of each account settled at intervals, and a banker who opens a credit to a merchant may, besides legal interest, charge a commission upon his advance. But when the commission has been once charged upon the advance or upon the settlement of the account, bankers cannot charge a commission on the money which they receive or send, or upon the securities which they give instead of money. They can only charge a commission upon those instruments which are sent to them from others, and which impose upon them care, labour, and expense (a).

(a) *Nouguier des Lettres de Change*, § 22.

CHAPTER XIV.

ON BANK NOTES.

BRITISH LAW.

Definition.

THE term bank notes is defined by statute to mean all bills or notes for the payment of money to the bearer on demand, other than bills or notes of the Governor and Company of the Bank of England ; and "Bank of England notes" mean promissory notes of the Governor and Company of the Bank of England, payable to bearer on demand (*a*).

Who may issue.

The issue of bank notes is limited by the Bank Act of 1844, to the Bank of England, and to those bankers who were lawfully issuing them on the passing of that Act. It was moreover provided that once a banker becomes bankrupt, or ceases to issue his own notes, he is prohibited from recommencing the issue (*b*). The Bank of England has the exclusive privilege of issuing bank notes unstamped in the city of London, and within three miles thereof. Bank notes issued by other bankers may be re-issued, provided securities be given to the Commissioners of Stamps for the stamp duties on the same (*c*).

Form.

The form of a Bank of England note is as follows :—

Bank of England.

I promise to pay Mr. Matthew Marshall or bearer, on demand,
the sum of Five pounds.

1863, Jan. 20. London, 20th Jan., 1863.

For the Governor and Company of the
Bank of England.

£ Five.

A. B.

Sum.

In England bank notes cannot be issued for less than £5, but in Scotland and Ireland they may. Such notes, however, cannot

Legal tender.

be circulated in England or Wales (*d*). A Bank of England note

(*a*) 7 & 8 Vict. c. 32, s. 10.

(*d*) 17 Geo. 3, c. 30 ; 7 Geo. 4, c.

(*b*) Ibid. s. 12.

6 ; 9 Geo. 4, c. 65.

(*c*) Ibid. s. 16.

is a legal tender for sums above £5 anywhere in England and Wales, except at the bank or its branches. A bank note payable at a specific place must be presented at that place before Presentment. a right of action can arise, and the presentment must be in reasonable time if the holder means to exercise his recourse against the party from whom he received it, and as such instruments are in point of law promissory notes, due diligence ought to be used to obtain payment, and if payment be refused notice should be given of that refusal (a).

Bank notes being transferrable by delivery, the person transferring is not liable on the instrument, although he is understood to warrant the genuineness of the note, and must bear the loss should it prove to be forged (b). But if a country When given for an antecedent debt. banker's note be given for an antecedent debt the note is not considered as sold, and in case of non-payment by the banker the transferee may have recourse to his original remedy for the antecedent debt (c).

The criminal law relating to the forgery of bank notes is as follows :

Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the Governor and Company of the Bank of England or of the Governor and Company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (d).

Whosoever shall, without lawful authority or excuse (the Purchasing or receiving forged bank notes. proof whereof shall lie on the party accused), purchase or

(a) *Camidge v. Allenby*, 6 B. & C. 373.

(c) *Camidge v. Allenby*, 6 B. & C. 373; *Raphael v. Bank of England*, 10

(b) *Fuller v. Smith*, Ry. & M. 49; *Smith v. Mercer*, 6 Taunt. 76; *Jones v. Ryde*, 1 Marsh. 157.

Q. B. 713.

(d) 24 & 25 Vict. c. 98, s. 12.

receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour (a).

As to making and engraving plates, &c., for bank notes, &c.:

Making and
engraving
plates, &c.,
for bank
notes.

Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession, any frame, mould or instrument for the making of paper with the words "Bank of England" or "Bank of Ireland," or the greater part of such words, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever, with the words "Bank of England" or "Bank of Ireland," or the greater part of such words, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall by any art or contrivance cause the words "Bank of England" or "Bank of Ireland," or the greater part of such words, or any

(a) 24 & 25 Vict. c. 98, s. 13.

device or distinction peculiar to and appearing in the substance of the paper used by the Governor and Company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour (*a*).

