Canadian Commercial Law

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THE existence in Canada of, first, a federal structure and, second, the two major legal systems of the Western world—the civil law in Quebec, the common law in the other provinces—does not permit as tidy a summary of Canadian law respecting commercial transactions and relations as can be made in countries lacking one or both of those features. There is division of legislative authority over relevant particulars between levels of government and there is diversity between common law and civil law concepts. Hence there is no commercial law of Canada properly speaking, only commercial law in Canada—an amalgam.

The confining construction which the courts have fixed on the grant to the Dominion Parliament, by section 91 of the British North America Act, of the regulatory power over “trade and commerce” deprives it of any real significance in this context. However, that section confers a long list of specific powers, several of which relate to commercial subjects. Probably the most important are those relating to “banking” and “saving banks,” “bills of exchange and promissory notes,” “interest” and “bankruptcy and insolvency”—briefly, the essential exchange and commercial credit arrangements of the Canadian economy. A major share in formulating the law of carriage also accrues to the federal government from section 91(10), “navigation and shipping,” and from sections 91(29) and 92(10) which, taken together, establish its authority over interprovincial “steam or other ships, railways, canals (and) telegraphs...,” thus dividing the law on carriers into two parts—the intraprovincial, which remains a matter of provincial competence, and all other, assigned to the federal Parliament.

Other comparably important subjects traditionally subsumed under the law merchant—e.g., sale of goods, chattel or personal security—are nowhere expressly enumerated in the BNA Act. It has been generally accepted without challenge or analysis that all of these are provincial matters, evidently comprehended within section 92(13), “property and civil rights in the province.”

Insofar as rights flowing from business transactions rest mediatly or immediately on a statute, the invoked statute must be intra vires the enacting legislature. The law governing credit and exchange institutions and extra provincial carriage is set forth in the relevant federal statutes and is the same for all Canada, save for any local variations prescribed in those statutes. Parliamentary silence does not leave it open to the provincial legislatures to speak on
these matters of federal competence. Other branches of commercial law, being for the provinces, may be molded by their several legislatures to suit local notions and needs.

There is nevertheless substantial, although not complete, correspondence among all provinces other than Quebec. On matters covered by statute—and in Canada as in other advanced economies most major areas now are partly or wholly so covered—there are strong family resemblances deriving from the tendency to borrow legislative provisions from the common law heritage of basic concepts, and sometimes from the recommendations of the Conference of Commissioners on Uniformity of Legislation in Canada, whose activity has been greatest with respect to mercantile law. Without a statute, the common law, including equity and the law merchant, prevails. In principle this is the same in all these provinces and conforms to the common law of England. In practice that is not wholly true. There are occasional divergences between provinces in the development of common law doctrine, indeed even in the application of federal statutory provisions. But by and large it may be said that each province receives as authoritative the law as expounded by the courts in another province or in England. Thus, in broad outlines, commercial law doctrines, even in non-federal areas, have a similar tenor with variations only in detail, usually attributable to statute.

Quebec’s situation is unique. Competent federal legislation of course applies there as elsewhere, including the relevant common law when expressly incorporated by reference—an alien graft which has occasioned some awkwardness in application. Its own provincial law derives from and reflects civil law sources. The very idea of what “commercial law” is differs somewhat between the common law and the civil law systems. Both rest on the pervasive lex mercatoria of the Middle Ages. However, lex mercatoria, addressing itself to the transactions distinctive of a special community, the merchants, could be regarded as focusing either on the dealings or on the dealers. Common law thinking emphasized the former, civil law the latter. While Quebec, departing from Napoleonic Code practice, has no special Commercial Code, that being only in part replaced by special provisions in book IV of the Civil Code, supplemented by incorporation

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by reference of other Civil Code provisions, commercial law is conceived of as a special body of principles concerned with the activities of business enterprises ("commerçants"). There are other sections dispersed throughout the Code making special provision as to traders.

What is meant by "commercial law" is pure semantics. The awkwardness and incoherence of a discussion proceeding on two disparate bases forces a choice of meaning. Adoption for purposes of this article of common law usage (with its transactional, as opposed to personal, orientation of "commercial law") rests purely on grounds of convenience—the assumed mental habits of most prospective readers and the author's own common law training. For Quebec, indeed for any civil lawyers, there may seem to be aberrations of both inclusion and exclusion. Some justification may also be found in the fact that discussion of each topic is introduced by an examination of federal law and that of the common law provinces, with Quebec similarities and differences then noted, an arrangement which lends itself to using the common law conception as an organizing device.

NEGOTIABLE INSTRUMENTS

In a belated exercise of the British North America Act's grant of power over "bills of exchange and promissory notes," Parliament in 1890 adopted The Bills of Exchange Act modeled upon the United Kingdom Act of 1882. With minor changes and considerable internal rearrangement, the statute continues, substantially unaltered, to embody the law on bills, notes, and checks. It is the comprehensive code now operating throughout the country uniformly, although until recently there were provisions especially applicable to Quebec requiring protest as a standard condition for perfecting rights against secondary parties on the paper. Some provisions (e.g., those relating to bills in a set) have been rendered largely anomalous by improved and evolving commercial practice. Crossed checks never had a place in Canadian banking practice and that part of the statute has always been a dead letter. Certified checks, on the other hand, are rather common but are not expressly mentioned in the Act, so that a gloss, American in inspiration, has been required. The Act could do with an updating to eliminate such major anomalies and to correct the three generations' accretion of constructional ambiguities and incongruities. But familiarity seems to have bred content; there is not a whisper of demand for

10. 1 P. Perrault, Traite De Droit Commerciale 12, 37 (1936); see 6 P. Mignault, Droit Civil Canadien 65 (1902) ("On peut poser le principe general que les actes fait par un commerçant pour les besoins de son commerce sont commerciaux, malgre qu'ils seraient civils s'ils etaien faits par un non-commerçant."); Banque Canadienne Nationale v. Labonte, [1947] Que. K.B. 415.
13. Id. §§ 158, 159.
14. Id. §§ 168-175.
reform; and it may safely be predicted that bills, notes, and checks will continue for the indefinite future to be governed by the present Act.

To third persons as putative transferees of obligations, the law of negotiable paper owes its two distinctive features. One feature, which is fundamental, is that the paper is capable of passing freely from hand to hand. Another, which is usual, is that the paper accrues additional liabilities through successive transfers.

Negotiability is only one type of transferability, but it is an immensely useful type for it allows one to take under circumstances giving him the status of a holder in due course, free of various personal defenses and equities available against an assignee even bona fide. Dealings are expedited by dispensing with time-consuming collateral inquiries. Hazards other than that of party solvency are eliminated so that the terms of transfer approach a pure interest rate uncomplicated by entrepreneurial risk compensation. These economies, probably essential for an efficient credit mechanism, presuppose a standard instrument clear in its tenor.

A considerable part of the law about negotiable paper consists of specifying the requisites of such an instrument—writing, certainty of time and of amount, performance only by money payment, prescribed parties, unconditionality of obligation—every one of which must be satisfied in order for the paper to be negotiable. Otherwise it is at best an assignable contract. What is involved in each case is the question of construing the terms of the particular instrument. Naturally not all the decisions are readily reconcilable. A Canadian oddity is the notion of lien notes, a characterization used by early judges, skittish about the emerging and then still unfamiliar conditional sale transaction, to deny negotiability to paper with clauses retaining title by way of security. The expression still makes an appearance in some judicial and academic discussions, but the difficulty is now easily circumvented and has dwindled to at most a trap for the unwary. Paper negotiable at inception continues negotiable until it is discharged or endorsed restrictively, i.e., in a form incompatible with further circulation. Arrival of the due date may call for activity incident to enforcement and precludes any fresh creation of holders in due course, but it does not make an instrument non-negotiable.

