Volume Four

Business Law

by

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"It does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds."
– Samuel Adams

Introduction

Business Law is not in the Anglo-American system a clearly separable layer of law. It is made up of any and all propositions from every part of the constitutions, statutes and decisions—to which must be added administrative orders and decrees and legally recognizable customs—that may be pertinent to any business situation. And as the term "business" itself is rather expansive, we may start with the assumption that no proposition in the law books can be dogmatically ruled out of the scope of business law. For convenience, however, we may recognize at once certain divisions of the law as more or less likely to be involved in the everyday pursuits connected with earning a livelihood. We may thus set aside as beyond the scope of this volume the whole of public law (Vol. III), of criminal law (Vol. II), of family law (Vol. VI, Part II), of property law (Vol. V), and even much of torts and contracts (Vol. VI, Part I). There remains a good deal of the law of contracts, particularly the contracts of buyer and seller, of employer and employee, of borrower and lender, of insurer and insured, of carrier and passenger or shipper, of the parties to negotiable paper and of the members of a business organization. There remains, too, a great deal that is not simply contractual in the sense of being based on consent, but, rather, is dictated by authority, about the conditions of the market, about credit, about business organization.

Many of these matters are covered by separate commercial codes in countries where the law is codified. Hence on the continent of Europe the courts, courses, books and periodicals devoted to Commercial Law have artificial boundaries within which prominent places are occupied by the law of Negotiable Instruments, Partnership and Corporations, and a great deal of ingenuity is developed in distinguishing between the transactions and persons that fall within the purview of the commercial code and those which are to be judged by the general code.

It is no mere accident that the Anglo-American system insists that all persons are governed by one law, whether they be "merchants" or not. That matter was fought out in England in the seventeenth century. Prior to that time the King's Courts had taken little notice of the disputes of merchants. They were handled in petty special courts, such as the Court of the Fairs. In the

early seventeenth century Lord Coke, Chief Justice of the King's Bench, by his decisions, his writing; and his political activity, succeeded in reducing these petty courts to insignificance and in transferring their jurisdiction to the King's Courts, and reducing their "laws" to recognizable "customs." As late as 1622 Gerard Malynes informs us that these customs apply only to merchants. A "gentleman" cannot be a party to commercial paper. But before the end of the century the courts are telling us that whoever signs such paper becomes *ad hoc* a trader.[1] Between these two views lie several generations during which Englishmen are superseding foreigners as merchants. So the Courts Merchant are suppressed, but the law merchant becomes part of the law of the land for everybody, and merchants are subject to the fused law of which their old customs are but a part.

This rule of one law for all was quite acceptable in the eighteenth century, particularly on this side of the Atlantic where it fitted well not only with political prejudices but also with social and economic facts. In pioneer life,

When Adam dolve, and Eve span,
Who was then the gentleman?

Likewise, who was the artisan, who the trader, who the farmer and who the professional man? Obviously, the division of persons into such classes for legal purposes would not have corresponded to the facts of life. So the doctrine of the equality of all men was written into our fundamental law. Our constitutions have condemned as "class legislation" all attempts to deal with one occupation in a special way unless they showed the clearest justification or, better still, were phrased in generalizations which negatived discrimination even while they singled out instances on the basis of a recognizable principle.

Still, subtle influences were at work in the nineteenth century to develop in our law a new differentiation between traders and the general public and among traders themselves. These influences operated principally through reading implications into contracts. The person regularly engaged in a business was understood to have made certain representations to the public as to his skill. It was one thing for a charwoman to sew a dress inside out, and quite another for a professional dressmaker to do so.[2] It is one thing for an iceman, who genially agrees to take your trunk to the railroad station, to mishandle it, and quite another for the regular expressman to do so.[3] In recent years the difference between the professional and the amateur in business has been emphasized by statutes—statutes requiring licenses and sometimes examinations before one can hang out a shingle; statutes pertaining to particular businesses, in spite of their general terminology; statutes singling out particular businesses (in spite of the constitutional prejudice in favor of generality), either on the score of police power or the state's right to regulate public utilities and other businesses affected with a public interest, or because of a peculiar opportunity of the state to bargain through its power to withhold or give conditionally a charter or franchise or other privilege. It is thus possible today, once more to speak not only of a law of business in a narrow sense, but also of the law of special businesses such as banking, public utilities, stock brokerage, real estate brokerage, retailing, chain stores, advertising, insurance, or even peddling, plumbing or conducting a beauty parlor.

The scope of our present study is, of course, broader. We include the activities of the market place, the factory, the bank, the exchange, the office, the directors' room, the stockholders' meeting, and we even look into the court and the public administrative office when these are the situs of business transactions. Our order of procedure will deviate somewhat from that usually pursued in books on business law. Instead of enumerating what the law provides in the way of rules, standards, principles and institutions and leaving their application to business needs to be dealt with as an afterthought—thus beginning with an answer and seeking appropriate questions—we shall proceed to ask what are the requirements of business and then turn to the law to see what it has to offer for their satisfaction. This is, of course, the order of procedure in life, when the business man brings his problem to the lawyer.[4]

[1] Witherley *v*. Sarsfield, Court of King's Bench, 1689. 1 Shower 125; Carthew 82. (L.B.P., p. 46.)

[2] Lincoln *v*. Gay, 164 Mass. 537 (1895).

[3] Hardin *v*. Grant, 54 S.W.2d 189 (1932).

[4] For note on abbreviations, see Volume I. In this volume the additional abbreviation "LB.P." refers to the author's "Law in Business Problems,"

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Chapter I

Business Postulates & the Law

1. Law, a Development of Civilization

As we go about our daily business we take a great deal for granted. If we had to look behind every tree, figuratively or literally, for a lurking Indian, we could hardly do the work of the modem world. We assume a high degree of safety; we assume a high degree of human trustworthiness; we assume that those about us will act in a reasonable and fairly predictable manner; and the vast majority of these assumptions are well founded. At least, we are not often disappointed.

If we analyze these expectations or postulates on which modern business is based, we find very readily that they are simple only to the simple minded. We discover that they differ not only in different times and places and among different races of men, but that they are by no means all equally safe assumptions nor are they founded on identical or even similar bases. In fact, the explanation of even the simplest and most obvious of these assumptions, upon analysis, becomes a hopelessly complex problem of the social and natural sciences. We take it for granted, for example, that a man can expose his wares in a shop with reasonable safety, and although we occasionally read of holdups showing the danger of such an assumption, we go on making it. Why? Is it because of our faith in the habits of mankind, or in the workings of the legal system, or some doctrine of chance, or because of our own recklessness, or a combination of all of these? The question becomes infinitely more complicated if, for such elementary human interests as security from holdups, we substitute the vast network of relations that we call the credit system, which is another of the postulates of modem business.

Without going far into the analysis of the basis of any one of these expectations, we may venture two propositions: first, that the legal system of any given time or place contributes heavily to the fulfillment of our expectations; and second, that the legal system is by no means alone in this function. The first of these propositions is, of course, generally taken for granted. It is our purpose here not to prove it, but to find out just how the law comes to the aid of the business world. The second proposition, however, is very generally overlooked. Legal specialists talk occasionally as if the sole deterrent from crime in the world today were criminal law.[1] Little wonder, then, that the layman looks to the law to accomplish singlehanded the greatest of wonders, and in turn criticizes the law for its failure to do that which he gratuitously assumes, in the first place, it can do. When anything goes wrong he says: "There ought to be a law against this or that." He expects a legislative *fiat* to make men moral, to make men sober, to make men efficient. We must, therefore, emphasize the limits of effective legal action.[2] When it actually was necessary to look behind every tree for a possible Indian, the best code in the world could not have done away with that necessity any more than we can today put an end to war by such a simple device as declaring it unlawful. Yet with the aid of law and a hundred other elements we have succeeded in reaching a measure of internal peace and we may hope to achieve a corresponding measure of world peace eventually. The point is that law does not and cannot work alone. The development of law is but a phase of the development of civilization. And when we speak of the part played by law in the satisfy-

ing of the postulates of business, we must bear in mind that it does not satisfy those postulates single-handed or exclusively. It is neither without allies nor without rivals.

2. Conditioning Forces

Nor is it without conditioning forces. Just as the business activities of the world take for granted certain conditions, including the cooperation of the law, the law itself has certain postulates. The current legal system assumes, for example, that people take a certain amount of initiative in turning the wheels of justice and, on the other hand, that they will restrain themselves just so much from interfering with this machinery. The system must break down completely—and does occasionally even in this country—not only where initiative is lacking because of indifference or fear, but also where masked mobs, or the parties to a "feud," or even willful juries take "justice" into their own hands. The law, furthermore, presupposes a certain degree of ability to understand the law—it has been found futile at several stages of history to transfer a highly developed code to a crude people. A law that penalized lying to the very limit would hardly work in a community of confirmed liars. Our primary concern, however, is not with what a system of law must take for granted—though we cannot ignore the bearing of this question on the law's limitations—but with what business expects and demands from the law.

3. Limitations upon Law for Business Ends

Furthermore, we must recognize that other aspects of our life, besides the business aspect, make demands upon the law. In the main, these demands are fortunately not only consistent with but identical with the demands of the business world. Peace, fair and honest dealings, and the enforcement of obligations, for example, might be demanded in the name of society, organized on its political side, just as readily as by that same society thought of as a "business unit." There are, of course, differences of emphasis, occasional differences in the limitations set, and even rare contradictions. Thus, business if left to itself might never have invented homestead exemptions as a limitation to enforcement laws. It is conceivable, but not quite probable, that the enforcement of debts by means of imprisonment might have been abolished by the business world as unprofitable in the long run, without the aid of the humanitarian considerations that were perhaps uppermost in the actual abolition of imprisonment for debt. So far, however, as we find conflicting demands made upon the law in the name of human interests other than business, we shall have to take them into consideration as limitations upon the use of law for business ends.

4. Enumeration of Business Ends of Law

What, then, are these business ends? Or, to resume the formal question with which we began, what does the business world demand or more or less thoughtlessly expect of the law today? It has been demonstrated with abundant learning by Dean Pound that the "end" of law, viewed both practically and theoretically, has been developing throughout the course of legal history.[3] The earliest end discernible was a mere attempt to keep the peace. In later states we encounter first the maintenance of an actual *status quo* and later the struggle for some ideal set of relations known as equity or justice or natural fights. Today we are stressing a fourth type of end, and emphasis is shifted to the satisfaction of human wants and particularly to the opportunity for development.

It must be remembered, however, that in all of these developments the earlier ends of the law have by no means been abandoned as the later ones have emerged. The maintenance of peace, the security of acquisitions, the approximation of what appears to society for the time being as natural justice or fairness, stand side by side today with the insuring of human opportunities for development and advancement. If we would restate these general ends of the law more narrowly in terms of what the business world seeks, we should still have to enumerate as major ends: (1) peace and effective enforcement; (2) security of acquisitions; (3) fair conditions in the market, and, in addition to these, (4) the facilitation of transactions. Of course, the meaning of all the older terms has developed very materially as time has gone on. The peace of the Anglo-Saxon world, such as it was, would not suffice for the needs of the modern business world. Neither would the enforcement machinery of the Middle Ages. The kinds of acquisitions that may be deemed the subject of legal protection have multiplied and are changing even today. Some of the most important developments of the law of recent years are concerned with the growing concept of *fair conditions in the market.* But in the main, it is true that the principal accomplishment of the last half century in the realm of business law has been the development of facilities and positive opportunities for the specific transactions that constitute business.

5. Development of Ends of Law

All these accomplishments of the law are so thoroughly and

readily taken for granted that it is somewhat difficult for us to realize that, in the Anglo-American system of law, one need go back only a few hundred years to reach a period in which the king's courts were not interested in the private disputes of citizens so long as they did not affect the king's revenue or the king's peace. Of course, the allusion to the king's revenue and the king's peace as the formal basis for taking jurisdiction over private disputes and enforcing private claims was for a long time a mere pretense, a fiction of the law. But the fact that such a fiction had to be used at the beginning of modem times should remind us that, what we take for granted today when we expect this or that of the law, was by no means taken for granted at all stages in our legal history; that it is by no means taken for granted in all parts of the world today, at least in the same way; and that we cannot be sure that we have reached the limit of possible demands to be made upon law in the furnishing of aids for the conduct of business. We are, in other words, dealing with a situation that is constantly developing, constantly being experimented with, and not at all with a preordained system of natural law.

6. Business Postulates of Today

For the purpose of fitting these postulates into the picture of business as it is conducted today, we might pursue the opposite order to that of their historical development and consider some characteristics of the need today for (1) facilitation of transactions, (2) fair market conditions, (3) security of acquisitions, and (4) effective enforcement and peace.

(1) FACILITATION OF TRANSACTIONS. Typical of the *transactions* for which we expect the law to furnish ready frameworks are those transactions that have to do with the *organization* of the business world. Business needs not merely schemes for summarizing the relations existing between people within a particular business enterprise—such as agency, partnership, corporation, or Massachusetts trust—but also those devices that bring together cooperating parts of a business, however separated they may at first sight seem. There is every gradation between the hand-to-mouth *buying* of raw materials by one plant from another, through more comprehensive contracts for seasons and through leases, to the complete control or even ownership of the plant furnishing the raw materials. Likewise, on the *distributing* side, a vast variety of relations may exist between the producers and those engaged in the various steps of marketing. For all of these relations the law is called upon to furnish a fitting framework and under the pressure of American life the law is just as likely to be called upon for mass production of frameworks of a more or less standardized nature as our factories are to give mass production of standardized machinery. Business presents numerous novel problems of *organization* calling for most ingenious massing of traditional devices. Thus, where living conditions in a great city produce vast buildings in which it becomes desirable to sell individual apartments to families, the organization of the business side of the scheme may involve incorporation with more or less complicated adjustment of ratios of control, ownership, return, and risks which may not correspond exactly to the amount of investment. It may involve further peculiar types of leases or deeds or mortgages. The financing may involve mortgages and trusteeship and the issuance of bonds or trust certificates in combinations that had never been thought of before.

The *credit devices* of the modern world must also respond very delicately to peculiar needs in particular situations. There is a constant problem, for example, to strike a balance somewhere between the safety of the loan and the freedom of the business to which the loan is made from interference. In a general way, where real security is used the more possessory a credit device is the simpler and safer it seems, but at the same time the more likely it is to interfere with the use of things in the ordinary course of business. The vast series of new problems connected with the financing of installment sales, of which the most prominent example, of course, has been automobile financing, will illustrate the type of call that is made upon the law for new machinery or for new combinations of the old machinery of credit.[4]

There is, of course, a vast variety of more or less typical transactions that make up the bulk of everyday business. The type of framework furnished for them is perhaps best illustrated in our statutes standardizing *contracts of sale,* the contracts involved in negotiable instruments, insurance contracts, employment contracts, and many others, by stipulating what the details shall be either in the absence of contrary stipulation or any agreement to the contrary notwithstanding.[5] New varieties of transactions are constantly emerging for which new types of contracts are required. Thus, with the coming of new modes of transportation, whether we turn to the period of the introduction of the steam railroad or that of the motor bus or that of aviation, new types of *receipts and agreements,* with new apportionments of risks, become recognized as standard in the

law. In general, the tendency of business is to require *devices for the facilitation—and* constantly for the greater facilitation—of a widening circle of business activities. And the law responds, sometimes through the ingenuity of the lawyers in adapting and combining the old legal devices, but occasionally also, with the aid of legislation, by the creation of new devices.

(2) FAIR MARKET CONDITIONS. The *market conditions* that the business world demands of the law have undergone a complete transformation since the days of Lord Coke. The picture of the *buyer* before the eyes of the law has ceased to be that of a very cautious, designing sort of person well able to take care of himself. On the contrary, every effort is made by means of the licensing of dealers and manufacturers, by means of the registration and inspection of products, by blue sky laws, by imposing penalties for misbranding, adulteration, and fraudulent advertising, by safeguarding competition and condemning unfair methods of doing business, to make the market safe for purchasers. Let us contrast the conditions in older systems of law that looked rather to the protection of the *seller.* In Roman law, for example, there developed the idea that a seller could repudiate an extremely bad bargain though there was no corresponding provision for a disillusioned buyer.[6] Such law was, of course, appropriate in a comparatively non-commercial society where the selling of goods outside of the ordinary course of business was a sign of distress on the part of the more or less unwilling and unfortunate owner. The buyer was looked upon as a wealthy person taking advantage of the distress of his neighbor, much as if he were lending him money for usury. This picture has changed completely. The buyer represents today the average member of society, while the seller is looked upon as the party better able to take care of himself. The development of the modern point of view in recent times is illustrated in the development of the law of implied warranties of quality[7] or of title[8] and the disappearance to that extent of *caveat emptor.*

The particular details as to which the public puts a buyer under its protection are, of course, constantly changing. Today the danger is from misbranding, false advertising, inadequately described securities. Yesterday the emphasis was rather on the danger of lack of skill in professional men, mechanics, and others who have been subjected to licensing laws. Tomorrow the dangers may be different and the emphasis may be shifted to prevent the abuse of high-powered salesmanship accompanied by intriguing installment devices.

(3) SECURITY OF ACQUISITIONS. The idea of security of acquisitions is, of course, one of the most important and best developed in the law. It not only fills the pages discussing real and personal property, but it is the motive behind much of the criminal law, the tort law, the family law and the constitutional law of this country. In fact, the law is frequently taunted with the charge of setting "property" rights above "human" rights. What is really meant is the setting out more clearly of rights in tangible things than rights that seem to have less and less to do with tangible things. Medieval law was so limited in its property concepts that it could not conceive of transferring such in-corporeal rights as the power of appointment to a church office without some such act as handing over the knob of the church door. But as time has gone on, the law has progressively overcome this dread of intangibles and within the field of business has accorded the treatment formerly reserved for rights in physical things to such new types of "property" as goodwill, patents, trade-marks, trade name, copyright, going-concern value, business reputation, interest in existing contracts, expectancies of various kinds and freedom of action. In addition, it has curtailed the principle of property protection as formerly understood by developing another type of interest, namely, the interest in security of transactions. We shall find many instances in which a *bona fide* purchaser acting in the ordinary course of business has his new acquisition protected in preference to the older owner who, though equally innocent of wrong, has failed to take the necessary steps to warn strangers of the nature of his claim. The varieties of business interests calling for protections are infinite.

(4) EFFECTIVE ENFORCEMENT AND PEACE. What has been said here at some length regarding the modern development of the old concept of security of acquisitions applies, *mutatis mutandis,* to the still older postulate of *peace.* This concept has grown to include a great deal more than the official ending of disputes. The machinery of enforcement includes not only litigation but also arbitration and conciliation, various preventive devices for anticipating both, and an increasing quantity of contractual control over adjective law.[9] The kind and degree of peace that are essential for commercial prosperity at this age are, of course, vastly different from that which enabled savage tribes to establish trading posts to which they would alternately bring their goods and from which each

would recede a safe distance while the other was present. But it also differs in smaller measure from the condition of commercial peace that was considered adequate in the pioneer days of this country, when horse traders did not feel thoroughly equipped for their business transactions unless adequately armed. Nor is the industrial peace of the early days of unionism in this country, when strikes were notoriously likely to be accompanied by violence, a fair picture of the business needs of these days of keener competition, greater publicity, and more intense interest in industrial disputes on the part of the legislature.

Perhaps the nature of the industrial and commercial peace of today may best be illustrated by reference to the exaltation of "due course" to the level of a major principle by which transactions are to be judged. It is not only, as already indicated, that that which is done in due course is made to stand. The converse is equally true. It is on this basis that a deviation from the simple, ordinary course of business comes to be condemned by the law. Thus, there was until recently nothing unlawful about a preferential payment of a debt by an insolvent. Business condemned the practice and now the National Bankruptcy Act incorporates the business man's point of view. There was nothing illegal until recently in a tradesman's act of selling goods outside of the ordinary course of business. The business conception of due course has, however, in spite of considerable resistance, been written into the bulk sales laws of many jurisdictions. Many acts that are coming to be recognized as "unfair methods of competition" are, in the final analysis, condemned because they are contrary to the ordinary established course of doing things—breaches of the peace as the modern business world formulates its requirements of commercial peace.

[1] *Cf.* Train, "The Prisoner at the Bar," 1907, Chapter 1.

[2] *Cf.* Pound, "The Limits of Effective Legal Action," 22 *Pa. Bar Ass'n Rep.* 221 (1916), A. B. A. J. 55 (1916); 27 *Internat. J. of Ethics* 150 (1916).

[3] Compare the chapter entitled "The End of Law" in Pound, "Outline of the Course in Jurisprudence," 3d ed., 1920, 40-55, giving full references, and c. 2, in Pound, "An Introduction to the Philosophy of *Law,"* 1922, reproducing the articles in 27 *Harv. L. Rev.* 195, 605 (1914), and 30 *ibid.* 201 (1917).

[4] 8 *Corn. L. Q.* 199, 210 (1923).

[5] 27 *Yale L. J.* 34 (1917).

[6] Girard, "Manuel Elementaire de Droit Romain," 6th ed., 1918, 552.

[7] Williston, "Contracts," 2d ed., 1936, IV, Sec. 983.

[8] *Ibid.,* Sec. 976.

[9] Isaacs, "Contractual Control Over Adjective Law," *W. Va. L. Q.* 1 (1922); same, "Recent Developments," 83 *U. of Pa. Law* Rev. 177 (1934).

Chapter II

The Law of the Market

I. DISHONEST MARKETING

1. Misrepresentations of Goods

When the President of the United States made the now famous pronouncement, "This proposal adds to the ancient doctrine of *caveat emptor,* the further doctrine, 'let the seller also beware,'"[1] was he setting a new force in motion or was he simply taking his place in a long line of legal reformers bent on making the market safe for the buyer? To answer this question it is necessary only to enumerate the principles to which the overreached buyer could resort before the New Deal was written into the statute books. In the first place, if the misrepresentation from which he suffered amounted to fraud- that is, if it was a misrepresentation of past or present fact, made knowingly or with reckless disregard of truth or falsity, under conditions where it tended to mislead and did mislead the victim to his hurt— the law pounced down heavily upon the seller. He could in all probability be prosecuted for one of the crimes of which fraud is an ingredient: false labeling, false advertising, obtaining goods under false pretense, larceny by trick, and so on. Again, he could be sued for damages by the defrauded party and probably forced to pay "smart money." The contract itself could be set aside and, under appropriate decrees of a court of equity, the parties restored to *status quo.* Or the contract could be ignored as a nullity if that practice best served the needs of the victim. Finally, the defrauder might find himself face to face with the summary procedure of some arm of preventive justice: a licensing commission ready to suspend his trading license, an aroused inspector ready to impound or destroy or brand his goods, a publicity bureau ready to announce his iniquity to the world.

2. Breach of Warranty

Even if the misrepresentation did not technically amount to fraud, the lying vendor would not get off with impunity. Though he may have innocently believed his own lie, he may have been guilty of a breach of an *express warranty.* An "express warranty" is defined in the Uniform Sales Act as "any affirmation of fact or any promise by the seller relating to the goods... if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods."[2] There are also implied warranties where nothing is said. The consequences of a breach of warranty, which is more easily proved in practice than is fraud, are, excepting for the penalties and quasi-penalties, the same as those of fraud. The disappointed buyer may keep the goods and sue for damages, or call the bargain *off,* or take other steps to restore the *status* quo. Obviously the law did not allow so much lying as the old by-word suggested.

3. Reforms in Laws to Prevent Dishonesty

Nevertheless, there were and are possibilities of unpunished dishonesty in the market place, some of which can be more effectively coped with as time goes on. The reforms of the last gen-

eration may be cited to indicate' the current tendencies. The most outstanding of these are: First, a readier assumption by courts and juries that lies tend to mislead and do mislead. Second, a host of statutes on phases of fraud covering such subjects as false labeling and advertising; the plain marking of substitutes, imitations, artificial coloring or flavoring, the country of origin of goods; the publishing of the essential facts pertaining to securities offered for sale; presumptions and burdens of proof in certain cases, and a tightening of procedure and a stiffening of penalties in others. Third, the intensive development of preventive measures against fraud, including licensing of persons, inspection of products, publicity, and the extra-judicial administrative machinery that goes with preventive justice.

To illustrate all of these tendencies we need only consider the recent history of *patent medicine advertising.* One need not be very old to remember when the patent medicine man made unlimited claims for his concoctions of alcohol, herbs and flavoring matter. No one was expected to take him literally, whether he barked about his elixir from the tail of his circus wagon or printed startling pictures labeled "Before Taking" and "After Taking" in the advertising columns of the rural magazine. Hence, two essential elements of fraud were missing: the tendency to mislead and the actual misleading. The exaggerations were glossed over as dealers' puffing. Today the vendor of patent medicines has to contend with a Federal Pure Foods and Drugs Act, quite likely to be strengthened, a Federal Trade Commission, fraud orders of the Post Office Department, the scrutiny of the radio licensing authorities, the state advertising laws, and direct responsibility, criminal and civil, for what he says or otherwise represents to be true under fraud and warranty laws that take him at his word. In addition, there are numerous laws altogether *preventing the sale of harmful drugs,* or at least putting dangerous ones subject to the requirement of a physician's prescription. There are, furthermore, standards of purity established by authority, a comprehensive United States Pharmacopoeia.

It would be a mistake, however, to attribute all this change to the internal workings of the law. The impetus has come from many sources, including educational campaigns conducted by medical associations, magazine publishers, Better Business Bureaus, government departments. The important point for our consideration is that the law of the market has been able to respond to the demand for a higher standard of honesty and has potentialities within it for still higher standards, as society becomes ready for them. The "fraud" formula must remain elastic.

What has been said of the prevention of misrepresentation applies with little change to the prevention of other undesirable conditions and practices in the market: monopolistic conditions, "unfair competition," incompetence, lack of responsibility, and in general one-sidedness or a loading of factors against the buyer. Still, each of these tasks of the law has its own interesting peculiarities as well as historic accidents meriting separate attention.

II. MONOPOLISTIC PRACTICES.

1. Development of Anti-monopolistic Laws

The laws against monopoly are very old. In the Middle Ages there were laws against "forestalling, engrossing and regrating," not to mention several subvarieties, the gist of which was interference with the opportunities of the citizens of a town to get their needs provided for in their regular market. The injury resulting to one citizen from another's simple trick of buying up the day's supply of foodstuffs on its way to town was a palpable one, to be combated regardless of any theory of the function of competition in society.[3] Actually, medieval society did not rely on competition to set the right price on all its goods and services. It did not hesitate to name a just price and a fair wage by decree. When we turn, however, to the late nineteenth century revival of interest in anti-monopoly laws, we find a society permeated with the notion that competition is in itself good, the very life of trade, and on the whole perhaps adequate for its effective regulation provided that artificial interference with its workings is not tolerated. It is no part of the function of the law to propound or to correct economic theories, but it must serve as the vehicle through which a society tries to put its theory into practice.

Since the Sherman Anti-Trust Act was passed in 1890 there has been an increasing tendency to supplement its workings by reliance on regulation, including price fixing, notably but not exclusively in the fields of railroad and public utility law. In the National Industrial Recovery Act of 1933, held unconstitutional on other grounds,[4] there was even a suspension of the workings of the anti-trust laws in favor of detailed regulation calculated to assure the public of the fair treatment that was the, primary objective of the anti-trust laws. With a changing economic philosophy, or at least a changing degree of faith in the efficacy of competition, we may expect more experimental legislation in the direction of regulation. The

whole agitation for a planned economy is based on this loss of faith in the efficacy of competition as a planning force, a faith which in the nineteenth century was rationalized by paralleling it with the theory of evolution.

2. Innovations in Anti-trust Laws

Remembering, then, that the Sherman Act speaks in terms of 1890, let us examine its innovations.

(1) CONTRACTS IN RESTRAINT OF TRADE. Contracts in restraint of trade were void according to common law. Whether combinations in restraint of trade effected otherwise than by contract—for example, by means of trusteeship—were void was debatable, but we may assume that even without the aid of statute the law would have reached them. Just how serious the restraint had to be in order to be obnoxious to the law was debated anew with each case that reached the courts. Here, too, we may assume a rule of reason would have developed without the aid of a statute. But to declare an arrangement void is to use only one of the "sanctions" of the law. It does not subject the perpetrators to a penalty, it does not lay them open to an action for damages at the instance of those whom they have hurt, it does not provide for undoing what they have done. These sanctions were provided by the Sherman Act.

(2) PREVENTION OF MONOPOLISTIC PRACTICES. It was not until 1914 that the modern approach of *prevention* was applied in the Federal anti-trust laws. In that year not only did the Clayton Act attempt to nip evil in the bud by prohibiting practices found likely to contribute to the upbuilding of monopolies, but the Federal Trade Commission Act provided for the watchfulness of a commission with wide discretion to preserve the proper workings of the competitive system.

(3) RULE OF REASON IN INTERPRETATION OF LAWS. The interpretation of the Federal antitrust act and of the state acts modeled after it has led to a series of important Supreme Court decisions that go beyond the mere verbal logic of ordinary statutory interpretation. They have worked out the principle that it is the substance and not the form that counts in determining whether a particular combination is illegal. Furthermore, they have established the *rule of reason,* which, stripped of its verbiage, merely means that by no means every contract which restrains trade or limits competition is obnoxious (for in a measure every contract does so), and that the only standard which the court can read into the statute without arbitrariness is the general standard of reasonableness.

(4) SUPPORT BY EVIDENCE. In reviewing the findings of the Federal Trade Commission the court has generally felt unable to question its finding of fact because of the peculiar wording of the statute which provides that such findings shall stand *if supported by evidence.* Had it said "the evidence," the court might have been called upon to weigh the evidence itself, but, as it is, the only question before the court is whether there was *any* evidence to support the finding. It would be a sorry case indeed if there were none at all.

The significance of this limitation on the courts is frequently overlooked by law writers as well as laymen in interpreting decisions under the Federal Trade Commission Act. Thus, in the famous Beech-Nut case,[5] which involved the systematic attempt of a manufacturer to thwart price cutters (the very aim that is now upheld by the Miller-Tydings Act[6] and similar legislation in most of our states[7]), the court had before it the finding of the Commission that the manufacturer was guilty of participating in some kind of a conspiracy in restraint of trade, and there was little for the court to do with that question of fact officially settled.

(5) UNFAIR METHOD OF COMPETITION. Partly as a result of this control given to the Commission, but in part at least with the encouragement of the court, the term "unfair method of competition," the subject of the prohibition of the important fifth section of the Act, has come to be looked upon rather paradoxically as the equivalent of undue interference with competition. In other words, a clause which, by necessary implication, recognizes the possibility that there may be bad competition as well as good, becomes submerged in the philosophy which upholds competition for its own sake. In the Beech-Nut case, already alluded to, Mr. Justice Holmes is a voice crying in the wilderness when he says that the practices complained of are neither unfair nor competitive. Thus, the phrase becomes a blanket authority for enumerating objectionable practices—objectionable principally because they tend to foster monopoly and because they involve fraud upon the public—and put them under an administrative ban.

It was partly owing to this confusion of terms and the trade practice conferences that grew out of it, that the unfortunate National Industrial Recovery Act proposed Codes of Fair Competition and that the term was promptly understood by administrators and business men as meaning codes prescribing and

proscribing practices with little or no thought of competition. Even the Supreme Court in the Schechter case[8] expressed doubt, in the face of such practical interpretation, whether the meaning of the phrase had any logical connection with the meanings of the words that composed it. Finally, to remove all doubt, the language has been amended in the Federal Trade Commission Act so as to include "any unfair method of competition or unfair or deceptive act or practice in commerce."[9] At the same time, the scope of the act has been broadened so as to include a good deal of false advertising regardless of whether injury to a competitor or even the existence of a competitor can be shown. The new version of the Act, therefore, transcends the limits of an anti-monopoly law.

3. Anti-competitive Legislation

Whether because of a change of economic philosophy or because of the purely empirical discovery of harms flowing from unrestrained competition, there have been engrafted on the anti-monopolistic acts certain anti-competitive clauses generally disguised for political reasons as *anti-trust laws.* Such disguise is possible because the competitors whose activities are curtailed are presumably large competitors on the way to becoming monopolies. Most noteworthy of these are the Robinson-Patman amendment[10] to the Clayton Act, and the fair practice acts culminating in the Miller-Tydings law.[11] The former tends to prohibit the large retailer from utilizing some of his *bargaining power in buying;* the latter, to prohibit him from using his advantages in *underselling* his small competitor in certain protected classes of goods. Both types are at this stage limited experiments calling for much administrative implementing, judicial interpretation, the watching of loopholes and by-passes open to aggressive competitors, and legislative amendment. The new state and Federal laws requiring employers to submit to *collective bargaining with employees*[12] are also, so far as they go, anti-competitive in their intent. Whatever social benefits may be sought by anti-competitive legislation—and there are many- no law can save us from paying for these benefits through higher prices and a sacrifice of the advantages claimed for intensive competition when trust-busting was the order of the day.

4. Extension of "Unfair Competition" to Special Cases

"Unfair competition," in spite of the incidental and cavalier treatment of it as part of the anti-trust laws of the country, has a significance outside of those laws. It is linked up with trade-marks and trade names. In fact, we may conveniently think of the term as embracing infringements of trade-marks, trade names, copyrights, patents, and other exclusive rights; palming off goods as those of an-other; and any other conduct that tends without legal justification to hurt the business of a competitor. An official enumeration would have the negative value of suggesting heretofore unimagined tricks, allowing to each, as to the common-law dog, at least one bite. The basis on which the aggrieved competitor or customer or the government or a commission may institute a complaint or seek redress will differ widely in the above cases which do not belong in any single legal category, however much they resemble each other in effect, and however much the courts and the lawmakers may desire to exclude that effect from the market place. To treat of all of them might get us into such diverse pockets of the law, as libel, in the case where one undertaker slyly sent his competitor's cards to the families of sick persons, and corporation law, where deception is carried out with the aid of a wholly owned subsidiary which parades as an independent corporation.

(1) GENERAL ASPECTS OF "UNFAIR COMPETITION" RECOGNIZED BY LAW. For our purposes, it will be better at this point to confine ourselves to those general aspects of unfair competition which the law recognizes, regardless of the means used, and add a few comments on the peculiarities of some of the more important situations. In general, the law envisages unfair competition through the eye of the customer or the public, except in those cases where an exclusive right has crystallized into a kind of property for the competitor, as in true trade-mark, copyright, or patent. Unless the public is deceived or a specially protected right is involved, it is quite possible to annoy or even hurt a competitor without violating any law. Thus, my competitor may copy with impunity my original plan for selling goods on credit, or my clever design for a garment, or my well-planned window display, or my combination offer, so long as he does not thereby mislead anyone into thinking that his customer is dealing with me. Some of these acts in competition appear quite unfair to the business man. He has coined the phrase "design piracy." He legislated against it in the NRA days and he has cooperated with trade associations and the Fashion Originators' Guild of America to put it down.[13] We may look forward to more effective protection of ideas in the future, but the law of unfair competition as such still bears the marks of its original aim- the

protection of the interest of the public.

(2) TRADE SYMBOLS. (*a*) *Selling or Licensing of Trade Symbols to Others.* Another consequence of looking at this branch of law through the eyes of the public is manifest in the rule that a trade-mark or trade name cannot be sold or licensed out in gross. That is to say, even if I have created, popularized and consequently own such a name as Ivory applied to soap or Red Cross to mattresses, I cannot authorize you to use the name on similar products of yours with which I have no connection. Familiarity with the practice of licensing by patentees, or the authorization to reprint given by copyright owners, has frequently misled business men into the trap of licensing others to use their trade symbols. But a trade symbol is nothing but a shorthand way of telling the public of your connection with the goods, and if you are not connected with them, your licensing another to use the symbol is merely authorizing him to tell a lie, and this the law will not countenance.

Just what connection must one have with the goods to make an arrangement for the use of his trade symbol on them proper? The answer depends on another question, a shifting question of business fact: "What does the trade symbol say to the ordinary member of the public?" A generation ago the judges were quite ready with an approximate answer to this business question. They said that a trade symbol indicated origin or ownership of goods. Today a more careful answer is called for. There are, for example, legitimate dealers' marks or even brokers' marks, as well as manufacturers', and they may speak of care in selection, willingness to warrant, uniformity of grade, or the possession of some quality suggested by the name or by an acquired meaning of the name under the force of usage and advertising. Once we determine precisely what the symbol says, we are able to answer our original question: whether the proper facts are there to justify a license or a transfer of the right to use a name.

(*b*) *Preservation of Trade Names.* The preservation of trade names as one's own property presents a serious and at times an insuperable problem. Apparently one may lose his exclusive right to such invented words as escalator, listerine, vaseline, tabloid, mulsified, aspirin, and kodak, not merely by abandonment but through no fault of his own, if the public actually appropriates the word and makes it mean a class of articles regardless of who makes them.[14]

(*c*) *Registration of Trade Names.* Registration of trade names under state and Federal statutes does not, in general, bestow rights. It merely makes clear the proof of the facts on which rights are based, and it gives notice to the world of these facts from the date of registration. Such notice may, however, itself have the effect of a fact when we ask what territory is preempted by a particular use of a name. In the absence of registration, it is possible to have the same name developed simultaneously in several parts of the country or even in several cities in a single state. As a business expands territorially, it becomes necessary at times to draw boundary lines around the territory belonging to each user.[15] But after a state registration, it is difficult to hold a new user in another part of the state, or after a national registration, a new user elsewhere in the nation, entirely without blame.