Provisions to the same effect are made against engraving, or having any plate for making notes of Bank of England or Ireland, or other banks, or having such plate, &c., or uttering or having paper upon which a blank bank note shall be printed (*b*). Also against engraving on a plate, &c., any word, number, or device resembling part of a bank note or bill, or using or having any such plate, or uttering or having any paper on which any such word is impressed (*c*). Also against making, or having moulds for making, paper with the name of any banker, or having such paper (*d*) ; and against engraving plates for foreign bills or notes, or using or having such plates, or uttering paper on which any part of any such bill or note is printed (*e*).

Other pro-
visions.

(*a*) 24 & 25 Vict. c. 98, s. 14.

(*d*) Ibid. s. 18.

(*b*) Ibid. s. 16.

(*e*) Ibid. s. 19.

(*c*) 24 & 25 Vict. c. 98, s. 17.

CHAPTER XV.

ON GUARANTEES.

BRITISH LAW.

Contract of
guarantee
must be in
writing.

A CONTRACT of guarantee, or a contract to answer for the debt, default, or miscarriage of another person, must be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (a). The statute applies not only to collateral undertakings by any party to be answerable for the subsisting debts of another, but also to undertakings made before the debt accrues; in other words, it applies to promises made to the persons to whom another is already, or is to become, answerable (b).

Need not
state the con-
sideration.

It is not necessary that the contract of guarantee should state the consideration for which it is given. The law on the subject was changed by the Mercantile Law Amendment Act, which declared "that no special promise to be made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document" (c). The duration of the liability of the surety will depend upon the terms of the contract, or upon the recital of the bond entered into by the party guaranteed (d).

Duration of
liability.

The guarantee
ceases when
the firm
changes.

Where a guarantee is given for a firm, whether to secure the faithful services of a clerk, or the repayment of advances to the firm, should any change take place in the firm by death or change of partners, the guarantee is at an end, unless it appears other-

(a) 29 Car. 2, c. 3, s. 4, as to Scotland; 19 & 20 Vict. c. 60, s. 6.

(b) Hargreaves v. Parsons, 13 M. & W. 561.

(c) 19 & 20 Vict. c. 97, s. 3.

(d) Berwick v. Oswald, 3 E. & B.

653; Augero v. Keen, 1 M. & W. 390.

wise from the terms of the contract. The law upon the subject has been declared in the Mercantile Law Amendment Act (a). The non-performance by the creditor of his express or implied engagements with the surety, or any alteration or release of the principal obligation, will discharge the surety (b). But mere forbearance will not discharge the surety (b). Every person who, being surety for the debt or duty of another, pays such debt, or performs such duty, is entitled to have assigned to him all the securities held by the creditor in respect of such debt, and becomes entitled to stand in the place of the creditor, and to use all the remedies in any action or proceeding, in order to obtain from the principal debtor, or any co-surety, indemnification for the advances made, and the loss he has sustained (c). Where any person has become surety for any principal debtor, it is not necessary for the creditor to whom such security is granted before calling on the surety for the payment of the debt to take proceedings against the principal debtor, but it is competent to such creditor to proceed against the principal debtor and the security, or against either of them (d).

The contract of guarantee is founded on good faith. In all cases, 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 void at law, on the ground of fraud (e).

FOREIGN LAW.

France.—The contract of guarantee or cautionnement exists when a debtor gives to his creditor a surety who will bind himself to pay in case the debtor should not. The cautionnement includes—1st. The obligation of the debtor to furnish the security ; 2nd. The obligations to which the security subjects

What will
discharge a
Surety.
Surety is
entitled to
the assign-
ment of all
securities in
the hand of
the creditor.

No necessity
for the cre-
ditor to pro-
ceed against
the debtor.

Misrepresen-
tation or fraud
annuls the
contract.

(a) 19 & 20 Vict. c. 97, s. 4; and as to Scotland, 19 & 20 Vict. c. 60, s. 7.

(b) Orme v. Young, Rolt. 84; Gor- ing v. Edmonds, 6 Bingh. 94; Musket

v. Rogers, 5 Bing. N. C. 728.

(c) 19 & 20 Vict. c. 97, s. 5.

(d) Ibid. c. 60, s. 8.

(e) Stone v. Compton, 5 Bing. N. C. 157.

himself. As to the first, the person who has promised to give a security cannot withdraw from his engagement, but he may instead give a pledge equivalent to the guarantee promised. The contract of guarantee depends entirely on the agreement of the contracting parties. The contract must be express, though it is not necessary that it should be in writing ; it may be proved by witnesses in matters of trade, provided there is no special law rendering it necessary to be in writing. In either case, the intention of the party to be a surety must be clearly expressed. If the surety has not limited his engagement to a specific sum, he must settle the whole sum when it becomes due. The surety has a right to demand that the creditor shall first proceed against the debtor, because he bound himself only in the event that the debtor should not pay. The surety is discharged in case of fraud or misrepresentation, and he has a right to be reimbursed of what he has paid in consequence of his guarantee (a).