17. The key provisions are BEA §§ 17, 176, setting out the requisites of a bill and a note respectively. Other statutory sections elaborate the meaning of the constituent elements.
18. The doctrine was first invoked in Dominion Bank v. Wiggins, 21 Ont. A.R. 275 (1894) which made no reference to the earlier contrary judgment in Harris v. Cummings, 3 Terr. L.R. 189 (1893).
19. Various techniques for escaping the lien note doctrine or for rendering it irrelevant have been developed, the main alternatives being illustrated by (a) Int. Harvester Co. of America v. Grant, 4 E.L.R. 1 (P.E.I. 1907); and (b) Edgar v. Bahrs, 11 Sask. 457, 43 D.L.R. 372 (1918); and (c) Killoran v. Monticello State Bank, 61 Can. S. Ct. 528, 57 D.L.R. 359 (1921). Canadian Bank of Commerce v. Johnson, 21 Alta. 504, 3 W.W.R. 328, [1925] 4 D.L.R. 511 seems to be the last case where a note was held not a promissory note because a lien note.
20. BEA § 69.
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Only by his signature on negotiable paper does one become liable as a party thereto. The notion of a written or oral acceptance exterior to the instrument was not received into the Bills of Exchange Act, but a liability very similar in its consequences, binding a drawee on contract or by estoppel, may be recognized. A transferor's liability, akin to the implied condition of title imposed on the seller of goods, also attends negotiation even without signature of bearer paper.

Liability as a party to the paper is of two fundamentally different kinds, primary and secondary. In this connection, the instrument itself and a contract which gave rise to it are to be distinguished. As to both, there may be primary and secondary parties, but relative status as to the contract and the commercial paper may differ. The quality of liability on the paper always depends entirely on the status expressed by the signature, regardless of what the liability may be on the underlying contract. Such problems ordinarily arise in connection with accommodation parties. A stranger to the chain of title may become an endorser, doing so normally by way of accommodation. Such a one is an aval, a position recognized in the civil law. This doctrine is a distinctive Quebec contribution to the Canadian law of negotiable instruments.

Parties primarily liable on the instrument-makers and acceptors—undertake without contingency to pay the instrument to the holder according to its tenor. This is so fundamental that a majority of provinces hold that even the designation of a place for payment does not make presentment there a condition to enforcing a promissory note against the maker. Secondary parties—drawers and endorsers—besides having a transferor's liability similar to but somewhat more persistent than that which arises from delivery of bearer paper, contract for a contingent liability; viz., to make good should the primary party default, but only in the event that prescribed steps are taken or excused. The detail of what steps need be taken and how and when they should be taken is highly complex. The general idea is to assure initial resort to primary parties and to give secondary parties a chance both to make arrangements for having requisite funds on hand and to take steps looking to self-protection. To those ends, presentment for payment and sometimes for acceptance, notice of dishonor, and

23. BEA § 138(b). Note that this is not a liability "on the instrument." *Id.* § 137(2).
27. Transferor liability is "to his immediate transferee." BEA § 138. Endorser liability is "to his immediate or a subsequent endorsee." *Id.* § 133(e).
28. Vanier v. Kent, 11 Que. K.B. 373 (1902). BEA § 133(a), announcing the general principle, speaks of liability "if the requisite proceedings are duly taken" but numerous specific provisions envisage their being "dispensed with." See *id.* §§ 92, 106, 107, 108, 110, or "excused," see *id.* § 79.
protest, in the case of foreign bills, are made conditions to secondary party liability. In practice, the significance of these requirements is much diminished by the inclusion in standard bill or note forms of comprehensive waiver clauses. To be effective each act called for must be timely done.\textsuperscript{29} However, demand notes, endorsed to be held as collateral or continuing security, need not be presented for payment during the existence of such a holding.\textsuperscript{30}

Secondary as well as primary parties may be liable to holders, even those not holders in due course since holding in due course does not address itself to the categories of parties against whom claims are assertable but rather to the invulnerability of a claim against whomsoever made. A holder in due course is one who has taken paper complete and regular on its face, in good faith, for value, without notice and before maturity.\textsuperscript{31} Good faith, legislatively defined as acting honestly, whether negligently or not,\textsuperscript{32} and perhaps the most nebulous of the elements, has been given substance by denial of holder in due course protection to an endorsee otherwise qualified who participates intimately and actively in the endorser's business operations which generate paper tainted by fraud.\textsuperscript{33} However, if this and all other requisites for a holding in due course are satisfied, the holder is indeed a favorite of the law, even to the extent of escaping, in special situations, the consequences of spuriousness of a prior signature on the paper. Even he, of course, cannot recover against the person whose signature was forged,\textsuperscript{34} but he is sometimes able to recover or defend against others as though it were a genuine signature. Thus the doctrine of Price v. Neal\textsuperscript{35} with its ramifications is recognized\textsuperscript{36} although neither statute nor case law clearly resolves the problem, left open by an early indecisive Ontario judgment,\textsuperscript{37} of whether the preclusion applies to a bill payable to drawer where contemporaneously and before presentment to the drawee there is parallel forgery of drawer and payee-first endorsee signatures. Doubt has been voiced as to whether the rule in Bank of England v. Vagliano Brothers,\textsuperscript{38} prevails in Canada. In that case the issue about the forged endorsement was whether it was a needed vehicle for the conveyance of rights or whether, instead, the paper was bearer paper, negotiable with no endorsement and so with a forged endorsement; the stated criterion was the drawer's intention respecting the payee—an inexact statement since there the purported drawer knew nothing about the paper and

\textsuperscript{31} Id. § 56.
\textsuperscript{32} Id. § 3.
\textsuperscript{34} BEA § 49(1).
\textsuperscript{35} 3 Burr. 1355, 97 Eng. Rep. 871 (1762).
\textsuperscript{36} BEA § 129.
\textsuperscript{37} Ryan v. Bank of Montreal, 12 Ont. 39 (1886), appeal dismissed, 14 Ont. A.R. 533 (1887).
\textsuperscript{38} [1891] A.C. 107.
could have had no intention. The status of the rule in Canada is presently unclear.39

**Banking: Credit Institutions**

The Bank of Canada, a federal Crown corporation, exercises typical central banking functions and is the only bank of issue.40 It does not engage in commercial banking nor does it serve as a bank of deposit for individuals or firms.41 These are the activities of the chartered banks,42 operating under the Bank Act, a federal statute.43

The chartered banks are now ten in number. They have a tremendous network of branches scattered through all the provinces and practically all communities, with many branches of each chartered bank in each major urban center. The broad proposition that each chartered bank, as an aggregate with all of its branches, constitutes one legal entity may overstate their integration. Certainly for special purposes, such as venue of causes44 and local taxation,45 the individual branch has received separate recognition, and transactions, such as stop payment orders46 and notices of dishonor of negotiable paper,47 given to one branch, are not regarded as instantaneously affecting all other branches. The single entity concept was developed to identify the debtor status vis-a-vis customers as being that of the entire aggregate not just that of the particular branch dealt with, despite credit transfers internal to the system,48 and may perhaps exhaust its function in that context.

The basic relationship between bank and depositor is that of debtor and creditor,49 the latter having no ownership in funds or items left on deposit but only a contractual claim to the balance standing to his credit. The Bank Act does not specify the incidents of the relation which are mostly left to be settled by general provincial law, statutory or other, about creditors' claims. By the language or nature of the transaction, banks may and do occasionally assume instead the status of bailee, as for safety deposit vaults, or of agent, as in the receipt of commercial paper not as holder but strictly for collection; then the

42. For a broad survey of historical development and structure, see Curtis, Evolution of Canadian Banking, 253 Annals 115 (1947).
47. Bank of Montreal v. Dominion Bank, 60 D.L.R. 403 (Ont. 1921).
49. Royal Trust Co. v. Molsons Bank, 27 Ont. L.R. 441, 8 D.L.R. 478 (1912).
respective rights and liabilities are those appropriate to the special status rather than those as between debtor and creditor."

In the absence of special contract terms, the bank’s undertaking is to pay on demand, i.e., on receipt of a proper order, conventionally on presentation of a check. This may be altered by contract, and language frequently appears on deposit slips and in passbooks conditioning the bank’s obligation upon such things as presentation of the passbook, or notice for a certain time. In practice, observance of the stated conditions is commonly not insisted upon. A bank which pays to a third person not presenting a proper order, which generally means one having a check but not qualifying as the holder, must restore to the depositor’s account amounts so disbursed and fall back on the claim, not always very valuable, of restitution against the person from whom it took the order.

A stop payment order clearly communicated is a countermand, disregard of which involves a breach of the bank’s undertaking, so that its attributes are contractual and not delictual.