(*d*) *Boundaries of Articles Covered by Trade Symbols.* An even more difficult problem concerns the boundaries around articles covered by a trade symbol. Again, the public's view is the test. Is the public likely to be misled by the use of the word "Philco," well known in the radio business, on safety razors?[16] We must keep in mind that this is a business question and that the answer is likely to change as manufacturing and marketing habits change. Courts have, it is true, attempted to list classes of articles such as foods, clothing, and machinery, to help them in solving this problem, but such classes are at best approximate and subject to change. And after they are made, the specific questions are as fact-ridden as ever: are chewing gum and tobacco in the same sub-class; are silk stockings and silk underwear; are shoes and hats?

(*e*) *Similarity of Trade Symbols.* Looking at trade symbols through the public eye forces us to regard the offense of infringement as complete when there is similarity though not identity. If two boxes of cigars look enough alike to be mistaken for each other when not seen together, it is idle to bring experts to testify that the types used in the printed matter are of different fonts, or the colors are distributed differently or the names spelled differently. The question is not whether an expert, setting the two boxes down together in good light with a ruler and magnifying glass, can distinguish the counterfeit from the genuine; it is, rather, whether the transient cigar buyer in the smoky atmosphere of the dimly lighted shop is likely to overlook the difference.

(*f*) *Absence of a Technical Trade-mark.* Furthermore, the public can be deceived in the absence of a true technical trade-

mark or trade name, and the law should protect it. It has long been laid down that one cannot make a trade name out of a descriptive or geographic term, and there are other limitations sometimes expressed by saying, “You cannot appropriate any part of the dictionary and exclude others from using it.” Nor can you appropriate a color or number or ordinary style of package as your own. And yet the law will not permit another to steal your good-will by deliberately pretending to the public that his product is yours just because you have neglected to perfect a technical trademark or trade name for yourself. Of course, you have a more difficult case if you must prove unfair competition without infringement of a trade symbol. You will have to show longer usage in order to convince the court that color of wrapping or combination of ordinary descriptive and geographic words has come to mark a product as yours. But it can be done, and the possibility is the basis of a harvest of legal cases every year.

(3) NAMES OF PATENTED ARTICLES. The names of patented articles are in a different legal class. An article worthy of a patent must be something new, and it is entitled to a new name. The patentee gives it that name. When the patent expires, the whole world has the right to make the article and to call it by its name. Nice questions may arise as to whether the name of the patented article includes the patentee’s name. Can anyone make a Singer Sewing Machine and sell it under that name? Or a Stillson wrench? Obviously it may be wise, during the life of a patent, to popularize not only the official name but a trade name or mark, as well, that can preserve for you such goodwill as you have earned, for the time when the patent itself expires.

(*a*) *Expiration of Patent.* A curious instance of the combination of the principles of the last two paragraphs is found in the Shredded Wheat case.[17] At the expiration of the patent in 1912, presumably anyone could have made the product and called it Shredded Wheat. But apparently no one did, and in the course of fifteen years the question arose whether beginning at scratch on the date of the expiration of the patent, the manufacturers had succeeded in putting into the words a “secondary” meaning. The Supreme Court recognized the possibility, but held that it had not taken place.

(*b*) *Similarity of Manufacturers’ Names.* The most difficult case of all arises where one wishes to use his own name for a product that has previously been introduced by an-other of the same name. Obviously there are three conflicting interests to be adjusted. The prevailing interest is again that seen through the eye of the public. One owns his name, but he has no more right to use it to injure the public than he has to use his crowbar for such a purpose. Injunctions are frequently granted to prevent such misuse of one’s own name. They should, however, be no broader than necessary to effectuate this proper end. Thus, it may be sufficient to demand a slight difference in the set-up of the name, or a notice differentiating the producer of goods or the owner of a store from an established business bearing the same name; or it may be necessary to demand a complete cessation of the use of the name. The courts will sometimes feel their way. In the case where a grocer named W. H. Baker lent his name to a chocolate bar dressed up to imitate the bar long sold by Walter Baker & Company, the court found it necessary, because of his persistence in what seemed a deliberate attempt to benefit by the good-will of the old established house, to broaden the injunction until it became unconditional.[18] The first comer in such matters obviously has some advantages over later comers, because his interest happens to coincide with that of the public.

III. LICENSING TO PREVENT INCOMPETENCE OR IRRESPONSIBILITY

To rid the market of incompetence, inefficiency, and irresponsibility, the chief resort of modem law is to licensing. We are so accustomed to the requirement of licenses for all kinds of activity from owning a dog to driving an automobile, and particularly for the privilege of engaging in business or following professions, that it is hard to realize how recent a development we are dealing with here. As late as 1883 Mr. Justice Field of the Supreme Court of the United States declared that it was the distinctive right of every American citizen to carry on the ordinary businesses of life without let or hindrance.[19] Even while he was speaking, a development was under way to require the licensing of physicians and lawyers, pharmacists and dentists. Soon the humbler callings of plumber and sewer tapper were included. By the end of the century, hundreds of cases had been decided in the highest courts of the several states and in the Supreme Court of the United States, upholding attempts to subject practically every known industry to the licensing power of the state or its agencies. Many of these licenses are perfunctory. They are really petty privilege taxes. Others are based on careful examinations, character studies and records. The potential control of the market by the gov-

ernment, which is inherent in the license system, still lies ahead of us. In the National Industrial Recovery Act, national licensing for all businesses was prescribed as an extreme measure.

The licensing power, however, does not in theory go so far as to authorize a state or national planned economy. That issue was fought out in the case of New State Ice Company *v.* Liebmann.[20] The State of Oklahoma had provided that no license be given to any ice company unless it had first procured from designated authorities a certificate of public convenience and necessity. Such certificates have in the past been required as conditions precedent to establishing new public utility enterprises, banks and a few other types of business charged with a public interest. The Supreme Court held (Mr. Justice Brandeis dissenting) that in the case of such an ordinary business as the manufacture of ice it was not for the state to say how many competing units were desirable. It is true, of course, that licensing is sometimes perverted into a' means of keeping down competition in an industry or profession. Those who are "in," easily persuade themselves that standards ought to be raised for newcomers. Nevertheless, if this is the avowed motive of licensing, it is unconstitutional. If an officially planned market becomes a desideratum, we must either amend the Constitution or resort to such subterfuges as purchasing compliance, after the manner of the Agricultural Adjustment Act,[21] which was held unconstitutional on other grounds, and of the Bituminous Coal Act of 1937.[22]

[1] From President Roosevelt's message to Congress on Mar. 29, 1933, recommending legislation for Federal supervision of traffic in investment securities in interstate commerce.

[2] Sec. 12 of the Uniform Sales Act, p. 297.

[3] E. A. Adler, "Monopolizing at Common Law and under Section Two of the Sherman Act," 31 *Harvard Law Review* 246.

[4] The provisions of the "Live Poultry Code," approved under the Act, were held invalid because adopted pursuant to an unconstitutional delegation of legislative power to the President; the Act was also held unconstitutional as an attempt to regulate intrastate commerce. A. L. A. Schechter Poultry Corp. *v.* United States, 295 US. 495 (1935).

[5] Federal Trade Commission *v.* Beech-Nut Packing Co., 257 U.S. 441 (1922).

[6] P. L No. 314, 75th Congress, 1st Sess. (Aug. 1937) Title VIII, which amends Sec. 1 of the antitrust laws, legalizes interstate price contracts and makes it possible for manufacturers in the 43 states where intrastate price contracts are valid to set up an interstate system of price fixing.

[7] In all states except Alabama, Delaware, Missouri, Texas, and Vermont.

[8] See *supra,* note 4.

[9] Amendment of March 21, 1938, 52 Stat. 111; U. S. Code, Title 15, Sec. 45.

[10] Amendment of June 19, 1936, 49 Stat. 1526, 1528; 15 U.S.C., Secs. 13, 13a.

[11] See *supra*, notes 6 and 7.

[12] Federal National Labor Relations Act of 1935 (49 Stat. 449, 29 U.S.C. Sec. 151 *et seq.)* was followed in 1937 by the passage of similar legislation in Massachusetts, New York, Pennsylvania, Utah, and Wisconsin. On April 12, 1937, the constitutionality of the Federal act was upheld, in five sweeping decisions, not only as it applied to interstate commerce, but also as it applied to manufacturing or production where interstate commerce is merely affected.

[13] This co-operation was held not to show monopoly in the case of Wm. Filene's Sons Co. *v.* Fashion Originators' Guild of America, 90 F. 2d 556 (1937).

[14] Another example involved the right to sole use of the word "cellophane." DuPont Cellophane Co. *v.* Waxed Products Co., 85 F. 2d 75 (1936).

[15] Courts have said that registration under the federal enactment projects the territoriality of the trade-mark to the boundaries of the United States. However, in a recent Supreme Court decision—U. S. Printing & Lithograph Co. *v.* Griggs Cooper & Co., U. 5. *156* (1929)—it was stated that federal registration of a trade-mark did not extend its territoriality to the extremities of federal jurisdiction but that such territoriality was still to be determined by common law principles. Cf. General Bronze Corporation *v.* Schmelling, 208 Wis. 565 (1932).

[16] In Philadelphia Storage Battery Co. *v.* Mindlin, 296 N.Y.S. 176 (1937), the manufacturer of Philco radio sets was given injunctive relief against the use of its trade-mark on this non-competing product.

[17] Kellogg Co., *v.* National Biscuit Co., Nov. 14, 1938.

[18] Walter Baker & Co., Ltd., *v.* Baker, 77 Fed. 181 (1896); Walter Baker & Co., Ltd., *v.* Sanders, 80 Fed. 889 (1897); Walter Baker & Co., Ltd., *v.* Baker, 89 Fed. 673 (1898); Walter Baker & Co., Ltd., *v.* Baker, 87 Fed. 209 (1898); Baker *v.* Slack. 130 Fed. 514 (1904). See also L.B.P., p. 70.

[19] Butchers' Union Company *v.* Crescent City Company, 111 US. 746, L.B.P. p. 40.

[20] *285* U.S. 262 (1932), L.B.P., p. 42.

[21] The Agricultural Adjustment Act was held invalid because invading reserved states' rights, in United States *v.* Butler *et al, 297* US. 1 (1936).

[22] In Carter *v.* Carter Coal Co. *et al.,* 298 U.S. 238 (1936), the Bituminous Coal Conservation Act of 1935 was held unconstitutional on grounds avoided in the Bituminous Coal Act of 1937 (P.L. No. 48, 75th Congress, 1st Sess.), which provides for price fixing and a code of fair competition in Interstate Commerce.

Chapter III

Market Facilities

I. THE USE OF CONTRACTS

For the successful conduct of business it is not enough to police the market-place and rid it of the dangers discussed in the last chapter. It is necessary also to provide reasonable facilities for its work, and among these not the least important are *facilitating laws.* The greatest part of this service is rendered by the *law of Contracts,* legally recognized and enforceable agreements. Contracts are involved in every sale of goods or lands, or other valuables such as securities or goodwill, in every lease, in every extension of credit, in every act of employment, in arranging for such services as the carriage of goods and passengers, in using the communication facilities furnished by the mails or the telephone and telegraph companies—in fact, wherever money is used, and in some transactions even where it is not used. A study of contracts would thus overlap, besides market facilities, a great many other parts of our study, such as Credit and Organization in business, and some domestic and property arrangements scattered through other volumes of this work. A general treatment of the principles of contract law is accordingly presented elsewhere (Volume VI). At this stage we are concerned, rather, with some specific contracts in common use in business than with principles common to all contracts.

1. Development of the Law of Contracts

It appears, then, that the warp and woof of modem business is contractual. It was not always so. We can picture places in the old world where the external appearances of life have not changed materially since the late Middle Ages. The man we now see working in the field is completely enmeshed in contracts. He is a tenant by virtue of a contract, or is employed by contract. In turn, he employs others in the same way. He sells his produce by contracts and acquires what he needs in like manner. Yet his ancestor, who did the same kind of work and lived a similar life, was scarcely touched by contract law. He was born into a status under the feudal system, and by reason of that status had certain rights and duties in his relations to those above him and those associated with him or below him in the social-economic-political structure of his time to which we have given the name "feudalism." If we ask why and how this great change has come about, we shall find the answer in a whole literature, the nucleus of which will be found in a famous sentence penned by Sir Henry Maine in 1861: "The movement of the progressive societies has hitherto been a movement *from Status to Contract*."[1] Nineteenth century writers attributed a good deal of significance to this formula. They saw freedom in the contract principle which said that no man (in the absence of fault) should be held to owe duties to his fellow men unless he had voluntarily undertaken them. The *status* theory of duties suggested serfdom or slavery, which had been abolished in Great Britain and its possessions earlier in the century and was soon to disappear in America and Russia and throughout the civilized world.

2. Freedom of Contract

In this country the doctrine grew to be a dogma of constitutional law, though it is not written into the Constitution of the United States: the dogma of freedom of contract. Under it, at the end of the nineteenth century and in the first years of the twentieth century, a good many legislative efforts to dictate the terms of contracts were thwarted. Not only were statutes with reference to the labor contract thrown out unless clearly within the police power of the state, but price regulation and the exclusion of unfair terms in types of contracts that had come to be one-sided were deemed impossible. The only exception of importance was that public utilities (including carriers) were subject to such control as to make them duty bound not only to contract with all members of the public without discrimination, but to treat them all fairly, and the authorities were beginning to interpret this to mean that the rates and other terms could be fixed by legislative or properly authorized administrative action.

3. In Absence of Agreement to Contrary

A practical compromise was possible about the turn of the century, when the theory of freedom of contract was at its height. However chary a legislature had to be in using the phrase "any contract to the contrary notwithstanding," it could readily say "in the absence of any agreement or contract to the contrary," and lay down the whole or the essential part of a standardized contract to fit any given situation. It was in this way that the State of New York, after an important study of insurance companies, wrote into its statute books a series of standard insurance policies which were to cover all cases in this absence of written agreements to the contrary. Only a few provisions were put beyond the control of the parties, and these were presumably justified under the police power- that somewhat vague power of the states to protect public health, safety and morals. Many other states followed the example of New York. Eventually, standardized insurance policies took the place of the widely varying, somewhat treacherous, one-sided documents that had become a scandal under the regime of "freedom of contract."

4. Advantages of Standardized Contracts

As other contracts have been standardized and still more are being standardized in the same way—notably, bills of lading, warehouse receipts, sales of goods, sales of securities, real estate transactions, and banking—it will be worth our while to consider the workings of the laws to standardize insurance agreements. In the first place, the elimination of specialized phrasing has greatly decreased litigation over the meaning of terms. All of the standard phrases have been judicially defined. The provisions are reasonably two-sided. It is possible to buy insurance quickly and, at least in ordinary cases, without expensive expert advice including legal advice. Furthermore, it is possible to cover parts of the same hazard in different companies without sowing a wind and reaping a whirlwind of confusion. It is possible to master, once for all, the essentials of each type of contract, as it was impossible to carry in mind a clear picture of what each individualized contract covered or failed to cover in the past. The companies benefit almost as much as their customers. Whatever competition they maintain, they are not forced to weigh in the balance non-comparable clauses. So a great deal of sales resistance has disappeared. Peculiar insurance contracts are still possible to meet peculiar situations, but the advantages of the standardized policies are such that they have come to prevail almost as generally as they would had the legislature been empowered to say "any contract to the contrary notwithstanding," and had it been so minded.

5. Disadvantages of Standardized Contracts

The advantages of standardizing contracts are not unlike those of standardizing machinery, and the government may play a similar part in both processes. There are, on the other hand, the same kinds of disadvantages. The standard gauge of machine or cut of clothing that serves the average case best may not serve any actual case so well as the made-to-measure article would. So, we shall see, the standardized contract of sale fits many modern situations rather poorly. Furthermore, standardization makes change to meet new conditions rather difficult. The standard gauge of railroad tracks is said to be based, in the last analysis, on the strength of a horse. No matter how powerful engines can be made in the foreseeable future, it is difficult to see a change in this gauge as long as trains run on tracks. In like manner, a standardized contract for any given purpose, whether it be insurance, banking, or the sale of clothing, is likely to resist adjustment to the changing needs of a dynamic society. We shall find ample illustrations in the most important standard contract of the market, that established in the Uniform Sales Act, or in the common law of Sales of the last century which it faithfully codifies.

II. UNIFORM SALES LAW

1. Standardized Contract of the Uniform Sales Act

A sale may be defined, for our purposes, as the transfer of ownership of goods for a consideration called a "price." So defined-other definitions are also possible—it is not a contract; it is merely a step in the performance of a contract of sale. The contract may call for an immediate performance or a future performance. It is also possible that, for one reason or another, such as delay in completing the goods, the performance takes place after the time agreed upon. We are for the moment concerned with the contract rather than with the nature of ownership and its legal consequences. There are, or may be, other details in the performance of the seller than a recognition of the thing as yours and no longer his, from a given moment. He must at least surrender possession, and probably also the "title" or indicia of ownership, and he may be bound by the contract to package, condition, transport, set up, or service the thing sold; he may be bound to defend your claim to it against all comers or only certain comers; he may be bound to make good certain or all defects and pay damages for losses resulting from defects, or take the goods back or stand behind them in other ways. He may have bound himself to give up possession without being paid and wait a stated time for his money. He may have agreed to insure the goods, to make proper arrangements on your behalf with a carrier for their transportation. He may have bound himself to keep spare parts on hand and to supply them to you at reasonable rates; likewise, to carry in stock improvements and gadgets that may be added, from time to time, to the article sold by the manufacturer. He may have agreed to take the article back under certain conditions and pay back or allow in trade parts of the price according to a schedule. Perhaps he has agreed not to sell goods of the same pattern to your competitors. It is, of course, impossible to exhaust the list of auxiliary promises that may be made by a seller in connection with his promise to transfer the title and possession of his goods.

Similar promises can be made by the buyer in addition to the primary undertaking to pay for the goods. Though it is not likely that a great many of the stipulations enumerated above exist together in any ordinary contract, it is even more unlikely that, in the ordinary course of business, we shall come across a sale in which none of them accompany the transfer of title. Hence, it is better, for purposes of analysis, to follow the English version of the Sales of Goods Act, which recognizes a Contract of Sale in every case, than the American version, which speaks of a Contract for the Sale of Goods if the transfer of ownership is postponed, and a Sale (with no allusion to any contract) if the transfer of ownership is immediate.

2. Special Stipulations in Individual Contracts of Sale

If all of the terms of every contract of sale had to be mentioned, to say nothing of a requirement of writing, the ordinary haberdasher's clerk could perhaps, with the aid of a lawyer, sell a single collar or tie in a day, and at the end of the day he would be completely exhausted. With standardization, he blandly wraps up package after package while chatting about the weather, and lets the law dictate the terms as to what may and what may not be expected of the goods. But on what principle does the existing Sales Law make its selection among all the possible contracts that the parties could conceivably make were they minded to write special stipulations?

To answer this question we must bear in mind the type of sale that was most common in England while this law was in its formative stage, a century ago, rather than the type of sale with which we are today familiar in the large stores m urban centers. Thus, the sale presumed is a *cash-and-carry transaction;* it is, in the absence of the proof of a contrary intent, the task of the buyer to pick up the goods as they are at the seller's place of business or home or wherever they may be, and carry them away. From this presumption arose the complicated result that *the carrier is generally to be considered the agent of the buyer* in getting the goods, rather than of the seller in carrying them. Hence, claims against the railroad company are normally made by the consignee; hence, also, the goods in the hands of the carrier, even if they are being sent C.O.D., are looked upon as already in the possession of the buyer. And since liens are based on possession, it is too late to enforce a lien, strictly speaking, if the goods are in transit, even though at that stage it is discovered that the buyer is insolvent. For this reason there has grown up a very technical doctrine of *stoppage in transitu,* to restore the goods to a position in which a lien or its equivalent can once more be asserted by the seller. Furthermore, as there is no presumption that credit is to be extended, the seller is entitled to hold the goods until there is a tender of payment, in the absence of specifications to the contrary. Out of this notion grows the *vendor's lien.*

3. Implied Warranties

(1) ABSENCE OF PROVISION FOR THE MIDDLEMAN. Another

feature of the type of sale contemplated which reflects the past rather than the present is the absence of provision for the middleman. Practically all of the warranties recited as "implied" assume that the only buyer contemplated is a consumer, and the sellers are dealt with as growers or manufacturers, whether they be growers or manufacturers or not.[2] Warranties do not run with the goods—that is to say, even if branded goods are bought from a middleman who obviously has nothing to do with their preparation, the buyer must look to him for any warranties, and he in turn may or may not have recourse to the manufacturer. The law has, it is true, done something to meet this condition, but not within the Sales Act nor under the heading of warranties. The disappointed buyer may make his claim against the negligent manufacturer, if at all, only on the ground that it was a tort to send poisonous or otherwise dangerous goods out into the world without proper warnings.

(2) WARRANTIES APPLICABLE TO CONSUMER-PURCHASER. An examination of the details of the implied warranties will bear out the picture of *(a)* the consumer-purchaser dealing with a manufacturing dealer, rather than *(b)* of a dealer-purchaser or manufacturing-purchaser. The first implied warranty is that, where there is reliance on the judgment of the seller that the goods are fit for the buyer's purpose, there is an implied warranty that the goods *are* fit for such a purpose. Another warranty is that, when one buys goods from a dealer the goods are of merchantable quality—and "merchantable," though it might originally have meant fit to be resold, has, since the Sales Act was adopted, been pretty definitely interpreted to mean merely "standard quality."

(3) USE OF TRADE NAME AND WARRANTY. Where goods are bought by their patent or other trade name there is no warranty that they are fit for any purpose. On the other hand, patent or trade names are coming definitely to have secondary meanings, as a result of the advertising that goes into them, and it is reasonable to read into the use of the name a warranty that the goods have all the qualities or ingredients for which that name has come to be an abbreviated method of statement. For this development, the Act makes no provision.

4. Rules Vesting Title in the Buyer

The type of sale contemplated, furthermore, is the sale of goods ready for *transfer over the counter,* in which case the sale is consummated when the contract is made.

Hence, on the question when title passes, after stating that it all depends upon the contract—which, in turn, is the intent of the parties, to be gathered from the words, surrounding circumstances, customs, and other relevant evidence—the Act proceeds to lay down a series of rules to be. resorted to in extreme cases of doubt, and these rules favor the earliest possible vesting of title in the buyer. Thus, the first of them assumes this extreme and rather surprising form: "Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or. the time of delivery, or both, be postponed."[3] Literally interpreted, this would mean that if A sold his automobile to B on January 1st, to be delivered and paid for on February 1st, B might expect a telephone call any time during the month of January informing him that his automobile (that is, B's) had been stolen or destroyed, and that he could take whatever steps were still open to protect his interests, but that A would still have to be paid at the time agreed upon. This, of course, would seem like arrant nonsense to B. All that the rule and those that follow it mean is that where the case permits of such an interpretation at all, early vesting of title in the purchaser is to be preferred to later possible dates.

5. Deviations from the Sales Act—Special Sales Agreements

In view of the inadequacy of the simple picture of sales that is taken from the life of a century or two centuries ago, it frequently becomes necessary to draw up special sales agreements, or at least stipulations, to cover phases of the sales contract for particular purposes. A comparison of the sales form used by a large corporation with its order form will indicate at once the latitude possible in making deviations from the Sales Act. The tendency of the sales form is to shift every possible risk to the buyer. The tendency of the order form is the opposite, and in addition it is likely to specify warranties of a technical type, such as the one against patent infringement, and to deviate markedly from the assumptions of the Sales Act by covering credit terms, plans for packing and delivery, opportunities for inspection and even devices for self-help in case of disappointment on the part of the buyer.[4] On the other hand, it is not unusual for both buyer and seller to favor a deviation from the law which refuses to excuse a man from his contractual obligation in the face of hardships not of his own making. A stipulation making an order or a promise to sell subject to strikes, lockouts, fires or other unavoid-

able causes for delay or non-performance is not unusual.

III. SPECIALLY REGULATED CONTRACTS

Although current law regards most of the other services rendered in business as fitting into the frame of contract, it has become necessary to recognize and regulate certain peculiar features of these relations, so that we may again look upon many of them as they were looked upon in Black-stone's day when they were more standardized. Of course, the details of the standardization of the twentieth century differ from those of the eighteenth. Thus, it is possible to view the duties of the carrier both of persons and of goods, the duties of the insurance company and certain public utilities, of banks and trust companies, commodity and security exchanges, public warehousemen and many others engaged in dealing with the public, as dictated only in part by contract and in large measure by rules of law, some of which are set down in the absence of any contract to the contrary, and others, "any contract to the contrary notwithstanding." Even where it is legally possible to deviate, it may be difficult if not impossible in practice to substitute one's own terminology: hence such rules are, in effect, a return to status. We may select, from this list of special services, two—that of the insurer and that of the public utility—to illustrate phases of their development pertinent to the study of other typical business services.

1. Substantive Law of Insurance

The essence of an insurance contract is an agreement whereby the insurer agrees to reimburse the insured for a loss. The insurer may, of course, be a group of persons including the insured, and the total significance of the contract may be to spread the loss over the whole group instead of leaving it on the shoulders of the individual upon whom it falls. On the other hand, the insurer may be a group of underwriters or a corporation that entered into the business on a purely commercial basis. By carefully calculating the probabilities of loss over a widespread field, the insurer can reimburse itself through the collection of a premium which is a small percentage of the risk covered in any particular case. These terms apply pretty clearly to *marine insurance,* in which the whole plan probably originated. They are almost equally applicable to *fire, accident, theft, tornado* and even *credit insurance.* Some stretching may be necessary in order to make them apply to *life insurance,* for life insurance has two phases: though the time of death is uncertain, its eventual occurrence is certain. Hence, life insurance involves the building up of an estate which will eventually be paid over, as well as the covering of the risk of premature death before the estate is built up. The estate-building side is, therefore, somewhat akin to the function of a savings bank. Its difference is that, instead of holding various sums calculated individually for each depositor, the insurance company holds a lump sum, in which all of its depositors have an interest, to be partitioned among the individuals in accordance with unforeseeable events.

(1) CONTRACTS OVER WEIGHTED AGAINST THE CUSTOMER. During the days of freedom of contract, insurance companies had a tendency to write their own lengthy and complicated agreements giving the customer little or no option but to sign on the dotted line. In course of time, the tendency was to make policies so one-sided that an insurance company could, if it cared to, dodge or at least question its liability. Thus, every statement made in the course of buying a policy was put down as a warranty, so that if there was any deviation from the truth, all of the rights of the insured could be defeated. Other special defenses, including special periods of limitation and special modes of proof of loss, were multiplied. This tendency to write drastic contracts weighted against the customer is by no means limited to the business of insurance. It has occurred in the history of bills of lading and many other fundamental contracts on which important businesses are based. Eventually in such cases the courts and the legislatures step in to protect the customer. In the case of the insurance companies, legislation has produced in most of our states a standard series of policies, and litigation has developed a principle of interpreting all doubtful phrases most strictly against the insurance company.

(2) WEEDING OUT OF IRRESPONSIBLE INSURANCE COMPANIES. Another phase of public interest in the insurance company has as its objective the weeding out of irresponsible companies and the prevention of practices likely to impair solvency. Under the laws of most states, insurance commissioners are appointed who exercise a broad discretion in the matter of granting licenses to engage in the business of insurance. Many of these laws are supplemented by the requirement of a minimum capital and a deposit of securities with state officials for the protection of interests of citizens. Furthermore, there is exercised control over the investment policy of insurance companies. Constant inspection is pro-

vided for, and liquidation by a public officer is compulsory where an insurance company has failed to maintain the margin of safety required by law.

2. Public Utilities

Still, an insurance company is not a public utility. It is not, in general, required to do business with anyone whom it considers a bad risk. The public utility must treat all comers alike. The insurance company generally requires no franchise in the sense of a special privilege in the use of public property. Most of our public utilities, such as water works, telephone and telegraph companies, gas and electric companies and street railway companies, are dependent on such franchises, and, in accepting, them are bound to assume special contractual relations with the state or city. In fact, the public utility has practically no freedom of contract. The telephone company must render service to all persons alike. The schedule of its rates is that which is dictated or at least approved by a commission. Its so-called contract is likewise a set of terms laid down for all persons subject to such commission's approval. Hence, the law of public utilities is very largely the administrative law of the several states.

(1) MAKING OF RATES. The central interest of the state is in rates, and a great deal of law has grown up governing the making of rates. Theoretically, the object of this legislation is to give the citizens fair rates; actually, however, the only possible basis on which utilities have been able to fight rates which they considered inadequately remunerative has been to allege in court that their constitutional rights are jeopardized by a rate which operates to confiscate their property without due process of law. Hence, the eyes of the law have been turned from the question of the fairness of particular rates to the entirely distinct question of the total remuneration of the persons who have invested in the utility.

(*a*) *Fairness of Particular Rates.* The two distinct questions have been rather crudely related in the procedure before commissions by using the formula of valuation for the property devoted to the public utility, in order to find a rate base, and from this rate base to proceed through the mathematics of a fair return to the answer m a rate schedule or a particular rate. Actually there are too many unknown quantities in this calculation from beginning to end to make it anything more than a check against careless guessing or arbitrariness. It is quite possible, for example, that the value of a plant has no direct relationship to the value of the service that it renders. A cheap taxicab might give the same service on a particular occasion as a more expensive one. In either case it may be worth fifty cents to be carried from the hotel to the station.

(*b*) *Remuneration to the Investors.* Furthermore, there may be a socially desirable rate which does not pay or which overpays the investor. Thus, there may be very good reasons why New York City should want to hold subway fares down to five cents, and those reasons may be so potent that it may be wise to have the citizens make up deficits out of taxes. The assumption that the rate which gives a normal return to investors is at the same time both a socially desirable rate and a rate that gauges the actual value of the service, is a wholly gratuitous assumption.

(2) FACTORS WHICH CONSTITUTE A PROPER RATE BASE. Nevertheless, a vast part of public utility law is devoted to refinements of the question: what constitutes a proper rate base. Is it original cost modified by depreciation, appreciation, depletion, obsolescence and such accounting considerations? Is it the present cost of reproduction, modified by this and similar considerations? Is it the prudent and defensible portion of actual investment that we should start with? Is it present valuation arrived at by appraisal independently of all these elements? Should earning capacity be taken into consideration? Is goodwill in any sense a possession of the investors in the utility? How shall franchises be valued? Though there is much technical learning put forward on all of these questions, most of it is rendered nugatory in effect by a very simple device on the part of commissions: whenever the finding of a commission is set aside because of its failure to take any one of these elements into consideration, it proceeds thereafter to make a point of listening to that type of evidence and proclaiming that it does take that element into consideration. An award of a commission which proclaims that it has taken everything into consideration is, if at all within the range of reason, proof against court attack.

[1] "Ancient Law," p. 168-170.

[2] Uniform Sales Act, Secs. 13-16. p. 298.

[3] Sec. 19, Rule 1, p. 300.

[4] L.B.P., pp. 196-198.

[5] For an outstanding work on this subject see Bonbright, James C., "The Valuation of Property," New York, 1937.

Chapter IV

Security of Transactions

1. Insecurity of Transactions after Completion

(1) ILLEGAL SELLING OF ANOTHER'S PROPERTY. Business involves so many risks, that it is reasonable for the business man to favor the removal of those within the control of the law. One of these is the insecurity of transactions after they have been completed. Legal tradition tends to protect property rather than transactions. The two ideals frequently clash. Thus, an unauthorized person sells the goods of one innocent man to another. The trickster has disappeared with the purchase money. As matters stand, one of two innocent persons must suffer. The first proposition that confronts us is that the goods still belong to the original owner. He has done nothing to authorize their sale, nor has he misled the innocent buyer. Of course, if he has, we may find refuge in another maxim: "where one of two innocent persons must suffer, let it be that one who has put the fraudulent party in a position to defraud." But even that maxim is a concession to the business man's point of view. In strict law, the ownership of the goods has not changed hands.

(2) CAVEAT EMPTOR. The old rule that throws the major risk on the buyer is a hindrance to business. The investigation it calls for slows up the process of negotiating and selling. The doubt that remains after the most complete investigation is a source of sales resistance. When the adverse claimant comes out of his hiding place, the seller in the market, who may himself be innocent, must make good his customer's loss. *Caveat emptor* in this sense, the only meaning in which it approximately reflects the law, is not a popular doctrine with business men. "The general rule of the common law," we are told, "is that every man dealing with another in reference to property that other may have in his possession, must 'take care,' *caveat emptor.* The property may be stolen, or borrowed, or pledged, or in the possession of a bailee for some specific purpose, and if so, the party in possession can convey no better or further right than he has himself."[1] The owner of a thing or of any interest in the thing could, according to this theory, follow it wherever it was taken and claim it against the holder for the time being, regardless of the conditions under which he had gotten it, regardless of the hardship thereby inflicted. A purchaser could acquire no greater rights than his vendor possessed. This dogma was put forward as a kind of law of nature, and Latin was invoked against those who questioned it. *"Nemo plus juris ad alienum transferre potest quam ipse habet."*[2] In fact, even after the innocent stranger had parted with the tainted property, the owner could complain of the conversion and sue him in tort.[3] It was worse than the Imp in the Bottle. Let us examine in some detail the process by which the law eventually destroyed the barrier to every business transaction implied in these ancient theories.

(3) LIMITATION ON RIGHTS AND POWERS OF OWNER OVER INNOCENT POSSESSOR. The earliest limitations on the rights and powers of an owner as against a peaceful and innocent possessor are procedural. The *right of recaption* (self-help) was limited to "fresh pursuit" and eventually lost altogether.[4] The right even to *restitution* through court help has been limited by a series of statutes of limitation. On a procedural basis, too, was worked out a theory that served as a *doctrine of accession.* Common

sense requires the concession that a thing may, for legal purposes, be deemed to have been destroyed when it has been hopelessly imbedded into something else or converted into another substance.[5] Hard as that line is to draw, once it is drawn the legal consequences of destruction may be visited on the man guilty of making the destructive accession, but the goods may not be reclaimed from him nor followed into the hands of a purchaser from him. A few other situations arose in odd places in the law in which a man could buy goods and resist any claim on the part of a former owner who had not consented to their sale—as when a new title was created by a judicial sale *in rem,* a forfeiture, bankruptcy, marriage, intestacy, or where the law for very good reasons empowered an officer or appointee to act instead of an owner for the conveyance of that owner's title. In none of these situations was there any thought of serving the need of modern business of making transactions stand even as against outraged ownership—but by furnishing prototypes in which the theory of ownership yielded and transactions stood, they became extremely important eventually when a motive emerged for striking a new balance between the sanctity of ownership and the importance of upholding transactions.

The first limitation on ownership in English law based substantially on the business considerations in favor of the security of transactions was probably the *doctrine of market overt.*[6] The idea seems to have been that if a thing was exposed and sold in a market overt in the ordinary course of business, the buyer took a clear title. The transaction was not only good between the parties but also binding on all those who had any right or property in the goods sold. This law, which has its counterpart in other systems, seems never to have taken root in America. We have no thieves' market where titles may be purified for buyers. On the other hand, we did, more or less unconsciously, take over a notion that benefits sellers—namely, that *money has no earmarks.*[7] Likewise, we took over another exception to the doctrine that *one cannot give more than he owns* for the benefit of tradesmen rather than buyers, the doctrine that a wrongdoer can give an effective lien on the goods of another to an innkeeper.[8] Surely American law begins with no particular bias in favor of buyers.

2. Principles of the Law of Transactions

Five principles, however, that have their germs in the early law, have been allowed to develop so as to reverse this condition since the American Revolution:

(1) The first is negotiability and its extensions.

(2) The second is agency and its extensions.

(3) The third is rather a limitation of a growing principle—that voidable titles cannot be set aside so as to interfere with the intervening right of innocent strangers.

(4) The fourth is a corollary of our public registration of documents.

(5) The fifth is hardly a principle—it is the tendency to create a strong or irrebuttable presumption of the regularity of acts in the ordinary course of business, and perhaps an opposite presumption as to acts inconsistent with business usage.