(a) *Pardessus, Droit Commercial, vol. ii. p. 90.*

CHAPTER XVI.

ON NEGOTIABLE INSTRUMENTS.

SECTION I.

DOCK WARRANTS.

BRITISH LAW.

A DOCK WARRANT is an engagement by the wharfinger to Definition. deliver the goods therein specified to the consignee, or any one he may appoint; and when a delivery order is granted for them, it operates as an authority to the person in whose possession the goods are, to deliver such goods. But unless the sale be intimated to the actual custodier of them, and the wharfinger has agreed to hold them for the assignee, no change in the ownership will have taken place (a). And at any time before such order has been presented and accepted by the assignee, it may be countermanded by the seller, and the lawful acceptance of it prevented.

As soon as the delivery order has been presented and accepted, the goods cease to be in the order of the vendor, and When will the property pass. the wharfinger becomes the agent or trustee of the purchaser (b). Though even then the delivery order may be countermanded in case of the insolvency of the purchaser, by the exercise of the right of stoppage *in transitu*, so long as actual possession has not been given of the goods, and provided the rights of solvent sub-purchasers have not intervened (c).

A dock warrant is not a conclusive title to the property of the goods; therefore, when it is fraudulently obtained, and the relation of vendor and vendee has never subsisted, the property in the goods would not pass by it. The mere possession of the

Dock warrant
not a con-
clusive title
to property.

(a) *Farina v. Holme*, 16 M. & W. 119. W. 718.

(c) *Hanson v. Meyer*, 6 East, 265;

(b) *Harman v. Anderson*, 2 Camp. 242; *Dickinson v. Marrow*, 14 M. & 242; *Hammond v. Anderson*, 4 A. & P. 69; *Swanwick v. Sothern*, 9 Ad. & E. 895.

goods, with no further indicia of title than a delivery order, is not sufficient to entitle the *bond fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action of trover (a).

SECTION II.

PUBLIC STOCK.

Every person inscribed on the books of the Bank of England or of the Bank of Ireland as proprietor of a share in the public stock (except the trustee of any share) may obtain a certificate of title to the said share, having annexed coupons entitling the bearer to the dividends. No certificate, however, is granted in respect of any sum of stock not being £50 or a multiple of £50, or in respect of any larger amount than £1000. The stock certificate will be issued only in respect of the £3 per cent. Consolidated Annuities, reduced £3 per cent. Annuities, and the new £3 per cent. Annuities. And the coupon will comprise the dividends for a period of not less than five years commencing from the date of the certificate. A stock certificate, unless a name is inscribed therein, will entitle the bearer to the stock therein described, and will be transferable by delivery. But the bearer of a stock certificate may convert the same into a nominal certificate by inserting therein in the manner prescribed the name, address, and quality of some person; and when so rendered nominal the stock shall cease to be transferable; and the person named therein, or some person deriving title from him by devolution in law, shall alone be recognised by the bank as entitled to the stock described in the certificate. The nominee in a nominal stock certificate is not entitled to have the same renewed as nominal; but he shall, on delivery up to the bank of his certificate, and of all unpaid coupons belonging thereto, be entitled to receive in exchange from the bank a stock certificate to bearer. The nominee in a nominal stock certificate and the bearer of a stock certificate to bearer may, on the like delivery, require to be registered in the books of the bank as a holder of the stock described; and thereupon the stock shall be re-entered in the books kept by the bank for the entry of transferable stock, and become transferable, and the

(a) *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J. Ex. 83.

dividends payable as if no certificate had been issued in respect of such stock. No fees are to be charged on the grant of a stock certificate to bearer in exchange for a like certificate, but in respect of all other proceedings. The income tax is to be deducted from any coupons in the same manner as from dividends. All sums due and not demanded on any coupons to be treated as unclaimed dividends. When any certificate of title issued in respect of any share in the public stock is outstanding, the stock represented ceases to be transferable in the books of the bank. Penalties are also imposed on persons committing forgery, falsely personating owners of stock, and engraving plates, &c. (a).

(a) 26 Vict. c. 28.

END OF VOL. I.

E. J. H.