In the ordinary debtor-creditor situation, the bank is entitled to a lien on specific items it receives from the customer in the course of ordinary banking transactions for claims similarly arising against the customer. There is further a right of setoff of aggregate accounts inter se. This right of setoff is limited at any given time to obligations presently due and, as concerns the aggregation of deposits, to those due in substance to the same depositor, for which purpose distinct accounts, although held by different branches, may be consolidated.

The general duty of care which pervades the common law applies to the bank and to the depositor, each being answerable for any loss caused to the other by negligence in the context of their special relationship. There is no specific duty on a depositor to make any verification of payments from or of the balance of the deposit and a failure to do so does not in itself constitute negligence.

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51. Agricultural Savings & Loan Ass’n v. Federal Bank, 6 Ont. A.R. 192 (1891). BEA § 49(3) conditions claims against a drawee bank for payment under forged endorsements upon the drawer’s giving notice of the forgery within a year.


57. Daniels v. Imperial Bank, 8 Alta. 26, 19 D.L.R. 166, 7 W.W.R. 666, 30 W.L.R. 133 (1914) (not as between personal account and trust account); Clarkson v. Alliston, 62 Ont. L.R. 149, [1928] 2 D.L.R. 715.


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Initializing or signature of a bank statement establishes it as an account statement, at least if applicable written terms expressly so provide; but whether, absent such a provision or particularly absent initialing or signature, failure to contest the accuracy of a submitted statement operates thus is doubtful.

Joint bank accounts have engendered a baffling corpus of case law but the perplexing questions arise mainly between depositors and are not properly a commercial law concern. The bank’s position is usually spelled out by contract terms at the time the account is opened authorizing it to make payments upon the signature of either joint depositor. These terms have proved quite effective in protecting banks from embroilment.

It will be apparent that the general structure of the common law resembles English common law, which has indeed been much invoked as a source of general propositions, perhaps beyond its true relevance in light of the institutional differences; e.g., deposits and payments by check are commonplace to all sui juris Canadians in contrast to Britain where bank use historically was significant only to those managing businesses or fortunes and still operates in the shadow of that tradition. Accommodation to the different setting has occurred in application by preserving the old rubrics intact while flexibly interpreting those circumstances which affect their operation; this may be sufficient, provided it does not eventuate in a heedless emulation of particular results posited on a different social and business situation.

The position of banks as creditors advancing funds, unlike their status as debtors receiving deposits, is extensively dealt with in the Bank Act. The two relations naturally may coexist and overlap, since many deposits are created by banks’ credit allocations, especially to firms, and many implicate reciprocally a continuing flow of items received from trade customers by depositors and an agreed line of credit. The overlap may also develop through overdraft financing, until recently a characteristic technique but currently discouraged by the regulatory authorities. Yet the two statuses of banks are conceptually distinct, admitting of independent treatment and specification even though both elements may need to be considered in the resolution of a total situation.

The gist of the Bank Act provisions bars a bank from doing business as a trader or dealer in property or commodities (other than money) while authorizing it to engage in a wide range of credit operations. It may acquire tangibles, other than its own business plant and equipment, only as an incident

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62. Such a statement is necessarily based on impressions and difficult to document in the absence of any direct statistical comparison. Clearly individual checking accounts are increasingly used in the United Kingdom, but as far back as World War II, while in Canada the number of such accounts equaled or perhaps somewhat exceeded the number of households, in the United Kingdom check issuance in the mid-1950s was only of the order of one per month per capita. see B. Higgins, Canada’s Financial System in the War, NBER 48-49 (1944); J. Holden, History of Negotiable Instruments in English Law 306, 307 (1955).
64. Id. §§ 75(1)(b), (c), (d).
65. Id. § 84(1).
to realizing on collateral and must dispose of them accordingly, with detailed prescriptions for, and a time limitation on, the holding of real or immovable property.66 There are ceilings on loans on the credit of shareholders and bank personnel.67 There being no other restriction on the making of unsecured loans, it is left to the discretion of the bank’s agents to be exercised in the setting of the law’s reporting and inspection procedures and of the policies and anticipated reactions of the responsible authorities.68

While virtually any kind of property other than it’s or any bank’s shares69 may provide the underlying basis of security for a loan, as may promissory commitments of secondary parties, the Act elaborates distinctions relating to the character and evidences of the debtor’s interest in the property which make it eligible as collateral. The Act spells out at length what may be done in connection with documents of title—warehouse receipts and bills of lading70—and with farmers’ and fishermen’s stocks and equipment.71 For these latter and for other inventory loans,72 registration of a borrower’s notice of intention within three years preceding the giving of the security safeguards against intervening adverse claims.73 This provision recognizes the validity of forward inventory financing for many types of business while simultaneously conditioning such validity.

If the security is permissible in type and mode of acquisition, the bank’s claim “shall have priority over all rights subsequently acquired in, on or in respect of such property”74 and, with large qualifications, over unpaid vendors’ claims.74 Such priority, being federally given, effectively supersedes any provincial rules about priorities.76 The provincial law which governs the attributes of competing rights determines the time of their inception, however, so that complex problems of interpretation can arise as to whether they were “acquired” “subsequently” to the bank’s security and must yield, or before it, in which case they may claim their ordinary preference under applicable provincial law.76

In some cases, notably in credit extensions to the construction industry, banks often take an assignment of book debts as security for a line of credit. These arrangements have no special status under the Bank Act. Hence banks are remitted to the general provincial law for the operative consequences and

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66. Id. §§ 78, 80, 82, 84.
67. Id. §§ 75(2)(d), (e), (f).
68. Id. §§ 103-16, provides for preparation and submission to the Minister of Finance of annual statements of liabilities and assets and of current operating earnings and expenses in accordance with schedules to the Act. Id. § 64.65 establishes the Office of Inspector General of Banks in the Department of Finance and outlines his duties and functions, including an inspection at least once annually.
69. Id. § 75(2)(c).
70. Id. § 86, 87.
71. Id. § 88(1)(e)-(l).
72. See id. § 88(1)(a), (b).
73. See id. § 88(4)(a).
74. See id. § 89(1).
priorities of the assignment as against for instance mechanics’ or materialmen’s liens or non-federal tax claims. But while the assignment may not particularly help the bank, it need not prejudice it. The bank may disregard both the assignment and its own character as a bank and rely on any other capacity, such as that of holder in due course, available under the circumstances.77

The chartered banks are not the only financial and credit institutions operating in the country, even apart from government agencies devised at both federal and provincial levels to assist with loans or guaranties for particular persons or programs specially related to the achievement of some legislatively favored public policy.78 “Banking” is exclusively a federal matter under section 91 of the British North America Act; and no institution may call itself a bank nor engage in the full array of banking activities except a chartered bank.79 But operations, in substance similar to large segments of a bank’s operations, whether in extending loans, discounting paper, or receiving and investing funds for repayment, are carried out by a multitude of other enterprises, typically established under provincial authority. A very considerable part of consumer and even of retailer financing is supplied by “finance” or “acceptance” companies as discounters of chattel paper.80 Trust companies serve the real property mortgage market.81 Loan corporations,82 akin to England’s building societies, and credit unions83 pool funds, characteristically in terms of “membership” rather than of “deposit,” for various types of authorized investment, some emphasis being given to making credit available to participants in the pool. The “caisse populaire” in Quebec is an outstanding example of this.84 Insurance companies provide large blocks of credit for construction projects and corporate financing. No adequate account of these institutions can be given in brief compass; but mention of them is needed to dispel any inference of identity between the banking system and credit institutions. As a very broad generalization, it may be said that the non-bank components are creatures of the provinces, governed in their dealings by the general law applicable to any

individual or at least any other private company doing business in the province, but with additional statutory limitations.\textsuperscript{85}

The grant of authority over “interest” to the federal government has meant that the subject has gone almost unregulated, Parliament having been reluctant to do much about it and the provinces having been powerless. Aside from a six per cent ceiling on bank loans\textsuperscript{86} and a few narrowly defined provisions applicable to particular lenders such as small loan companies,\textsuperscript{87} there is no limit on what may be exacted, only an establishment of five per cent as the legal rate where no other is expressly contracted for.\textsuperscript{88} The fantastic rates to which some ignorant or improvident or distressed borrowers commit themselves are not, however, utterly beyond the reach of the provinces. Excluded though the provinces obviously are from direct usury legislation, some provincial legislation has been written translating equity’s historic hostility to oppressive and unconscionable transactions into specific prohibitions and, in this context, such legislation has been sustained by the Supreme Court.\textsuperscript{89}