Let us examine briefly the bearing of each of these on the position of a buyer in modern business:

(1) NEGOTIABILITY OF INSTRUMENTS AND ITS EXTENSIONS. In negotiable instruments we have the extreme form of the merchant's rejection of the notion that one cannot sell a better title than he has. However we undertake to make a reconciliation of the attitude of the law merchant with the common law—whether we say negotiation cuts off equities, or that it makes presumptions absolute, or that it excludes personal defenses, or that the man who voluntarily puts such a document into circulation impliedly consents to this or that—the simple fact is that the law of negotiable instruments provides that a man can sell a better title than he has. We are too apt to overlook the revolutionary nature of this innovation when we try to explain the resistance to the introduction and extension of the doctrine in England until Mansfield's day. On the other hand, we are likely to misunderstand the "obstinacy" of the merchants of Lombard Street which finally triumphed. As a practical matter, a foreign document which could be assigned only subject to all the facts of the case and thus could not be taken as telling its whole story on its face, could not be taken at all.

In recent times the principle that a better title than a particular seller has to a negotiable instrument can be sold, has appealed to the business world to such a degree that it has sought to extend it to an increasing range of transactions. It endeavored to make its corporate bonds follow the form and come within the principles of promissory notes.[9] It dealt with stock certificates much as it did with bonds, and, after attempting to make them as nearly negotiable as possible by what it printed on them, succeeded eventually in having legislation passed in many jurisdictions to make them actually negotiable.[10] More important, however, for our present purpose is the legislation making documents of title, ware-

house receipts,[11] and bills of lading,[12] when properly drawn, negotiable. Negotiable instruments familiarized the business world and the lawyer with several concepts such as "due course," "*bona fide* purchaser for value without notice," as well as with the general idea of the security of a transaction, and these ideas were found useful eventually in connection with the other principles that came more directly to the aid of buyers.

(2) AGENCY AND ITS EXTENSIONS. Agency in its strict sense and narrower applications is, of course, no illustration of the extension of any special favor to buyers. It is only when, by a liberal interpretation of apparent scope in the light of the ordinary course of business, an agent of a dealer is clothed with powers beyond his authorization, that the buyer is benefited. The principle is not different in theory from that which would equally benefit sellers or other contracting parties under similar circumstances. In practice, however, buyers are very important beneficiaries of this principle. Not only are they entitled to assume the ordinary powers of warranty in the agents with whom they deal, but also the power to sell the things in their possession- so far as consistent with the ordinary course of the trade.[13] There is, however, a further extension of the principle which makes it possible in an increasing variety of cases to treat a person to whose possession goods have been entrusted as an agent to sell by reason of "the holding out," though in fact he is not an agent at all.[14] This quasi-agency has been technically built up on the basis of estoppel. In fact, it has come about in response to the business need for the protection of buyers in the ordinary course of business.

(3) TRANSFER TO INNOCENT PURCHASER OF VOIDABLE TITLE OR ONE HAVING INCUMBRANCE. Tangible things are not negotiable. There are situations, however, in which the holder of a voidable title can transfer a perfectly good title to an innocent purchaser for value. A title acquired by fraud, duress, undue influence, or under any other condition in which a contract may be set aside at the option of the victim, may have to stand if the rights of an innocent stranger have intervened.[15] It is true that there is a difference in degree between the situations in which the fraudulent purchaser of a horse gives a good title and that in which the finder of a negotiable instrument, payable to bearer, passes a good title. Thus, where the transferor has no title to the object the buyer from him gets none.[16] But the conception of what constitutes *bona fides,* what constitutes value, what constitutes notice in the conception of the *bona fide* (or innocent) purchaser for value without notice, tends to be taken bodily from negotiable instruments law and read into the law of dealings in goods by fraudulent owners. There has accordingly been a relaxation in late years. Whereas formerly some states disqualified the innocent purchaser who though without actual notice might have acquired knowledge,[17] today the tendency is to require the proof of actual knowledge of the defect or such facts that his action in taking the commodity amounts to bad faith, before he is disqualified from taking a better title than his seller had.[18] Likewise, the value with which he must part is anything that will serve to support a simple contract as consideration,[19] such as a promise, or forbearance, or a discharge of a debt. It need not be present value. The law is very liberal to the buyer under such conditions—more liberal, for example, than to one who buys from a defaulting trustee.[20]

Where one's defect in title is not due to its voidability, but simply to the existence of a condition or incumbrance, under the common law theory it can be sold only subject to the incumbrance.[21] If the object had previously been mortgaged, the innocent purchaser has only his folly to thank when it is taken from him to satisfy the mortgage. The same principle applies to a conditional sale or to any other arrangement whereby a creditor has retained or acquired a legal interest in the subject matter of the sale. Unless something could be done to protect an innocent purchaser against such secret incumbrances, all security of transactions would disappear.

(4) RECORDING OF DOCUMENTS. As to real property the same problem existed, though the inconvenience of requiring a long drawn-out investigation was not felt as so prohibitive a burden because of the relatively greater size and importance of the transaction. Several solutions or partial solutions of the difficulty have found their way into our statute books, most of which involve a public notice, filing, or record. If such public notice, filing, or record is neglected, the law declares the transaction void, or at least inoperative as to strangers. There is considerable diversity in recording laws as to the strangers benefited by their violations—whether they must be purchasers and if so whether judgment creditors are to be considered purchasers, whether they must be ignorant of the prior transaction, and so on. A difference between real estate and personal property was discovered early in the development of the laws of public notice. There was no difficulty as to where the record should be made for real

estate, as the land could never be moved out of the county. But suppose a public notice was effected as to a chattel mortgage on a piano in Buffalo, New York, and that piano was wrongfully sold while the mortgage was unsatisfied, in Cleveland, Ohio, to an innocent purchaser. In such a case it was held that the mortgagee had done all that the law required him to do and that the doctrine of *caveat emptor* would apply.[22] In other words, the buyer is not so effectively protected in the case of personal property as he is in the case of real estate, though the devices adopted for his protection are similar. This is particularly noticeable in the case of automobiles. They are very commonly incumbered with chattel mortgages or conditional sales, and yet they are so easily moved from county to county and state to state that the chattel mortgage list in some remote county is certainly no protection to a prospective buyer. Consequently, we hear. suggestions as to national recording for automobile encumbrances, or checks on the transfer of automobiles through the official issuing of licenses, and even the requirements of formalities and public notice subject to penalties, in connection with every sale of a car. The problem is not solved, but it seems to be taken for granted that a simple return to *caveat emptor* is not a satisfactory solution. We may have to put the buyer to some trouble in the examination of records, and we may have to leave him subject to some chance, but we take it for granted that the law should be relied on to devise some means for making the buyer of personal property as well as real estate, of used articles as well as new ones, reasonably safe against incumbrances.

(5) PRESUMPTION OF REGULARITY OF ACTS IN BUSINESS. The old law used to expect a great deal from the man on the street. He was not only expected to be circumspect, to examine the title and quality of everything he bought, but he was expected to know a good deal about the corporations with which he dealt. He was supposed to make sure that they existed according to law, that they had the power to do that which they undertook, and that the officers through whom they acted were the duly constituted officers. A bank dealing with a corporation can and does demand evidence for its records of all these things. The ordinary customer of the corporation does not and cannot. In the early days of the use of the corporation in private business there was a possibility at one time that the doctrine of *ultra vires* would be so applied as to hamper the usefulness of the corporate form in business. But gradually the whole doctrine began to fade out of the picture. A legal necessity for a technical investigation at the threshold of each of the hundreds of contracts made in a modem business day is an intolerable burden.

[1] First Nat. Bank of Macon *v.* Nelson & Co., 38 Ga. 391, 398 (1868).

[2] *Dig.· L.,* 17, 54.

[3] Swim *v.* Wilson, 90 Cal. 126 (1891); Sharp *v.* Parks, 48 Ill. 511 (1868); Robinson v. Skipworth, 23 Ind. 311 (1864); Everett *v.* Coffin, 6 Wend. 603 (N. Y. 1831); Bancroft-Whitney Co. *v.* McHugh, 166 Cal. 140 (1913).

[4] I Blackstone's "Commentaries" 297.

[5] Blackstone founds accession on the right of occupancy. Traditionally, since Bracton, the doctrine in Anglo-American law has been supposed to have been taken from Roman law (bk. 2, cc. 2 and 3). *See* Pulcifer *v.* Page, 32 Me. 404 (1851*).* The test of relative values, however, which has been widely applied in this country, differs quite radically from the test of change of species of the Roman law, and the injection of a distinction against a willful trespasser goes to distinguish the Anglo-American doctrine of accession from that of the Romans.

[6] 2 Co. Inst. 713: ".... the Common Law did hold it for a point of great policy, and behovefull for the Commonwealth, that Fairs and Markets overt should be replenished, and well furnished with all manner of commodities, vendible in Fairs and Markets, for the necessary sustentation and use of the people. And to that end the Common Law did ordain (to encourage men thereunto) that all sales and contracts of any thing vendible in Fairs or Markets overt, should not be good only between the parties, but should bind those that right had thereunto. But this rule hath many exceptions."

[7] This doctrine is, of course, subject to numerous reservations.

Where money can be described and identified as a specific chattel it is, of course, a subject of conversion. Cases are collected in (1911) 38 Cyc. 2015.

[8] For the history of this doctrine in America, see Waters *v.* Gerard, 189 N.Y. 302, 82 N. E. 143 (1907).

[9] Hibbs *v.* Brown, 190 N. Y. 167, 82 N. E. 1108 (1907); (1906) 19 *Harvard Law Review* 616.

[10] Uniform Stock Transfer Act, proposed by the Commissioners of Uniform State Laws in 1909, has been adopted in twenty-five states.

[11] The Uniform Warehouse Receipts Act, proposed in 1906. has been adopted in forty-eight states. The amendments proposed thereto in 1922 have been adopted in fourteen states.

[12] The Uniform Bills of Lading Act, proposed in 1909, has been adopted in twenty-nine states.

[13] Herring *v.* Skaggs, 73 Ala. 446 (1882).

[14] There is, of course, more than a technical distinction between implied agency and so-called agency by estoppel. In the latter, it is said, for example, that the stranger must show that he knew and relied upon the conduct of the principal. The effect, however, of both is identical so far as the passing of a title without the consent of the owner is involved.

[15] Browning *v.* De Ford, 178 U. S. 196 (1900).

[16] Bolles Woodenware Co. *v.* United States, 106 U. 5. 432 (1882).

[17] Walsh *v.* Stille, 2 Pars. Eq; 17 (Pa. 1842); Walbrun *v.* Babbitt, 83 U. S. 577 (1872); Mahoney *v.* Ganno, 2 Ind. App. 107, 27 N. E. 315 (1891).

[18] *Cf.* Negotiable Instruments Law, Sec. 56, Uniform Sales Act, Secs. 24, 76(2). Appendix, see p. 230, p. 304, p. 326.

[19] Uniform Sales Act, Sec. 76(1), p. 326.

[20] In states in which purchase for value had previously been defined to refer to present value (Ohio, for example), there was, of course, no change so far as laws of trusteeship were concerned effected by the new uniform acts. *Cf.* Crigler v. Rouse, 209 Ky. 439, 272 S. W. 905 (1925).

[21] *Cf.* Sondheimer *v.* Graeser, 172 Ill. 293, 50 N. E. 174 (1898).

[22] Kanaga *v.* Taylor, 7 Ohio St. 134 (1857). *See* 41 *Harv. L. Rev.* 779 (1928).

Chapter V

Business Property

1. "Business Property" Defined

When the business man lists his "assets" for a financial statement, he is not exactly making an inventory of his property in the legal sense of the word. The traditions of accounting require him to list a combination of past and present facts and guesses together with some future hopes and with adjustments based on averages or estimated averages, and the result of the calculation yields a purely artificial surplus. The practice serves some practical purposes. Linking the plant figure to original costs and allowing depreciation on the basis of approved averages prevents the introduction of entirely fantastic figures. When an expense such as taxes has been incurred and the amount is unknown, a guess must be allowed for reserves. Receivables, as well as goodwill, are, like faith, necessarily the substance of things hoped for. But behind this list may be discerned the elements of value, the legal rights in which we may call "property." Some of these elements are in land and buildings, some in movable tangible goods, some in intangibles.

2. Protection of Business Property

The interests which the law recognizes and protects in physical things, both movable and immovable. are the subject of another volume in this series.[1] Subject to some limitations indicated in the last chapter, the rules of property law that have grown up outside of business must suffice for business. When we turn to the intangible values, however, we are confronted with some new types of property or quasi-property for which business insistently demands and the law reluctantly accords recognition. Of course, it makes little difference to the business man whether you accord the name "property" to his goodwill, his trade-marks, trade names, secret formulae, advantage of having a going concern, advantageous contract, established labor relations and other similar advantages, and even his nuisance values. He is very much concerned, however, in the manner in which the law protects such interests from subtle attacks, in the manner of his being taxed because of them, in the question of their transferability either in gross or in connection with property in tangible things, and in what facilities the law furnishes for staking out, recording, publishing and perpetuating such interests. To put the matter another way, the reason these interests are treated in certain ways is not that they are or are not property. On the contrary, they become or fail to become essentially like property because of the way they are treated.

(1) TRADE-MARKS AND TRADE NAMES. We have, in an-other connection, already considered the nature of the protection accorded true trade-marks and trade names, and also the similar protection against unfair competition accorded trade symbols that fall short of the technical requirements of trade-marks and trade names. The influence of the property idea is seen, however, in the different rules of damages allowed for infringement and for unfair competition where there is no infringement. In the case of the American Girl Shoe[2] much turned on this question. If this name were taken to be fanciful, a full accounting of the profits of the defendant would have to be made, whether he sold to new customers or to the old customers or the plaintiff. If, however, the term were taken to be geographical and descriptive the offender would be answerable only for the loss suffered by his competitor, the plaintiff. The difference was considerable. Fortunately for the plaintiff, the full trade-mark included a picture of an American girl, and for this and other reasons the court leaned to the conclusion that the name was a fanciful one.

(2) EXISTING CONTRACTS. A man's reasonable expectation that strangers will not induce breaches of his existing contracts is an intangible interest now fully protected by law. This rule had its humble beginnings in the cases of interfering with or enticing one's servants. It gained clarity from the famous case of Lumley v. Gye[3] in which two London music hall owners clashed over the attempt of one to induce a singer to "jump" her contract with the other. It has since had many repercussions in the growing law of labor relations, boycotts, and unfair competition. The rule does not insist that the contract be formal or of stated duration. In fact, it has been extended to cover cases where a contract was only in contemplation, and therefore, by another step, to the protection of goodwill in general.

(3) PROTECTION OF GOODWILL. (*a*) *Definition of Goodwill.* Goodwill has been variously defined. To the accountant it is apt to mean a capitalization calculated to represent the invisible source of otherwise unexplained surplus of earnings over the average in comparable industries. From this point of view a business with average earnings has no goodwill, and one that is losing money has, if anything, a negative goodwill. But to the business man it is quite evident that even the business which is losing money may have certain intangible, invisible and imponderable advantages that do not show currently in the earnings or that show in the form of a diminution of losses. Occasionally he calls on the lawyer to phrase such advantages in appropriate form for purposes of transfer. The lawyer is apt to begin with a concept of goodwill which likens it to the beaten path to one's business door. In fact, when this expression was first used in the law books it was no mere figure of speech. Goodwill was associated with a specific place. It was a kind of secondary interest in land. Hence, there still lingers the idea that it cannot be sold without some interest in land. This concept is not adequate to explain the facts of business. The goodwill of a professional man will follow him from office to office, as he moves. The owner of a "route" for hawking or milk delivery or service may be landless. Even a local store can move about considerably within a city without losing its identity or its patronage. A chain-store may have "a beaten track," on the basis of other stores in the system, the moment it opens its doors in a new neighborhood.

(*b*) *Agreements in the Sale of a Business or Practice.* Let us analyze what takes place when a doctor or lawyer undertakes to sell his "practice." In the first place he probably agrees to introduce his successor to his clientele, or to permit his successor to so introduce himself. He may actually hand over his lease and assign other useful contracts. He may deposit his records with the new man. He may consent to the transfer of his telephone number. He probably will agree not to compete directly or indirectly with his successor or to interfere with the reasonable attempts of his successor to take his professional place. A similar set of agreements may very easily be conceived of in connection with the sale of a business. In fact, the law had occasion to analyze the sale of the goodwill of a business long before it was able to dissociate the idea from real estate. It had to decide, for example, whether a sale of goodwill implied, in the absence of specification, an agreement not to compete, and it leaned quite naturally to the view that no such agreement was implied. It is, therefore, necessary in drawing agreements for the transfer of such intangible interests to describe fully what each side undertakes without relying too much on the denotation or connotation of such words as "goodwill," "route," "practice," and their approximate equivalents.

(*c*) *Agreement Not to Compete.* Another handicap that the law has imposed on efforts to traffic in goodwill grows out of the theory that an agreement not to compete or not to engage in the trade or profession for which one has been trained, is against public policy. The older cases followed this theory. Eventually, escapes were found by distinguishing between those agreements unlimited in time and space and those which were limited. An actual examination of the decisions shows that a failure to limit time made little or no difference so long as the space was limited. Some odd practices developed under this mechanical rule, such as agreements not to compete except in some out-of-the-way spot or some unlikely state or country. Finally the modern rule was evolved: that in every case the reasonableness of the restraint in view of the legitimate end to be accomplished must be the test of validity.[4]

(*d*) *Protection of Goodwill from Agent or Employee.* In contrast to the reluctance of the law in facilitating the transfer of goodwill and in protecting it against onslaughts from without, stands the alertness of the law to protect it against attacks from within an organization. One's agent owes the highest degree of loyalty and fidelity. This duty is interpreted as including the renunciation of any advantage inconsistent with the interests of

the employer; it extends beyond the time of the termination of the agency, for the former employee is not free to utilize confidential information, or other similar advantage received while in the employ of his principal, in competition with that principal either on his own behalf or on behalf of a new employer. The fiduciary quality of the relationship invites the ready intervention of the courts of equity. Such a court will enjoin not only the agent or former agent from wrongfully utilizing his advantage, but also those conniving with him. Injunctions have protected trade secrets and trade lists, and prevented the solicitation of customers of the former employer.[5] At times there is a difficulty raised in deciding whether the goodwill involved really belongs to the agent or to his employer. Consequently we occasionally see not only specifications in contracts on the subject, but ingenious efforts to direct the development of goodwill. A bond house, for example, in its desire to build up a regular clientele, may adopt rules and practices calculated to make the customer feel that he is the customer of the house and not of the salesman.

(*e*) *Protection from the Middleman; Refills.* The coming of the middleman into business has created some new problems, which the law has not yet solved, in the protection of the goodwill of the manufacturer. His legal inability to impose restraining conditions on the power of the middleman to sell his goods has frequently placed his reputation at the mercy of the careless or unscrupulous dealer. A long debate has only recently come to an end as to whether it hurts the reputation of goods to use them as loss leaders or otherwise cut their prices. With the upholding by the Supreme Court of the United States of the Fair Trade Acts of California and Illinois,[6] and the adoption of similar acts by forty-one other states and the United States Congress,[7] it is now possible at last for the manufacturer to control the retail sales price of his branded goods. But he is still battling with the middleman who finds it more profitable to sell non-genuine parts or refills for machines of various kinds. Unless a very good case is made out, such an attempt on the part of the manufacturer looks like full line forcing, a recognized variety of unfair competition. He is waging a losing battle with the substituter who openly recommends substitution, especially under the impact of the price maintenance laws. In his effort to prevent his packages from being refilled, he has called in not only the aid of the inventor (with non-refillable bottles for beverages and lubricating oil), but also of the legislator who lays down penalties on the misuse of milk bottles, or of the courts which once enjoined the refilling of containers marked Prest-o-lite with other makes of acetylene gas[8] and now insist that the shells of Champion Spark Plugs shall have every vestige of their original maker's identity sand-blasted off before they are sold after being reconditioned.[9] To get the full protection of labeling, the manufacturer announces that his product is "never sold in bulk." When it is sold in bulk or is rebottled or packaged by the middleman, trouble and recrimination of another sort arise. The courts are called on to prevent or at least regulate the use of the name of a perfume-maker on what purports to be his own product in packages and combinations that are not his.[10]

(4) INTANGIBLES AS BUSINESS ASSETS. (*a*) *Recognition by Law.* Undoubtedly the law's recognition of intangibles as a kind of property has been accelerated by the desire of the state to make them bear a share of the property tax load. The methods employed have varied widely. At one time the prevailing method was merely to list on the tax duplicate such intangibles as claims, whether evidenced by writing or not, whether secured by mortgage or not, whether in the readily available form of bank deposits or in the more entangling combinations of shares of stock, corporate bonds, or beneficial interests in trusts or business ventures. This system was unsatisfactory because under it concealment was so easy and so generally connived at that scandalously small returns came in. Furthermore, it permitted the total escape of other important types of intangibles, such as goodwill. Eventually, elaborate schedules were worked out to get at the intangibles of business. Massachusetts, for example, led the way with a system for taxing corporations under which the total net value of the corporation minus the value of the tangible property taxed was looked upon as the intangible value, to be taxed as such. The coming of income taxes, both state and Federal, has tended to shift emphasis from taxes on intangibles.

(*b*) *Situs for Taxation of Intangibles.* Nevertheless, nice legal questions still arise as to the *situs* for taxation of various kinds of intangible property. The law began its attack by relying on the maxim *mobilia sequuntur personam,* a maxim originally intended to cover tangible movable property, but eventually found too cumbersome a fiction for its original purpose. Hence, much learning was devoted to such questions as the situs of a debt or, rather, of a claim based upon a debt, the *situs* of a share of stock, or the *sit us* of a bank ac-

count. The logical answer, "at the home (or perhaps on the person) of the owner," though it served as the basis of important constitutional decisions in its time, became less and less realistic as the indicia of such claims came to be looked upon more and more as things. Consider, for example, the history of the stock certificate. A century ago it was apparently so unimportant that none was generally given to the stockholder. The evidence of his ownership was in the books of the company. If for any reason he wanted a certificate, a simple writing was given to him which was precisely what the name indicates: a statement by the proper official of certification to whom it might concern that John Doe was on a certain day the owner of so many shares of the capital stock of the company. Whatever satisfaction, profit or standing this certificate gave John Doe, it did not enable him to consummate a sale of his interest without applying at the office of the company. He might lose or destroy his certificate without endangering his position. In fact, there is every reason to suppose he could easily procure another, and probably would have to get another if proof of his ownership at a later date became desirable. As larger corporations developed, it became customary—it is hard to say when—to issue a certificate to every stockholder, and business men began to regard these tokens as something that ought to pass from hand to hand with proper endorsements on sale of the stock. They stood for the stock. Eventually they were made practically negotiable by statute. Transactions could be based upon their physical presence as the subject matter of pledges, exchanges, sales. The record in the books of the company, though still important for certain company purposes, becomes secondary so far as dealings between other parties are concerned. Under these circumstances it becomes easy for a resident of New Orleans to leave his "securities" in the hands of an agent in New York, where they can be produced instantaneously as needed for every business purpose. It would be straining the fiction too far to say that New York shall not tax this property within its borders because it is technically not there. Ultimately, the fiction yields to the new reality. Intangibles tend to be-come tangibles for practical purposes.

(*c*) *Valuation of Intangibles.* In the famous Adams Express Company case,[11] Ohio was upheld in its effort to find and appraise intangibles within the state. The total value of the express company's business was calculated on a reasonable basis, then the total amount of its annual business and the portion of the business done in Ohio was figured out. Then by the rule of three—rather than by appraising the value of office furniture, trucks, printed forms, leases and other contracts—the value of the company's property in Ohio, that is, its going concern value, was estimated. This experiment was the forerunner of numerous successful attempts in other states, and a few unsuccessful ones, to evaluate intangibles by indirect but perfectly clear and reasonable methods.

Of course, in order to take account of the value of intangibles for taxation or other purposes, it is by no means imperative that we think of intangibles as separate items. The question of value might be attacked quite as well by regarding much that we have discussed in this chapter as a *phase of the visible tangible property* before us. The difference between the going concern value of a business and its junk value is no more striking than the difference in value between a live horse and a dead one; yet no appraiser or accountant would think of writing the life of the horse down on a separate line beneath the horse itself. The analogy goes a step further: it would be as impossible to sell going concern value separately from the business as it would be to sell the life of the horse to one customer and the horse to another. The analogy would be controlling, were it not for our accounting practices, many of which are ordained by law, which make it impossible to adjust values, once entered, by reason of such conditions as stoppage or acceleration of processes, or accretion of goodwill in most of the senses in which we have applied the term, or any turn of luck not duly labeled in the limited vocabulary of legal accountancy.

[1] See VoL V.

[2] Hamilton-Brown Shoe Company v. The Wolf Brothers Company, 240 U.S. 251 (1916).

[3] 2 E. & B. 216 (1853).

[4] General Bronze Corp. *v.* Schmeling, 208 Wis. (1932); L.B.P., p. 213.

[5] Essex Trust Company *v.* Enwright, 214 Mass. 507 (1913), L.B.P., p. 404.

[6] Dearborn Distributing Co. *v.* Seagram-Distillers Corp., 299 US. 183 The Pep Boys, Manny, Moe & Jack, of California *v.* Pyroil Sales Co., Inc., 299 U.S. 198 (1936).

[7] See p. 16, *supra,* notes 6 and 7.

[8] Prest-o-Lite Co. *v.* Avery Portable Lighting Co., 161 Fed. 648 (1908).

[9] Champion Spark Plug Co. v. Emener, 16 F. Supp. 816 (1936).

[10] Prestonettes, Inc. *v.* Coty, 264 US. 359 (1924).

[11] Sanford *v.* Poe, 165 U.S. 194 (1897).

Chapter VI

Credit Enforcement Machinery

I. ORDINARY ENFORCEMENT MACHINERY

Credit, a very important part of the modern business system, is founded upon the enforcement machinery of the law. Yet this machinery has been but little influenced by modern business ideas. Procedure is essentially the same in our courts, whether damages are sought or not; whether we are concerned with buying and selling or with matters so far from the workaday world as the claim of a bishop for having been ousted wrongfully from his seat; whether there is an accusation of false advertising or of murder; whether equity is invoked to enjoin unfair competition or to test the constitutionality of a new marriage law. Procedure is thus not a distinctive part of Business Law. It is, however, within the scope of our purpose to study the impact of procedural law as we find it on Business.

1. Procedural Law and Business

Every hindrance to enforcement of claims is a clog on credit; every facilitation is an encouragement to its use. Legislation calculated to "protect" the debtor, therefore, frequently operates as a boomerang by preventing the extension of credit to the prospective debtor. That we are all at one and the same time debtors and creditors became clear when the cheapening of the dollar was before the country as a live issue. In general, such a process might be expected to redound to the benefit of debtors who could wipe out their debts, as a result, with a smaller value (let us say in terms of food or labor) and, accordingly, to the detriment of creditors. Debtors include all those who have borrowed money on their farms, all who have bought on the installment plan, all who have run up troublesome bills, and tenants in arrears, to be sure; but as the rich and powerful can borrow more readily than the poor, by far the greatest group of debtors are corporations with large bond issues, the business borrower from commercial banks, the banks themselves, insurance companies, and prospectively all persons at the paying end of contracts that have some time to run, such as lessees, employers, advance purchasers of crops. On the other hand, those at the opposite side of each of the transactions and situations suggested are creditors, including, to single out only a few, the depositors in banks, the purchasers of insurance, the bondholders, landlords and employees under contracts. Obviously modern business leaves very few of us free to follow the advice of Polonius, "Neither a borrower nor a lender be."

2. Action in Court

The principal burden of this credit structure must be borne, in the last analysis, on the assumption that the creditor can, if necessary, *bring an action in court* against the defaulting debtor and pursue his claim to judgment and satisfaction either by payment or through execution of the judgment by court officers who seize and sell the defaulter's property. There are, to be sure, some other aids at the disposal of the creditor that serve as props of the credit system. In extraordinary cases, tribunals administering criminal

law, equity, bankruptcy law, administrative law, or association rules may be feared more by the debtor than an ordinary court awarding damages for a simple breach of contract. In still other cases, as we shall see in the next chapter, ingenious arrangements for the safeguarding of credit may overshadow the ordinary legal procedure. Finally, in petty credit transactions, the probable willingness of the debtor to pay rather than the creditor's ability to make him pay is the basis of the extension of credit. *Consumer credit* is readily extended in cases where it is obvious that it would not pay to bring any action, both because of the cost in time, money and undesirable publicity and because liberal exemption laws would probably render the debtor execution-proof. Yet, after all these concessions are made, the simple action at law for damages for breach of contract remains the very backbone of the credit system.

(1) STEPS IN PROCEDURE It will, therefore, be worth while to make a special examination of some phases of this type of action here, though courts and actions at law in general are discussed more fully elsewhere in these volumes.[1] In the simplest case, it is necessary (1) to have the adverse party brought into court, literally or figuratively, (2) to have the claim and the essential facts on which it is based stated, (3) to give the other side an opportunity to state its side of the case, (4) to focus the dispute in "issues," whether of law or fact, (5) to have a trial of the issues, (6) to render judgment, and (7) to enforce the judgment. In addition to these essential elements, our legal tradition provides for one or more opportunities for judicial review in a higher tribunal and for various processes in aid of execution in the enforcement of a judgment. The function of each of these steps becomes painfully obvious in a poorly planned arbitration proceeding, when the parties persist in dragging in grievances that merely tend to confuse the merits of the case being heard, and the arbitrators are quite helpless about excluding them because no clear issue has been presented to them. On the other hand, too rigid an adherence to the "rules of the game," as developed in the long history of court procedure, may result in various failures from the business man's point of view, notably excessive costs, delays, arbitrariness, and "technicality," by which he means- not only excessive fussiness about trifles, but the actual sacrifice of the merits of the case to a rule that seems to have lost its sense if it ever had any.

(2) PLEADING. The history of "pleading," by which the lawyer means the steps in framing an issue, is in point. A century ago, common law pleading had developed a fine spun system of logic which forced parties to select single claims on a single narrow question squeezed out under that system. The simplification of pleading according to various patterns is an outstanding achievement of nineteenth century jurisprudence in England and America. Most jurisdictions today call for a clear and concise statement of the essential facts on which a *claim* is based—not the evidence of the facts nor mere inferences drawn from the facts, but, so far as such distinctions of degree can be made in practice, the operating facts themselves. The *defense* is to be stared in the same way, if it is a fact defense, so that a jury may pass on the truth of the allegations. If the parties agree on the facts, for the sake of argument, a question of law may be raised for the court to decide by a "demurrer," the legal equivalent of the colloquial, "So what?"

In petty courts of limited jurisdiction, very informal pleadings will serve the purpose, such as oral pleadings or so-called "notice pleadings," provided judicial discretion is preserved to demand bills of particulars when the course of justice will thereby be aided. Liberal delays, however, should not be granted where there is no possible element of surprise in the revelations of such a bill of particulars.

(3) THE JURY. The traditional fact-finding tribunal of the common law courts, for both criminal and civil cases, is the jury. The literature in praise of the jury system is vast and venerable; that against it, somewhat meager and recent. It is gratuitously described as a bulwark of the Anglo-Saxon liberties, though the Anglo-Saxons had never heard of it. When it was introduced in England by the Conqueror, it looked very much like the Inquisition, with' which it was, in fact, historically identical It was based on the King's royal prerogative to force subjects under oath to tell him the truth, particularly unpleasant truths about one another. It was used in the compilation of Doomsday Book, the record devised to give the King all of his feudal dues from every manor. A century later it reappears as the Grand Jury, a group of citizens sworn to tell the King all the gossip that might lead to prosecutions. It appears in court as a fact-finding device, lent by the King, for a consideration, of course, some time after the Fourth Lateran Council of the Roman Catholic Church forbids priests to lend their aid to magico-religious trial by ordeal, 1215. It had nothing to do with the feudal judgment of one's peers mentioned in the contemporary Magna Carta. It was not

even a fact-finding body for nearly three centuries—it was only a fact-declaring body, a group of sworn witnesses rather than sworn judges of fact. But it did, in course of time, serve its function well. It not only found facts of the kind entrusted to it efficiently, but bravely and independently. It always injected into the administration of justice an element of common sense that frequently saved the "law in action" from the effects of the folly of legislatures. It has served as a training school of citizenship. On the other hand, the system of calling in, qualifying and swearing twelve men who know nothing about a case and are not interested in it, in order to pass on a question of fact, is obviously cumbersome and expensive. If the fact is one beyond the ken of the ordinary man, if it involves business practices, figures, modern machinery, and the choice and application of standards of due care, ordinary prudence, proper vigilance, customary precautions, reasonable time and reasonableness in general, doubts may be expressed as to its fitness for its novel tasks, however infallible it might be in sensing where the blame lies in a street brawl. Finally, juries have prejudices and are not always beyond being "reached" and "fixed," or swayed by resourceful lawyers.

(4) EVIDENCE. (*a*) *Three Principles.* Out of the peculiarities of our jury system grows our law of evidence. The voluminous works of Greenleaf a century ago and Wigmore of our own day, to say nothing of Fletcher's Encyclopedia of the Law of Evidence, supplemented by the quarrels we hear in the court room over the exclusion of bits of evidence and the large percentage of reversals in higher courts on the basis of errors in the law of evidence, are calculated to inspire the lawyer as well as the layman with awe in contemplation of this esoteric system of logic. It is no wonder that legislatures write into the laws governing administrative tribunals and arbitrators that they shall not be governed by technical rules of evidence. And yet the whole system is built on only three principles, all of which are alluded to every time a lawyer objects: "Incompetent, irrelevant and immaterial." Two of these principles should give the layman very little trouble. What is *irrelevant* is a question of logic. What is *immaterial,* though remotely relevant, is a question of common sense. What is *incompetent* is a question of law.

(*b*) *The Principle of Competency. Hearsay,* for example, may be both relevant and material. We rely upon it every day in the most important affairs of life. Yet the law keeps it from the ears of the jury because it is not comparable, for court purposes, to testimony under oath, subject to the great corrective of cross-examination. What makes the books on Evidence so voluminous is the *exceptions* and apparent exceptions to the hearsay rule. The business world is interested in many of these exceptions: the admissibility of books of account and other business records, the use of public records, the functions and limitations of expert testimony, the question as to what words in a transaction are part of the *res gestae,* what constitutes an admission against interest, and so on. Business men would, in general, throw the weight of their influence in favor of more liberal exceptions to the hearsay rule. They never resent the discrepancy between their way of doing things and the courts' more than when challenged on the witness stand with what sounds like the comedian's poser: "Were you there ?"

Some other rules under the competency principle fare a little better in the opinion of the business man. The rule that calls for the "best evidence," such as originals instead of copies, is entirely acceptable provided it permits the use of the next best evidence for what it is worth when a foundation is laid by giving a reasonable excuse for the non-appearance of the better type of evidence, and provided, further, no nonsense is indulged in about the first note made by a clerk being better evidence than the first permanent record made in the ordinary course of business.

So there is little opposition to the rule excluding certain types of witnesses for reasons of public policy: the religious confessor or the husband or wife in certain cases. In general, modern law does not exclude, as the older law did, parties or other interested persons, for fear they will commit perjury. It listens to them and takes their interest into consideration in passing on their credibility. The principle of competency has been toned down to meet the understandings of the layman. Yet, one still hears too frequently from witnesses: "Every time I began to tell what I knew one of the lawyers objected and the judge stopped me."

3. Slow Legal Procedure

(1) ADVANTAGES AND DISADVANTAGES. The tradition of our law that gives a man not only a day in court but two or three opportunities to be heard is tinged, like much of our procedure, with the philosophy of a much slower moving era than that in which we live. There are justifications for proceeding slowly, deliberately, thoroughly, in that small percentage of disputes that reach the courts, for the outcome must serve as a yardstick for innumerable similar transactions. Yet inequalities arise from the power of the rich to keep or threaten to keep a

case in court beyond the endurance of the poor, whereas the poor man who loses a case in a lower court is practically precluded by the expense from carrying it higher. There are many situations in business in which any decision is better than no decision, and a prompt rough decision is better than a meticulously accurate one coming several years too late. Mercantile courts were noted for their speed in the Middle Ages, as Coke's amusing attempt to explain the name of the Pie-Powders Courts reminds us. He says that, in these courts, justice was dispensed as rapidly as dust is shaken from the foot. Incidentally, the same Lord Coke explains our whole system of appellate jurisdiction as traceable to the Law-Giver Moses. However valuable the system may be, particularly if limited to one trial and one review in ordinary cases, it is apt to be a hindrance in the simple cases on which the credit system is based.

(2) CUMBERSOME MACHINERY FOR COLLECTING JUDGMENTS. (*a*) *Exemptions.* Another source of dissatisfaction with the law is the cumbersomeness of the machinery for collecting judgments. Leniency with debtors has a good social basis. The civilized world has passed beyond the imprisonment of unfortunate debtors pictured in the novels of Dickens. It has, too, recognized the importance of preserving the self-respect of the individual and the integrity of the family through making some property execution-proof. In some places these exemptions are so liberal that the whole credit system must either be rebuilt on an artificial basis or abandoned for the ordinary citizen. Of course, by hiding behind a corporate entity, even the small business can create additional exemptions for itself.