\textbf{SALE OF GOODS}

The caption of this subtopic, while familiar enough to those versed in the common law and while none better suggests itself, does not exactly fit the Canadian experience due to the unique situation of Quebec. In Quebec one deals not in “goods” but in “moveables” which are only approximately the same,\textsuperscript{90} and “sale” under the Civil Code (whose provisions in general extend indiscriminately to moveables and immoveables) may contemplate a bit more precision both in the thing sold and in the price term than will satisfy the common law.\textsuperscript{91} But those differences are terminological. The transactions which “sale of goods” connotes to a common law lawyer occur equally in Quebec, where they would usually be thought of in the light of a sale of moveables and where indeed they would ordinarily not differ greatly in their consequences. Thus the expression may conveniently, even though somewhat inaccurately, be used to mean that group of transactions. So understood it may be said initially that there is a large correspondence, but falling short of a complete identity, between the corpus of rights and duties arising from such transactions in the


\textsuperscript{90} For the distinction between immoveables and moveables, see Que. Civ. Code, book II, tit. 1 [hereinafter cited QCC].

\textsuperscript{91} Cf. 7 J. Mignault, Droit Civil Canadien 5 n.(d) (1906).
common law and in the civil law systems. Unqualified general propositions may be taken as applying to both; specific differences will be rather freely noted. The matter is important for here we are in an area of provincial competence.92

Each common law province has a statute modeled very closely on the English Sale of Goods Act—more closely than the relevant provisions of the Civil Code are on those of its prototype, the Code Napoleon.94 Indeed the most distinctive thing to be said of the Civil Code may be that there is just about nothing to be said of it that would seem distinctive to one acquainted with the English law. As in England, the Act reflects with few exceptions the pre-existing case law which therefore remains a valid guide for statutory interpretation.95

Whether title has passed, what the rights of the parties are in one or the other case, and how far the seller must answer for defects in the goods or in his ownership are the central preoccupations of the law.

Title passes when the parties intend it to pass.96 The Act, following the common law, in order to derive an intention left undisclosed, calls in presumptions which vary according to whether the subject of the sales agreement is or is not (a) in a deliverable state, and/or (b) specific and ascertained. If it is both, title is presumed to pass at the time of the contract;97 if ascertained but not yet in a deliverable state, title passes when the subject becomes so and the buyer is notified;98 if unascertained or future, at the time there is "appropriation" by either party matched with assent thereto by the other.99 Under the Code, it is a question not of presumption but of legal rule. Where the goods are specific, ascertained and deliverable, the prescribed effective time corresponds to the common law presumption.100 If the goods are unascertained, title passes when the goods are "certain and determinate" and the buyer is notified to that effect101 (note that "appropriation" and assent are not specified). Nothing is said in the Code about the case in which goods are ascertained but not yet deliverable, except where what is to be done is weighing, measuring or counting,

94. Thus, the Code Napoleon's eight chapters in the title, Of Sale, have become thirteen in the Civil Code; the Code Napoleon has no provision corresponding to the important art. 1488 of the Civil Code. The Canadian Comparative Table leaflet accompanying G. Chalmers, Sale of Goods (13th ed. 1957) is a parallel section tabulation of the Sale of Goods Act of the United Kingdom and all the provinces. The requirement of a writing, earnest payment of receipt of goods for goods of substantial value (typically $40 or over) derived from the original Statute of Frauds, survives in Canada.
95. "Our common law is rich in the exposition of principles, and these expositions lose none of their value now that the law is codified." G. Chalmers supra note 94, at v.
96. The Sale of Goods Act § 18, Ont. Rev. Stat. c. 358 § 18 (1960) [hereinafter cited SGA]. Section references will follow Ontario numbering; equivalent but not necessarily identically numbered sections in the acts of other provinces will be deemed to be referred to.
97. SGA § 19, rule 1.
98. Id. § 19, rule 2.
99. Id. § 19, rule 5(t).
100. QCC art. 1025.
101. Id. art. 1026.
when such quantification occasions the title passage.\textsuperscript{102} This contrasts with the Act's provision that, in those circumstances, title is presumed to pass when the act is done and the buyer notified.\textsuperscript{103}

The Code does speak in terms of presumption in connection with a sale "upon trial," presumed to be "on a suspensive condition" absent indications of another intention;\textsuperscript{104} this resembles the Act's provisions for sale "on approval or 'on sale or return' or other similar terms."\textsuperscript{105} The results in this situation are substantially identical.\textsuperscript{106} The Act clearly contemplates, reversing the rule of Grantham \textit{v. Hawley},\textsuperscript{107} that there can be no present sale of future goods\textsuperscript{108} but in disregard of its provisions, the doctrine of potential property has received judicial recognition.\textsuperscript{109} Under the Code, such sales are recognized either as attaching to the goods upon their inception or as a transfer of the venture, depending on the circumstances.\textsuperscript{110}

Upon title passage, changes occur in the parties' rights, \textit{inter se} and as to third persons. The usual position under a bilateral executory (synallagmatic) contract is that breach by a party entitles the other to recover damages incident to nonperformance.\textsuperscript{111} For the buyer, damages or specific performance in the alternative are authorized under the Code at his option,\textsuperscript{112} but under the Act in the court's discretion.\textsuperscript{113} Once title has passed, the seller becomes entitled to the price of the goods, not just damages.\textsuperscript{114} Under the Act, overages or deficiencies in delivery as well as a delivery co-mingled with nonconforming goods empower the buyer to reject or accept, paying in case of quantity deviations at the contract rate for goods accepted;\textsuperscript{115} by limiting its deviation provisions to immovables,\textsuperscript{116} the Code fails to provide any clear rule for movables in these situations.\textsuperscript{117} Risk of loss, injury or diminished value, and conversely the benefit of accretions or enhanced value, prima facie shift from seller to buyer upon title passage under the Act;\textsuperscript{118} under the Code, the buyer is entitled to

\begin{footnotes}
\item[102.] \textit{Id.} art. 1474.
\item[103.] SGA \textsection{} 19, rule 3.\textsuperscript{109}
\item[104.] QCC art. 1475.
\item[105.] SGA \textsection{} 19, rule 4.
\item[107.] Hob. 132, 80 Eng. Rep. 281 (C.P. 1616).
\item[108.] See SGA \textsection{} 6(3).
\item[109.] See Jacobson \textit{v. Int'l Harvester Co.}, 11 Alta. 122c, 124, 10 W.W.R. 955 (1916).
\item[110.] See 7 J. Mignault, \textit{supra} note 91, at 50-51.
\item[111.] SGA \textsections{} 48(2), 49(2) ("directly and naturally resulting in the ordinary course of events from the ... breach"), 52; QCC art. 1074 ("which have been foreseen or might have been foreseen").
\item[112.] QCC art. 1065.
\item[113.] SGA \textsection{} 50.
\item[114.] \textit{Id.} \textsection{} 47(1); cf. QCC art. 1532.
\item[115.] \textit{Id.} \textsection{} 29.
\item[116.] See QCC arts. 1501, 1502.
\item[117.] The case law reaches similar results to that in common law jurisdictions; see M. Faribault, \textit{Traite du Droit Civil} 186 n.345 (1961).
\item[118.] SGA \textsection{} 21.
\end{footnotes}
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the profits following the sale but the seller remains obligated to deliver "the thing . . . in the state in which it was at the time of the sale."110

The Act provides a vendor with methods of recourse to the goods to secure payment of the price independent of terms in the underlying contract or in any contract of carriage. If no credit arrangement is in force, the unpaid vendor has a possessory lien with the general attributes of that class of security plus a qualified power of sale;120 under the Code there is a comparable dispensation from the obligation of delivery.121 Under the Act, furthermore, an unpaid seller by appropriate notification, grounded upon the buyer's insolvency, while the goods are in transit may obligate the carrier to hold the goods subject to the seller's directions.122 The Code handles the matter differently. It does not concern itself with the carrier's holding, probably because the irrelevance of "appropriation" largely obviates the occasion for attaching special importance to it. Instead, the Code gives the seller the right of revendicating the goods128 or a privilege on their proceeds124 for eight days after their delivery to the buyer (thirty days if he is insolvent). The latter is often more valuable but is not available in cases of sales on credit125 where accordingly the common law's remedy of stoppage in transitu is more favorable to sellers.

The two systems use radically different principles to reach similar results so far as regards dealings with third persons. In the common law provinces one without title can convey none.126 Except that anciently St. Johns, Newfoundland, was market overt for fish,127 the doctrine of market overt is not and never was in effect.128 But in Quebec, exceptions to the rule nemo dat quid non habet are recognized "if (the sale) be a commercial matter or if the seller afterwards become owner of the thing";129 and the owner of a lost or stolen article "bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles" can not reclaim without reimbursing the purchaser130 and, if sold "under the authority of law," not at all.131 Outside Quebec, the Quebec provison has been treated as not going to title.132

In the event of successive sales by a seller remaining in possession, the bona fide purchaser first taking possession will prevail even against those to whom title passed under an earlier dealing.133 The Act assimilates this to acting

119. QCC art. 1498.
121. QCC arts. 1496, 1497.
122. SGA §§ 42-44; see Richardson v. Twining, 8 N.S. 281 (1871).
124. Id. art. 2000.
125. Id. art. 1999(1).
126. See SGA § 22.
128. See SGA § 23.
129. QCC art. 1488.
130. Id. art. 1489.
131. Id. art. 1490.
133. SGA § 25(1); QCC art. 1027.
under an authority from the owner, to which it also equates a like transfer by a person having possession of goods which he has contracted to buy.\textsuperscript{134} Again Quebec reaches a like, perhaps even broader, result by making "a promise of sale with tradition and actual possession . . . equivalent to sale."\textsuperscript{135} The civil law's general antipathy\textsuperscript{136} to the concept of estoppel, so laxly welcomed in the common law, may account for their different paths to much the same position.

Defective goods or a defective title can not be palmed off on a buyer who has bargained for something better. The Act, following the common law, treats this as a matter of condition or of warranty. The difference is that a condition permits the buyer either to reject the goods or to claim damages, while a warranty limits him to the latter.\textsuperscript{137} Passage of title to goods specific at the time of the bargain and acceptance of goods in other cases normally reduces a condition to a warranty.\textsuperscript{138} A corollary is that the buyer is given an opportunity to make reasonable examination of goods not previously examined and is not taken as having accepted them before either lapse of a reasonable or stated time or a manifestation of his assent to become their owner.\textsuperscript{139}

For defects in title, there are implied warranties for quiet possession and against encumbrances and an implied condition of right to sell\textsuperscript{140}—the ensemble resembling in substance, it will be noted, the obligations of a vendor of real property. For defects of quality, the Act provides "there is no implied warranty or condition . . . except" that conditions are implied of (a) reasonable fitness for a particular purpose disclosed by the buyer in such a way as shows he relies on the seller's skill or judgment to satisfy it, if the seller is one regularly dealing in that class of goods but not if the goods are bought by "patent or other trade name," and (b) merchantable quality as to goods bought by description from a dealer in that class of goods, but not for observable defects if the buyer has examined the goods.\textsuperscript{141} This formula of a negative general rule with defined exceptions reflects the ancient maxim, \textit{caveat emptor}, but legal prescription has in Canada, as elsewhere, been yielding ground to changed business operations and new social policies, particularly though not exclusively in sales for consumption. So, a particular purpose need not be distinctive but may involve only the normal or standard use of articles and disclosure of the use can be implicit from the fact of their purchase.\textsuperscript{142} A very considerable reliance by a buyer on his own judgment or that of a third person does not prevent the condition if there has been to some appreciable degree a reliance

\begin{itemize}
\item \textsuperscript{134} SGA § 25(2).
\item \textsuperscript{135} QCC art. 1478.
\item \textsuperscript{136} See Heeney, \textit{Estoppel in the Law of Quebec}, 8 Can. B. Rev. 401, 500 (1930).
\item \textsuperscript{137} SGA § 12(1), (2); Home Gas Co. v. Streeter, [1953] 2 D.L.R. 842, 8 W.W.R. (n.s.) 689 (Sask.).
\item \textsuperscript{138} SGA § 12(3).
\item \textsuperscript{139} Id. §§ 33, 34.
\item \textsuperscript{140} Id. § 13.
\item \textsuperscript{141} Id. § 15.
\item \textsuperscript{142} See, e.g., Van Doren v. Perlman, 38 Mar. Prov. 1 (Newf. 1956) (Fur coat must be fit for wear.); Thompson v. Cameron, 41 N.S. 29, 2 E.L.R. 192 (1906) (cash register).
\end{itemize}
upon the seller as well.¹⁴³ Where a seller is held liable for goods he never saw, such goods having been sent out as premiums by his suppliers under contract, the notions of the seller’s possessing any skill or judgment whatever about them or of his being a dealer in them have been attenuated virtually to extinction.¹⁴⁴

The requirement of privity of contract between seller and buyer still survives,¹⁴⁵ even if a bit battered;¹⁴⁶ but acceptance of the doctrine of Donoghue v. Stevenson¹⁴⁷ and of easy ways of establishing the negligence element makes its survival relatively unimportant.¹⁴⁸ Whatever its text may say, the Act has been accommodated to a wide range of consumer claims of defects in goods.

Besides fitness and merchantability, in sales of appropriate type a condition which is expressed, rather than implied, of correspondence to description, sample, or both is enforced.¹⁴⁹ An odd departure from the doctrine as received elsewhere is the suggested distinction between a sale by sample and a sale from samples, with the former confined to the situation where the representative specimen was actually drawn from the bulk.¹⁵⁰

Conditions and warranties are quite independent of misrepresentations or negligence. They may coexist, but the members of either pair are in no sense ingredients in the other.¹⁵¹

The Code provisions about conditions¹⁵² in obligations relate to future happenings not present qualities;¹⁵³ but the goods must meet the quality terms which were agreed to, otherwise the seller is in breach of his undertakings.¹⁵⁴

Hence, the substance, though not the formulation, of the buyer’s rights is comparable to the situation under the Act. When the Code implies terms, its prime reliance is on warranty—the warranty against eviction or the warranty against latent defects.¹⁵⁵ The former is much like the title warranties for quiet possession and against encumbrances noted above.¹⁵⁶ The latter extends to latent defects which “render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given

¹⁴⁶. See Yelland v. National Cafe, [1955] 5 D.L.R. 560, 16 W.W.R. (n.s.) 529 (Sask.) (Where there was a purchase of soft drink from retailer for family consumption, recovery was denied against bottler but allowed against retailer in action by consumer whose father bought as her “agent.”).
¹⁵². QCC arts. 1079-1088.
¹⁵⁵. QCC arts. 1506, 1507.
¹⁵⁶. Id. art. 1508.
so large a price if he had known them." The seller is not held for patent defects. Merchantability is not critical.

For breach of warranty under the Code, the buyer acting with reasonable diligence may either have a redhibitory action for the price upon restoring the goods, or may keep them and get any difference in value attributable to the latent defect, by way of damages. The power of rejecting the goods does not come to an end with their reception in the way the common law condition turns into a warranty. The price is the upper limit to the buyer's recovery upon redhibition (a) in case of the warranty against eviction if the buyer knew of the title flaws at the time of the bargain, and (b) in case of the warranty against latent defects unless the seller knew or is legally presumed to have known of them when he sold. Otherwise, the buyer may also have all resultant damages. Every producer or trader is legally presumed to know the properties of, and thus any defects in, goods which he ordinarily makes or deals in, except possibly when they are such that no available practicable test would reveal them.