(*b*) *Bankruptcy.* The Federal Bankruptcy Law, with its recent amendments, sets still other practical limits to the collection of debts. The procedural details and other safeguards against abuse are too technical and too subject to change to warrant inclusion here, but the principle of modern bankruptcy is clear: the honest debtor who surrenders all his property to the court for administration for the benefit of his creditors can have his debts discharged and begin again with a clean slate. This idea differs in almost every detail from bankruptcy as it was understood in the Middle Ages. The thought then was rather to punish the debtor than to discharge him; to protect creditors rather than to salvage debtors; it was allied to criminal law rather than to the administration of estates; it was always involuntary, and it applied only to traders. The recent amendments further emphasize the rehabilitation motive and yield reorganization facilities rather than bankruptcy in the traditional sense. Yet the evolution of the new conceptions of bankruptcy have been so gradual and natural that it is generally believed the courts will find ample justification for this legislation by Congress in the Constitutional Clause that gives it the power "to make uniform the law of bankruptcies" throughout the United States.

4. To Make Obligations Secure

To escape the uncertainties of procedure and to make obligations, particularly credit obligations, more secure, business men have resorted to three types of arrangements:

(1) Contractual modification of the details of procedural law.

(2) Resort to arbitration.

(3) The special devices for safeguarding credit, which are the subject of the next chapter.

(1) CONTRACTURAL MODIFICATION OF PROCEDURAL LAW. A generation ago courts were denying the power of contracting parties to interfere with the procedure of courts. They frowned on arbitration agreements which tended to "oust the court of its jurisdiction." They resisted attempts to state in advance the amount to be paid to the injured party in case of a breach. They declared void any stipulation that a particular document shall be taken as conclusive evidence. Business men were reminded that they could not emancipate themselves from the rules of evidence or the statute of frauds or the statute of limitations which were not of their own making nor written for their own convenience. Nevertheless, courts have gradually been induced to take a different view and to make a distinction between those stipulations which tend to promote the general objects of court procedure, though they do so in a novel way, and those which tend in a contrary direction. They first made a distinction between stipulations for penalties, which they held void, and stipulations for liquidating damages, that is, estimating and agreeing upon such damages in advance, which they held valid. They have upheld waivers of many formalities, of summons, of trial by jury, of appeal or other review, of exemptions within limits, and of some defenses. They have upheld authorizations in notes and even in leases to confess judgments on the contracts in case of defaults. They have recognized liberally during litigation, and more sparingly if made in advance, "stipulations" as to evidence and admissions. They have recognized reasonable curtailments of the period of limitations. On the other hand, they have refused to recognize agreements to refer disputes to one of the parties or his nominee. They frown on

stipulations that proof of one fact shall carry with it a conclusive presumption as to another. They have refused to recognize unreasonable limitations of the period within which an action may be brought. And some courts have steadfastly refused to recognize most of the waivers referred to above.

(2) RESORT TO ARBITRATION. The legal position of arbitration has, in the period under review, been completely changed. The widely copied New York (1925) statute not only makes valid but irrevocable and specifically enforceable agreements to arbitrate future disputes under a contract, as well as submissions of pending disputes. These modern statutes further permit and encourage submission to arbitration of the fact disputes in a case already in court, they provide court aid for arbitration proceedings, including the subpoenaing of witnesses, ruling on questions of law, and the treatment of an award properly recorded as a judgment of the court. In general, however, these statutes are permissive, and whether they become widely useful or not will depend in the first instance on how well they are implemented by trade associations, chambers of commerce, and other voluntary groups, and, secondly, on the extent to which they can cut down the time, expense, publicity and animosity of court procedure without too great a sacrifice of the ultimate advantages of state or nation-supported courts.

[1] See General Index in Volume VI.

Chapter VII

Devices for Safeguarding & Facilitating Credit

1. Fundamental Ideas in Safeguarding Credit

Credit is older than the legal devices for credit. Consequently, from the earliest days we find the ingenuity of the business man taxed to find ways of making himself safe in accepting a promise to pay rather than a payment. The *pledge* idea seems to have grown among all peoples in some such way. The man who agreed to hand over a cow with which he was not ready to part, might leave his horse instead with the understanding that he could eventually substitute the cow. *Suretyship* seems also to have grown up in this way. A friend or relative of the debtor was probably left in the custody of the creditor to be "redeemed" by the fulfillment of the obligation, whatever it might have been, for which the law furnished no adequate means of enforcement. The *mortgage,* at least the English mortgage, is on its face and perhaps was in its origin, the transfer of one's property to the creditor with the understanding that the property could be redeemed by the performance of the principal obligation.

Even after the law developed to the point where a simple promise, made in the course of business, could be enforced, the many slips between the bringing of the action and the actual collection of the debt have caused business men to look around for various means of making assurance doubly sure. They have continued in the path blazed for them by those early pioneers who created in various times and places the pledge idea, the suretyship idea, and the mortgage idea. Thus, there has come into being a good deal of contractual self-help in the matter of credit, and various legal institutions have been wrested from their original setting to serve the purpose of making the creditor secure. These include, besides the pledge, suretyship, and mortgage already mentioned, various applications of agency, leaseholds, bailments, employment, partnership, the issuance of corporate securities, symbolic possession, negotiable paper, and anything else that the ingenuity of the business man can use as the basis for feeling safe in extending credit or, to view it from the other angle, anything that his ingenuity can devise to induce another to become his creditor.

Instead, therefore, of approaching the business problem of using the law's devices for credit from the point of view of the law, and studying each institution mentioned in this hodgepodge, let us rather approach the problem of credit from the business point of view and refer to these institutions only with regard to their adaptability for the purpose of safeguarding credit under various sets of facts.

2. Credit from the Business Point of View

From the business man's point of view there are two bases of credit outside of the ordinary legal procedure for the collection of debts: first, *personal security* and, second, *real security.* Both of these terms are used in their literal senses, that is, they refer to the simple fact that, in making a creditor more secure, we may resort either to reliance on an additional *person* or to some thing *(res)* which shall be put under the control of the creditor.

(1) PERSONAL SECURITY. Personal security may be added to a debt in many ways, including *guaranty* of several types, *suretyship, indemnity agreements, endorsement* or other signing for accommodation of commercial paper, and *del credere* agency.

(*a*) *Guaranty.* These plans may be illustrated simply by assuming that two men enter a store together for the purpose of buying goods for one of them. Let us designate them as "K," standing for Known, and "U," standing for Unknown. K's credit is good, but his friend U is the one who wants the goods. K may, of course, say: "Give U the goods and send me the bill." This transaction does not come within any of the classes, as U is outside of the contract altogether. But K is more likely to say: "Give U credit. If he does not pay, I shall." This is a *guaranty of payment.* It must be reduced to writing and signed by K in order to be binding under the Statute of Frauds. Again, K may say: "Give U credit. If you cannot collect from him, or if he becomes insolvent, I shall pay." This is a *guaranty of collectibility or of solvency.* It, too, requires writing. But, obviously, in order to complete his right of access to K, one must do or show a great deal more than in the case of guaranty of payment. Guaranties may be made conditional upon the giving of certain notices, the keeping of certain records, the exercise of diligence in various ways and, of course, in such cases the law insists on the fulfillment of all conditions before it will hold the guarantor. A simple endorsement of negotiable paper, we shall see, carries with it such a *conditional guaranty:* if demand is made on the person primarily liable, in the right way, at the right place, at the right time, and he refuses to pay, and if the requirements laid down in the negotiable instrument law for making a proper record and giving notice of the facts are complied with, the indorser will pay. In all of these cases of guaranty, it is to be noted that there are two contracts to pay: first, that of the principal debtor; second, the collateral contract of the guarantor, which must in itself satisfy all the requirements of the laws of contract to be complete.

(*b*) *Suretyship.* K's proposition may be varied ever so little in words, with rather startling legal effects. He may authorize the giving of the goods to U, to be charged jointly to K and U. This we may call suretyship—though there is by no means unanimity among law writers in the use of this word, as some appropriate it for what we have called guaranty of payment. In the situation we have described, we simply have a contract with two promisors on one side instead of one. Between these two promisors the situation is thoroughly understood. If K pays any part, U must indemnify him. If U pays, the matter rests there. If the promisee knows the nature of their relation, he will have to proceed with the same type of caution as called for in the case of guaranty. Changing the risk or the burden of the surety without his consent will let him out.

(*c*) *Endorsement or Other Signing of Commercial Paper.* K can become a surety for U by signing a promissory note along with him.. Or he may sign the note alone, making it payable to U, and U may endorse it to the creditor. In either case, U, as a signer of the note, is absolutely bound to pay and is not entitled to the benefit of the conditions enjoyed by the endorser whom we have described as a conditional guarantor. In fact, the creditor can get the benefit of "two names" on a negotiable instrument, regardless of the position that the parties, for convenience, choose for their names, subject to the requirements imposed on the creditor by the negotiable instrument law and the stipulations in the document. Thus, K may appear as one of the persons unconditionally liable (the maker of a note or the acceptor of a bill of exchange), or as one conditionally liable (the drawer of a bill of exchange or the endorser of either type of instrument).

(*d*) *Indemnity and Del Credere Agency.* K may get into the picture of U's debt in a very different way, as an insurer of a business man against certain credit losses, and U may be only one of the debtors. Such a contract is one of indemnity, and is subject to the laws of insurance. Again, K may be an agent selling the goods of D on credit to a group of customers chosen and approved by K, with the understanding that he is to be responsible for U as one of these customers. K is then a *"del credere"* agent whom the law so far distinguishes from a guarantor as not to include him under the Statute of Frauds as a person agreeing to answer for the debt of another.

All types of personal security have some of the weaknesses of the ordinary procedure at law because they are enforced through it. Furthermore, in the interpretation of these contracts there is a strong tendency to give the benefit of every doubt to the person who presumably got no advantage from the transaction. Thus, on such questions as whether an offer of guaranty called for a notice of acceptance, whether the completed contract called for a notice of each action un-

der it, notice of every default, and other precautions for the safeguarding of the interests of the guarantor, whether the contract was meant to cover a single transaction or to run for a series of transactions, whether a contract was a guaranty of payment or only a guaranty of solvency, all doubts are resolved in favor of the guarantor. Such strict care is enjoined for the benefit of the guarantor, surety, accommodation party, and others similarly situated, except perhaps the paid surety company, and the defenses allowed by courts in such cases at times seem so unreasonable to business men that the use of personal security is limited in practice to comparatively few situations, and in most of these the party secondarily liable is really an interested party: for example, a large stockholder of a corporation who endorses its paper, a contractor who stands behind the subcontractor so as to enable him to get his necessary materials, the seller of goods who endorses his customer's trade acceptance to his bank, the automobile dealer who assumes a contingent liability for his customers account to the financing company.

(2) REAL SECURITY. Real security (dependence on things) presents an even larger variety of frameworks for credit than the personal arrangements already discussed. Unlike these, which are based almost entirely upon the contract idea, the real security devices come from widely scattered parts of the law—from Real Property, Personal Property, Contracts, Corporations, Agency, Trusteeship, Public Records, Negotiable Documents of Title, and from Mortgages, which latter is compacted of several of these and with peculiarities of its own. We shall, therefore, have to make brief excursuses into remote parts of substantive law in explanation of some of the common plans.

Let us first divide into three classes the holds which a creditor may have on things belonging to the debtor: (*a*) possessory holds, (*b*) title holds, and (*c*) combinations of these with other means of control.

(*a*) *Possessory holds* will include all situations in which the actual physical control of the property passes to or remains in the creditor, even if, in addition, elements of the other modes of control are included in the plan. Here we may include *possessory liens, pledges of things,* the deposit of *symbols or documents of title* or of documents carrying rights with them as *collateral security.* Sub-varieties of each of these or special contractual modifications of them exist and can be added without number. For our purposes the main features of their commonly recurring forms will suffice.

Possessory Liens. It was formerly said that *liens* exist by virtue of statute, by common law or custom or by contract, but the nineteenth century was so contract-minded that it reduced practically all cases to contract, express or implied, and sought only the evidence of some of its implications in statutes, common law, or custom. Furthermore, it was anciently assumed that a claim under a lien was one thing and a right of action in contract was another, and that the two would not coexist. But, again, the all-pervasive theory of contract prevailed, and liens are now looked upon as secondary supports for contracts in every case.

The eighteenth century lawyer could enumerate the types of persons who had liens and say whether the liens were special—that is, covering only the goods involved in the transaction out of which the charge had grown, or general—that is, covering newly acquired goods for back-balances. The carrier, the innkeeper, the repairman, the animal trainer, and a host of others, had special liens. The wharfinger, the factor, and the packer had general liens. The agister lost his lien through a curious mistake. The first printed case on the subject was one of contract, and, *therefore,* the agister in that case had no lien. Two centuries later, the courts had forgotten the learning necessary to explain that reasoning, and it was dogmatically said that the agister had no lien at common law. This rule made generalization difficult, but finally the text writers rose to the occasion and laid it down thus: whoever adds to the value of the thing entrusted to his care has the right to hold it until he is paid for his services. As to general liens, they said: whoever necessarily parts with goods in the course of giving the service for which they were entrusted to his care may have a lien for his balance on other goods of the same owner coming into his hands.

Today we have many possessory liens created or recognized by statute, such as the garageman's lien, the unpaid seller's lien, and more that are expressly covered by contract, such as landlords' liens, stockbrokers' liens, and, to jump to another extreme, the analogous stipulation laid down by a college that no degree will be granted to a student until all arrearages are paid.

A bare possessory lien is a narrow, precarious right. In itself it carries no assurance of payment unless or until the debtor becomes sufficiently eager to get his goods back to be moved to redeem them. The fact that today the creditor may sue

on his contract leads inevitably to some kind of procedure whereby the lien can be utilized to satisfy the judgment. In other words, modern law provides differently in different jurisdictions for some sort of foreclosure of a possessory lien after due notice to the owner of the goods. Generally a public sale is required and a strict accounting is expected of the surplus yielded by the sale over and above the debt and the costs of procedure. A lien of this kind is easily lost; for example, it is forfeited if possession is given up and does not revive on retaking possession; it is lost if the lienholder is guilty of a conversion of the goods, and apparently he is guilty of a conversion if he withholds the goods from the owner without specifying the lien as his reason for withholding them.

Lien law is important in a few businesses which deal with a constantly shifting traveling public: carriers, innkeepers, garage-men (which take the place of the smiths of Blackstone's day), and repairmen generally.

Pledges of Things; Collateral Securities. The lien, with its modern equipment for enforcement, closely resembles the pledge, whether it be the pawn in the pawnshop or the collateral security in the vaults of a bank or brokerage house. There is a thought-provoking difference between the evolution of the pawnbroker's pledge and the bank's. The former has been governed and standardized for many years by the action of the state. The latter has developed through rather one-sided contracts written by the banks and brokers. Hence the pawnbroker, in order to convert his pledge into money, must proceed step by step in a manner calculated to give his clients a good deal of consideration, whereas the pledge agreements of the banker and the broker allow them to "sell out" their borrowers with or without notice, at public or private sale, to themselves or others practically whenever the collateral holder becomes sufficiently alarmed to deem such action necessary for his own protection. They further generally stipulate that the thing pledged may be utilized as security for other claims of the pledgee against the pledgor; that the pledgee may repledge the collateral; that the pledgee may, but need not, take steps to protect the interest pledged or permit the pledgor to take action with reference to it when its value is endangered by a reorganization of the corporation issuing the security, but that he may require the pledgor to do so; that the pledgee shall be free from the ordinary obligation to account to the pledgor for any surplus realized, and that the pledgee be free of blame for all manner of conduct or misconduct.

The proponents of such drastic forms for signature have something to say in self-defense. When security values begin to topple, quick action may be essential not only to protect the bank's interest but also the interests of the pledgor and of the public whose money the bank controls. Furthermore, banks may be trusted not to use thoughtlessly all the extreme powers entrusted to them. Prudence dictates that they be armed with powers for emergencies though such emergencies, admittedly, rarely occur. In any event, courts may be relied on to put a reasonable interpretation on such documents confessedly drawn by one side and signed on the dotted line by the other. Finally, if there is a market quotation on the securities pledged, there is no danger of arbitrariness in the fixing of a sales price, regardless of how the sale is made. In view of the flood of complaints that reached the courts after the stock crash of 1929, it is impossible to say that this reassurance is very reassuring. Brokers' contracts are already the subject of study by stock exchanges and administrative commissions, and bankers' agreements may well be submitted to voluntary or compulsory revision.

Documents of Title. Besides securities in the sense of stocks and bonds, other valuable papers, particularly *documents of title,* serve as the basis of banking credit. Under widely prevailing statutes today not only bills of lading and warehouse receipts may easily be made negotiable by making the goods deliverable to one's order, or by otherwise following the statute, but practically any thing may be covered by a negotiable document of title. The Uniform Sales Act says: "A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title."[1] Such documents are particularly useful in shipping goods great distances, especially in foreign trade, where it is possible to attach the document representing the goods to a draft (bill of exchange) to be delivered on payment of the draft, or in more complicated cases to attach papers representing Cost, Insurance and Freight (C.I.F.), exchange, collection and interest, none of which need be paid for by the customer until the goods are available, while the bankers who make the necessary advances are secured by holding the papers. Longer financing of goods in a warehouse is possible with such paper, which enables the bank to substitute the drawers in its safe for a lumber room, in the original sense of the term,

such a room as that in which the Lombards, England's medieval bankers, kept their pledges.

(*b*) *Title Holds.* All possessory liens suffer from one great defect that greatly limits their practical usefulness in business. They withdraw the goods that are used as the basis for credit from use and to a great degree from the channels of commerce. Hence, when a *"floor* plan" of credit is needed, that is, a plan wherein the goods are to remain on the floor of the dealer who is being financed, or any plan of consumer use while the goods are being paid for, a *title hold* must be given to the creditor, instead of a possessory hold. The prototype of title holds is the real estate mortgage, though its imitations, such as liens on real estate, chattel mortgages, conditional sales, leases with privilege of purchase, trust receipts, consignment arrangements for credit purposes, have deviated, at times, pretty far from type. In some cases the title is actually transferred; in others only an incumbrance is created.

(*c*) *Real Estate Mortgages.* The real estate *mortgage* is *in form a deed* which conveys to the creditor the property that serves as security for credit. At the end it recites that, if the debt in question is paid in accordance with an agreement, the deed shall be null and void; otherwise, however, it shall remain in full force and effect. Though there is considerable diversity in the theory of mortgages adopted by the several states, no English-speaking jurisdiction gives literal effect to this language. It has been said rightly that no man by the light of nature can understand an English mortgage. The reason for the obscurity lies in the very laudable efforts of equity to mitigate the rigor of the law by avoiding the forfeiture which the language of a mortgage involves. Ordinarily the property is worth more than the amount loaned on it, and it would be an unfair penalty, for failing to pay the debt on a particular day, to make the entire property forever that of the creditor and beyond redemption. Equity has, from an early period, taken the view that the true meaning of the parties was that the property should serve as security for the payment of the debt and nothing else. It has, therefore, created a special right for the delinquent debtor, called an "equity of redemption." This simply means that even after default he can come in and pay the amount he owes plus interest and possibly damages, and thereby redeem his property. If he fails to do so within a reasonable time, it is, of course, desirable to provide some means of cutting off the equity of redemption—that is to say, *foreclosure.* The term "foreclosure" has been used in various jurisdictions for a large variety of procedures ranging from formal notices, followed by a lapse of time, to public sales with or without judicial procedure. In general, however, the tendency of American law is to make it unlikely that the mortgagee can make a profit out of the forfeiture clause in a mortgage by giving effect to the simple language of the document and converting what was once a mortgage into a deed.

Passing of Title. The diversity of the various jurisdictions is illustrated chiefly in the question whether the so-called condition at the end of a mortgage is to be looked upon as a condition precedent or a condition subsequent to the *passage of title from the borrower to the lender.* In form it looks very much like a condition subsequent—that is to say, it looks as if title was intended to pass to the mortgagee immediately upon the execution of the mortgage with the expectancy that, in the normal course of events, it would pass back to the mortgagor. And so most of the older jurisdictions—the Eastern states—seem to hold. The opposite view, which seems to prevail in the West, is that no title passes until default or, according to some states, until foreclosure. The consequences of this diversity of view are more technical than substantial. Thus, if the mortgagee is the title holder, the mortgagor who remains in possession is pretty clearly a tenant, and the legal relations between the two are viewed accordingly. If, on the other hand, the mortgagor still has the title, whatever he is, he is not a tenant, and other analogies must be resorted to in working out the relative rights of the parties. In actual practice, the difference is likely to be mitigated by the terms of the contract written into the mortgage which may state rather fully the claims that each shall have against the other under every imaginable set of facts—in other words, the mortgage, like many other legal instruments, has gone through a development *from status to contract.*

Modern law views the mortgage as an *incident to the debt* which it secures, whether that debt is evidenced by a promissory note or other type of document or merely existent on the basis of an ordinary contract. Consequently, the holder of the mortgage generally has the *option of bringing an action* on the debt without regard to the mortgage, or of proceeding on the basis of the mortgage, or of doing both simultaneously. Of course, he is entitled to only one satisfaction of his claim. If the mortgage property brings a surplus over and above the claim

and court costs, the debtor is entitled to an accounting. If, on the other hand, the mortgage property brings less than the claim, and the action included the entire claim, a *deficiency judgment* may be given for the balance.

Since the mortgage is merely incidental to the debt, and since debts, particularly those evidenced by negotiable instruments, are easily transferred by creditors, it follows that the law must provide in some way for the *transfer of the mortgagee's interest.* The exact formula in any state will depend, in the first instance, on whether the mortgagee is looked upon as the holder of the title to the property in question or not. In any event, the tendency today is to simplify the process of transferring the mortgagee's interest, or even to look upon it as passing, in the eyes of equity, along with the debt where no formal transfer has taken place. The mortgagor's interest is likewise transferable. Great caution must be exercised, however, that in transferring it one does not unintentionally pass to the purchaser of it an obligation personally to pay the entire debt. That is to say, the mortgagor may transfer his interest in the land subject to the mortgage, or he may transfer it and exact a promise, which may be worded in various ways, involving the unconditional payment of the mortgage by the purchaser of the land or the reimbursement of the original mortgagor if he is compelled to pay. It is, of course, also possible to make the mortgagee a party to the transaction or to leave the transaction open for him to come in at his option and deal with the new lender as the principal creditor or as a surety or even as the sole creditor with the original mortgagor discharged. The interpretation of the same words is likely to be different in different jurisdictions, and the presumptions indulged in may differ to such an extent that the transfer of this type of interest must be looked upon as a very technical branch of conveyancing.

It is, of course, possible not merely to convey the interest that remains in a mortgagor but also to mortgage it—that is to say, to put a *second or third mortgage* on the property. Obviously in those jurisdictions in which the first mortgage transfers title to the mortgagee, some other interpretation than that of the title theory is necessary to explain the situation of the parties to a second mortgage. It becomes very similar to the first mortgage in jurisdictions not accepting the title theory. This difference between a first and second mortgage has led to some curious doctrines, such as that of "tacking," under which it is possible for a first mortgagee to acquire a third mortgage which, by reason of his superior position as a title holder, becomes a part of his interest in the land, and thereby obtain priority over a stranger's second mortgage. There is a great tendency, however, to depart from such technical theories under modern statutes.

In the *real estate mortgage,* as in all arrangements that merely encumber the title of property without affecting its temporary possession, there is danger that a stranger dealing with the apparent owner of the property in possession might find himself in competition with the mortgage claimant. If the strict letter of the old law is followed in such a case, the stranger is defeated and the owner of the secret lien prevails. *Caveat emptor.* The desire of the business world to make indefeasible transactions entered into in the ordinary way in good faith has, in this case as in others already studied, been recognized by the law and written into the provisions for registration. The mortgagee is expected to put his mortgage on record where it will be found as an encumbrance upon the property by anyone examining the title. If he fails to do so his mortgage is not rendered invalid, but it is simply dealt with as if it were fraudulent so far as innocent strangers are concerned. The registration laws of the several states differ from one another on many important points. Thus, some allow a short period for registration; some give the same effect to actual notice or constructive notice that they give to registration in saving the secret lien; still others make the moment of registration operate mechanically as the basis of priorities claimed under registered documents.

(*d*) *Chattel Mortgage.* By analogy to the real estate mortgage there has developed in more recent times the *chattel mortgage.* In some states the analogy is very close, but generally the force of business necessity, as well as the relative simplicity of the law of transfer of interests in things, has led to considerable differences both in the formality and in the operation of chattel mortgages. Thus, it is generally true that, instead of registration, the comparatively inexpensive and simple expedient of *filing* is sufficient. The actual document need not be executed with the formality of a real estate deed, but only with that of a bill of sale or similar document for the conveyance of an interest in personal property. On the other hand, a chattel mortgage is expected to be comparatively short-lived and not a part of a permanent systematic legal record of the history of the thing; hence it is

usual to demand an affidavit renewed from time to time to the effect that the debt is still subsisting. In many states a *change of possession* at the time the chattel mortgage is made may serve as the equivalent of recording or filing.

There is also less likelihood of difficulties growing out of the title theory, because chattel mortgages, being relatively new and governed by statutes, are likely to be free from the technicalities suggested by the laws of title in real estate law. Foreclosure is usually allowed with less formality or reliance on court action than in the case of real estate, but in the main the analogies of real estate mortgage law have been followed closely—perhaps too closely—in the development of the concept of the chattel mortgage.

Sale agreement. Theoretically, the *conditional sale* is merely a short cut accomplishing the same end as transferring a title to a buyer and then taking back from him a chattel mortgage giving the seller once more a title-hold on the goods as security for the debt incurred in their purchase. In practice, however, several differences have arisen which have required statutory adjustment. Today a conditional sale agreement requires filing and the other formalities of a chattel mortgage in most jurisdictions, though, of course, a statute speaking of a chattel mortgage does not by those terms include a conditional sale. The agreement is, furthermore, likely to be ever so much simpler than a chattel mortgage and to leave room for more doubts. Thus, a perfect conditional sale is accomplished whenever it is stipulated at the time of the contract of sale that title will not pass until final payment is made. A single line to that effect, or even an oral understanding, is sufficient. The stranger who deals with the goods in ignorance of such an arrangement is technically, perhaps, in a poorer position than the stranger who deals with the title holder in ignorance of a chattel mortgage—for the one acquires an unencumbered title; the other, no title. The tendency today, however, is to dispose of the cases in exactly the same way.

(*e*) *Lease with Privilege of Purchase.* Another variation of the mortgage idea, used both for real estate and personal property, is the adoption of the form of a lease with a privilege of purchase. Historically the privilege of purchase in the development of this form was incidental, and the lease was exactly what it purported to be. But when the figures are juggled so that, after paying $5 a month as "rental" for a piece of furniture one eventually reaches a point where by a final payment of $5 he can become the outright purchaser of the thing, or where the same plan is worked out with reference to a house, it becomes clear that what we are actually doing is to postpone the transfer of title until the final payment on the purchase is made. In the case of real estate, no great hardship is likely to result from such an arrangement, because the title of record is a clear enough warning to all outsiders dealing with the tenant in possession. Still. courts have at times found it necessary to point out that such an arrangement is in substance a sale coupled with a purchase money mortgage.[2] In the case of personal property, however, the legal difficulties are somewhat more intense. It is hard to bring such arrangements within the terms of a statute requiring record for secret liens. None the less, the tendency of both statutes and decisions is today to look to the substance of all such arrangements rather than to the form. A somewhat similar situation arises where goods are *sold on consignment.* The motive for making such an arrangement may have little or nothing to do with credit, but the scheme happens to lend itself to the needs of a "floor plan" of financing traders. Under it, the dealer with the object—say, an automobile-in his possession, is quite free to pass a title to a purchaser. The money which he receives, however, is not his; it is the money of his principal, who had remained title holder to the object until the moment of its sale. If the dealer becomes insolvent, not only is the claim of the title holder of the goods protected, if this money can be traced, but he is free to reclaim remaining parts of his stock without sharing their value with other creditors.

(*f*) *Trust Receipt.* The so-called *trust receipt* represents a distinct evolution of another kind in the creation of title holds on goods in the possession of a debtor. It is possible, and at one time was common in certain industries, to make an arrangement that is, in a technical sense, one of *trusteeship.* The manufacturer or finisher of goods whose credit standing is doubtful might be given raw goods in return for a trust receipt in which he recites that he is accepting the goods as trustee with certain obligations to see them through particular processes and eventually to convert them into cash which will take the place of the trust *res* and as to which he will render an accounting in the ordinary manner of trustees. Since trust claims are not wiped out by bankruptcy, and trust objects are not thrown into the general fund of a bankrupt, and since, moreover, the answerability of

a trustee at all stages of his work is more marked than that of an ordinary debtor, this arrangement, while not entirely knave-proof, has proved to be quite satisfactory. In its later modifications, however, it has ceased to be true trusteeship and has, rather, created a situation in which the processor of goods becomes a mere *bailee* to whom no title passes at any time. In other words, the arrangement becomes more like consignment to which is added an obligation to do some work on the goods besides selling them, and it culminates not in the holding of money as a trust *res* but in the somewhat similar situation of an agent accountable to a principal.

(*g*) *Mechanic's Lien.* There remains to be considered a statutory device of prime importance in the building industries. The so-called mechanic's lien had its chief impetus, if not its origin, in America a century ago in an effort to protect the interests of the laborer. It has met and overcome several difficulties, however, in the problems of contractors, subcontractors, and materialmen as well as laborers, by giving them all a direct claim against the property on which they work or into which their materials go, instead of limiting them to personal actions against those with whom they have dealt directly. It has, furthermore, given them the equivalent of a shorthand mortgage on the property acquired by merely filing in the proper public office an affidavit or a notice of claim. For practical purposes this is a cloud on title which the property holder must remove by settling the account or forcing a test of the claim in court. As a purely statutory creation which varies in various places and is amended in each from time to time, it is the victim of much judicial interpretation which has frequently been overly technical. Its law is consequently full of pitfalls for owners, purchasers, and lien claimants, particularly where the statute gives even a short retroactive effect to the act of filing the notice. One example will suffice to warn of the treacherous nature of these liens. Where a statute permitted the filing of a lien within so many months after the work was "finished," an unpaid subcontractor long after the period expired took advantage of a property owner's complaint about some of his work. He admitted that it was not "finished" and after putting a very little "finishing" work on it filed his lien for the whole of his claim, and the courts upheld him. In the main it may be said that the working of the mechanics' lien laws has been of tremendous advantage in smoothing the path of the contractor and insuring substantial justice to all concerned in the actual process of building. Similar statutes have been extended here and there to mine work and to ship building.

3. Negotiable Instruments

We have already had many occasions to allude to negotiable instruments of various kinds. Negotiability is one of the bases on which we founded a concession of the legal ideal of security of rights in favor of the business ideal of security of transactions. We have seen how the idea of negotiability has been copied from bills of exchange and promissory notes and has been extended to other types of commercial documents: bonds, stock certificates, bills of lading, warehouse receipts, miscellaneous documents of title. We have noted the convenience of the form of negotiable instruments for use in creating suretyship, guaranty and other credit combinations. A brief summary of the substantive law covering these very important business documents will conclude our chapter on legal devices for safeguarding and facilitating credit.

(1) PROMISSORY NOTES. A promissory note is in form one side of a contract: the agreement to pay. In Blackstone's day, by virtue of its form it received the special recognition of the law, even as between the parties, that it is accorded on the Continent of Europe today. The bargain which it represented did not have to be established by the ordinary Law of Contract, including such doctrines as "consideration." The nineteenth century, however, in England and America, assimilated the law of promissory notes to that of ordinary contract, so that today theoretically between the original parties there is no difference between a contractual promise evidenced by a promissory note and any other contractual promise. The only compromise in the situation is that the form of such document raises a presumption that there has been a consideration, but this presumption is rebuttable. In like manner, the ordinary Law of Contract has become applicable, so far as immediate parties are concerned, in the type of instrument known as a bill of exchange, or in commercial parlance as a "draft," where a request is addressed to someone named in the instrument to pay money to another. This request is of the nature of an offer; the payment, or even the promise to pay, in accordance with the tenor of the instrument, constitutes an acceptance of the offer, and it is understood that there is an obligation on the part of the person making the request to reimburse the person honoring the request.

If these documents are made

out in the special form that has developed in business history and that is now almost universally covered by statute, the document becomes negotiable—that is to say, transferable and capable, while being properly transferred, of clearing away many of the defects or limitations that may have impaired its value as between the original parties. Where a negotiable instrument is negotiated, we have an illustration of a party selling a better title to a thing than that which he himself possessed.

The *marks of negotiability,* laid down by the statute, are:

"An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a certain sum in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer; and, (5) where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."[3]

The *process of negotiation* depends on whether the paper is at any moment in a state payable to bearer or payable only to the order of a specific person. The endorsement in blank has the effect of making the document payable to bearer—so has the writing in of the word "bearer" or any other word clearly not intended to be the name of a specific person in the original document. In such cases, the document is negotiable by delivery. If, however, the document is payable to a specific person, that person's endorsement is necessary to accompany delivery for the purpose of negotiations. Furthermore, to constitute negotiation, the transfer must be in ordinary course of business—that is, it must be made before the maturity of the document, for value, and to a person who has no actual notice of any defects, counter-claims or equities that would serve as partial or complete defenses for the person primarily liable on the paper.

When such negotiation is completed, all possible defenses are by no means cut *off.* There are so-called *real defenses* which constitute a risk even for the buyer of a document who becomes a holder in due course. These are principally of two kinds: those that amount to (1) *forgery* and (2) those which *particular statutes* as parts of the public policy of a state set up as final. A defense is equivalent to (1) *forgery* in the sense in which the term is used here, (*a*) not merely where the signature of the person sought to be held has been written in by another without his consent, but also (*b*) where the document in its present form was made up over a genuine signature[4] or (*c*) where a document that had never been completed or delivered had been filled out and delivered and thus made into *a* negotiable instrument by the misuse of a genuine signature. (2) Instances in which a *statute* sets up a final defense are those which go to the capacity of the party to make a contract and in some jurisdictions gambling contracts.

Most defenses are considered purely *personal*—that is, they apply only between immediate parties and cannot be utilized against the holder in due course or anyone claiming title under him. Thus, if the document was acquired by fraud not amounting to forgery, or if it is found that there was no consideration for the contract, or if the maker of the document had a counter-claim against the person to whom he had given it, or if the delivery had been incomplete or only conditional, the defense is not available after negotiation.

Negotiable instruments speak a shorthand language. When one writes his name on the back of such a paper he *is* actually signing many legal documents. Thus, (1) there is a receipt acknowledging the payment to him by the next holder of the amount of money recited in the document; (2) there is an assignment or transfer of the document to the next holder, whether this was necessary for the negotiation or not; (3) there are certain warranties enumerated in the statute, in general to the effect that the document is genuine and what it purports to be; (4) there is a series of conditional guaranties—that is, promises to pay if the person primarily liable fails to do so and the necessary legal steps are taken properly to record that fact and promptly to notify the endorser.

(2) CHECKS. Checks are a variety of *draft* or *bill of exchange.* They are drawn upon a bank by a depositor who has presumably left funds with the bank in advance, or made some other arrangement under which the bank honors his demand. They do not recite any particular time at which the demand is to be made or at which payment is expected, but by custom it is understood that they are to be presented forthwith in the ordinary course of business and that, while a reasonable time is allowed for each endorsement, it is negligent on the part of a holder to delay for more than one business day the presentation of his check to a bank. For this reason he may find that the failure of the bank during the course of his delay may fall upon him.

In one respect checks are

assimilated to notes rather than to drafts. In the case of an ordinary draft the man who signs his name in the lower right-hand corner, the drawer, is not the person primarily or absolutely liable on the document. If the document is accepted—in the case of a check this process is called "certification"—the acceptor is the one primarily liable, and his position corresponds to that of the maker whose name is signed at the end of a promissory note. The drawer, unlike the maker, is liable conditionally very much as the endorser is, and is entitled to notice in case of default on the part of the person primarily liable or even dishonor of the document by nonacceptance on the part of the person to whom the document is addressed. In other words, the drawer of an ordinary draft may under certain conditions be discharged of all liability. In the case of the drawer of a check, however, his discharge is limited only to the amount by which his position is prejudiced through a delay. For the rest, he remains absolutely liable precisely as if he had been the maker of a note instead of the drawer of a bill of exchange.

[1] Uniform Sales Act, Sec. 27.

[2] Harkness *v.* Russell & Co., 118 U.S. 663 (1886).

[3] Negotiable Instruments Law, Sec. 1, p. 219.

[4] Commerce Securities Corp. *v.* Hays, 60 S.W.(2d) 335 (1933): Where signature to note in blank is procured by fraudulent representations and is thereafter, without maker's consent, filled in as to payee, amount, and date of maturity, alterations amount to forgery, rendering instrument unenforceable, even in hands of holder in due course, on proof that maker was not negligent.