The parties may contract for different, other, or no conditions or warranties. The ingenuity of sellers in devising standard form clauses to negative warranties or hobble their assertion has been often frustrated by the ingenuity of judges in finding restrictive constructions. Thus, a provision that no conditions or warranties not expressed have been given does not signify that the implied ones are excluded; a disclaimer of all conditions or warranties, statutory or otherwise, does not rule out buyer relief grounded on misrepresentations, the disclaimer terms forming no part of the relevant contract; and seller's non-performance through essential non-correspondence of the goods furnished with those contracted for continues as an available defense. Provisions, not quite so one-sided, limiting the period or the manner in which claims for defects may be asserted, or specifying the extent of recovery, such as repairs or, as in the familiar "seedsman's warranty," replacement cost, have been curtailed less severely.

157. Id. art. 1522.
158. Id. art. 1523.
159. Id. arts. 1526, 1530.
160. Id. art. 1512.
161. Id. art. 1528.
162. Id. arts. 1511, 1527.
163. 7 J. Mignault, Droit Civil Canadien 112, 113 (1906).
164. SGA § 53; QCC art. 1507.
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Sales which jeopardize the position of persons giving or continuing credit hypothetically in reliance on the holding of goods as an indicium of the seller-debtor's business standing are denied finality. By federal law, an insolvent seller's transfer by way of preference is itself an act of bankruptcy and subject to be treated as void by the trustee if bankruptcy proceedings against the seller commence within three months thereafter, the trustee being entitled to recover the goods or their proceeds from the buyer. Outside bankruptcy, the provinces provide for striking down fraudulent conveyances—those of the common law tradition by legislation modeled on the Statute of Elizabeth respecting conveyances with intent to "hinder, delay or defraud" creditors, and Quebec by authorizing the Paulian action which may be a shade narrower in application.

One situation attracting special attention is that covered by the bulk sales acts which address themselves to dealings in the aggregate assets of an enterprise. The basic arrangement is to call for the furnishing by the seller of a schedule of creditors and to require compliance with prescribed procedures for applying the buyer's payment to their claims or for getting their consent to the sale. If these steps are not taken, the buyer exposes himself to a successful challenge by creditors of the validity of the sale without inquiry into issues of good faith, notice, or exchange of value. There are variations among the provinces as to the kinds of business, kinds of sale, or kinds of creditor falling within the scope of the Act, the form of the creditors' schedule and the responsibility for taking the initiative in its provision, the techniques of purchase price application to creditor claims, the proceedings available in case of non-compliance, as well as other important particulars. The particular statute and the decisions construing it must be consulted. The terms of some perhaps impede the carrying out of quite legitimate business activities; but the broad policy is firmly entrenched in the law.

SECURED TRANSACTIONS

Mass markets imply a credit economy and, moreover, an economy of secured credits. When trade was either barter or a concourse of communally supervised participants in fairs and markets, there was little occasion for mercantile law

171. Id. § 64(2).
172. Id. § 66(2).
174. QCC arts. 1032-1040.
175. For a comprehensive discussion of the Paulian action in Quebec law, see 7 G. Trudel, Traite de Droit Civil de Quebec 435-534 (1946).
176. For statutory variations, see B.C. Rev. Stat., c. 39 (1960); N.S. Rev. Stat., c. 27 (1954); Ont. Rev. Stat., c. 43 (1960); QCC arts. 1569a-1569e. Legal authors have virtually neglected the field, a major exception being Catzman, Bulk Sales in Ontario, 3 Can. B.J. (1960), whose counsel had a leading part in the revision of the Bulk Sales Law in that province.
to concern itself with documented collateral. The means afforded the innkeeper for assuring payment by holding the wayfarer's steed or the noble lord for staking the family plate against the moneylender's advances—matters outside the course of commerce—were good enough precedents for the odd case in which traders looked beyond promises for credit backing. They still serve, but they no longer suffice. They have been adapted; they have been supplemented; and the adaptations and supplementations, now an intricate complex, are a major aspect of business relations and hence, although no part of traditional mercantile law, they are a central element in actual mercantile law.

Secured transactions still bear the mark of their origin in other contexts. The forms of action rule only from their graves; the forms of transaction still walk the earth. One must deal not with security but with particular kinds of security different in name and in attributes at common law and at civil law—a necessity which precludes the blended treatment so far used and explains the separate examination which follows, first of the security devices of the common law provinces, then of those of Quebec. The relevant law is almost entirely provincial.

Old fashioned liens and pledges still play a part, albeit a relatively minor part. While they—liens particularly—often have statutory standing, they retain substantially their common law content. Characteristic aspects of a lien—retention of possession as the condition and measure of the lienholder's power, inability to sell the goods, hazards of being treated as converter for small deviations, confinement to the specific item which occasioned the claim and dislike of a lien for general balances of account—limit its usefulness to small short term debts. The pledge, shaped more by the contract than by general legal prescriptions, escapes many of these difficulties; but even it is predicated on a transfer of possession from pledgor to pledgee and in—


183. By statute in some provinces goods may be pledged only for stated relatively short periods; see, e.g., The Mercantile Law Amendment Act, Ont. Rev. Stat. c. 238, § 11 (1960) (twelve months for logs, lumber and the like, six months for goods generally).

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volves a fairly strict surveillance of the pledgee's conduct in realizing on the security. These elements, particularly the transfer of possession, are inconveniences since the pledgee will normally be set up to do business as lender, not as dealer or warehouseman, while the pledgor on the other hand will often want to be processing the goods or using them as business equipment. A warehouse receipt, representative of the goods, may indeed be issued to the pledgee obligating the pledgor to hold them pursuant to its terms; but the obligation is personal and does not attach to the goods so as to prejudice one buying them in ordinary course of trade. Inventory pledges might be accomplished through the somewhat elaborate field warehousing arrangement, but that has never caught on in a large way. A floating charge upon a class of assets whose members are contemplated as fluctuating in the ordinary operations of the debtor’s business is possible; but it awaits some crystallizing event before it attaches to anything prior to which it exists in a state of suspended animation which may result in its being postponed in security as it is in time.

The chattel mortgage has been valuable in appropriate circumstances. In theory, it is a transfer of title in goods to the creditor subject to defeasance by the buyer's exercising his equity of redemption, normally leaving possession with the buyer so that they can be used for production of income. The buyer, having no title after the transfer, could convey none were it not for the protection accorded those dealing on the faith of the buyer's apparent ownership of goods retained by him after sale. The obvious solution, provision for public registry as a condition to setting up the chattel mortgage against third person's claims based on the unchanged possession, was adopted early and is now in general use.

Nothing more is needed for a debtor to use his present holdings as a basis for credit; and the law also recognizes the effectiveness of after-acquired property clauses to bring later acquisitions within the coverage of the security and of mortgagee's power of sale clauses to permit turnover, so that a shifting

185. See A.E. Ames & Co. v. Sutherland, 9 Ont. L.R. 631 (1905) appeal dismissed, 11 Ont. L.R. 417 (1906), aff’d, 37 Can. S. Ct. 694 (1906) (Sale by pledgee without giving notice was held to be a breach of contract though not a termination of pledgee's special property interest.)


189. In each common law province and territory there is a separate chapter on chattel mortgages (and bills of sale) in the Revised Statutes, save in Newfoundland. There are two sections of The Registration of Deeds Act, Newf. Rev. Stat. c. 14, §§ 27, 31 (1952), which deal with the matter in a somewhat rudimentary way.

190. See Imperial Brewers, Ltd. v. Gelin, 18 Man. 283, 9 W.L.R. 99 (1908); Creighton v. Jenkins, 17 N.S. 352 (1884).

stock of goods may be its subject. The chattel mortgage arrangement, a qualified conveyance from debtor to creditor, is ill-suited, however, to the provision of security for the price of goods being transferred from the creditor to the debtor. That can indeed be handled by a purchase-money mortgage but only in a convoluted manner, always awkward and by its additional steps creating additional risks.\textsuperscript{192} Hire purchase was one possible way of fusing the sales and security aspects; but that line was not taken and the notion has been absorbed into the alternative which was chosen, the conditional sale.\textsuperscript{193} After initial judicial fumbling with an unfamiliar transaction\textsuperscript{194} which, falling outside the chattel mortgage acts, resurrected the danger of secret claims, statutes were enacted setting up an independent filing system for conditional sales agreements and there are now probably more of such dealings than of any other form of security agreement, perhaps more than all others combined.

This still leaves the case where the buyer, contemplating acquisition of goods from one source and of the funds for their purchase from another, needs to use the prospective goods as security for the prospective funds. The trust receipt device is admirably adapted to this end, but, in prudent submission to what was perhaps only dictum, although certainly very extensive dictum,\textsuperscript{195} it has not been received into the commercial practice. The overriding federal provisions of section 86 of the Bank Act, where complied with, may permit a dealing in effect not very different from a trust receipt in the special case of a bank credit;\textsuperscript{196} but, aside from that, there has been no legislation for registering such contracts and no use of them.\textsuperscript{197}

The law makes choses in action, as well as goods, property available as security. The special situation of company financing secured by the terms of bonds, debentures, and trust deeds is not here examined but should be noted. Holders of shares or bonds of companies and holders of negotiable paper, wishing their use as security for loans, may employ a transaction in the nature of a pledge.\textsuperscript{198} For documents of title—bills of lading and warehouse receipts—a


\textsuperscript{193} See, e.g., Alta. Rev. Stat. c. 54 (1955), (Conditional Sales Act applies to sale or bailement but excluding by § 3, bailements do not have the attributes of a hire purchase); Ont. Rev. Stat. c. 61, § 2(2) (1960) (Substantive rules of previous subsection “appl[y] to the case of a hire receipt where the hirer is given an option to purchase.”); P.E.I, Rev. Stat. c. 28, § 1 (1951) (“Conditional sale” includes contracts “for the hiring of goods.”); Yuk. Terr. Rev. Ord. c. 20, § 2(b) (1958) (same). Now and then a hire purchase form is used but the assimilation of these infrequent dealings to conditional sales seems to be complete. In Newfoundland the provisions for chattel mortgage registry are expressly made inapplicable to hire purchase agreements and to conditional sales, Newf. Rev. Stat. c. 141, § 39 (1950), and there is no statute which addresses itself to such transactions.

\textsuperscript{194} See, e.g., Sawyer v. Pringle, 18 Ont. A.R. 218 (1891).


\textsuperscript{198} For illustrations of this method of dealing, see A.E. Ames & Co. v. Sutherland, 9 Ont. L.R. 631 (1905), and Warren v. Bank of Montreal, 14 Ont. W.R. 622, 1 Ont. W.N. 28 (1909).
closer equivalent is the chattel mortgage with continuous possession in the mortgagee. Besides these special types of choses in action, there is the undifferentiated mass of customers’ accounts and other business claims which forms an appreciable part of the assets of many an enterprise. Written assignment of these book debts, existing or future, by way of security is authorized; but again, for the protection of third persons, only upon the condition of registration as provided in the Act.200

Thus there are provisions in effect whereby a wide range of security transactions is available, many with a common element of public registry as a safeguard. They cannot be said to constitute a system, however, because of the dissimilarities in the requisites for and consequences of registration.

Registration of assignments of book debts and of chattel mortgages needs an accompanying affidavit of good faith by assignee or mortgagee (and often an assignor’s or witness affidavit, too) of indicated content which is different for the two forms of security; conditional sale needs none.201 Despite a provision that clerical irregularities or errors which, variously, are not calculated to mislead or deceive, or do not have the effect of misleading or deceiving or did not actually mislead or deceive do not impair the registration,202 the courts have inclined to insist on a rather rigorous conformity with the prescriptions of the particular statute and to treat variances as destroying the effect of the registration—a treatment also given similar clauses about petty defects in conditional sales filings.204 The prescribed place of registry is different for the different transactions and it is not always easy to know where a searcher should look. Time

199. This follows from the rule that “The endorsement or transfer vests in the transferee from the date thereof all the right or title of the transferor to or in the goods, subject to the right of the transferor to have the goods, warehouse receipt or bill of lading retransferred to him if the debt is paid when due.” Ont. Rev. Stat. c. 238, § 8(2) (1960). The situation is similar elsewhere.


205. Thus, in New Brunswick, the filing is to be generally with “the proper officer” of a “registration district” as to chattel mortgages, that “in which the chattels . . . are situated at the date of execution,” N.B. Rev. Stat. c. 18, § 6(3) (1952), and as to conditional sales, that “in which the buyer resided” or for non-residents “in which the goods are delivered,” id. c. 34, § 3(2), and as to book debts five alternative locales are listed varying with the assignee’s incorporated status and its business activities, id. c. 12, § 4(1).
gaps between transaction and registration are variously treated; for instance, conditional sales may be filed up to ten days and assignments of book debts registered up to thirty days after the transaction with retroactive effect, while chattel mortgages must coincide in execution and registration unless, upon good cause shown, a judge allows later registration, but even that does not relate back. The registry's effectiveness may be indefinite in duration or for different fixed periods with a possibility of renewal by timely advance refiling whose details are particularized somewhat differently for the different types of dealing. Something is done by way of spelling out the rights and duties consequent upon a conditional seller's exercising his contract recourse against the security, as also is true of some lien statutes but not of the typical chattel mortgage or assignment of book debts act. The law on these and other items is a jumble of particulars defying coherent statement. In this medley of prescriptions, diversified according to the form of the transaction, bewildered creditors, debtors, or third persons may almost account it a happy accident when multiple registration provisions give better assurance than would none at all. Integration of the law of personal property security transactions, in line with Article Nine of the Uniform Commercial Code, so as to eliminate divergence in results, and to achieve effective province-wide registration without discarding use between the parties of any desired type, has recently been attained in Ontario and is under consideration in several other provinces.

In some western provinces statutes exclude a creditor from enforcing personal contracts for the deficiency, at least after he has resorted to enforcement of his chattel security. This debtor's relief legislation operates with respect to successors in interest as well as between the original parties to the transaction but there is a loophole in that any arrangement not falling strictly

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206. The text summarizes Ontario provisions, see Ont. Rev. Stat. c. 24, § 3(1)(c) (1960) (assignment of book debts), and c. 34, §§ 4, 10 (chattel mortgages), and c. 61, § 2(1)(b) (conditional sales). The details vary from province to province but non-uniformity as among transactions is a common feature.

207. E.g., in Prince Edward Island, registry of assignments of book debts is to be renewed triennially, see P.E.I. Rev. Stat. c. 13, § 7 (1951), and of chattel mortgages quinquennially, see id. c. 18, § 11. However, no limitation of time is specified in connection with conditional sales filings.

208. Thus, to claim for a deficiency on resale, the respossessing conditional seller must give notice strictly according to statute; see Garner v. Garner, 6 D.L.R.2d 87, 19 W.W.R. (n.s.) 595 (B.C. 1956); Myers Motors, Ltd. v. Patafie, 18 D.L.R.2d 679, [1959] Ont. W.N. 82. Buyers' rights on default are not spelled out but there has been some judicial effort to supply them by implication from the qualifications on the seller's rights being read as duties; cf. Duthie v. Lounsbury, Ltd., 4 D.L.R.2d 631 (N.B. 1956), aff'd, [1957] Can. S. Ct. 590, 9 D.L.R.2d 225.


210. [1967] Ont. Stat. c. 73. The substantive provisions of the Act are not yet operative, but will come into effect on a date to be proclaimed, id. § 72, to allow for establishment of the registration machinery. A serious gap in the Act is the exclusion of corporate secured charges. See id. § 3(1).


within the forms of security specified leaves the creditor free to have both chattel and action.\(^{213}\)

Under the Civil Code in Quebec, the approach is the same—provision for a variety of particular security devices, each with its own attributes. The designations naturally differ from, and no one of them is exactly like, any one of those developed under the common law, though in total coverage they are not radically different.