Chapter VIII

Desiderata

If we think of organization as division of function coupled with unification of design, we may apply the term in business not only to the internal structure of a unit but also to the normal relations of that unit with other units. When we think of this larger aspect of business organization, we can hardly be satisfied with a lawyer's list made up of corporations, various types of partnerships, agency, and the business trust. On the contrary, we must think of all elements that are needed for the successful operation of a business unit (the labor, the enterprise, the capital, the land) and how they are brought together. Or, in terms of human relationships, we must think of the persons who furnish these elements and of the basis for expecting them to be forthcoming as they are needed in accordance with the plan. The vast variety of the plans that make up modern business organization calls not only for reshaping the recognized legal devices for organization, but for drawing in from time to time various types of agreements that may never before have been thought of as devices for organization—for example, leases, mortgages, trade acceptances, standing offers, comprehensive sales agreements, letters of credit, and a vast variety of nameless contracts.

1. Motives of Unification

From the executive's point of view, the particular legal form used for the expression and enforcement of his plan is not nearly so important as are such practical questions as the degree of centralization of authority and responsibility within his unit and in relation to other units, and the closeness with which units are related, ranging from complete merger on one hand to the merest touch-and-go relation at the other. He is, furthermore, interested in certain aspects of organization that seem desirable from his point of view, such as plasticity, presence of control, absence of responsibility, and speed, cheapness, and simplicity in the making, maintaining, and enforcing of the relations involved in his organization.

Let us view these executive problems from the point of view of a manufacturer of automobiles. The parts which he assembles may be purchased from a manufacturer of such parts on a hand-to-mouth basis as he needs them. Suppose, however, he desires a closer contact with the source of his supply. He can, of course, make more comprehensive agreements to purchase by the season or even to purchase the entire product of a plant. He may insert peculiar clauses in his contracts of purchase, if he has the power, which will give him the control that he desires. Besides the mere detailing of specifications for the goods, he may bargain for the presence of his own inspectors or other employees while the raw materials are being produced. His motives in seeking a closer contact with the source of supply may be various. He may have encountered a situation in the market of dangerously fluctuating prices or of an inadequate supply from time to time, or it may be that he fears latent defects in raw materials, the presence of which cannot be detected until serious damage is done. Or it may simply be to win for himself the profits which he suspects have been large in the basic industries on which he relies. It may even be that he is in search of a place for investing his surplus. Whatever the motive, we may readily imagine him reaching back further and further until he owns not only lumber yards

and saw mills but forests, not only factories for the manufacture of metal parts but steel mills and refining plants, mines, railroads, and steamship lines.

The reaching out may go forward in the other direction. The manufacturer may acquire closer and closer relations with the distributing and retailing end of his business. His motives here may be to control the conditions of ultimate sale of his product. On the other hand, while cultivating a complete vertical organization on the manufacturing end, he may avoid the expense and risks of marketing because for one reason or another he may not feel the need of controlling conditions of the market.

We have moved in two directions of the vertical development of a unit, beginning with the manufacturer as the center. Of course, in the actual history of a business we may find the retailer occupying this central position and working backward by acquiring the wholesale distributing organization, or eliminating that and acquiring the manufacturing plant and more or less of the structures that lie behind it. For present purposes the principle is the same. It is for the executives to decide, so far as in their power lies, how closely knit a relationship shall exist among the units that constitute in a broad sense the business organization of which they are a part. It is for the law to furnish a variety of organization devices that will delicately respond by giving exactly the degree of unification desired.

2. Motives of Isolation

We have spoken of the motives for unification. We must not overlook the possible motives for isolation of the various parts of an enterprise. Turning again to the automobile industry, let us recall the early stages when the manufacturer undertook quite incidentally to sell a few cars that he produced, without any separate selling organization. The market at this time was quite limited and those who purchased cars did so very much on their own initiative and thought of themselves as having something built to their order. The customers were recruited from among the wealthy, and there was no problem of financing purchases. In course of time all this was changed. The scale of production increased rapidly and, although the cost per car decreased, the investment in the manufacturing of cars became so great and the work of selling so specialized that a cleavage developed between the manufacturing and the *marketing of automobiles.* The burden of *financing* cars up to their final sale was variously adjusted between the manufacturing and the marketing organizations. Eventually, the problem of financing the ultimate purchaser came up and had to be faced by manufacturer and marketing organization alike, with the result that financing schemes more or less directly fostered by the automotive industry have come into existence.

In the several stages of development sketched here, many fine readjustments have been necessary in the *distribution of functions* within the industry as a whole. And as plans have progressed, the law has been called upon to furnish organization devices that would adequately correspond to the division of functions planned in every emergency. In these cases the motive for isolation has been pretty largely the splitting of financial burdens. There may also be discerned, however, a recognition of different types of skill requisite in the industrial and commercial fields. There are also very different *types of risks.* In the early stages of any manufacturing industry banks are hesitant about making loans, and the money necessary for the financing of such a project is likely to come in on some speculative basis. New industries very generally suffer from this aspect of money raising, but so long as thy are speculative they call for types of organization facilities that divide risks and compensate for their assumption in accordance with very peculiar needs in each situation. On the *distribution* side, however, the risks are not so radically different from those of any storekeeper who has his wares for sale. Hence, capital can be attracted and money borrowed to cover peaks on a much less speculative basis. Accordingly, the isolation of the units from each other may free one part of the industry from risks and burdens to which the other party is subjected.

Other motives for isolation range from a simple bookkeeping attempt to keep accounts separate, to a complete diversity of identity for such purposes as keeping a part of an enterprise out of a foreign state. The latter extreme, in fact, is not uncommon today. It is quite possible for a manufacturer of rubber goods, for example, to sell all of his product in bulk to another unit, a marketing organization. This marketing organization crosses state lines and complies with all local requirements, whether of law or custom or particular business conditions. Sometimes the separate entity of part of an organization is desirable to keep two products separate so as to avoid "trading down" or confusion in the mind of the public. A dealer in medium- to high-grade goods, for example, might suffer in the estimation of the public if under his name there also was operated an establishment in which a lower grade of goods prevailed. There is not necessarily any misrepresentation to the public in concealing the relationship between

two establishments by their independent organization. In fact, such separate organization may be one means of protecting the public from the confusion and interchange of goods. But the line that divides the genuine independent from the bogus independent is at times rather hard to draw. It may happen, for example, that the New Englander purchasing a cotton mill in the South finds it advisable, in general, to maintain that cotton mill as a unit distinct from his New England interests. He may thereby retain the local goodwill connected with the newly acquired plant and he may avoid jeopardizing goodwill in the neighborhood of his original operations. It is conceivable, however, that a point may be reached, in dealing with a local prejudice or fear in either vicinity, in which the concealment of the relations between the plants takes on an active form. An extreme situation was reached in the World War when questions arose as to the interest of alien enemies in American corporations. In other words, whatever device may be found to have use in keeping related business enterprises apart may also be subject to abuse.

The mere element of *size* may, from a practical business point of view, determine the desirability of merging or keeping apart two related enterprises. It has been said by the courts that mere size unaccompanied by unlawful acts is not a basis for prosecution or other objection under the anti-trust laws. Nevertheless, size, or rather the proportionate place occupied by a business within its field, may be the most telling evidence in a trust prosecution. But quite apart from the legal implications, there are reasons to believe that, in particular types of industries under particular sets of conditions, there is a most advantageous size of unit, below which there is experienced with growth an increasing return and above which there is experienced a diminishing return. This optimum size must be determined in the present state of business study quite empirically. Eventually, principles may be discovered on the basis of which the optimum unit may be related to technique of management, to local spread, to the state of the arts involved, or to other more or less measurable differences in businesses. Legal limitations may, of course, be found pertinent elements whenever such an analysis is undertaken, and whenever standards are discovered, either empirically or scientifically, the adjustment of units resulting therefrom may call for a bringing together of parts of the business and a deliberate separation of other parts through the aid of legal devices of organization.

3. Endurance of a Business Organization

The question of duration in business organization has undergone in recent generations a series of kaleidoscopic changes. Permanence, or the endurance of a business beyond the life of its founder, has frequently been achieved in less dynamic environments than our own through the handing down of business units from father to son. In this country there are very few businesses that have remained in that way in a single family for three or more generations. But a different type of endurance has been sought and achieved through the use of the newer types of legal framework for organization, such as the *corporation.* It is rather curious to contemplate the headlong plunge that we have taken from types of business organization measured by the active life of an individual, into a type presumed to be perpetual. Statistics are not yet available to show the actual expectancy of life of business corporations, and even if the statistics were available it would not necessarily follow that the corporations organized fifty years ago for the operation of street cars, for carriage making, or for banking, were engaged in the same types of activities today as those for which they had been founded. And in view of the power of the state to alter, amend, or repeal the charters and its actual use of this power by changing the general law of corporations which constitutes the charters of today, it is sometimes doubtful whether the entity called the X Corporation today can fairly be identified with the thing that bore its name and preceded it. Some states, it is true, make it possible to organize a corporation for a limited period or for a temporary purpose, and some even set a limit to the possible duration of a corporation engaged in a particular enterprise. It is even possible that the psychological effect of the corporate form in making men build for the future and plan for the long-run has been great. But, in general, the business world gives little attention to the question of duration at the time of making its major plans of organization. This attitude may be traceable either to a careless disregard of the future and a feeling that so long as the venture pays it will continue, or it may involve a tacit assumption of building for the future. No doubt there are instances of both types. The form of organization to which one man thoughtfully turns in order to make the life of his business independent of his own term of years may be the very same form to which another turns because a scheme in which he is interested is a venture to which he does not care to be attached too definitely or closely.

We have mentioned other

aspects of an organization device that, from the point of view of the planner, seem desirable. Which of these desirable traits, if any, are of outstanding importance in any particular enterprise is, of course, a business question calling for the highest executive ability. Once this question is determined, however, it is for the lawyer rather than the executive to select and adapt that legal device for organization which best serves the important ends, even if some of the minor ends must be poorly served. Thus, speed, cheapness, and simplicity in the making, maintaining, and enforcing of the relations constituting the organization may have to be sacrificed to achieve or maintain plasticity. Power of control must be generally weighed against freedom from responsibility for the mistakes or missteps of those who serve the organization.

4. Methods of Organization

Disregarding at this stage the details of law involved in the use of particular devices for organization, we may classify all the methods that the lawyer offers to the executive for the solution of his nice problem of adjustment as coming under one of two heads: (1) *contract,* and (2) the *creation of special status.* Generally speaking, the effecting of a division of function coupled with unification of design by contract furnishes far more room for play, more plasticity, than does the adoption of a ready-made status with all of its incidents laid down in the law. On the other hand, status, as illustrated, for example, by an instance where an organization is effected through the acceptance of a corporate charter from the state, has all the advantages of standardization: thus, hundreds of details as to the relations between stockholders and directors, between stockholders and the public, between directors and the public, between directors and the company, and so on, are taken care of without the need of any specifications of particulars.

When we come to examine, however, the various types of contract and status relations, we shall find that there is a gradation from the most individualized to the most standardized of arrangements. Contracts, for example, may be subdivided so as to include contracts without special names, the purport of which is simply: "You do this and I shall do that." Some of these unnamed contracts have become more or less standardized as they have been found useful in business on repeated occasions. They lead gradually into the class of named contracts: contracts of sale, for example, leases, employment contracts, the contracts involved in a negotiable instrument, mortgages, guaranty, suretyship, insurance, and so on. Some of these, indeed, are more highly standardized than others. The status relations may also be subdivided so as to include, in the first place, those somewhat akin to the contract principle in that, at least as between the parties, they are subject to extensive variations. Thus, the relations between principal and agent or between the members of a partnership are far more subject to individual variation than are the relations of parties in a corporation; but even within the corporation the particular rights of holders of special types of stock may be made to vary in accordance with the terms of by-laws or particular contracts. What distinguishes all these status relations, however, from the purely contractual relations is that the outside world is free to assume that the status relations are typical rather than individual and to act accordingly. Where we have agency, for example, the secret instructions of the principal, varying the authority of the agent in a particular transaction from the ordinary understanding in such situations, will be ineffective so far as the innocent stranger is concerned.

5. Problems of Organization

On the whole, the desirability of an organization device must, therefore, be judged by a process of weighing the importance of its good and bad features in view of a particular set of circumstances, and the relative weight to be given to these features is, in the long run, the problem of the executive rather than of the lawyer. A series of such cases will demonstrate the nature of the co-operation between the lawyer and the executive in the use of the facilities of the law for organization.

(1) Let us first consider the problem of policy in the *employment of men in various parts of an organization.*[1] Is it desirable, for example, in the employment of salesmen to utilize a uniform standardized contract to be signed on the dotted line, or is it preferable to deal with each man individually and attempt to frame his contract in accordance with the individual features of his case? A discussion of the relative merits of the standardized and individual contract as an instrument of organization involves, of course, the broader question of the standardization of legal devices for various other business purposes, such as sales, warehouse receipts, or bills of lading. But confining ourselves to those features most clearly affecting the problem before us, we may safely venture the opinion that those who use a standardized form for their salesmen are moved to do so by the consideration of the saving of time, trouble, and expense, when they compare the task of sitting down

with each man separately and talking over his terms with the infinitely lazier process of copying the contract worked out for A when B comes in. Of course, the force of these considerations is increased when the number of those affected is large and when their functions are fairly similar.

The relative advantage of the process of dealing with all comers alike is enhanced by the tendency it has to break down "sales resistance." The very fact that all the employees of the house sign the same agreement removes doubts and vain wishes for special treatment from the mind of the applicant. Furthermore, it is a source of relief to both sides to feel that the document between them is not experimental—that it has been worked under and tested, perhaps interpreted authentically, and that it has taken its present form as a result of the experience of others. Many a business man would prefer to make a clear concession of a point rather than to buy his way into a law suit.

After the contract of employment is made, it does, of course, simplify business administration to be able to give uniform instructions to the clerical force as to the treatment of all persons in a class, instead of being compelled to go over with them independently the manner of recording and checking the transactions of each man in the group separately. It is easier, too, to make strangers with whom one deals understand and respect the stipulations as to the authority vested in one's sales force or in some other group of employees than it would be if the impression once got out that every one of the group had a law unto himself.

What, then, are the disadvantages of the standardized salesman's contract? These generally appear, in the first instance when we consider the matter from the point of view of the salesman rather than of the organization, and it is chiefly when his point of view is respected because of his individual importance to the concern that a halt is called to the process. In the first place, there is something deadening about the conception that makes a man a part of a machine and obscures the individual aspects of his function. Such aspects may arise from the differences in advantage and experience on the part of the men, from differences in the territory or branch of the trade that they visit, from differences in. their personal goodwill or control over customers. To force two sets of business relationships into the same legal mold, when, as a matter of fact, they are different, may superficially solve the difficulty, but it is likely to create greater difficulties in the end. It may involve, in the first place, reducing the legal formula to a mere form that will not be respected by either party in his practical interpretation from the very beginning. On the other hand, it may result in constant friction because somebody somewhere in the organization insists on taking the legal document too literally. Such a uniform scheme of things is pretty irksome when it becomes necessary rapidly to turn a corner in business or to deal with a particular territory or branch of a business, in view of an emergency, in some unforeseen way. For at this point the original selling argument that all employees are treated alike is seen to carry with it, more or less inarticulately, the corollary that all will continue to be dealt with alike. In fact, the impersonal standardized system of dealing with men too frequently carries with it automatic scales of increase and rules of promotion that paralyze the hand of the executive.

(2) A frequent problem of organization encountered in the course of the expansion of a business comes down to the question: *Shall we buy the assets or the stock of the corporation whose business we are taking over?*[2] We have already discussed some of the considerations involved here, namely, the comparative desirability of making a unit of the new organization and of keeping the parts of the resulting organization intact, separate though related. The use, and indeed the abuse of the subsidiary corporation for the purposes outlined is one of the most remarkable developments in the use of legal devices in business of the last generation. A glance at such manuals as Poor's and Moody's will show the extent to which operating companies have become, in part, holding companies and pure holding companies have been superimposed on operating companies. In fact, the controlled company itself controls others, so that a pyramid similar to that of feudal times may be imposed on the visible, active business, the "tenant paravail."[3] Among the specific factors in the problem of buying assets or stock must be considered the relative cost of control. Where stock is purchased, only a majority of the voting power need be acquired. For the rest, the old financing, whatever it may have been, serves its purpose without necessarily involving the new corporation in the work of raising funds, or the responsibility of underwriting. But with this decreased cost, it must be remembered, there goes a decreased degree of control. The controlling company is by no means free to transfer to itself such parts of the business of the controlled company as it can take over most profitably. The minority stockholders can insist on the maintenance of the *status quo* between the two

corporations, and however limited we may find the ultimate powers of the minority, among these powers we shall find a destruction of the plasticity of an organization.

There is a curious condition in the Federal statute law pertaining to combinations in restraint of trade that has no doubt driven many businesses to avoid the purchase of stock and prefer the method of purchasing assets in effecting any combination with a competitive concern. In Section 7 of the Clayton Act (1914) one of the objectionable methods enumerated and made unlawful, even if only tending "to substantially lessen competition" or to "create a monopoly in any line of commerce," is the acquisition, directly or indirectly, of the whole or any part of the stock or share capital of another corporation. In the absence of this or any of the other specially enumerated objectionable methods of creating a monopoly, one would have to allege a great deal more to bring the case under the Sherman Anti-Trust Act. One would have to show that there had been effected a monopoly, or that there had been what the law calls an attempt to monopolize, or a conspiracy to monopolize, a part of interstate commerce. The "attempt" or "conspiracy" or success in monopolization is so different in the eyes of the law from the mere tendency described in the Clayton Act, that there are no doubt instances in which it is safe to buy the assets of a competing concern, though it may not be so to purchase any part of its stock.

(3) A very common business problem that assumes constantly changing form is *whether to incorporate.* A great deal of literature has been scattered by officials and more or less interested private institutions setting forth in glowing terms the advantages of incorporation. In general, these are two: (*a*) the *limitation of liability* upon the part of the investor, and (*b*) the standardization of the resulting relations. Each of these may be subdivided and elaborated in various ways. Thus, (*a*) the *limitation of liability* is not merely the personal assurance that one will not be liable for the debts of the corporation at all or beyond a certain point in case of insolvency; it includes the freedom from the risk of being bound by the activities or representations of associates not duly authorized to represent the organization. It includes, further, the assurance that even the duly authorized officers cannot go beyond very definite limits set out in the articles of incorporation and the charter or the general laws under which the company is organized. (*b*) Standardization, in this case, includes a fairly definite understanding as to the rights and liabilities of stockholders, some of which no doubt cannot be modified effectively even by special contract.

But it must not be assumed that these advantages are in any sense absolute. There are, first of all, legal limitations to the types of business that a corporation may be engaged in. For example, in most states, a corporation is not permitted to engage in such a profession as the practice of law or the practice of medicine. Furthermore, there are definite laws preventing corporations organized for one set of purposes from engaging in certain other activities. Department stores have, for example, found to their chagrin that they are not only effectively barred in some states from opening dental departments, but also that they must not engage in insurance or banking or various public utility enterprises. The growth of licensing laws has extended the field closed to the corporation, because licenses are in general purely personal. Sometimes attempts are made to use the idea of licensing deliberately to check the use of the corporate form.[4]

(*b*) With regard to *standardization,* we have already indicated in another connection that there are situations in which it is important to have a handmade, specially ordered device rather than the standardized forms that meet approximately the conditions of all business, but only approximately. In other words, the corporation is not so plastic as the partnership or the business trust or the business conducted under individual ownership. In like manner, the desirability of limited liability is questionable at times. It may simply mean that the men responsible for a corporate undertaking are called upon for personal indorsement of the corporation's debts. There are also businesses bordering on professions, such as that of the investment banker, in which a distinct loss of prestige might result from incorporation. There are, too, numerous undertakings in which the heavy mechanism of a corporation is, to say the least, cumbersome. It may involve for a very small business an expense, a degree of publicity, an opening to attack by one who casually or deliberately comes into possession of a share of stock, a complicated and perhaps costly tax situation, a keeping of minutes, and the rigmarole of elections, which at best are a nuisance and at worst a stumbling block, for there is always danger that the omission of routine will invalidate important acts.

(4) The problem whether *to organize the retailing branch of one's business* as an agency in the technical legal sense of the term, or by constituting the distributors "independents" or such semi-independents as *del cred-*

ere agents, or by the use of subsidiary corporations is, of course, primarily a problem of planning in which the legal possibilities must be studied rather carefully. Of course, for many undertakings the problem is solved by the nature of the commodity, almost regardless of the legal disadvantages involved. It would be impractical, for example, to sell goods that are looked for in a grocery store or a dry goods store, and that altogether make up a small part of the stock of such stores, through local branches employing agents in every part of the country. Furthermore, a business must be quite large in order to make the establishment of local branches pay, and it must be financially very strong to make such a venture at all possible. Few publishers, indeed, could do what the Curtis Publishing Company did when it converted over 450 wholesale dealers into local agents.[5]

On the other hand, it may be the very weakness of a manufacturer that forces him to deal through local agents rather than through independents. This is illustrated in the automobile industry where a factory branch in an Eastern community is likely to be the result of a defeat in the effort of the manufacturer to find a local distributor willing and able to bear the financial burden of handling his car as an independent dealer. A shoe manufacturer who is not primarily engaged in the retailing of shoes may find himself confronted with the necessity of maintaining a chain of retail stores as an outlet for his product, or even if the major part of his product is sold through independents he may find that, in order to gain an entrance into a particular territory, he must finance in whole or in part the venture of opening a store there.

But between these two limits of compulsion and free choice there are many cases in which the problem of how to organize one's distribution is one of the most difficult that confronts the executive. A rubber manufacturer, when asked why his house dealt so largely with retailers instead of jobbers, replied that in the early days of his venture his competitors were so much stronger than he was that they could easily have demolished him in a market consisting of a half a dozen or a dozen jobbers, but that with several thousand small accounts on his books he felt far safer; or, as he graphically put it, "They had plenty of ammunition for bears, but nothing to hunt chipmunks with." Manufacturers sometimes look with covetous eyes at the profits made by the jobbers and adopt a policy of selling directly to the retailers. In many cases they learn a good deal in the process of the experiment and sometimes they find that the cost of distributing directly is greater than it would be through the jobber. Frequently they find that the skill with which they are able to manufacture effectively is of a very different kind from that which is required for effective distribution.[6]

With these phases of the problem the law is, of course, not directly concerned. Once the decision is reached by the executive as to the degree of independence to be accorded to the local distributor, the lawyer can easily find a way of crystallizing the organization so as to meet the plan. But the plan itself is likely to change in the course of consultation with the lawyer, by reason of the information he is able to give as to the limited control that accompanies the limited responsibility of dealing with independent distributors. The dictation of policies, of what shall be sold or shall not be sold in company with particular goods, is cut off. On the other hand, if increased control is desired, the lawyer's information as to the increased responsibility involved may cause the executive to go back from the conference with a very nice problem in the choice of evils. One cannot shake off his responsibility for the acts of his "agent," nor can he even limit the authority of the agent effectively, so far as outsiders are concerned, by anything that the lawyer can draw up in his office.

(5) We come next to the *problem of superorganization.* The legal limitations that make it difficult and occasionally illegal to co-operate with one's competitors, though involved in every problem of co-operation, can best be treated in another chapter—that dealing with the maintenance of competition as a market prerequisite. There are, however, certain undisputed fields in which unrelated businesses and even competing businesses may co-operate. In the first place, the anti-trust laws make certain specific exemptions, such as labor organizations and farmers' co-operative organizations. Again, although the boundaries have not yet been clearly marked out by the courts, it is definitely conceded today that there is an important field within which trade associations may facilitate co-operation.[7] Thus, they may gather and exchange information; they may elaborate standards and codes of ethics; they may develop arbitration tribunals: always provided that in such activities they do not go to the point of directly or indirectly eliminating competition.

There can be no doubt that the tendency to co-operate in various ways is increasing. In fact, in every really difficult problem one suggestion that comes up is co-operation with others faced with the same problem. Thus, in a community in which

several manufacturers are engaged in the same general kind of work, all may be interested in eliminating the "floating" of laborers from factory to factory by coming together and adopting a uniform policy and agreeing to exchange labor information. In fact, the problem frequently reaches such proportions that no action on the part of a single manufacturer can cope with the situation at all. In like manner, wholesale or even retail dealers may desire to exchange credit information. No one of them may care to risk the odium or even to incur the expense involved in an aggressive policy of fighting the fraudulent debtor. For such purposes, they may wish to unite. They may likewise have common problems of research, problems ranging from those of pure science, such as chemistry, down through applied science to such trivialities as research in the probable effect of style changes on the demand for particular dyestuffs. A single manufacturer may find himself quite helpless, in the face of competition, in any attempt to standardize styles or even gauges of parts of machines. Cooperation may be necessary to save whole industries from chaos in this respect.

In all such cases, quite apart from the question of what the law will allow, there is the executive question of what is desirable in kind and in degree of association to bring about the desired end. Much can be accomplished by simple goodwill in a centralized industry. Credit information, for example, may be exchanged by jobbers without any preconceived plan. On the other hand, in some situations a centralized office may be necessary, and this office may be conducted under the guise of an organization in which the co-operators hold shares. It may be an unincorporated association, or it may be an entirely independent service bureau related to the various members of subscribers by simple individual contracts. It may, within its specific field, have no powers beyond suggestion or advice or the simple reporting of information; or it may be vested with the powers of an agent to bind its constituents either with each other or to the outside world contractually. It may be readily subject to dissolution at the desire of any party, or it may be that the very nature of its objects requires a definite duration for its activities.

For all of these various needs the law can supply more or less appropriate forms. In fact, a very interesting chapter in modern business history is concerned with the readiness with which the lawyer has supplied new forms of association as old ones were found to be or made illegal. Thus, when "big business" began in this country some time after the Civil War, it experimented for a short time with rather simple contracts in restraint of trade. On discovering that contracts not to compete were ineffective and that slight changes in their setup failed to save them, experimentation soon turned to various *types of pools.* The buying pool or the selling pool was perhaps something more than a simple contract in restraint of trade. It was more like the joint adventure that competitors under ordinary conditions could concededly engage in, where a particular undertaking was too big for the capital of any one of them. But in course of time it became clear that the pool, too, could be looked upon as a contract in restraint of trade, and so, being unenforceable, fell to pieces of its own weight.

The next great experiment in this direction, that of the 80's, was by *avoiding contract* altogether and seeking a combination through the ancient device of trusteeship. Strictly speaking, trusteeship, which gave unified ownership in the eyes of the law to a small group, did not involve any contract as the basis for the elimination of competition in business controlled by the trustees. It was not until the end of the 80's that the courts began to reach the conclusion that a trusteeship in restraint of trade was subject to the same laws as a contract in restraint of trade, and the Sherman Anti-Trust Act and the state acts drawn on the same model removed all doubt by declaring not only contracts but combinations in restraint of trade, and, in fact, monopolies however created, illegal and void.

But the ingenuity of the organizers did not stop there. There was no authoritative pronouncement as yet to make it impossible to grow to the size of a monopoly by the out-and-out purchase of the stock of competing corporations. And so the *holding company* came into existence. Another decade passed before that, too, was ascertained to be illegal under the sweeping terms of the Sherman Act.

Meanwhile, experimentation had grown up along such lines as the interlocking directorate. But as all of these were upon examination found to involve the same obnoxious element of combination in restraint of trade, nothing seemed to remain but the out-and-out merger by the complete unification of associates and the obliteration of the old framework of the corporations absorbed in the course of the growth of a business.

Eventually that, too, was found illegal or at least capable of being illegal unless so managed as carefully to avoid the obnoxious features that had come to be understood as the definition of monopoly. Since 1915 the emphasis has been rather on the isolation and detection of these features than on mere size. In one sense it may

be said that the ingenuity of the lawyers in supplying new frameworks of association as rapidly as the old ones were smashed by the axe of the law has been unsuccessful. But the object of passing these types of organization in rapid review at this point is not by any means to test the adequacy of the wording or the wisdom of the anti-trust legislation: it is simply to illustrate the types of organization at the lawyer's command as they have appeared in the last generation in efforts towards superorganization.

(6) In the planning of relations, business men are constantly confronted with the *apportionment of risks.* Writers on economics have frequently isolated the function of bearing risks analytically and assumed that in some imaginary or ideal society this function could be borne by one type of participant in the economic processes, a participant whom they have generally called the *"entrepreneur."* In the actual world of business, however, the function of the *entrepreneur* is blown to pieces and scattered so widely and intricately that the process of finding the *entrepreneur,* sure as we may be that he must exist, is almost hopeless. The difficulty is exactly parallel to the task that political writers often impose upon themselves to isolate and discover sovereignty in a modern state. That somebody, somewhere, somehow exercises the functions in the modem state that made Louis XIV a sovereign in his state is quite true. But by means of constitutions, written and unwritten, those functions have been given to groups of people acting in various capacities and in various ways, so that the putting together of the atomized sovereign is as hopeless as the restoration of Humpty Dumpty. In like manner, risk bearing in any enterprise is today divided among its promoters, those who furnish its initial capital, those who furnish its current funds, its employees, its creditors, and 'in fact everyone who deals with it directly or indirectly.

The process of deliberately and consciously *shifting risk* is effected by contracts of insurance. But by far the greater part of risk adjustment is effected in business through stipulations rarely if ever thought of as insurance. Thus, a stipulation postponing or accelerating the passing of title in a sale carries with it a postponement or acceleration, as the case may be, of many of the risks ordinarily covered by insurance. In like manner, the difference between calling a man an authorized "agent" and constituting him an authorized "dealer" is essentially a difference in the apportionment of risks. There is a difference in the risk assumed when one deals with a corporation from that which would be involved if the opposite party were charged with unlimited personal responsibility.

Warranties are essentially assumptions of risks about things beyond the actual knowledge of the person assuming responsibility. Every contract of employment involves either the risk of keeping an employee and paying him when he is not needed if the term is definite, or a corresponding risk on the part of the employee of the loss of a job where the term is indefinite. The significance of *the* last proposition as to labor is quite frequently overlooked. Though it is often said that the laborer risks nothing in a venture and that the investor is the sole *entrepreneur,* in truth, the laborer who brings his family to a community, who settles within it and becomes part of it, and who enters into an enterprise subject to the daily risk of losing his position, is perhaps the most venturesome of all *entrepreneurs,* though in his case the risk may seem to be adjusted rather through the silence of the contract than through what it says.

The risk of non-sale of securities may be met by the formation of an underwriting syndicate whose members agree to take portions of the securities issued if they cannot be sold through the channels prescribed in the first instance within an agreed period of time. The manufacturers of patterns are confronted with the question who shall bear the risk, not only of non-sale but of rapid obsolescence. Others who are subject to rapid economic effects of changes in fashions must work out a plan either of leaving the burden of change where it falls or of "insuring" their distributors or distributing agents against it. The significance, in this connection, of hand-to-mouth buying is worthy of study. In some industries it has involved a complete deflection from the distributor to the producer of the rapid changes in value. All laws, whether statutory or customary, and all specific stipulations of contracts bearing on the question "What constitutes an excuse for non-performance of a contract?" are risk directing devices. Contracts, for example, which are made subject to strikes, lockouts, fires, or other unavoidable causes of loss or delay, which would otherwise be risks of the person assuming the obligation to perform, are essentially of the nature of insurance contracts. In a broader sense, the bankruptcy law is virtually a device for shifting the risks of the independent dealer to the business which furnishes his supplies or his credit.

An ever-increasing number of these risks is being made the subject of conscious barter in the form of insurance contracts. A mere enumeration of these will

suffice to indicate the importance of recent developments, and in reading the list it must be remembered that the possibilities have by no means as yet been exhausted: life insurance, accident insurance (including many special types such as automobile insurance, boiler insurance, and the like), burglary and theft insurance, liability, casualty, credit, cyclone, tornado, hail, health, lightning, live stock, marine, plate glass, rent, title, taxation, rain, and the miscellaneous group included under Lloyd's insurance.

(7) Problems of finance in the sense of the *planning of the financial structure* of a business likewise are embraced within "organization" as we use the term. Of course, the law is called upon to safeguard the interest of the man who puts forward money to be administered by another. These safeguards as such we can discuss to better purpose along with the facilities for credit in general. What we are concerned with here is the degree of control or the ownership that goes along with investment under one scheme or an-other of organization. In the simplest forms of organization, ownership and control are, of course, identical. A distinction must be drawn, however, between partnerships, which are really jointly owned business ventures, and business trusts. In the latter there is, of course, great danger that a degree of control will be given to the beneficial owners which will convert them into partners in the eyes of the law. The difference is clear enough in extreme cases. The partners take an active hand in the management of their business; the beneficiaries in the trust have no control over the actual management of the business. There is, however, a very difficult borderland in which ever so slight a power of control actual or threatened is reposed in the beneficiaries, and in these cases courts differ as to whether they shall be dealt with as partnerships.

In the corporate form, a wide latitude exists in respect to the type and degree of control to be exercised by the investors. A distinction must be borne in mind, however, between the legal theory of control of stockholders' funds and the actual practice in large corporations. A good deal of recent discussion of the disfranchisement in recent years of the investor, by means of the multiplication of the varieties of non-voting stock, is based upon an oversight of this divergence between the legal theory and the business practice of control by stockholders. If there has been a disfranchisement of the small stockholder, it has by no means been accomplished by recent manipulations in which non-voting stock has more or less surreptitiously been substituted for voting stock. The disfranchisement complained of has been a growth of long duration, not very different in its workings from the disfranchisement of the voter in politics who has been a victim of party manipulation and perhaps of his own despair of exerting any influence through his lone vote. The individual stockholder has generally felt his lack of experience, lack of understanding of the issues involved in his vote for this or that director, and so has relied upon the conduct of his affairs by men who had more at stake and who were in a better position to make an investigation. It is, of course, true that the voting privilege not exercised carries with it a reserve force and perhaps even a constant threat that was of some importance in the business world until recently. But gradually the individual stockholder came to look more and more to the law to protect him by its requirements of fair dealings on the part of the directors than to his vote.

As the matter stands today, there are legal facilities available for almost any imaginable combination of ownership or control to accompany investment, ranging from the highly protected but otherwise weak position of the bondholder to the strong position of self-help of the stockholder in whose hands voting power may not only exist but may be concentrated or rendered doubly effective through combination in voting trusts.

(8) Miscellaneous *executive problems in the choice of legal forms of organization* have to do with the use of the Massachusetts trust, though this is constantly being made to work more and more like a corporation even in those jurisdictions that do not class it as an out-and-out partnership; with the various special types of partnership that our state legislatures are offering for one type or another of business; with the alternative of what amounts to Federal incorporation open to banks; with the choice of a state in which to incorporate; with the particular scheme of capitalization and the relation of ownership to voting power; with the raising of capital by the sale of stocks or of bonds. For a solution of all these and similar questions, the lawyer is able to furnish the executive essential information as to the nature and workings of each of his devices. It is for the executive, however, to make the choice.

[1] H. R. Tosdal, "Problems in Sales Management," 1925: Curtice and Nye Company, p. *556;* National Cash Register Company, p. 561.

[2] H. B. Vanderblue, "Problems in Business Economics," 1925: Tuttle Tire Company, p. 330; T. T. Lane Wholesale Grocery Company, p. 326.

[3] A. A. Berle, Jr., and G. C. Means, "The Modern Corporation and Private Property," New York, 1932, p. 74.

[4] Louis K. Liggett Co. *v.* Lee, 288 U.S. 517 (1932).

[5] Curtis Publishing Company *v.* Federal Trade Commission, 260 U.S. 568 (1923).

[6] E. P. Learned, "Problems in Marketing," 1936, Chapter III.

[7] See problems of employers' associations, *Harvard Business Reports,* pages 418, 437, 448, 478, 460. In Sugar Institute *v.* United States, 297 U.S. 629 (1936), reporting or relaying by sugar refiners of information as to current or future prices, so as to permit circulation of voluntary price announcements by individual refiners, according to trade usage, was held not enjoinable as unreasonable restraint of competition.

The court said: "... . Accordingly we have held that a co-operative enterprise otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Appalachian Coals *v.* U. S., 288 U.S. 344.... Maple Flooring Ass'n *v.* U.S., 268 U.S. 563. In that case, we decided that trade associations which openly and fairly gather and disseminate information as to the cost of the product . . . do not fall under the interdiction of the Act"

Chapter IX

Historic Legal Materials

1. Devices Used in Organization

If we turn to the law to find ready-made answers to our demand for a finely adjusted ready-made plan, giving for any purpose in hand just the required balance of control and responsibility, of intimacy and isolation, of risks and security, of planning and adventure, of foreseeability and freedom, we shall probably be disappointed. The foundations of our legal institutions were laid down long ago with no thought of pleasing the modern business man. He must pick and choose among them and modify and combine what he finds until he develops a workable mechanism for putting legal force behind his business plan. If we list the mechanisms that he uses as, roughly, (1) contracts, including the named and standardized varieties, (2) agency, (3) partnership, (4) corporations and (5) trusteeship, we may profitably contrast their several histories; for in these histories we must find the explanation of many of their most serious divergencies.

(1) AGENCY. The law is apt to labor hard to discover whether a particular situation is one to be labeled "agency" or "independent dealing." Then, after determining by the merest hair's breadth that the relation is agency, it launches forth dogmatically with the consequences, which will include absolute loyalty and fidelity and the exclusion of activities detrimental to the principal's interest. If, on the other hand, it determines that, on the whole, the label of "independent dealer" is the more fitting, it proceeds equally unsparingly to lay down the opposite rules: the alleged principal, who is now found to be merely a supplier, cannot even by contract hope to prevent his purchaser from dealing in the products of his competitor. Likewise, however nice may be the question whether one, who has put money into a friend's business and rendered other assistance from time to time, has made himself a partner, once the law reaches the conclusion that he is, it is inexorable in piling on him exactly the opposite consequences from those that would have followed from the finding that the same facts had made him a creditor instead. The group of partners who decide to incorporate because one feature of the incorporation law—say, limited liability—pleases them, learn very soon that they have simultaneously given their business other features not so pleasing—for example, the destruction of the *delectus personae* (choice of person) that they had previously enjoyed. When we ask why these combinations come in such curious bundles, we are soon turned to history for an answer.

Before we go into the history of the forms of organization now in use we may pay tribute to other schemes for the organization of business life that have passed away, and look at still others that are put forward as possible substitutes for those that we are familiar with. The so-called feudal system of the Middle Ages in Europe was really no single system, but a vast variety of arrangements that had one tendency in common, namely, to confuse what we separate as political and economic aspects of life. *Dominium* was both kinds of authority. On the economic side this confusion, or rather fusion, brought about the appearance of one's being born to legally enforceable rights and

duties in a planned economy. To assume such a position in society if one was not born into it required a ceremony rather than a contract—*homagium,* it was called. Eventually functions that the feudal system did not provide for were found necessary in society. Hence, merchants were only loosely associated with it. Yet the right to hold a fair was a feudal type of right, and the Jews and other foreigners who were permitted to engage in business did so either as vassals of the king or as holders of what might be described as quasi-feudal charters. With the growth of cities and urban industries, another system of business organization was developed: the domestic system. The master was master of a household as well as of his craft, and to this household the apprentice became attached. The journeyman came into the master's household for the working day. Until recently the law books echoed this way of looking at business organization, by classifying the relation of master and servant as a "domestic relation," though the movement for the substitution of the shop and factory for the home as the place of industry and commerce robbed this classification of its meaning over a hundred years ago.

(2) CONTRACT. We have already discussed in another connection the nineteenth century reliance on the contract idea. The field of organization was no exception. The relation of employer and employee in particular was regarded as contractual and subject, as such, to the quasi-constitutional principle of freedom of contract. In the first years of the twentieth century the relationship has been removed farther and farther from the realm of simple contract through social legislation that dictates duties and liabilities for the employer, any contract to the contrary notwithstanding. Such laws include employers' liability and workmen's compensation laws, the safety of working places, sanitary conditions, holidays, the right to organize for collective bargaining and other purposes and, in an increasing number of "exceptional" situations, minimum wages and maximum hours.

Closely related to the employment of labor and yet differing in one all-important particular, is the employment or authorization of agents. The ordinary employee is not expected to bring his employer into legal relations with a stranger—though he has the power to do so through a tort, a wrongful act inflicting damage. The agent, on the other hand, is employed for the purpose of establishing contractual relations between his principal and outsiders. The nineteenth century books were inclined to bring the relations between principal and agent under the heading of contract. Strictly speaking, no contract is necessary to create this relation, and whether it can be terminated by the will of either party in violation of a contract depends on legal principles other than contractual intent. Persons not legally capable of making contracts may, in many instances, appoint or be-come agents. There is no necessity of such legal prerequisites of contract as "consideration" to make an agency valid. Of course, it is also true that in actual business affairs an agent is usually employed under a contract. The incidents of agency, however, so often fly in the very face of the actual agreement between a principal and his agent that we must seek an explanation for them in some other branch of the law. The scope of an agent's power is not measured by his actual authorization but by the apparent scope of his authority. Historians have traced the doctrines of agency to slavery, to the Roman patriarchal households and to various odd institutions in ancient Roman and Germanic law. The truth is that its fundamental maxim, *"Qui facit per alium facit per se,"* a maxim which sets forth the fiction of identity between principal and agent, has been taken from the Canon Law of the Roman Catholic Church. That law may have taken it from the Orient where it was an established principle, and it is possible that it was influenced in doing so by the theological concepts of vicarious sin and vicarious atonement which are logically related to it.

(3) PARTNERSHIP. The most popular form of business organization in the nineteenth century lent itself well to the contract idea: partnership. The men who wish to cooperate in a venture build their relation on a contract—the articles of partnership—whether written or oral. Yet here, as in agency, they soon find that there are many matters beyond the control of their contract, notably their relations to the outside world, but also in their internal relations. From the historian's point of view they were employing a form of organization that had its principal development not in English law but on the continent of Europe, and there it went back not to ancient business precedents but to the situation of co-parceners, members of a family (usually daughters) who found themselves in possession of the family property with no organization among them. The principal proposition that the law laid down was that any one of them could work with any part of the property, provided only that a complete accounting of such voluntary stewardship would be forthcoming to the others even-

tually. The law of partnership has undergone much development in the course of two thousand years, but this broad power to act coupled with a duty to account afterwards is still of its essence, and the owning of an enterprise in common is still a workable definition for it.

(4) CORPORATION. When we change a partnership into a corporation we are substituting a model of a government for that of a family group. The origins of both the modern corporation and of constitutions go back to the same kind of royal charter. There is not much difference between the charters on the basis of which the American colonies were established and those given to such trading bodies as the Muscovy Company or the East India Company. Both types have governmental and business features. They develop differently by suppressing one or the other groups of features. Yet the business corporation still retains its governmental machinery of voting, officers, oaths, formality of meetings, records, by-laws, official notices, and public reports. This is rather heavy machinery for a little retail store or a modest factory. Its weight sometimes produces curious results, not the least of which are connected with the habit of neglecting the holding of formal meetings, the keeping of minutes, and the giving of notices. The granting of the privilege of incorporation is still regarded as a high act of sovereignty, and although the process of taking advantage of this act of sovereignty has been reduced first to the stage of accepting a contractual offer and then to a mere filling out of forms and paying of a fee, the necessity of carefully complying with all formal requirements, and the rigorously standardized legal results that follow, are reminiscent of the origin of the corporation.

(5) TRUSTEESHIP. Another way of bringing business capital together into an association with a unified front having many of the advantages of incorporation is by means of trusteeship. Reduced to its simplest terms, the arrangement is a copy of what happens when a man leaves his business at his death to a trustee to manage for the benefit of his family. The members of the family in such a case have nothing to do with the actual management and no responsibility for the acts of the trustee. Their risk is limited to the capital invested in the business. The trustee, on the other hand, is liable personally on all contracts. Yet he may avoid such liability by specification in each contract, and thereby produce a result quite similar to the limited liability of corporation law. This whole setup may be copied by the creation of a trust among living persons. An early impetus to experiment with such a plan came in Massachusetts, where the general corporation law failed to provide for corporations created for certain purposes, particularly for dealing in real estate. When this so-called Massachusetts trust came into being, we had a most striking example of a legal device created for one purpose and ultimately used for purposes undreamed of while the device was taking shape.

The idea underlying trusteeship may be roughly expressed as separating the legal tide from the equitable interest, allowing the legal title to reside in one person or group who hold for the benefit of another person or group. This idea seems to have found its way into England in the thirteenth century as a device whereby the Franciscan and Dominican friars were able to work property given to them, in spite of the restrictions of their orders and of the law. It was used in successive generations in slightly different forms for widely divergent objects, such as the evasion of feudal burdens, as a substitute for or a supplement to last wills and testaments, as a basis for organizing charities and dissenting churches, as an entering wedge for freeing the estates of married women from their husbands' control, and in more recent times for many business purposes illustrated in the daily work of the modern trust company. Though plastic in the extreme, it is hardly to be expected that this instrumentality taken from the Middle Ages will serve all new needs as they arise without embarrassment or modification. In fact it seems that it is the curious fate of this device to serve as a pathfinder, to be superseded eventually by roadmakers who pay the pathfinder the curious complement of naming the roads in his honor. This historic formula is reflected in each of the following familiar terms: charitable trusts, monopolistic trusts (or simply "trusts"), investment trusts, voting trusts, trust receipts. In each case the purpose once accomplished by trusteeship is now accomplished more generally by a more specialized tool, though the old phrase is retained. In the case of Massachusetts trusts, or business trusts, trusteeship still remains discernible, though for purposes of taxation and control they have been made increasingly like corporations through a series of statutory enactments.

2. Modification of Organization Devices

All of these types of organization devices are subject to constant modification by specific agreement. Even the position of the stockholder may be said to be increasingly contractual as a result of preferences, voting restrictions, redemption clauses, and various rules in the by-laws regarding special majorities

needed for special purposes, particular rights, or limitations of minorities. In a partnership, as between the parties great deviation from the norm or type laid down in the Uniform Partnership Act is possible, subject always to the difficulty, in the absence of statutory authority, of effectively bringing such deviation to the attention of strangers so that they may respect it. In trusteeship, by elaboration of the articles of trust and of the trust certificate, similar deviation is possible, provided that the certificate holders are not given such control over the actions of the trustees as to make them partners in the eyes of the law.

3. Inter-unital Organizations

The devices that are available for the organization of the business unit are also used for inter-unital organization: contract, agency, partnership, incorporation and trusteeship. When so used they not only require more drastic adaptation and more skilful combination of devices, but greater precautions against passing the limits set by the law. Not only must we have regard for the anti-trust laws, but also for the tradition of the law that declares a corporation incapable of becoming a member of a partnership or otherwise delegating the powers vested by the law in its directors; also the rules of law against restraints on alienation of property, against perpetuities, against the combination of certain businesses in units, against particular uses of certain devices (such as clogging the equity of redemption in a mortgage). We must also be circumspect about the incidence of taxation in its relation to inter-unital arrangements. The consolidation of returns may be allowed or disallowed with rather curious results when we attempt to balance certain gains against certain losses. Recent discriminatory taxes against chain stores have led, on the one hand, to separate incorporation with tying contracts, and, on the other, to the substitution of super-markets for small links in chains. The supermarket may itself be a composite organization with department leases of the nature of concessions at fairs. With infinitely expanding business needs and a few finite legal devices, the practical law of business organization may well be described as kaleidoscopic.

4. Business Man's *versus* Lawyer's Organization

As a consequence of the multifarious new uses to which these limited historical materials are put, there is frequently a great divergence between what might be called the business man's organization chart and the lawyer's in any given situation. The lawyer, for example, may set down the directors at the head of his corporation chart. In a particular corporation, however, the directors may be "dummies." The president, or treasurer, or chairman of the board, or the manager may be the real head of a business—or the one bearing such a title may be a mere rubber-stamp. The lawyer dogmatically sets down the stockholders as investors and the bondholders as outsiders who lend money to a business. It may be much truer to business reality to set the bondholders down in particular cases as investors. With highly modified preferred stock, there may even be a reason for looking upon some stockholders as essentially outside lenders. Likewise, legal mortgagors may in particular business set-ups be branch managers, as in the tied-house arrangement familiar in the retailing of liquor. Legal lessees may be department managers in a department store. In bank representatives sent to watch over a business, the law may refuse to see anything but ordinary directors elected by stockholders. The climax is reached in an equity receivership in which nothing is called by the same name in legal and business parlance. The whole procedure in business is frankly a reorganization proceeding. The law prior to the recent amendment of the Bankruptcy Act knew nothing of any such proceeding—we simply had a bill in equity under one of its recognized grounds of jurisdiction in the course of which a receivership was incidentally asked for and allowed pending the outcome. To the business man the receivership was merely an umbrella under which he could proceed to negotiate for a better organization. The court, solemnly pretending to be unconscious of these negotiations or the purpose of the postponements asked for, is eventually induced to incorporate its results in the form of a series of wholly imaginary hearings, findings, appraisals, sales, orders, decrees and accountings.

To follow any legal proposition about business organization into life's realities may require two kinds of learning— the somewhat limited legal learning about the legal devices that are used, and the far more complicated and changing business lore about the realities of the situation. To a brief restatement of the first of these, we shall devote the next chapter. To a few aspects of the latter type of study we shall devote our final chapter.

Substantive Law

Passing by the law of contracts, which bulks as large in the work of organization as in other branches of business law, we have as the specific topics in substantive law for restatement in connection with organization: Agency, Partnership, Business Trust, and Corporation.

We shall deal with the rules for the formation of each of these relations; then with their operation as to outsiders, their operation within the organization, and, finally, their dissolution. Under each of these headings we shall deal first with Agency, then with Partnership and particular varieties of partnerships, with Business Trusts and similar associations, and finally with Corporations.

1. Formation of the Relations

(1) AGENCY. Agency is formed by authorization on the part of the principal and acceptance of the charge by the agent. There may or may not be a contract involved in the act of authorization. In business there usually is, because there is a stipulation of payment to the agent for his services in consideration for a definite promise on his part to do the work that is expected of him. It is possible, however, for persons who have no capacity to contract, or only a limited capacity, to appoint or become agents. The greatest difficulty of law arises in situations that might be called quasi-agency, for they are rather cases in which the law deals with the parties as if agency existed than true cases of agency. Such situations arise where one has so acted that it would be unfair to permit him to deny that another has been acting as his agent; or where no agency in fact existed at the time of attempted action by the so-called agent, but where his acts were afterwards accepted and ratified by the principal. Finally, there are situations of so-called agency by operation of law, as where the wife is held to be the agent of the husband for the purchase of family necessaries. In all of these cases the law has found it convenient to assimilate the situation to that of true agency based on the simple act of authorization in advance, which is the ordinary basis for permitting one to act for and in the name of another.[1]

(2) PARTNERSHIP. Partnership is really double or multiple agency. In the simplest partnership, each member of a group authorizes all of the others to represent him so far as the business is concerned. Here, too, the phenomenon of quasi-partnership must be provided for where there is no authorization but only the misleading appearance of it. The exchange of authorizations and the other incidents to a partnership amount to a contract which may be expressed in written articles of partnership covering the plans and purposes of the undertaking, the duties of each of the member; and their share in the ownership and control of the business and in profits and losses. In neither agency nor partnership is any special authorization from the state required or any particular formality ordinarily insisted on by the law.

There are, however, certain special forms of partnership which are made possible solely by statute and which give to some or all of the members advantages which they could not arrogate to themselves without the aid of a special law.[2] Such are the limited partnerships in which one or more members have only limited liability for the debts of the business, and certain other special statutory partnerships in which the powers of

members to bind each other are modified after the general manner of corporations. No one can claim the advantage of one of these statutory partnerships unless he has complied in every detail with the requirements of the statute that calls them into existence. In some cases this rule has been so rigidly enforced that persons have found themselves saddled with all of the burdens of an ordinary partnership merely because of having overlooked some very technical point in connection with the public notice required by law.

Between the partnership and the corporation stands the joint stock company. Unlike the ordinary partnership, its ownership is divided into large numbers of transferable shares which permit the ready entrance and exit of members without the consent of those already in the business. Furthermore, there is more designed specialization of functions, with officers chosen and endowed with the exclusive power to bind the business venture in contracts. There is, however, in the absence of special legislative authority, no provision for limited liability in these organizations; in fact, as in the case of the ordinary partnership, there is no need of relying on any special statute, such an association being purely voluntary.

(3) BUSINESS TRUST. For the formation of the business trust[3], the essentials are the same as in any other trust- the separation of the legal title from what might be called the equitable title to property. This might be accomplished either by conveying the legal title to A and the equitable title to B, and by imposing charges on A in connection with the administration of the estate for the benefit of B. Or it might be accomplished by having the holder of both titles convey either the legal title or the equitable interest in the property to another. Normally, in the case of the business trust, the owners of the property or funds hand over the legal title to a group of trustees and take from them a trust receipt which recites that the funds or properties are to be administered for the benefit of the numerous owners. At first sight it might appear that no statutory aid is necessary to accomplish this end. In many states, however, courts have refused to recognize this type of institution as anything but a partnership, and recently even in those states where the so-called Massachusetts trust has been recognized there has been a tendency to treat them very much like corporations, both in the matter of taxation[4] and in the issue of securities.[5] Registration of deeds of trust has sometimes been required, and in general there is a tendency to treat such voluntary associations more and more as if they were corporations.

(4) CORPORATION. For the formation of the corporation, to a greater extent than in any of the cases recited so far, the consent of the state is necessary. Theoretically, the state gives a group of people a charter which enables them to act as a body, and the state recognizes this body as a person separate and distinct from the natural persons who have organized or at any particular time control the corporation. It can sue and be sued in its own name, it can hold the title to personal property or real estate, and it can make contracts even with its stockholders—for before the law it has all the attributes of a person. Obviously, in order to form a corporation there must be, first of all, a charter granted by the state. This ordinarily appears today in the form of a general charter in the statute books, addressed to all persons who undertake to comply with its terms. Here, as in the case of the special partnership, one must be careful to comply with these terms strictly; otherwise it may be claimed that no corporation exists in the eyes of the law. It is true that in the case of defective incorporation, where a possible charter exists and where a bona fide attempt has been made to come under it but through a technicality some act or step has been omitted, the law will recognize for most practical purposes the *de facto* corporation- subject always to the paramount power of the state to object at any moment to its continued existence. There is always danger, however, that any particular defect in complying with the offer contained in the general charter of the statute book will be regarded as more than a mere technicality and thus prevent the corporation from coming into existence either *de facto* or *de jure.*

In general, the formation of a corporation has been greatly simplified by most of the states. Thus, they furnish standardized forms for each of the steps necessary under the statutes. Difficult questions arise, however, particularly in the phrasing of the purpose for which the corporation is organized. On the one hand, the purpose must come within the terms of the particular statute of which use is to be made. In some states this statute differs for one or more of the following types of organization: railroads, public utilities, money companies such as banks and insurance companies, manufacturing corporations, trading corporations, and corporations not for profit. At the same time it is necessary to make the powers broad enough to cover not only the immediate needs but all of the probable needs of the corporation as it carries on its business. The failure, for ex-

ample, to stipulate the power to hold real estate may or may not be embarrassing under particular statutes and decisions for this or that type of corporation.

2. The External Relations

(1) RESPONSIBILITY IN AGENCY. (*a*) *Liability of Principal in Contract.* The *responsibility of a principal* on *the contracts* made for him by his agent proceeds on an entirely different principle from the liability of a master for the wrongs done by his servant. As to the former, the important question is always whether the act of the agent was within the *apparent* scope of his authority. As to the latter, the question is whether the wrong was inflicted in the *actual* course of the employer's business. The reason for the difference will readily be seen if we take the simple case of the owner of a truck who has a laundry route and who pretends, with the consent of the owner of the laundry whose name appears conspicuously on the truck, to be an employee of that laundry. Let us assume that purporting to act as the agent of the company this truck owner makes an offer of settlement to the owner of a lost laundry bundle. Let us assume that on the same day the same truck owner, while negligently driving, injures a pedestrian. Now, while it is perfectly reasonable for the customer to argue that he would not have entrusted his laundry to the truck driver if he had not been led to .believe that the laundry was responsible, it certainly would be foolish for the pedestrian to argue that he would never have exposed himself to the danger of being run down if he had not first read the name of the laundry company on the wagon.

(*b*) *Master's Liability in Tort.* The rationale, therefore, of true agency is simple: it is liability based either on actual authorization or on the creation of the appearance of authorization. The rationale of the *master's liability* for the acts of his servant is much more difficult to work out. It is not giving effect to fault, for it is no defense that the master has exercised the highest degree of care in the selection, instruction and warning of his servant. Historical explanations have been sought and found, going back to the days of slavery, but the perpetuation of the idea in modern law is no doubt due to the acceptance of the casualties of business as an element of the cost of doing business regardless of whether these casualties are brought about by the failure of inanimate objects or the limitations of the human body.

(*c*) *Distinction between Principal's Liability and Master's.* The difference between the basis of the principal's liability in contract and the master's liability in tort (the same person may, of course, be both principal and master) gives rise to this contrast: While it is, within reasonable limits, possible to avoid the appearance of having authorized an agent to act in a particular way, it is by no means possible through one's conduct to limit his responsibility for his servant's acts. On the other hand, it is possible so to organize one's affairs that a person who might otherwise be a servant becomes for all legal purposes an independent contractor. The distinction between the two is not always easy to draw. Thus, if I hire a window cleaner he is my servant. If I engage the services of a window-cleaning company, even if it is only a one-man company, my work is being done by an independent contractor. In the one case I should be liable to anyone hurt by the negligence of the window cleaner, and in the other case I should, of course, not be responsible for his acts. Accordingly, the courts have laid down tests which are helpful though by no means conclusive, such as the degree of detailed control reserved by the employer, the mode and basis of payment, the general custom of employment in connection with particular service, and the names by which the various steps in the process of employment are called.

(*d*) *Undisclosed Principal.* Care in the matter of holding out will not go so far as to relieve an actual principal from liability for the contracts made by his agent. The law has developed a doctrine of undisclosed principal. Such a person may come out and claim the contract at any time. On the other hand, if he is discovered he may be drawn out to bear the burden of it. Nor is it practical by any degree of care so to vary the relations of a particular type of agency as to deprive the public of the privilege of assuming that the authority ordinarily exercised exists in any given case. Thus, a manager of a branch store, a traveling salesman, an insurance agent, a real estate agent, or an agent entrusted with the selling of a horse, have come in the understanding of the community to possess standardized authorities. Where it is true, for example, that the agent to sell a horse presumably has the power to warrant the horse as sound, no amount of private instruction of such an agent can prevent him from so binding his principal—regardless of the fact that in exercising such a power he is going way beyond his rights and may be answerable to the principal or to others for doing so.

(2) LIABILITY IN PARTNERSHIP. In partnership, the principles that govern the liability of employers with agents and ser-

vants are closely duplicated. The standardization of the idea of holding out, however, has gone much further. Thus, in a trading partnership it is possible to assert that the members of the firm may bind the firm on commercial paper, and in other types of partnership the assumption may be indulged in that whatever is necessary and usual in the conduct of a business is within the scope of each partner s authority. The liability which each partner assumes in full, however, is in the first instance a joint liability of the members of the firm. It is necessary, therefore, in suing a partnership to proceed against the group, unless the ordinary foundation is laid in law for an excuse from including one or more members of the group, such as death, hopeless insolvency, or absence from the jurisdiction. When judgment is rendered against the group, however, it is available as the basis for levying on the property of the individual partners as well as on the property of the partnership. Equitable adjustments of the claims of the private creditors of individual members of the partnership have led to a somewhat different result where a partnership is wound up and its affairs are being settled in equity: namely, that the partnership creditors have priority so far as the partnership property goes, and the individual creditors have priority on the non-partnership property of the individual members. In the ordinary course of a going concern, however, the partnership creditors have the advantage of priority so far as partnership property is concerned and parity with other creditors in their resort to separate property. This liability of the individual partner for all of the debts of the partnership is at once the strength and the weakness of the partnership plan of doing business. It furnishes a very strong basis for credit; on the other hand, it tends to frighten away from a partnership venture those who do not wish to jeopardize all that they have in it.

It is this desire for limited liability that has gradually driven out the partnership in favor of the corporate form or one of the other substitutes for incorporation that have been devised with or without the aid of statutes. The limited partnership, the special partnership, and various other types of statutory partnerships sometimes remaining partnerships in name only and having all the essential attributes of a corporation, have been devised accordingly. Some of these provide for at least one general partner with unlimited liability, but in others there is no personal liability other than the risk of losing what is already invested. The important feature in such statutes is the bringing of adequate notice to the attention of creditors and would-be creditors as to the limited nature of a partner's responsibility. The word "limited" may be required in the name of the partnership. Public record of some kind and notices in conspicuous places, or other methods adopted by various statutes, aid in giving this protection to the public. The law so jealously guards the public's rights in these matters that a comparatively minor deviation from its requirements may throw the whole undertaking back into the category of a general partnership.

In dealing with the liability of a partnership to outsiders, a question of more than academic interest is presented when it is proposed that a partnership be dealt with as a separate entity or a person, in the eyes of the law. Theoretically, a partnership is nothing of the sort; actually, the law has made concessions which in the aggregate tend to outweigh this theory. Thus, under modern statutes partnerships may sue and be sued in their own name, they may hold and transfer real estate, and their funds are, as already indicated, sometimes dealt with as if they had been incorporated.

(3) LIABILITY OF A BUSINESS TRUST. The liability of a business trust and its owners to the outside world is theoretically a very simple but unsatisfactory arrangement— namely, that the trustees are fully liable, as if they were partners in the business. They may, of course, seek reimbursement from the trust funds for all payments that they are forced to make in the course of the business through no fault of their own; but the beneficiaries of the trust, who in point of fact are the real parties in interest, while the trustees are mere managers, are free of liability or of any risk other than the loss of the trust estate. It is of course possible for the trustees to stipulate in all of their contracts that they shall not be held liable personally and that the persons with whom they contract must look to the trust fund, and only to the trust fund, for their claims. No such arrangement, however, will help the trustees in a tort action, and of course it is impossible to force this contractual stipulation on all strangers who deal with the business trust. The greatest danger in such arrangements lies in the likelihood that a particular court will look upon the whole transaction as essentially a partnership in spite of the nice formalities written into the trust agreement. Even in those states which have taken the lead in the recognition of this form of business organization, it is necessary to be very careful to give no direct or indirect part of the control of management to the beneficiaries of the trust.

(4) LIABILITY OF A CORPORATION. The simplest of all the theories of external relationship is that of the classical period of corporation law in America. The stranger dealing with the corporation has no connection whatever with the stockholders or even with directors. His claim is purely that against the artificial person- the corporation- and unless it can be satisfied out of the corporation's property it must go unsatisfied, regardless of whether it be a claim in contract or in tort. In course of time, a good many important modifications of this theory have been worked out. There are, in the first place, statutes which give double liability or proportionate liability, or even unlimited liability to stockholders, particularly in such institutions as banks.[6] These statutes are rather strictly construed with reference to the time at which one must be a stockholder to come within their operation, the manner in which one must proceed in order to take advantage of the statutes, the question whether the obligation of the stockholder becomes a contractual one that will be recognized everywhere or a penal one that will be given only local recognition, the question whether a judgment must first be rendered against the corporation, and so on. A more serious danger, however, faces both the stockholder and the director where the basis of procedure against them is not a statute but the claim that there has been some fault, such as fraud or irregularity in the actions of the corporation or of the persons proceeded against, on the basis of which they owe reparations on common law principles to the outsiders.

In general, the piercing of the veil of corporate entity is practically limited to cases of fraud. Thus, even where a wholly owned subsidiary takes a lease in its own name and is later abandoned by the rich parent corporation, the lessor is likely to find it exceedingly difficult, if not impossible, to hold the stockholding parent corporation responsible.[7] On the other hand, where a corporation was organized for the purpose of circumventing the law against the paying or receiving of railroad rebates, courts quite readily ignore the fiction of corporate entity and set out the natural persons whose acts, thus laid bare, constitute a violation of the statute.[8] In these days of complicated pyramids, with subsidiary and parent corporations, it is unwise to dogmatize as to the possibility of hiding behind the fiction of corporate entity. Public opinion has been stirred by the use of that fiction for tax evasion and has demanded remedial measures. Furthermore, the securities and exchange legislation of recent days has tended to tighten the responsibility of directors, promoters, and persons who control their actions, with reference to corporate issues.

3. The Internal Relations

(1) SIMPLE CONTRACT. Where the form of organization is that of *simple contract,* the widest possible latitude exists in the type of control that each party to the bargain has over the other. We discuss elsewhere (Volume VI) not only the liability in contract under ordinary legal procedure but also the contractual control of procedural law that is sometimes attempted in this particular use of the contract, as well as in others. There are, however, several limitations to the use of the contract principle in the establishment of mutual control m organization contracts. The most important of these of course grew out of the tendency to change the labor relation from one of simple contract to one bearing the earmarks of status. There are other limitations on the contract principle that sometimes lead to the adoption of curious devices for the maintenance of control. Thus, in recent years a great deal of business dissatisfaction has existed over the inability of the manufacturer of goods, particularly trademarked goods, to control resale prices and terms, although from a practical business point of view the retailer may be as much a part of the distribution organization of a manufacturer as a local branch manager could possibly be. This dissatisfaction has led to a wave of legislation, particularly since the upholding of the California[9] and Illinois[10] fair trade acts, and the passing of the federal Miller-Tydings Act, under which it is now possible to make contracts exercising this degree of control, or even to bring it about without the formality of contracts. The law still prohibits, however, exclusive agency arrangements in interstate commerce where the tendency is to create a monopoly or unduly to interfere with competition. It still prohibits certain restraints on alienation of goods after they have reached the hands of the dealer, and latterly it has added a restraint on the freedom of contract in the selling of goods, based on the principle of nondiscrimination against competing dealers.[11]

These contractual limitations have led to the use of more intimate business relations than the simple contract calls for. Thus, the independent dealer may be converted into an agent,[12] or into a lessee of such property as a gasoline pump[13] or shoe machinery.[14] On the other hand, an employee in charge of a branch may become converted into a nominal independent dealer bound to the former employer by the terms of an elaborate mortgage. To counteract the advantage of increased control,

there is in general the disadvantage of increased responsibility. Combinations may be found, however, under which the necessary degree of control may be worked out under the law without undue burden.

(2) PRINCIPAL AND AGENT. The substantive law of the mutual duties and rights of principal and agent presents an extreme form of both control and responsibility. The agent owes the duty of absolute loyalty and fidelity, perfect good faith, and ordinary diligence, plus whatever skill is contracted for expressly or impliedly in connection with his undertakings. In addition he owes a strict accounting which may be enforced in equity, or even in criminal law, by drastic remedies. His position is, in short, a fiduciary one. The principal's duties to his agent, on the other hand, are not fiduciary; they are merely the contractual obligation to compensate, reimburse, and give proper opportunities and facilities to the agent for the performance of his duties. But, of course, as between the parties there is room for extensive modification of the principal-agent relationship. The law takes cognizance of the actual understandings generally entered into in various types of agencies as the basis for its assumptions in particular cases. Thus, auctioneers, accountants, lawyers, factors or commission merchants in particular lines of industry, various types of brokers such as so-called real estate brokers and stock brokers, insurance agents, advertising agencies, drummers, mercantile rating agencies, and a great many others, have taken on a standardized business relationship and are coming to be understood by the law as having entered into certain detailed standardized contracts with their clients or principals.

(3) PARTNERSHIP. More standardized, however, are the internal relations in a partnership—largely because the law refuses to intervene in the disputes of partners unless or until they reach such a point that dissolution is called for. Of course the terms of a partnership agreement may vary the normal understanding that a majority vote shall control, or that books and records shall be open to partners, or that accounts shall be rendered from time to time. But even where the obligations of partners to each other and the nature of their power of control in the business is great, it is difficult if not impossible for the law to take cognizance of them except as the basis of alleged breaches in the extreme or cumulative cases that come before it eventually.

(4) BUSINESS TRUST. In the case of trusts, control must not be exercised by any act or vote of the beneficiaries. Trustees are, however, answerable in court for mismanagement of the trust estate, but Courts are not willing to substitute their own judgment for that of trustees acting in good faith, no matter how erroneous or foolish the judgment of the trustees seems to be. Hence, in general the control exercised over trustees in a business trust is the purely negative one of checking misconduct. It is not a policy-forming control.

(5) CORPORATION. Control in the case of the corporation goes to the other extreme of invoking legal sanctions at every turn. In the first place, stockholders' control is exercised by voting, and a great many complaints are accordingly answered with slight comfort by the suggestion that the remedy is at the ballot box. In recent years there has been a great tendency to underestimate the importance of voting power—in fact, the power is meaningless to a small minority stockholder in a nation-wide corporation. This tendency has been reflected in the actual legal set-up of many corporations in which types of stock have been issued with limited or conditional voting power or no voting power at all. On the other hand, voting power has sometimes been accorded quite irregularly, from the point of view of classical corporation law, to bondholders and others in similar positions. Generally, in the American charter of today, voting power is apportioned on the basis of the number of shares of stock held. In a few instances the older idea of one vote for each stockholder lingers on, but the modern tendency is perhaps in the direction of cumulative voting systems whereby a minority, by casting all of its votes in favor of only a portion of the candidates, is enabled to get representation on the board of directors. In general, the voting power of stockholders is limited precisely to the selection of directors. Exceptional situations are created by some statutes requiring the ratification of extraordinary measures by stockholders' vote, and occasionally by-laws do the same. In a few matters, the vote, or rather the veto, of a minority stockholder is important because of the provisions of the law requiring unanimous consent to drastic changes in the structure of a corporation. Thus, in the classical corporation law of the end of the last century it was not uncommon to find such veto power left to a single stockholder in such matters as changing the purpose of the corporation, selling all of its assets, or changing its capital structure. More recently there has been a tendency to leave such matters to the board of directors or, at most, to require a ratification by a stated majority—perhaps two-thirds or three-

fourths of the stockholders—and to give to the individual stockholder, instead of his former veto power, a right to be bought out at an appraised valuation if he took every necessary step to protest against the contemplated major changes.

Individual stockholders are protected by the courts against the bad faith or clearly unlawful acts of directors. They have little or no protection against what they consider the bad judgment of the directors or even their arbitrariness in such matters as withholding dividends where bad faith cannot be proved. The court will not in general substitute its opinion of how the corporation should be run for that of the duly elected directors. There have been cases in which stockholders have succeeded in compelling directors to pay dividends, but in every such case some element will be found other than the mere arbitrary refusal of directors to declare a dividend. For example, in the case of Dodge v. Ford Motor Company,[15] which attracted a great deal of attention at the time, it was held that Mr. Ford's own admission that his directors were holding back earnings in order to accomplish certain humanitarian ends, rather than for any good business reason, was sufficient to warrant the court in exercising its visitorial powers and compelling the declaration of a dividend. Had the directors merely insisted that in their opinion it was for the business interests of the company to build up a surplus at that particular time, it is difficult to see how a court could have overridden their decision.

4. Readjustment and Dissolution

When in the course of events it becomes necessary to dissolve or rearrange business ties, the parties generally find one phase of their relations in which their preliminary plans were defective.

It is quite natural that when one's attention is concentrated on a venture which he hopes and expects to prove profitable, all darker possibilities will be touched upon lightly or dismissed from the mind. Quite apart from the psychological operation of such an uneven distribution of attention it would certainly be unwise to create unnecessary sales resistance by suggesting, in making the preliminary plans, all the possible evils that might be encountered. Furthermore, those evils which could be foreseen as possibilities are the very ones that are least likely to overtake a business venture. Consequently, at the moment of readjustment or dissolution, the parties frequently find themselves in a situation inadequately provided for by their original agreements. So far as this is true, they are compelled to resort to one of two sets of ideas: first, they may dissolve or rearrange their relationships by means of a new agreement; second, they may resort to general rules of law that become operative in the absence of specific agreements.

(1) CONTRACTUAL METHOD OF REORGANIZATION AND DISSOLUTION. At the outset, we may well bear in mind that under the contractual pattern of business already described the contractual method of reorganization and dissolution predominates. Ever so many questions that have reached our courts as to the rights and duties of the parties after a dissolution have to be answered on the basis of an analysis of the agreement to disagree. It is quite possible and even usual for the parties to leave open an obligation to adjust errors and take care of new developments or discoveries that have their basis in the former relation, especially if it is long-continued or complicated.

Thus, in the course of a project, questions have arisen between owners and builders calling a halt to operations by mutual agreement. What shall be done with building material ordered but not delivered, with building materials delivered to the premises but not opened, with material opened and not used or only partly used? The answer of course depends upon the terms of the agreement dissolving their relations, express or implied. Similar questions arise when an employee is dismissed with or without cause, or when he otherwise terminates his relationship as an employee. What of commissions on transactions which he has begun but not consummated, or on transactions consummated under which the following through of the performance was delayed until the happening of some event or on a contingency? What of the employee's right to enter into a competing business in which he would use the knowledge gained in the former employer's business, and what of his relationship established with the trade while in that employ? Again the agreement -if there is one- embodying the terms on which the employee operates should be resorted to in the first instance in answer to these questions.

Though this formula simplifies the numerous questions relating to dissolution, and suggests at the same time the importance of embodying in agreements of dissolution a good deal more than the mere mutual agreement to quit, there are situations in which the agreement to disagree cannot be or at all events is not used. It cannot be used where the relationship between the parties is one in which the public has a special interest. Thus, to take a type of status created by contract outside of

the business field as an extreme illustration, no agreement between husband and wife can terminate the marriage relationship. In fact, where the court procedure provided for such cases is used and it is discovered that the parties have resorted to the courts as a result of an agreement in which one is bound not to contest the action of the other, the entire transaction is not only void because of collusion but is also a basis for criminal prosecution.

(2) DISSOLUTION OF CORPORATIONS. Less extreme, of course, is the situation involved in the dissolution of a corporation; but, in general, the charter given by the state can be destroyed only by the formula provided by the state. Any agreement among stockholders and other parties in interest from which this formula, whatever it may be, is absent, will leave the corporation alive or, if for practical purposes dead, at least unburied and ready to haunt those who have left it so.

State laws usually provide that for the surrender of a charter a reasonable process of publicity, such as notice to creditors and advertisements for the benefit of the public, be utilized and that reasonable assurance be publicly given that all debts have been paid and all proceeds properly distributed. The exact machinery for accomplishing the reasonable assurance of these ends differs of course in the different states and for different types of corporations. Furthermore, there is a great deal of difference between the dissolution of a solvent corporation and of one that is insolvent. The latter may require a court procedure in which a receiver takes charge of the dissolution for the greater assurance of justice to all parties. There is likewise a difference in various systems and rules as to who may initiate the process of dissolution. For a going concern that is successfully accomplishing its purpose the traditional rule has been that any stockholder could insist upon its continuance. Gradually there has developed a view that a majority of at least a two-thirds or four-fifths have the power of forcing a dissolution. Sometimes dissolution is provided for on the initiative of the state as a kind of double penalty imposed on the corporation for specific acts. Occasionally the initiative of the state may be utilized without specific reason under the clause reserving to the state which grants the charter the right to alter, amend, or repeal the charter. But whatever methods are provided by the statute law which creates the corporation, only those methods enumerated by the law are effective. In the absence of any law on the subject, for example, there can be no dissolution or repeal of charter by mere desuetude.

(3) DISSOLUTION OF PARTNERSHIPS. What has been said of the corporation applies to a much smaller degree to the partnership. In general, partnership can be dissolved by agreement between the parties, at least so far as the parties and those claiming under them are concerned. But so far as the public is concerned the result of partnership law may still adhere to the acts of the parties. Thus, unless persons are notified of the change or dissolution in the partnership makeup, they can go on assuming that they are dealing with the original partners. A specific notice to persons who have had dealings with the partnership and a more general advertisement in the newspaper for the benefit of other members of the public are generally deemed sufficient. The situation is really no different from that existing in ordinary agency. One who has been an agent may go on binding his principal, even after the agency has ceased, because of the continued appearance of agency, unless and until the principal has taken the necessary steps, through actual or constructive notice, to avoid a continuation of the appearance of authority in the agent. Special types of partnership created by law resemble corporations in that one who has taken advantage of the special provision of a statute may be so subject to the terms and conditions of that statute.

(4) DISSOLUTION OF TRUSTS. If the relationship is, in the eyes of the law, that of trustee and beneficiary, the public has a sufficient interest in the proper administration of the trust to require the court's approval of the dissolution, but whether this is insisted upon or not depends, of course, on local law which frequently distinguishes various types of trust.

If the organization or the relation between the parties has been effective through a conveyance of real estate or such document as a lease or mortgage, an effective dissolution may require a reconveyance or other cancellation of a document in writing. In all these cases, of course, by effective dissolution we mean one that will bind the public as well as the parties. Between the parties themselves, the simple contract of dissolution may be quite effectual in many of these instances. It may even give one or the other party a right to go into a court of equity to force the other to execute the necessary documents for the completion of the dissolution as to the public.

(5) TERMINATIVE OR CONDITIONAL CONTRACT. There remains for study that class of cases in which dissolution is pos-

sible by contract but is effected in some other way than by a clear distinct contract of dissolution made at the time of dissolution. The most obvious case is, of course, that in which an agreement creating a relationship gives a power of termination to one side or the other under various conditions and stipulates what shall be done if and when that power is exercised. The original agreement may even stipulate the time for the termination of the relationship or the event on the occurrence of which it shall automatically cease. Such cases differ from those of agreements of dissolution already discussed only in that the terms are to be sought in the original agreement rather than in the subsequent one. Practically, of course, this difference may be a very great one in that the original agreement may fail to foresee the situation that actually confronts the parties at the time of the termination of their relations.

(6) IRREVOCABLE AGENCY OR PARTNERSHIP. A more common instance of the same kind arises where, in spite of any agreement to the contrary, one party has a *power* to terminate the relationship even though he has no *right* to do so. This is generally true of both agency and partnership. A principal, an agent, or a partner may in general put an end to the relationship, even though he had agreed definitely not to do so within a specified time, and even though he lays himself open to an action for damages by the breach of his contract by terminating the relationship. Business men have attempted by their contracts to curtail this power: in other words, to make an agency or a partnership irrevocable. Sometimes their effort shows itself in the establishment of a penalty or a forfeiture of an interest where the power is wrongfully exercised. The limits of this type of self-help or contractual control of adjective law we have already explored. The law does recognize, however, at least one class of irrevocable agency—the so-called *power coupled with an interest.* A great deal of learning has clustered around the meaning of this phrase. One of the leading cases on the subject is Hunt *v.* Rousmanier's Estate." In that case an experiment was tried for the creation of a novel type of security: the creditor, instead of getting a mortgage, was given a power to sell a ship and reimburse himself for his debt out of the proceeds. This substitute for the mortgage would probably have worked out satisfactorily, either as a means of pressure on the debtor or as an actual satisfaction of the claim of the creditor through the machinery proposed, but the parties had not foreseen the complication that would arise if the debtor died before the execution of the power. Under the ordinary rule of agency, death operated as a revocation of a power, but it was contended that this was a power coupled with an interest. Chief Justice Marshall ruled that is was not, that the type of interest contemplated in that phrase as used in this connection was only a kind of part ownership in the thing and not merely an interest in the proceeds of the sale authorized by the power. The creditor was treated as an ordinary unsecured creditor. And though courts since that day have been a little more ready to detect present interest in the thing under any given set of facts, they have continued to apply the rule as laid down by Marshall once they determine that the interest in question is limited to the proceeds.

(7) TERMINATION BY LAW. In addition to these various acts of parties -either two-sided or one-sided- that may terminate a relationship, there are some instances of termination purely by operation of law. *Death* is the most important of these - but it does not terminate all relationships. Death, for example, does not end a contract in the absence of a stipulation to that effect, or circumstances giving rise to the implication of such a stipulation. Of course, such circumstances exist where one side is to give a personal service. If "A" agrees to paint a portrait for "B" and dies either before he has begun the work or while the portrait is in process, "A's" executor can hardly expect "B" to accept a completed portrait finished by someone else in fulfillment of the contract. If an employer or employee dies in the middle of the term of employment the contract of employment is at an end. Yet there are other agreements in which there is no such implication. Suppose, for example, that I buy an expensive set of books or furniture and agree to pay in installments. If I die before the last installment is paid, my estate owes the balance. Many contracts are made for things required for individual persons and not at all for their families—such as law books for the lawyer, or medical books or apparatus for the physician—without due consideration of the fact that the contractual obligation continues in spite of death. Of course, the situation has been met in some types of business agreement by stipulating definitely what shall happen in the event of death. A rather curious limitation on the power of contract to meet this condition, at least in one way, has developed in connection with the advertisement of an installment furniture house that in case of death of a purchaser without paying quite all the installments, under certain conditions a receipt in full would be given to his

estate. This was interpreted by an insurance commissioner as a contract of insurance and, as such, one which a furniture company was not authorized to enter into. Death likewise has very little effect on the business relationships made up in the form of contract in which the parties are corporations rather than individuals; for though the death of a partner terminates a partnership, the death of an officer or shareholder leaves the corporation intact, with a new owner of the stock and, at most, a vacancy in office for the filling of which the law provides.

It is further possible to avoid the effect of death on a contract by stipulating that the contract is made on behalf of the maker's executors and administrators, as well as on his own behalf.

There are, however, some phases of the' operation of law not so easily circumvented. Thus, war suspends a contract and other relationships between subjects of the *warring states.* Intervening illegality of the purpose of the contract or relation by reason of a *change in law* will automatically terminate the relation. Likewise, *bankruptcy, statutes of limitations,* and the like, may operate against the wishes of the parties or of one of them by reason of the supremacy of the law.

(8) BASES FOR PLANNING TERMINATION. Within the limits of control of the manner of terminating relations, it remains to consider the actual practice in providing methods of termination for various types of relations common in business. At least a few general tendencies stand out: labor relations are usually made terminable at the will of either party, rather than timed. The reason is not merely the desire of the business man to retain control over his employee through a constant threat of possible discharge, but the more deep-seated fear of the business cycle. Until some progress is made in stabilizing industry so as to avoid extremes of speeded production and unemployment, no time contract with labor will commend itself to the executive. In certain types of employment there has grown up a practice of requiring at least a short-timed notice, such as the two-weeks period in the standard actor's contract, and it may well be that this tendency will manifest itself more widely as a first step towards the elimination of the insecurity of the employee incident to the present system.

There are, of course, business situations in which the very opposite thing is striven for: namely, where the power of terminating an agency or a partnership agreement is specifically *diminished* or sought to be withheld by the imposition of a penalty or the actual creation of a power coupled with an interest for no other purpose than to avoid terminability. Again there are situations in which business recognizes the propriety of giving a choice of continuation or termination to one side. This is present in the *renewable lease,* where the mode of renewal is through silence or through the definite giving of notice. Business may further be interested in the termination of relations in case of *bankruptcy* or a similar complication. Leases nowadays frequently specify that, in case of bankruptcy, a lease shall become terminable at the option of the lessor. Just what is a convenient period for any particular type of relation to endure is a question of business fact depending upon customs of trade, seasons, and cycles in a particular business, the length of time required for the completion of a deal or deals, the comparative length of the period of preparation or training necessary to make an employment or similar relationship profitable, and the like. In some instances, however, the actual custom or practice is controlled by arbitrary limits such as the calendar year, or by arbitrary customs such as those which prescribe moving days in various localities.

Just what events shall be looked upon as terminating a relation, and particularly as discharging a contract, is essentially a *question of interpretation,* depending, like all questions of interpretation, on the actual words used and their most likely explanation in the light of customs and practices, past dealings and other attending circumstances. An interesting question in the conflict of laws is raised where a contract was made in one place to be performed in another, and a particular event occurs which, in the absence of stipulations to the contrary, would constitute a discharge of the contract in one of those places though not in the other. In general it is safest to view such situations as calling for the intent of the parties. The assumption is frequently indulged in that the intent of the parties can be ascertained by reference to the law of the place of making rather than to that of the place of performance, so far as the question of discharge is concerned. The matter can of course easily be taken care of by express stipulation, since the difficulty is entirely one of interpretation.

Differing in many respects from termination of the relation is the alteration of the business relation in view of *new circumstances.* It is, of course, possible in many such cases to proceed to separate stages: first, the dissolution of the former relation and, second, the creation of the new one. In very simple situations this analysis is practical and convenient. In some, it furnishes an equitable basis for pro-

cedure even if the parties themselves have not taken the two steps consciously and deliberately. Thus, in building contracts in which unforeseen difficulties have arisen and in the course of which the owner promises the builder an additional compensation to that originally agreed upon, in the terms of his promise to finish the work, which he is already bound to do, courts have seen a way out of the difficulty of lack of consideration by pretending that the transaction had *two stages* and that after the slate had been cleared by mutual release a new contract had been entered into with a new consideration for a new promise that resembled the old one.

In more complicated situations, however, there is a real difficulty involved in taking the two steps or even in imagining them. It is the difficulty of taking care of a complicated bit of business machinery during the *process of transition.* Even where the reorganization of a business is entirely voluntary, and where it is dictated through no failure whatever of business but simply as an ordinary incident in its growth, a period of negotiations must be weathered in which the maintenance of a *status quo* and possibly a perfectly neutral temporary control may be important postulates. If, as is quite likely during this period, there develops a dissatisfied faction, be it ever so small a minority, a truly amicable reorganization becomes impossible. Our corporation laws, for reasons that antedate modern business, contemplate such a static condition of business that they give a *single stockholder* the power to block any change in the articles of incorporation. In recent years statutes have been passed modifying this power of the minority stockholder, so that a majority can take steps likely to be profitable if not necessary in the course of business development provided they comply with such procedure as the statute provides by way of substitution for the old power to block change for the protection of the minority stockholders. For example, several states have provisions to the effect that a two-thirds majority of the owners of all stock of the corporation may sell the entire plant and proceeds of the corporation and, therefore, lay the foundation for an eventual dissolution, but that a minority in such case if it objects to the price at which the assets are sold may demand arbitration and be reimbursed for its share in accordance with the award of such arbitration.

Where the differences of any of the various factions become serious, and particularly where the creditors of the organization are likely to be delayed in their claims through the process of reorganization and are in a position to check or interfere with its ordinary work, the particular legal device that seems most usable for the tiding-over process is the *receivership.* The receivership is not in itself a "remedy" furnished by the law or equity to mend any situation. It is a subsidiary part of procedure applicable only in a case that is pending in the court or which gets into court on some entirely independent legal or equitable ground. Of course in a great many cases there is a simple and legitimate ground for going into court, and the receivership can be asked for by a party in interest in the ordinary course of things. But in a vastly greater number of cases of business reorganization the thing actually desired is the subsidiary device of receivership, and the ground for going into court is a more or less trumped-up one. A friendly suit is instituted by someone having a technical claim, and by the recitation of more or less fictitious matter the way is paved for a friendly receivership. In recent years the courts have relaxed their rigidity in requiring an independent cause of action and have come to recognize a kind of non-litigious administrative function of tiding over the period of reorganization and watching the process so as to safeguard the interests of all parties concerned.

The inevitable result of the process of adapting the old tool of receivership for a new purpose is exactly what we witnessed before in similar situations. There are numerous imperfections in the system. While the "umbrella receivership" does serve to keep things intact and moving on the negative side, it does not go very far towards a solution of the difficulties if the parties themselves are not willing to come to an understanding. At most, there is a threat in the distance that if the parties will not come together amicably the machinery of foreclosure or of some other drastic remedy may be so utilized as to injure all of them.

(9) FEDERAL BANKRUPTCY LAW. Among the proposals for further adapting the machinery of the law to the business of corporate reorganization, the most sweeping is that appended to the *Federal Bankruptcy Law* as Chapter X. Reorganization is not bankruptcy in any traditional sense. Nevertheless the emphasis of bankruptcy law has shifted from the quasi-criminal treatment of the debtor to the processes of rehabilitation in the course of time. If we read the constitutional clause which gives Congress the power to make uniform the laws of "bankruptcies" throughout the United States, thinking of the important word as the "skin of a living thought" and not as a "crystal," we may uphold the power of Congress to take control of

corporate reorganization under bankruptcy forms. Congress has proceeded in this matter cautiously by merely enacting the procedure developed by courts without statutory aid, under the "umbrella receiverships" of recent years. It has, however, cut away a great deal of red tape by making the receivership and the reorganization under it the thing asked for rather than an incidental boon in a proceeding largely fictitious. The essential thing asked for by business is a respite during which unhurried bargaining can lead to an effective plan, and the aid of an impartial tribunal to see that the plan is fairly arrived at and honestly carried out. "Nuisance value" and "squeezing" must be reduced to a minimum.

(l0) THE "EQUITIES." Above all, realities must be faced to apportion what the business man has learned to call the "equities," by which he means the ultimate calculation of the extent of the interests of all the types of creditors, proprietors and other claimants. Legal priorities must frequently give way to business priorities. Thus it may be vital to all parties to keep a business unit intact. In such a situation there may be a dispute among those claiming special interests in the various parts of the business as to how they should be ranked. Thus a second mortgage on a plant absolutely essential to an organization may well take priority over a first mortgage on a less essential plant. Furthermore, new money must be catered to at the expense of the old investors for their ultimate benefit. And this new money must be sought where it can be found. Experience has shown that common stockholders, if given even a slight, advantage, will frequently furnish that new money. Creditors, generally, will not. Hence it had been found impractical to refuse any such concession to stockholders where creditors are not paid in full, although theoretically if there is any value left in the enterprise it belongs to the unsatisfied creditors. A practical compromise has established itself: that such creditors may not be passed over entirely if stockholders are to be dealt with. They must be treated fairly.

[1] Stockwell *v.* Morris, 22 *Pac.* 2d, 189 (1933).

[2] Lancaster *v.* Choate, 87 Mass. (5 Allen) 530 (1863).

[3] Schumann Heink *v.* Folsom *et al.,* 328 Ill. 321 (1927).

[4] Hecht *v.* Malley, 265 U. S. 144, 44 S. Ct. 462 (1924).

[5] Reilly *v.* Cline, 27 Ariz. 432 (1925).

[6] This arrangement is of course not new. In early American law, incorporation did not generally carry with it limited liability. It was only some 50 years ago, in the period which is here described as the "classical' period of American corporation law, that the limitation of liability became nearly universal.

[7] Majestic Co. *v.* Orpheum Circuit, Inc., 21 F. (2d) 720 (1927).

[8] Bundred *v.* Rice, Ohio St. 640, 32 N. E. 169 (1892).

[9] Kunsman *v.* Max Factor & Co., 299 U. S. 198, 57 S. Ct. 147 (1936).

[10] 01d Dearborn Distributing Co. *v.* Seagram-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, (1936).

[11] Robinson-Patman Act of June 19, 1936, 15 U. S. C. A. Sec. 13 *et seq.*

[12] F. T. C. *v.* Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210 (1923).

[13] F. T. C. *v.* Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450 (1923).

[14] United Shoe Machinery Co. *v.* U. S., 258 U. S. 451, 42 S. Ct. 363 (1922).

[15] 204 Mich. 459, 170 N. W. 668 (1919).

[16] 8 Wheaton (U. S.) 174 (1823).

Some Frontiers of Business Law

1. Development of Business Law

The processes by which the law brought over to America from England has been adapted to the current needs of business are continuing and likely to be accelerated in the immediate future, in view of the rapidity and the extent of the changes of the demands of business life in the world today. We have progressed from a rural to an urban pattern, even in rural communities. We have accordingly become *interdependent* to a degree undreamed of in the days of the "rugged individualism" characteristic of the pioneer. We have accustomed ourselves to rapid transactions, necessarily standardized to save time, expense, labor. We have become adjusted to mass production and its necessary counterparts, mass distribution and mass consumption. Consumers have become separated from the producers who supply them, not only in space but through the intervention of various kinds of middlemen. Business has tended to become nation-wide rather than a matter of purely local concern. The significance of size has become acute, whether we consider the question of an optimum size or of the actual size of units. Associated with this question is that of the *relation between the investor or owner of an enterprise and the management.* Further, with size and the development of "absentee ownership" has come a new series of *labor relations,* as different from the personal relations of employer and employee of petty capitalism as those were from the still more personal relations of the domestic system of production. Specialization of functions has given rise to a series of recognized types of trades and even professions to do the work formerly allotted indiscriminately to "merchants." The *attitude of Government to business* has, in course of time, undergone many changes. Not only have there been much heralded "new deals" from time to time, but imperceptibly, from time to time, have state and Federal Governments and their agencies increased their direct participation in business as producers, buyers, sellers, competitors. Gradually, too, have they extended the idea of regulation of private business, through officers and administrative commissions vested with a high degree of discretion. Underlying these changes in the attitude of Government we must recognize not only new needs calling for new methods, but increased knowledge leading to a desire to conserve what was formerly wasted or protect interests that had formerly been inadequately defined. Thus, the desire to conserve natural and human resources has led to interference with such concepts as the right of property and freedom of contract, and may lead to further curtailment of these concepts, even in the absence of drastic external changes.

2. Future Trend of Law Development

The process of prophesying the trend of legal development is even more precarious than the guessing of the future of natural

phenomena, because of the human element, which is likely to differ from time to time and from place to place. Yet there are several steps that can be taken towards meeting the future of law in such a definite area as American business at the present day.

(1) ESTABLISHED CODES OF BUSINESS LAW. In the first place, a distinction may be drawn between those parts of the law that have been stabilized for the next generation by codification or allied processes and those in a state of flux. The drafts of the American Commissioners on Uniform State Laws for Negotiable Instruments, Sales, Conditional Sales, Warehouse Receipts, Partnership, Limited Partnership, are typical, but by no means exhaustive of the first group. There is an understandable resistance against amendments, however good in themselves, that will destroy uniformity. There is, moreover, even in the absence of the consideration of uniformity, a reluctance about disturbing the well-established expectations of the layman, or his vested interests. Hence, major disturbances are not common in American legislation in the main outlines of real estate law or contracts or even agency or trusteeship or the torts most significant for business life. On the other hand, we have less assurance of continuity in the essentially legislative field of corporation law, or the controversial arena of labor law, or in the newly entered realms of administrative regulation of particular business relations. These are today's frontiers of business law.

(2) NATION-WIDE SIMILARITY OF BUSINESS LEGISLATION. Within these confines there are further limits resulting from the centripetal forces that have heretofore prevented American state law from developing into forty-eight independent state systems. Some of these forces are still potent. There are, for example, the nation-wide textbooks, encyclopedias, digests, periodicals and other literature; the national law schools and lawyers' associations; the movements for uniform laws sponsored by lawyers and businessmen alike; the occasional attempts to "restate" the law of America, particularly when practiced on the grand scale of the American Law Institute; the nation-wide character of pressure groups, including the organized mouthpieces of particular industries and of labor; the imitativeness of legislatures; and, operating through all these channels, the fundamental similarities of needs and wishes throughout the country.

(*a*) *Statutory Waves.* As a result of these forces, business legislation, even to a greater extent than legislation on other subjects, has passed over this country in easily recognizable waves. In the social legislation affecting labor relations, for example, that has been a major phenomenon of the last fifty years, there are distinguishable several waves. First came the early factory and mining acts pertaining to working conditions in the Eighties. Later, a growing interest in the employment contract left us, in spite of resistance on constitutional grounds, a precipitate of laws regarding hours, modes and periods of pay, machinery for conciliation, mediation and arbitration, if not for all industries and employees, at least for those shown to require the exercise of that exception to ordinary constitutional limitations known as "police power." In the Nineties arose a series of experiments for employers' liability or workmen's compensation, sometimes with a state insurance feature. Legislation favoring unionism, establishing or strengthening the "right" to strike, to picket, or use other weapons of organized labor without interference from employers or employer-controlled organizations, has been typical of the first third of the twentieth century. The growing political power of labor has been respected by legislatures in minor ripples of statutory activity regarding a hundred subjects ranging from washroom facilities to a fair and free opportunity to vote in political elections. In other series of acts the laborer is protected against exploitation by loan-sharks dealing in wage assignments, against crooked employment bureaus, against grafting foremen, and various kinds of intimidation.

(*b*) *Federal Legislation.* Federal legislation for men employed in interstate commerce has heretofore followed the same models as state legislation. Recent Federal legislation beginning with the unconstitutional National Industrial Recovery Act and continuing in the Wagner National Labor Relations Act extends to all industry engaged in or affecting interstate commerce a rule in favor of collective bargaining, against employer interference with employee organization. Further Federal legislation is directed at standards of hours and wages. The significance of the entrance of the Federal Government into this field of law is enhanced by three considerations: first, the tremendous influence exercised by Federal legislation as an example for our mimetic state legislatures; secondly, the assumption that where the Federal Government has the power of regulation, that power is plenary, and not to be measured by the limited extent of state regulation allowed in corresponding cases; finally, the recent holdings of our Supreme Court giving new scope to the possibilities of

reaching through the interstate commerce power to activities physically localized within a state.[1]

(*c*) *Federal Influences on State Legislation.* In addition to these long-existing Federal influences for maintaining the essential unity of American law, there has appeared in recent years a tendency on the part of the Federal Government to suggest particular state legislation, and not infrequently to back up the suggestion with an offer of financial cooperation. Provisions in the Social Security laws and inheritance tax laws, and administrative action in the administration of relief, are in point.

(*d*) *Federal Courts and the Common Law.* On the other hand, one aspect of Federal influence towards uniformity seems to have suffered a setback. Ever since Mr. Justice Story's pronouncement in Swift *v.* Tyson,[2] there has been an academic controversy over the relation between Federal courts and the common law. Conceding that it was the common law of the several states that they were called on to administer, there remained the practical question whether they were bound to accept the view of state courts as to what that common law was in any state. A hundred years ago Story was inclined to proclaim that he knew better than the New York judges what the law of negotiable instruments was in New York—and he probably did. A troublesome line of decisions followed under which one result could be expected in a Federal court and another in a state court supposed to be administering the same law. This condition has recently been ended by a Supreme Court decision.[3] The result is a happy one, although it does involve the recognition of the supremacy of each state in finding its own common law as well as creating its own statutes.

Obviously, it was indulging in a less violent fiction to insist on the uniformity of the common law in our several states in Story's day than it would be today, and, in spite of all the leveling forces, we must look forward to a condition in which it becomes more and more perilous for the business man to cross state lines equipped only with the forms, franchises, authorizations and general legal outlook of a single locality. In commercial law it is, on the whole, likely that convenience will point the way to greater uniformity than in other parts of the law, but those differences which will endure for it will be all the more noticeable and more important, because ever since the days of Cicero it has been recognized that commerce tends to seek a uniform rule of law wherever it goes.

3. Time Element and Business Law

A final consideration limiting our survey of the frontiers of business law is that of time. Are we concerned with next year's legislatures, or the next revolution of the business cycle, or the length of an average business career, or the long process of human evolution in which the capitalistic system may be regarded as a stage? Obviously, each of these time-schemes has its interest and its significance. To the labor leader on the fighting line, next year's legislation may be all-important and the details of administration may loom large. To the student of economic history these matters are of minor importance. He wonders whether our whole system of contract will endure under the incessant penetration of administrative interference into enclosures formerly considered sacred to private agreement.

For present purposes neither extreme will be most useful. We are concerned with as long a look ahead as is practical in business planning worthy of the name. This period is perhaps longer than most of us imagine. We make long leases, we invest, we buy insurance, we build, we create trusts, we incorporate, we prepare for careers on the basis of hurried assumptions about the relative immutability of legal systems not at all borne out by facts. Let us consider, for example, some of the uncertainties of future law involved in a fifty-year lease entered into by a department store in a large city. We assume that it will continue to be legally possible to engage in that business in substantially the same way during that period in spite of laws pretty definitely aimed at curtailing the advantage of the large retailer both in buying *(e.g.,* the Robinson-Patman Act) and in selling *(e.g.,* the so-called Fair Practices Acts). As licensing laws increase, we shall probably encounter new difficulties in holding drug and optical goods and liquor and personal service departments together in one organization. One extremist in the New York legislature has suggested that department stores be required to have a separate entrance for each department, precisely as that state already requires a separate entrance for a liquor department.

But assuming that neither law nor economics will destroy the department store within the term of the lease, what shall we say about zoning laws, or expensive requirements as to safety and convenience of premises, or special taxes? What of the law's power over the dollars in which rent shall be paid? What of labor laws or administrative regulation of advertising and merchandising that may fall with peculiar force upon such units? Bills have already been proposed to divorce manufacture completely from the

functions of a retail selling organization of this type. Of course, it would be impossible to do business if every far-fetched proposal were an object of fear. It is precisely the necessity of discriminating between the far-fetched and the probable prophecies about our legal system that makes a study of some of the typical frontiers desirable; and hence we base our time limits on this necessity.

To recapitulate: our specific frontier themes are, (1) labor law, (2) the administrative regulations of particular business and (.3) corporation law; our point of view recognizes state differentiation of details, but concentrates on the waves of legislation and decision that the nation as a whole experiences; our time schedule adopts a reasonable period for business planning, which, of course, varies in different parts of the law.

I. LABOR LAW

The labor law frontier may be disposed of most readily. We have already traced the history of modern labor legislation. What is happening today may be summarized under the following tendencies, by no means limited to labor law:

(1) The departure from the contract idea and the substitution of a new type of status law for employer and employee regardless of the terms of contracts of employment.

(2) The increasing interest of government and particularly the Federal Government in labor relations.

(3) The increasing use of the machinery of administrative law in developing labor relations.

1. National Labor Relations Board

The second and third features of current labor law are treated elsewhere in this work. The National Labor Relations Board can best be understood in juxtaposition with other regulative boards whose early history it is repeating. It begins by taking its tone from the agitation that led to its creation precisely as the Interstate Commerce Commission did fifty years ago. It proceeds as a prosecuting body protecting one interest, labor, and opposing every other. Whether it will reach the judicial level of the Interstate Commerce Commission slowly or rapidly, with or without radical statutory amendment, remains to be seen. It is, however, necessarily experimenting and unearthing a great deal of information not unlike that unearthed in the first rate cases of the Interstate Commerce Commission. While litigation is pending as to the exact requisites of a hearing under the statute or under the constitution, the large questions to be encountered next are political rather than legal, and there is no reason to expect a diminution of Government interest in the welfare of the laborer in the immediate future.

2. Collective Bargaining

Our immediate concern here is rather with the first-mentioned feature, the departure from the contractual conception of the employer-employee relationship that was universally accepted in the middle of the nineteenth century. In our brief historic sketch we spoke of certain statutory modifications of the contract of employment, such as those established by employer's liability, any contract to the contrary notwithstanding. What we are facing today in the ascendancy of the principle of "collective bargaining" is not a new application of the contract idea in labor but a denial of it. The theory is that however a person became an employee, his position gives him a right to exert the influence of a vote in a group after political models. Furthermore, as in the political models followed, the majority rules. What the representatives chosen by this majority can do is not precisely to act as agents and bind them by contract. Not a single laborer is bound to work under conditions approved by their representatives. The representatives are certainly not bound, as under the statutes they may be chosen from outside the group of employees. If the employer is bound by the results of collective bargaining, his condition is certainly not to be explained on any traditional principle of contract law. In its present stage "collective bargaining" law is principally negative. The employer must not thwart group action on the part of his employees by individual arrangements, by coercion, by interference, even benevolent interference in the affairs of their organizations, and he must not refuse to recognize their representatives or to sit down with them for negotiations of the standard basis of individual employment.

Of course, compulsion to bargain collectively, however likely it may be to lead to peaceful agreement, is by no means synonymous with compulsion to reach an agreement. It is theoretically possible to comply with any number of mechanical provisions that the law lays down with no intention to yield an inch in the course of negotiations. The task of the law is, therefore, twofold. On the negative side it must set the stage for collective bargaining by preventing interferences with such machinery as it sets up. On the positive side, it must actually encourage honest efforts to reach conclusions in good faith. Both of these objectives are more easily stated and accepted in principle than

worked out m detail. Hence in accordance with the general legislative tendency of the day, an administrative commission is called into being with a broad discretion both in rule making and in enforcement. Needless to say, the process entrusted to them is complicated and delicate beyond the aid of precedents and, after all is said and done, it cannot take the place of the actual haggling for points and positions that is implicit in bargaining.

II. ADMINISTRATIVE REGULATIONS IN BUSINESS

What has been said of the administrative refuge of the law in connection with the labor frontier may serve as an introduction to the more general problems of administrative law in relation to business. Brave words were used in the nineteenth century about the freedom of all Americans to engage in any ordinary business or occupation without let or hindrance from any superior authority. Various traditions combined to insist on a "government of laws and not of men." The due process clauses of our constitutions were popularly and judicially interpreted as inconsistent with much that the twentieth century complacently accepts as Administrative Law. Furthermore the division of the functions of government among legislative, executive and judicial branches implicit in all of our constitutions, state and Federal, and explicit in some, has made it somewhat difficult to classify Administrative Commissions either as belonging to one of these branches or as being a combination of several. Furthermore, a doctrine prohibiting the delegation of legislative power had to be reckoned with wherever administrative discretion was enlarged into a rule-making power. That administrative law has developed to its present proportions, in spite of these prejudices and restrictions, is the fact that concerns us most here. It betokens a pressing necessity which knew no law. In the contemplation of this frontier of business law we should, therefore, consider the nature of this necessity and the question of its likelihood to continue to grow or to diminish.

1. Development of Government Regulation

Most important among the forces that have produced administrative law are the growing complexity of both government and business. The demands made on government by business were comparatively few and simple when our Constitution was adopted a hundred and fifty years ago. In small communities people bought from manufacturers whom they knew personally. They dealt with bankers with whom they had grown up as neighbors. They employed relatives and acquaintances and invested in enterprises carried on under their very eyes. Unfortunate members of society, whether the victims of sickness, old age, hard times or their own folly, were taken care of by their relatives, by private charities and in rare instances by the state, or they suffered. A few types of occupation were regulated or at least subject to particular rules of law: thus interest rates were vigorously limited and the price of bread and a few other necessities were here and there fixed by statute. In most situations, however, it was not only customary but quite reasonable to expect competition and the ordinary vigilance of the buying public to reward business virtue and to eliminate fraud, incompetence, overreaching, irresponsibility, adulteration of products, traffic in deleterious foods, avoidable dangers, unfairness and oppression from business life. This expectation became less and less reasonable. Middlemen separated the manufacturer from the consumer. Boards of directors and managers separated corporate owners from corporate employees. Great distances as well as complicated forms of organizations separated investors from the uses to which their investments were put. Employment became a touch and go relation. It began to dawn on the country some time after the Civil War that unless organized society would appoint agents to inspect and certify goods, examine and license persons, standardize and approve practices, acquire and make public information on many subjects, regulate businesses charged peculiarly with a public interest, and itself take over some functions for which private industry seemed inadequate, it would effectively be taking the side of the worst elements in business against the best. Competition which had operated to raise standards under simpler conditions would in blinder and less personal situations tend to drive out the better, more expensive standards. This discovery is not to be credited to any single political party or labeled as the "New Deal" of any particular year. It has been a slow, continuous growth, the result of endless struggles and compromise, the work of men who had neither the time nor the aptitude to make the philosophy behind their acts articulate or ever consistent. In all these years administrative control of business has generally been defended not as a good rule but as a series of proper exceptions. Today there is a tendency to justify administrative law as a rule because the complexity of business calls for a more intimate study of details and adjustment

of means to ends than is possible either in a legislature or a court.

2. Interpretation of Business Regulation by Government

This survey points in the direction of continued development of administrative law in business for some time to come. From a practical point of view it means that the business man's rights and duties may be subject to the discretion of commissions and officers in such matters as obtaining the original charter, license, certificate of convenience and necessity, franchise, permit or certificate without which he cannot begin operations, for the terms under which he may offer or advertise his securities or otherwise raise the money needed in his undertaking, for the terms of his relations with employees, bankers, customers, creditors, injured employees, public utilities and common carriers, for calculation of his taxes, for building permits, for approval of his safety devices and sanitary equipment, to say nothing of the indirect power exercised by commissioners who may lay down the terms under which the government will do business with a business man, or who may enter into competition with private business or grant or withhold government aids, obvious or subtle. Of course, the discretion of such officers or commissions is not absolute or final in all cases. It must be a properly "canalized" discretion; it must not be exercised arbitrarily, it must not be exercised in an "unstatutory" manner and the statute under which it is claimed must not be unconstitutional. Furthermore, the findings of such an administrative body on law are subject to attack in court; its findings on fact-questions are generally made subject to such attack though they need not be; and only its decisions involving a genuine choice of policy within a range of flexibility set by statute, are generally subject to no judicial review. Furthermore as administrative law is taking shape and developing standards for opportunities to be heard, the quasi-judicial functions of administrative bodies tend to be isolated and made more like judicial procedure. The American Bar Association is on record in favor of a system of administrative courts, distinct from ordinary courts and also from quasi-legislative bodies. It has been suggested, with some plausibility that a course of development parallel to that by which Equity became a part of the English system of the administration of justice, may make administrative law in America an auxiliary branch of the administration of justice as it has been in fact in Continental Europe for a century. On the other hand, it must be observed that points administratively developed have been taken over into statute or common law. Furthermore since the very existence of administrative law implies a kind of abdication on the part of courts and legislatures, it is important to note the fact that both courts and legislatures have from time to time staged restorations to temporarily abandoned parts of their authority.

III. THE FUTURE OF CORPORATIONS

1. Blind Spots in Corporate Structure

The last of our frontiers of business law singled out for survey is in the field of organization and particularly that part of it which concerns the future of the corporations. We have already traced the increasing complexity of corporate organization since the classical period of fifty years ago. What concerns us now is that this complexity has created what might be called a huge blind spot in corporate affairs. Contributing factors to this blind spot already discussed are the contractual deviations from traditional understandings between the stockholder and the corporation, the holding company or series of holding companies that stand between the investor and the subsidiary company or companies in which his money is used, the magnitude and scattered location of enterprises controlled by nation-wide corporations, the complication of intercorporate relations often concealed rather than revealed in long leases, mortgages, interlocking directorate arrangements and gentlemen's agreements, and fin ally the antiquated accounting that was no doubt ample for the needs of the simpler days in which it was crystallized. No single easy method can be devised to illuminate the blind spot adequately, as the difficulty is inherent in the situation. Thus the so-called blue sky laws that aim to make the initial sale of a security honest (fraud acts), or reasonably clear (publicity acts), or sound (licensing acts), do not carry with them any warranty as to later developments. Furthermore, if publicity is relied upon and details are piled on details in a public record only the expert can read the reports understandingly and, after all is said and done, all that can be recorded or published is past fact, whereas the goodness or badness of an investment depends on unascertainable future fact. Obviously, there is a connection between future probability and past fact, but it is not one that can be reduced to mathematical formulae.

2. Divergence between Corporate Fiction and Business Fact

Another source of confusion

in corporate affairs is to be found in the divergence between various parts of the corporate fiction and the realities of business. The corporation takes over from its governmental prototype, the specially chartered company of early modern times, a great many of the features of a state or city. Its "officers" are "elected" and in many jurisdictions must take an oath of office to qualify. Voting, meetings, official records, the official seal, the doctrine of "ultra vires" — all reflect this origin. For most corporations this machinery is too heavy and cumbersome and elaborate for daily use. For some it is too simple. Thus, it is possible generally to draw two organization charts, one stating the business understandings and the other the legal theory of interrelations of parts. The contract between them may reveal that the directors are "dummies," or bankers' representatives, the president a mere employee, the treasurer the virtual owner, those who have lent money on bonds the actual investors, or certain stockholders mere money lenders. Particular contracts with other corporations or employees may upon examination be as fundamental as charters or by-laws, so-called surplus may really be working capital; a subsidiary may be the thing for which the parent corporation exists—there is nothing unique about the President's discovery of "a four-inch tail wagging a ninety-six inch dog." It is unfair to jump to the conclusion that there is any abuse involved in these situations, though it may be demonstrable that by leading to confusion they facilitate fraud, and there may be occasions where the confusion has been deliberately heightened for sinister purposes. Sweeping proposals to abolish *holding companies* of all kinds or holding companies in particular industries such as public utilities, remind one of Henry VIII's attempted abolition of the practice of holding land for the use of another so as to facilitate his handling of church and monastery lands.

A somewhat similar effect may be aimed at in certain *tax measures.* The abolition of the practice of accepting consolidated returns for closely affiliated corporations may force certain companies to change their structure so as to be able to deduct the book losses of one part of an enterprise from the book gains showed by another. A more direct attack on one front of the problem is shown in various attempts to stiffen the liability of directors in the hope of ousting directors who do not direct. Unfortunately, such efforts, particularly in certain blue sky laws including the Federal Security and Exchange Legislation, sometimes act as a boomerang by inducing the resignation of responsible directors and the substitution of persons of doubtful financial responsibility. Another attack on the problem consists of imposing liabilities not only on directors and officers but on those who control their actions. The problem, however, is not a simple one so long as the theory of corporate structure is too inflexible to permit its reshaping to correspond with business realities.

3. Substitutes for Incorporation

Business has, of course, attempted to escape from some of the rigid requirements of the corporate pattern by experimenting with devices calculated to bestow some of the benefits of incorporation without the burdens. The joint-stock company, various kinds of dormant and secret partnerships, the Massachusetts Trust and various elaborate contracts that purport on their face to be leases, mortgages or even sales, are the result. In most of these situations the advantage is precarious. If the courts are lenient the legislature is likely to take the matter up as in the provisions for taxing unincorporated associations along with corporations. On the other hand legislatures have authorized under protective conditions various kinds of partnerships with more or less limited liability and other corporate advantages. These statutes may perhaps be regarded as representing a stage in the evolution of something between the partnership and the corporation for moderate-sized business, preserving the flexibility and freedom of the former and yet giving the advantages of the latter under safeguards that may be adequate though not so cumbersome in theory or practice.

4. Federal Incorporation and Licensing

The impact of the Federal Government on the careers of corporations raises one of the most serious problems on the business horizon. Heretofore corporations have been, with the important exception of national banks and a few exceptions of far less importance to business, state-creatures that stood before the Federal Government full-grown. They were not citizens to be sure but they were persons, and as such entitled to protection under the Constitution against being deprived of property without due process of law. They even acquired one important prerogative of citizenship, the right to resort to Federal courts on the ground of diversity of citizenship. The courts benevolently closed their eyes to obvious facts and indulged in the fiction that a corporation was necessarily made up of citizens of the state from which it held a charter. In any event as persons, corporations were subject to a good deal of Federal control as

well as protection. With minor exceptions they were gradually brought under the Federal Bankruptcy Acts. Their interstate commerce was as fully a Federal matter as was that of natural persons. Hence the anti-monopoly laws affected them and since nothing so big as an effective monopoly could be thought of without incorporation, it might be said that the anti-monopoly laws were made with these state-creatures directly in mind. Nevertheless the mystery of their creation was no part of Federal jurisprudence. Chief Justice Marshall had declared that their charters constituted contracts with states; but states in the course of a century had pretty well overcome the results of the Dartmouth College case by the insertion of the "alter, amend, or repeal" clause in specific charters, in general statutes and even in their constitutions. A changed attitude of the Federal Government is discernible chiefly in the Securities and Exchange Legislation. By the use of the interstate commerce and postal powers Congress seeks to take a controlling hand in the issue and marketing of corporate securities. There is, furthermore, in the "death sentence" legislation against holding companies for public utilities and in the control assumed over the financing and organization of railroads engaged in interstate commerce, and in the amendments to the Bankruptcy Act providing for the reorganization of corporations, an unmistakable indication of increasing congressional interest in the structure of corporations. Proposals have been seriously considered in Congress both for Federal chartering and for Federal licensing of all corporations engaged in interstate commerce. Furthermore Congress has experimented in its tax legislation with dictating a dividend policy to corporations. Curiously enough at the very moment that it begins to frown upon subsidiary corporations it uses a parallel device, the government-controlled corporation for an untold variety of purposes that would a few years ago have been achieved through government bureaus. Some of these are federally chartered as well as authorized by Federal laws. Most of them receive their charters from states.

Much can be said in favor of the extension of Federal authority over corporations. The failure of the states to take steps to make their laws on the subject uniform, the freedom with which corporations cross state-borders, the actual practice of some of the "liberal" states to spawn corporations for the obvious purpose of engaging in business elsewhere, the tremendous need of simplification and standardization of the relations entered into by the purchaser of stock with their corporations and with the public, suggest the desirability of Federal action. On the other side, of course, every argument that has ever been put forward for the preservation of States rights may be expected to be put forward most emphatically by billions of dollars of vested interests that may fear serious interruption to or even cessation of their authority to do business if the power of life and death over corporations is centered in Washington. If any prophecy may be ventured in such a titanic struggle of interests, it would probably be in the direction of increasing Federal activity in those matters which resemble the issuance of securities in their nationwide interest. If Federal incorporation comes it will probably for a long time be optional and rather in the nature of an additional franchise than as a substitute for State incorporation. Meanwhile the efforts in the direction of simplification and unification of State corporation laws are the order of the day in the business world.

[1] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U.S. 1; National Labor Relations Board *v.* Fruehauf Trailer Co., 301 U.S. 49; National Labor Relations Board *v.* Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[2] 41 U.S. 865 (1842).

[3] Erie Railroad Company *v.* Harry J. Tompkins, 58 S. Ct. 817 (1938).

The Negotiable Instruments Law

An Act to Make Uniform the Law of Negotiable Instruments

TITLE 1.—NEGOTIABLE INSTRUMENTS IN GENERAL

ARTICLE I. - FORM AND INTERPRETATION

Section 1. - Be it enacted, etc., An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer;

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and,

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Section 2. - The sum payable is a sum certain within the meaning of this act, although it is to be paid—

(1) With interest; or

(2) By stated installments; or

(3) By stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due; or

(4) With exchange, whether at a fixed rate or at the current rate; or

(5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Section 3.—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with—

(1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

(2) A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

Section 4.—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable—

(1) At a fixed period after date or sight; or

(2) On or before a fixed or determinable future time specified therein; or

(3) On or at a fixed period after the occurrence of a special event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Section 5.—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which—

(1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

(2) Authorizes a confession of judgment if the instrument be not paid at maturity; or

(3) Waives the benefit of any law intended for the advantage or protection of the obligor; or

(4) Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Section 6.—The validity and negotiable character of an instrument are not affected by the fact that—

(1) It is not dated; or

(2) Does not specify the

value given, or that any value has been given therefor; or

(3) Does not specify the place where it is drawn or the place where it is payable; or

(4) Bears a seal; or

(5) Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Section 7.—An instrument is payable on demand:

(1) Where it is expressed to be payable on demand, or at sight, or on presentation; or

(2) In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

Section 8.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of—

(1) A payee who is not maker, drawer, or drawee; or

(2) The drawer or maker; or

(3) The drawee; or

(4) Two or more payees jointly; or

(5) One or some of several payees; or

(6) The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Section 9.—The instrument is payable to bearer—

(1) When it is expressed to be so payable; or

(2) When it is payable to a person named therein or bearer; or

(3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

(4) When the name of the payee does not purport to be the name of any person; or

(5) When the only or last indorsement is an indorsement in blank.

Section 10.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Section 11.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

Section 12.—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Section 13.—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Section 14.—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Section 15.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Section 16.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional

delivery by him is presumed until the contrary is proved.

Section 17.—Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply:

(1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

(2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

(3) Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

(4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

(5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

(6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

(7) Where an instrument containing the words, "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Section 18.—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Section 19.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Section 20.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Section 21.—A signature by "procuration" operates as notice that the agent has but a limited authority to sign,, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Section 22.—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Section 23.—When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

ARTICLE II.—CONSIDERATION

Section 24.—Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every-person whose signature appears thereon to have become a party thereto for value.

Section 25.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Section 26.—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

Section 27.—Where the holder has a lien on the, instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

Section 28.—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Section 29.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE III.—NEGOTIATION

Section 30.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Section 31.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of

the indorser, without additional words, is a sufficient indorsement.

Section 32.—The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Section 33.—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

Section 34.—A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Section 35.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Section 36.—An indorsement is restrictive, which either—

(1) Prohibits the further negotiation of the instrument; or

(2) Constitutes the indorsee the agent of the indorser; or

(3) Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Section 37.—A restrictive indorsement confers upon the indorsee the right—

(1) To receive payment of the instrument;

(2) To bring any action thereon that the indorser could bring;

(3) To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

Section 38.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

Section 39.—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Section 40.—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Section 41.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Section 42.—Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Section 43.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Section 44.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

Section 45.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Section 46.—Except where the contrary appear; every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

Section 47.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Section 48.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Section 49.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose

of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Section 50.—Where an instrument is negotiated back to a prior. party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE IV. —RIGHTS OF THE HOLDER

Section 51.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Section 52.—A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face;

(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

(3) That he took it in good faith and for value;

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Section 53.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

Section 54.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Section 55.—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Section 56.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Section 57.—A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereto against all parties liable thereon.

Section 58.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Section 59.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE V. —LIABILITIES OF PARTIES

Section 60.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

Section 61.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

Section 62.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

(2) The existence of the payee and his then capacity to indorse.

Section 63.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Section 64.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

(1) If the instrument is pay-

able to the order of a third person, he is liable to the payee and to all subsequent parties.

(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Section 65.—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants—

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract;

(4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

Section 66.—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

(1) The matters and things mentioned in subdivisions one, two, and three of the next preceding section; and

(2) That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Section 67.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Section 68.—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Section 69.—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VI. —PRESENTMENT FOR PAYMENT

Section 70.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Section 71.—Where the instrument is not payable on demand, presentment must he made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Section 72.—Presentment for payment, to be sufficient, must be made—

(1) By the holder, or by some person authorized to receive payment on his behalf;

(2) At a reasonable hour on a business day;

(3) At a proper place as herein defined;

(4) To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Section 73.—Presentment for payment is made at the proper place—

(1) Where a place of payment is specified in the instrument and it is there presented;

(2) Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

(3) Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

(4) In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Section 74.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

Section 75.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Section 76.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if

such there be, and if, with the exercise of reasonable diligence, he can be found.

Section 77.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Section 78.—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must he made to them all.

Section 79.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Section 80.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

Section 81.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Section 82—Presentment for payment is dispensed with:

(1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made;

(2) Where the drawee is a fictitious person;

(3) By waiver of presentment, express or implied.

Section 83.—The instrument is dishonored by non-payment when,—

(1) It is duly presented for payment and payment is refused or cannot be obtained; or

(2) Presentment is excused and the instrument is overdue and unpaid.

Section 84.—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

Section 85.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Section 86.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Section 87.—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Section 88.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VII. —NOTICE OF DISHONOR

Section 89.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Section 90—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up would have a right to reimbursement from the party to whom the notice is given.

Section 91.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Section 92.—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Section 93.—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

Section 94.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

Section 95.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Section 96.—The notice may

be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Section 97.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Section 98.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Section 99.—Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

Section 100.—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Section 101.—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Section 102.—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Section 103.—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

(1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

(2) If given at his residence, it must be given before the usual hours of rest on the day following.

(3) If sent by mail, it must he deposited in the post-office in time to reach him in usual course on the day following.

Section 104.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

(1) If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

(2) If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Section 105.—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Section 106.—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department.

Section 107.—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Section 108.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

(1) Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

(2) If he live in one place, and have his place of business in another, notice may be sent to either place; or

(3) If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Section 109.—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Section 110.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Section 111.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Section 112.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Section 113.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Section 114.—Notice of dishonor is not required to be given to the drawer in either of the following cases:

(1) Where the drawer and

drawee are the same person;

(2) When the drawee is a fictitious person or a person not having capacity to contract;

(3) When the drawer is the person to whom the instrument is presented for payment;

(4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

(5) Where the drawer has countermanded payment.

Section 115.—Notice of dishonor is not required to he given to an indorser in either of the following cases:

(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

(2) Where the indorser is the person to whom the instrument is presented for payment;

(3) Where the instrument was made or accepted for his accommodation.

Section 116.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

Section 117.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Section 118.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

ARTICLE VIII.—DISCHARGE OF NEGOTIABLE INSTRUMENTS

Section 119.—A negotiable instrument is discharged:

(1) By payment in due course by or on behalf of the principal debtor;

(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

(3) By the intentional cancellation thereof by the holder;

(4) By any other act which will discharge a simple contract for the payment of money;

(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Section 120.—A person secondarily liable on the instrument is discharged:

(1) By any act which discharges the instrument;

(2) By the intentional cancellation of his signature by the holder;

(3) By the discharge of a prior party;

(4) By a valid tender of payment made by a prior party;

(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

(6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

Section 121.—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

(1) Where it is payable to the order of a third person, and has been paid by the drawer; and

(2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Section 122.—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Section 123.—A cancellation made unintentionally, or under a mistake or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Section 124.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Section 125.—Any alteration which changes:

(1) The date;

(2) The sum payable, either for principal or interest;

(3) The time or place of payment;

(4) The number or the relations of the parties;

(5) The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change

or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE 11. —BILLS OF EXCHANGE

ARTICLE I.—FORM AND INTERPRETATION

Section 126.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Section 127.—A bill of itself does not operate as an assignment the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Section 128.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Section 129.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Section 130.—Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Section 131.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE II.—ACCEPTANCE

Section 132.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Section 133.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

Section 134.—Where an acceptance is 'written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Section 135.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Section 136.—The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Section 137.—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder he will be deemed to have accepted the same.

Section 138.—A bill may be accepted before it has been signed by 'the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by nonacceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Section 139.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Section 140.—An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Section 141.—An acceptance is qualified, which is:

(1) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

(2) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(3) Local, that is to say, an acceptance to pay only at a particular place;

(4) Qualified as to time;

(5) The acceptance of some one or more of the drawees, but not of all.

Section 142.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser

receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE III.—PRESENTMENT FOR ACCEPTANCE

Section 143.—Presentment for acceptance must be made:

(1) Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

(2) Where the bill expressly stipulates that it shall be presented for acceptance; or

(3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Section 144.—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

Section 145.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

(1) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

(2) Where the drawee is dead, presentment may be made to his personal representative;

(3) Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Section 146.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

Section 147.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

Section 148.—Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

(1) Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.

(2) Where, after the exercise of reasonable diligence, presentment cannot be made.

(3) Where, although presentment has been irregular, acceptance has been refused on some other ground.

Section 149.—A bill is dishonored by non-acceptance:

(1) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

(2) When presentment for acceptance is excused, and the bill is not accepted.

Section 150.—Where a bit! is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Section 151.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

ARTICLE IV.—PROTEST

Section 152.—Where a foreign bill, appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Section 153.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:—

(1) The time and place of presentment;

(2) The fact that presentment was made and the manner thereof;

(3) The cause or reason for protesting the bill;

(4) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Section 154.—Protest may be made by:—

(1) A notary public; or

(2) By any respectable resi-

dent of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Section 155.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Section 156.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Section 157.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Section 158.—Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

Section 159.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

Section 160.—When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE V. —ACCEPTANCE FOR HONOR

Section 161.—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the: bill supra protest for the honor of any party liable thereon or for-the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

Section 162.—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

Section 163.—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

Section 164.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Section 165.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him.

Section 166.—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

Section 167.—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

Section 168.—Presentment for payment to the acceptor for honor must be made as follows:—

(1) If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

(2) If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

Section 169. —The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Section 170.—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE VI. —PAYMENT FOR HONOR

Section 171.—Where a bill has been protested for non-payment, any person may intervene and pay its supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

Section 172.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

Section 173.—The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to

pay the bill for honor and for whose honor he pays.

Section 174.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Section 175.—Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Section 176.—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

Section 177.—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE VII.—BILLS IN A SET

Section 178.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

Section 179.—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

Section 180.—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

Section 181.—The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

Section 182.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

Section 183.—Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

TITLE III—PROMISSORY NOTES AND CHECKS

ARTICLE - I

Section 184.—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Section 185.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

Section 186.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Section 187.—Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

Section 188.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Section 189.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

TITLE IV. —GENERAL PROVISIONS

ARTICLE I

Section 190.—This act may be cited as the Uniform Negotiable Instruments Act.

Section 191.—In this act, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holders" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

Section 192.—The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

Section 193.—In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Section 194.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Section 195.—The provisions of this act do not apply to negotiable instruments made and delivered prior to the taking effect hereof.

Section 196.—In any case not provided for in this act the rules of the law merchant shall govern.

Section 197.—Of the laws enumerated in the schedules hereto annexed that portion specified in the last column is repealed.

Section 198.—This chapter shall take effect on

[Blank - to be filled in with date upon which the Act took effect in each state. The Uniform Negotiable Instruments Act is now in force in all forty-eight states.] ■

Uniform Partnership Act

PART I. PRELIMINARY PROVISIONS

Section 1. Name of Act.—This act may be cited as Uniform Partnership Act.

Section 2. Definition of Terms.—In this Act, "Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

Section 3. Interpretation of Knowledge and Notice.—

(1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice

(*a*) States the fact to such person, or

(*b*) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

Section 4. Rules of Construction.—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

Section 5. Rules for Cases Not Provided for in this Act—In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

PART II. NATURE OF A PARTNERSHIP

Section 6. Partnership Defined.—(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

Section 7. Rules for Determining the Existence of a Partnership.—In determining whether a partnership exist; these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-

owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the person sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(*a*) As a debt by installments or otherwise,

(*b*) As wages of an employee or rent to a landlord,

(*c*) As an annuity to a widow or representative of a deceased partner,

(*d*) As interest on a loan, though the amount of payment vary with the profits of the business,

(*e*) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

Section 8. Partnership Property.—

(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

PART III. RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

Section Partner Agent of Partnership as to Partnership Business.—(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(*a*) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.

(*b*) Dispose of the good-will of the business.

(*c*) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(*d*) Confess a judgment,

(*e*) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

Section 10. Conveyance of Real Property of the Partnership.—

(1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance ex-

ecuted by all the partners passes all their rights in such property.

Section 11. Partnership Bound by Admission of Partner.—An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

Section 12. Partnership Charged with Knowledge of or Notice to Partner.—Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Section 13. Partnership Bound by Partner's Wrongful Act.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Section 14. Partnership Bound by Partner's Breach of Trust.—The partnership is bound to make good the loss:

(*a*) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(*b*) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Section 15. Nature of Partners Liability.—All partners are liable

(*a*) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(*b*) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

Section 16. Partner by Estoppel—

(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(*a*) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Section 17. Liability of Incoming Partner.—A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

PART IV. RELATIONS OF PARTNERS TO ONE ANOTHER

Section 18. Rules Determining Rights and Duties of Partners.—The rights and duties of the partners in relation to the partner-

ship shall be determined, subject to any agreement between them, by the following rules:

(*a*) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(*b*) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by

him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(*c*) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(*d*) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(*e*) All partners have equal rights in the management and conduct of the partnership business.

(*f*) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(*g*) No person can become a member of a partnership without the consent of all the partners.

(*h*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

Section 19. Partnership Books.—The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

Section 20. Duty of Partners to Render Information.— Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

Section 21. Partner Accountable as a Fiduciary.—

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

Section 22. Right to an Account.—Any partner shall have the right to a formal account as to partnership affairs:

(*a*) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners.

(*b*) If the right exists under the terms of any agreement,

(*c*) As provided by section 2!,

(*d*) Whenever other circumstances render it just and reasonable.

Section 23. Continuation of Partnership Beyond Fixed Term.—

(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima fade evidence of a continuation of the partnership.

PART V. PROPERTY RIGHTS OF A PARTNER

Section 24. Extent of Property Rights of a Partner.—The property rights of a partner are

(1) his rights in specific partnership property,

(2) his interest in the partnership, and

(3) his right to participate in the management.

Section 25. Nature of a Partner's Right in Specific Partnership Property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in. partnership.

(2) The incidents of this tenancy are such that:

(*a*) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(*b*) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(*c*) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(*d*) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such

surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(*e*) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

Section 26. Nature of Partner's Interest in the Partnership.— A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Section 27. Assignment of Partner's Interest.—

(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Section 28. Partner's Interest Subject to Charging Order.—

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(*a*) With separate property, by any one or more of the partners, or

(*b*) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

PART VI. DISSOLUTION AND WINDING UP

Section 29. Dissolution Defined.—The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

Section 30. Partnership Not Terminated by Dissolution.—On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Section 31. Causes of Dissolution.—Dissolution is caused:

(1) Without violation of the agreement between the partners,

(*a*) By the termination of the definite term or particular undertaking specified in the agreement,

(*b*) By the express will of any partner when no definite term or particular undertaking is specified,

(*c*) By the express will of all the partners who have not assigned their interests or suffered them to be charged for

their separate debts, either before or after the termination of any specified term or particular undertaking,

(*d*) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

Section 32. Dissolution by Decree of Court—(1) On application by or for a partner the court shall .decree a dissolution whenever:

(*a*) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(*b*) A partner becomes in any other way incapable of performing his part of the partnership contract,

(*c*) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(*d*) A partner willfully or per-

sistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(*e*) The business of the partnership can only be carried on at a loss,

(*f*) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 27 or 28:

(*a*) After the termination of the specified term or particular undertaking,

(*b*) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

Section 33. General Effect of Dissolution on Authority of Partner.—Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(*a*) When the dissolution is not by the act, bankruptcy or death of a partner; or

(*b*) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section so requires.

(2) With respect to persons not partners, as declared in section *35.*

Section 34. Right of Partner to Contribution from Co-partners After Dissolution.—Where the dissolution is caused by the act, death, or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(*a*) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(*b*) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

Section 35. Power of Partner to Bind Partnership to Third Persons After Dissolution.—

(1) After dissolution a partner can bind the partnership except as provided in Paragraph (3)

(*a*) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(*b*) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

I. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

II. Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on, and in the legal periodical, if any, designated by rule of court in such place or places for the publication of legal notices.

(2) The liability of a partner under Paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(*a*) Unknown as a partner to the person with whom the contract is made; and

(*b*) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(*a*) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(*b*) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

I. Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

II. Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph (1bII).

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

Section 36. Effect of Dissolution on Partner's Existing Liability.—

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having

knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Section 37. Right to Wind Up.—Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

Section 38. Rights of Partners to Application of Partnership Property.—

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(*a*) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(*b*) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or

pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a11) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(*c*) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a11), of this section,

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Section 39. Rights Where Partnership Is Dissolved for Fraud or Misrepresentation.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(*a*) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(*b*) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Section 40. Rules for Distribution—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(*a*) The assets of the partnership are:

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities speci-

fied in clause (b) of this paragraph.

(*b*) The liabilities of the partnership shall rank in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners m respect of capital,

IV. Those owing to partners in respect of profits.

(*c*) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(*d*) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(*e*) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(*f*) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of

this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(*g*) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(*h*) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(*i*) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors,

II. Those owing to partnership creditors,

III. Those owing to partners by way of contribution.

Section 41. Liability of Persons Continuing the Business in Certain Cases.—

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1)

and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the

person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

Section 42. Rights of Retiring or Estate of Deceased Partner When the Business Is Continued.—When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 4, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act.

Section 43. Accrual of Actions.—The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution in the absence of any agreement to the contrary.

PART VII. MISCELLANEOUS PROVISIONS

Section 44. When Act Takes Effect.—This act shall take effect on the day of one thousand nine hundred and

Section 45. Legislation Repealed.—All acts or parts of acts inconsistent with this act are hereby repealed.

Uniform Limited Partnership Act

Section 1. Limited Partnership Defined.—A limited partnership is a partnership formed by two or more persons under the provisions of Section a, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Section 2. Formation.—

(1) Two or more persons desiring to form a limited partnership shall

(*a*) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated.

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned.

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and nature of such priority,

XIII.The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(*b*) File for record the certificate in the office of [here designate the proper office].

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

Section 3. Business Which May Be Carried on.—A limited partnership may carry on any business which a partnership without limited partners may carry on, except [here designate the business to be prohibited].

Section 4. Character of Limited Partner's Contribution.—The contributions of a limited partner may be cash or other property, but not services.

Section A Name Not to Con-

tain Surname of Limited Partner; Exceptions.—

(1) The surname of a limited partner shall not appear in the partnership name, unless

(*a*) It is also the surname of a general partner, or

(*b*) Prior to the time when the limited partner became such the business had been carried on under a name in which the surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

Section 6. Liability for False Statements in Certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(*a*) At the time he signed the certificate, or

(*b*) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in Section 25 (3).

Section 7. Limited Partner Not Liable to Creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

Section 8. Admission of Additional Limited Partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of Section 25.

Section Rights, Powers and Liabilities of a General Partner.—

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(*a*) Do any act in contravention of the certificate,

(*b*) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(*c*) Confess a judgment against the partnership,

(*d*) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(*e*) Admit a person as a general partner,

(*f*) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(*g*) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

Section 10. Rights of a Limited Partner.—

(1) A limited partner shall have the same rights as a general partner to

(*a*) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(*b*) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(*c*) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in Sections 15 and 16.

Section 11. Status of Person Erroneously Believing Himself a Limited Partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

Section 12. One Person Both General and Limited Partner.—

(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were, not also a general partner.

Section 13. Loans and Other Business Transactions with Limited Partner.—

(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No

limited partner shall in respect to any such claim

(*a*) Receive or hold as collateral security any partnership property, or

(*b*) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

Section 14.. Relation of Limited Partners Inter Se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

Section 15. Compensation of Limited Partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

Section 16. Withdrawal or Reduction of Limited Partner's Contribution.—

(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (10) and the limited partner would otherwise be entitled to the return of his contribution.

Section 17. Liability of Limited Partner to Partnership.— (1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

Section 18. Nature of Limited Partner's Interest in Partnership.—A limited partner's interest in the partnership is personal property.

Section 19. Assignment of Limited Partner's Interest.—

(1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with Section 25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under Sections 6 and 17.

Section 20. Effect of Retirement, Death or Insanity of a Genera! Partner. The retirement, death or insanity of a general

partner dissolves the partnership, unless the business is continued by the remaining general partners.

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

Section 21. Death of Limited Partner.—

(1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

Section 22. Rights of Creditors of Limited Partner.—

(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

Section 23. Distribution of Assets.—

(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contribution, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

Section 24. When Certificate Shall Be Cancelled or Amended.—

(1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under Section 20.

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

Section 25. Requirements for Amendment and for Cancellation of Certificate.—

(1) The writing to amend a certificate shall

(a) Conform to the requirements of Section 2 (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the [here designate the proper court] to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the [here designate the responsible official in the office designated in Section 2] in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and when the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office [here designate the office designated in Section 2] where the certificate is recorded

(a) A writing in accordance with the provisions of paragraph (i1, or (2) or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be, for all purposes the certificate provided for by this act.

Section *26.* Parties to Actions.—A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

Section 27. Name of Act.— This act may be cited as The Uniform Limited Partnership Act.

Section 28. Rules of Construction.—

(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action on proceedings begun or right accrued before this act takes effect.

Section 29. Rules for Cases Not Provided for in this Act.— In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

Section 30. Provisions for Existing Limited Partnerships.—

(1) A limited partnership formed under any statute of this state prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of Section 2; provided the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of (here insert proper reference to the existing limited partnership act or acts), except that such partnership shall not be renewed unless so provided in the original agreement.

Section 31. Act (Acts) Repealed.—Except as affecting existing limited partnerships to the extent set forth in Section 30, the act (acts) of (here designate the existing limited partnership act or acts) is (are) hereby repealed.

Uniform Sales Act

PART I. FORMATION OF THE CONTRACT

Section 1. Contracts to Sell and Sales.—

(1) A contract to sell goods . a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another.

Section 2. Capacity; Liabilities for Necessaries.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

FORMALITIES OF THE CONTRACT

Section 3. Form of Contract or Sale.—Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4. Statute of Frauds.—

(1) A contract to sell or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same *fit* for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

SUBJECT-MATTER OF CONTRACT

Section 5. Existing and Future Goods.—

(1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) 'Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6. Undivided Shares.—

(1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section *7.* Destruction of Goods Sold.—

(1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale:

(*a*) As avoided, or

(*b*) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding. the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8. Destruction of Goods Contracted to be Sold.—

(1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part. of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract:

(*a*) As avoided, or

(*b*) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

THE PRICE

Section 9. Definition and Ascertainment of Price.—

(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10. Sale at a Valuation.—

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

CONDITIONS AND WARRANTIES

Section 11. Effect of Conditions.—

(1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such

first mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12. Definition of Express Warranty.—Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13. Implied Warranties of Title.—In a contract to sell or a sale, unless a contrary intention appears, there is:

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14. Implied Warranty in Sale by Description.—Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15. Implied Warranties of Quality.—Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

SALE BY SAMPLE

Section 16. Implied Warranties in Sale by Sample.—In the case of a contract to sell or a sale by sample:

(*a*) There is an implied warranty that the bulk shall correspond with the sample in quality.

(*b*) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(*c*) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II. TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

Section 17. No Property Passes until Goods Are Ascertained.—Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in Section 6.

Section 18. Property in Specific Goods Passes When Parties so Intend.—

(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 19. Rules for Ascertaining Intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

RULE 1.—Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

RULE 2.—Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of puffing them into a deliverable state, the property does not pass until such thing be done.

RULE 3.—

(1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact

RULE 4.—

(1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

RULE 5.—If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost or transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20. Reservation of Right of Possession or Property When Goods are shipped.—

(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price

and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21. Sale by Auction.—In the case of sale by auction:

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22. Risk of Loss—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

(*a*) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(*b*) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

TRANSFER OF TITLE

Section 23. Sale by a Person Not the Owner.—

(1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect:

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24. Sale by One Having a Voidable Title.—Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25. Sale by Seller in Possession of Goods Already Sold.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same. [Compare Sales Act, Secs. 20(4), 23, and 27 through 40.]

Section *26.* Creditors' Rights against Sold Goods in Seller's Possession.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27. Definition of Negotiable Documents of Title.— A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title..

Section 28. Negotiation of Negotiable Documents by Delivery.—A negotiable document of title may be negotiated by delivery:

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29. Negotiation of Negotiable Documents by Indorsement.—A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30. Negotiable Documents of Title (marked "not negotiable.")—If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "nonnegotiable," or the like.

Section 31. Transfer of Non-negotiable Documents.—A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document can not be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32. Who May Negotiate a Document.—A negotiable document of title may be negotiated:

(a) By the owner thereof, or

(B) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time

of such entrusting the document is in such form that it may be negotiated by delivery.

[Under the Sales Act Amendments of 1922 the section would read:

"Section 32. [Who May Negotiate a Document.] A negotiable document of title may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the document, the bailee issuing it undertakes to deliver the goods to the order of such person, or if at the time of negotiation the document is in such form that it may be negotiated by delivery."]

Section 33. Rights of Person to Whom Document Has Been Negotiated.—A person to whom a negotiable document of title has been duly negotiated acquires thereby:

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(B) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34. Rights of Persons to Whom Document Has Been Transferred.—A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to

acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35. Transfer of Negotiable Document without Indorsement.—Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36. Warranties on sale of document.—A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a) That the document is genuine;

(b) That he has a legal right to negotiate or transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37. Indorser Not a Guarantor.—The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38. When Negotiation Not Impaired by Fraud, Mistake or Duress.—The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

[Under the Sales Act Amendments of 1922 the section would read:

"Section 38. [When Negotiation Not Impaired by Fraud, Mistake or Duress.] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was deprived of the possession of the same by loss, theft, fraud, accident, mistake, duress, or conversion, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor in good faith without notice of the breach of duty, or loss, theft, fraud, accident, mistake, duress or conversion."]

Section 39. Attachment or Levy upon Goods for Which a Negotiable Document Has Been Issued.—If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they can not thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40. Creditors' Remedies to Reach Negotiable Documents.—A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

PART III. PERFORMANCE OF THE CONTRACT

Section 41. Seller Must Deliver and Buyer Accept Goods.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42. Delivery and Payment are Concurrent Conditions. —Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Section 43. Place, Time and Manner of Delivery.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in the case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section Delivery of Wrong Quantity.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage-of trade, special agreement, or course of dealing between the parties.

Section 45. Delivery in Installments.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by installments.

(2) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46. Delivery to a Carrier on Behalf of the Buyer.— (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule *5,* or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows

or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47. Right to Examine the Goods.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where the goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48. What Constitutes Acceptance.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Section 49. Acceptance Does Not Bar Action for Damages.

—In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50. Buyer Is Not Bound to Return Goods Wrongly Delivered.—Unless otherwise agreed, where the goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them, to the seller, but it is sufficient if he notifies the seller that he refused to accept them.

Section 51. Buyer's Liability for Failing to Accept Delivery.—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV. RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Section 52. Definition of Unpaid Seller.—(1) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(a) When the whole of the price has not been paid or tendered.

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section *53.* Remedies of an Unpaid Seller.—(1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this act;

(d) A right to rescind the sale as limited by this act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with

his rights of lien and stoppage in transitu where the property has passed to the buyer.

UNPAID SELLER'S LIEN

Section 54. When Right of Lien May Be Exercised.—(1)

Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of

them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55. Lien after Part Delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56. When Lien Is Lost.—(1) The unpaid seller of goods loses his lien thereon,—

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in goods or the right to the possession thereof;

(*b*) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

STOPPAGE IN TRANSITU

Section 57. Seller May Stop Goods on Buyer's Insolvency.—Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the

possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58. When Goods Are in Transit.—

(1) Goods are in transit within the meaning of Section *57,—*

(*a*) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(*b*) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section *57,*

(*a*) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(*b*) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(*c*) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3) If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made

under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section Ways of Exercising the Right to Stop.—

(1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the

carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

RESALE BY THE SELLER

Section 60. When and How Resale May Be Made.—

(1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

RESCISSION BY THE SELLER

Section 61. When and How the Seller May Rescind the Sale.—

(1) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

Section 62. Effect of Sale of Goods Subject to Lien or Stoppage in Transitu—Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right or stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

PART V. ACTIONS FOR BREACH OF THE CONTRACT

REMEDIES OF THE SELLER

Section 63. Action for the Price.—

(1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before the judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for

the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64. Action for Damages for Non-acceptance of the Goods.—

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section *65.* When Seller May Rescind Contract or Sale.—Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

REMEDIES OF THE BUYER

Section *66.* Action for Converting or Detaining Goods.—Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67. Action for Failing to Deliver Goods.—

(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) 'Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68. Specific Performance.—Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section *69.* Remedies for Breach of Warranty.—

(1) Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer he can not rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the

goods to the seller in substantially as good condition as they were in at the .time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section *53.*

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70. Interest and Special Damages.—Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI. INTERPRETATION

Section 71. Variation of Implied Obligations.—Where any right, duty or liability would arise under a contract to sell or a sale of implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72. Rights May Be Enforced by Action.—Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section Rule for Cases Not Provided for by This Act.—In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74.. Interpretation Shall Give Effect to Purpose of Uniformity.—This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those States which enact it.

Section 75 Provisions Not Applicable to Mortgages.—The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76. Definitions.—

(1) In this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels

personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery. "Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or can not pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 76(*a*). Act does not apply to existing sales or contracts to sell.—None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this Act.

Section 76(*b*). No Repeal of Uniform Warehouse Receipt Act or Uniform Bills of Lading Act—Nothing in this Act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the Act to Make Uniform the Law of Warehouse Receipts, or of the Act to Make Uniform the Law of Bills of Lading.

Section 77. Inconsistent Legislation Repealed.—All acts or parts of acts inconsistent with this act are hereby repealed except as provided in section 76b.

Section 78. Time When the Act Takes Effect—This act shall take effect on the day of one thousand nine hundred and

Section 79. Name of Act—This act may be cited as the Uniform Sales Act.

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