The pledge ("pawn") of a movable combines features of common law lien and pledge. Like the former it is, with qualifications soon to be noticed, a power of holding possession to enforce payment, without any power of sale or disposition.\(^ {214}\) Like the latter, it stems not from services of some kind specially affecting the goods, but from an ad hoc contract,\(^ {215}\) and even goes beyond it in permitting the creditor to retain for after-contracted debts due and owing as well as for that on account of which the article was pledged.\(^ {216}\) Farmers and traders may, additionally, pledge their business equipment for not over a ten-year credit\(^ {217}\) (and for farmers' inventory as well),\(^ {218}\) while retaining possession as quasi-borrowers from the creditor, but only by a notarial deed which must be deposited in the proper registry office.\(^ {219}\) This being done, the creditor may on default demand possession or sell publicly.\(^ {220}\) He may not stipulate for a relinquishment to him of title relieved of any duty to sell.\(^ {221}\)

Privilege, a broader category than pledge, is more a scheme of priorities\(^ {222}\) than a counterpart of any common law type of security. It embraces, \textit{inter alia}, pledgees\(^ {223}\) as a class plus unpaid vendors\(^ {224}\) and an array, reminiscent of traditional common law liens, of persons performing services related to the goods.\(^ {225}\) All are given preference over general creditors and rank in the order of their respective preferences;\(^ {226}\) the unpaid vendor also has, as has been mentioned already, a right of revendication.\(^ {227}\)

The concept of divided title, legal and equitable, established by Chancery, is alien to the civil law system where there are no mortgages and no chattel mortgages. The nearest equivalent is the contract of sale with right of redemption reserved.\(^ {228}\) Its, like the chattel mortgage, contemplates a conveyance subject


\(^{215}\) Id. art. 1967.

\(^{216}\) Id. art. 1975.

\(^{217}\) Id. arts. 1979a, 1979e.

\(^{218}\) Id. art. 1979a.

\(^{219}\) Id. arts. 1979b, 1979f, 1979g.

\(^{220}\) Id. arts. 1979c, 1979i.

\(^{221}\) Id. arts. 1979d, 1979k.

\(^{222}\) Id. art. 1983 ("a right which a creditor has of being preferred to other creditors according to the origin of his claim").

\(^{223}\) Id. art. 1994(4).

\(^{224}\) Id. art. 1994(3).

\(^{225}\) See id. art. 2001.

\(^{226}\) See L. Baudoin, Le Droit Civil de la Province de Quebec 905, 906 (1953).

\(^{227}\) QCC art. 1998.

\(^{228}\) See Faribault, \textit{Remere et Clause Resolutoire}, 1 Rev. de Bar. 121 (1941).
to the resolutory condition of restoration upon repayment.\textsuperscript{229} The permissible provisions of such a contract and the way rights under it are to be asserted—including a term against “strict foreclosure”—are set out in detail in the Civil Code.\textsuperscript{230} A structural disadvantage is that it normally supposes possession held by the buyer for the redemption term, guarding against prejudice to the seller by disallowing after redemption incumbrances placed on the moveables by the buyer during the holding, but not really adapted to allowing active use by the seller, as would often be commercially desirable instead of a sterile holding by the buyer. No public registry system is established as an alternative to a change of possession, at least for movables.\textsuperscript{231} The omission is more striking in view of the provision for registry of “the sale of the whole, of a portion or of a particular category of debt or book accounts, present or future, of a person, firm or corporation carrying on a commercial business”\textsuperscript{232} although even this is only an optional step in making such a transfer effective, being in effect a substitute for notifying the debtor owing the assigned claim as a basis for asserting “possession available against third persons.”\textsuperscript{233} The conjoint step of newspaper publication provides the element of publicity. Book debts thus have a closer analogue than do chattel mortgages but not very close.

Hire purchase agreements are made sales;\textsuperscript{234} and sales with a title retention clause are made simple credit term contracts “transfer[ing] to the buyer the property of the thing sold”\textsuperscript{235} unless they meet the very precisely stated requirements as to terms, form, and subject matter (e.g., “commercial sales only at retail and not exceeding . . . eight hundred dollars”) for statutory qualification as sales on the installment plan.\textsuperscript{236} If they do, a transferrable right quite comparable to a conditional seller’s exists. As under the legislation of the western provinces, upon the buyer’s default there is an “option either [to] exact payment of the instalments due or retake possession of the thing, . . . [i]n [which] latter case the buyer is freed . . . of the balance of the price of sale and of the payment of the notes. . . .”\textsuperscript{237} Here again there is no provision for the registry of contracts with title retention terms, whether qualifying as sales on the installment plan or not.

As against the confusing multiplicity of registry provisions for different types of transactions encountered in the common law provinces, virtual absence of any as a condition for establishing claims to security based on moveables effective against third persons characterizes the Civil Code. In any given case, that can clearly mean a difference in the relative positions of persons seeking to subject such property to their claims. The overall effect is not clear. Bona

\textsuperscript{229} See QCC art. 1546.
\textsuperscript{230} Id. arts. 1547-1550.
\textsuperscript{231} For immovablees, there is such a provision, see id. art. 2102.
\textsuperscript{232} Id. art. 1571d.
\textsuperscript{233} See id. art. 1571.
\textsuperscript{234} Id. art. 1561i, par. 2.
\textsuperscript{235} Id. art. 1561i, par. 1.
\textsuperscript{236} Id. art. 1561f.
\textsuperscript{237} Id. art. 1561f.
fide purchasers from the debtor in possession are better off in Quebec. This is less true of bona fide creditors since the Civil Code provisions concerning pledges and privileges may often effectively give more protection than registration with all its uncertainties in the common law provinces.

One kind of security, that arising by contracts of suretyship and guaranty, is essentially the same everywhere. It consists of the promise of another making himself secondarily liable for a debt, i.e., liable in the event it is not met by the person primarily undertaking its payment. Although the systems differ, in such particulars as the requirement under the Statutes of Frauds provisions generally in force in the common law provinces that the promise be in writing versus the Civil Code requirement that it be "expressed," they are the same in their general character including such major attributes as the rights to subrogation, contribution, and indemnity and even in such secondary ones as that generally a surety is discharged by a release but not by a covenant not to sue or that the purely personal defenses of the primary debtor are not available to the surety. It may bear repeating that the primary or secondary status of parties in this context is distinct from their position as primary or secondary parties on negotiable paper, the former being ruled by provincial, the latter by federal law.

Carriage of Goods

The constitutional and statutory framework within which the transportation industry operates, one of division between federal and provincial competence and, within both, one of a predominantly administrative oversight grounded on special delegations for water, air, rail and motor carriage, prevents the existence of a single body of rules governing the carriage of goods. But with common law principles as a base and frame of reference, there is a standard pattern whose outlines can be broadly traced even though the many and various particulars cannot here be fully developed.

The British North America Act grants to Parliament of authority over "Navigation and Shipping," extraprovincial ferries, "Lines of Steam or other

240. QCC art. 1935.
241. See Matter of Pathe Freres Phonograph Co., 50 Ont. L.R. 644, 64 D.L.R. 628 (1921); see also QCC art. 1950.
244. See Guggisberg v. Weber, 18 Sask. 6, [1924] 1 D.L.R. 335, [1924] 1 W.W.R. 137 (release); Hall v. Thompson, 9 U.C.C.P. 257 (1860) (covenant not to sue); cf. QCC art. 1185.
246. See supra note 23 and accompanying text.

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Ships... connecting the Province with any other... or extending beyond the Limits of the Province” and the “Lines of Steam Ships between the Province and any British or Foreign Country” effectively vest the federal government with control of all commercially significant water carriage. As to air carriage, “in its pith and substance... the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament,” a proposition which in conjunction with the operation of the occupied field doctrine leaves small scope for provincial activity. The tiny remainder of purely local water and air carriage is of little commercial interest and has attracted only casual provincial regulation. To all intents and purposes the law about carriage other than by land is federal law.

While certain domestic shipping is subject to carrier licensing and corresponding contract approval by the Board of Transport Commissioners, water carriage is primarily a matter between shipper and carrier within the limits fixed by general rules of law and more particularly by the Water Carriage of Goods Act. The Canada Shipping Act is a comprehensive code of the familiar type exemplified by the Merchant Shipping Acts. In the Canada Shipping Act, section 657 (limitation of liability), sections 664 and 665 (carrier’s obligation to receive for carriage and carrier’s liability) and sections 674-682 (delivery of goods and lien for freight) are especially relevant in the present context.

The Aeronautics Act, a much less elaborate statute, in substance delegates to the Air Transport Board, which it establishes, responsibility for governing air carriage by licensing, by orders or by regulations, including specifically regulations “respecting traffic, tolls or tariffs,” as the situation may make appropriate. The regulatory grant has been exercised mainly in connection with air safety and air navigation; but the Commercial Air Services Regulation pro-

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248. Before the development of the present transportation network, private acts were availed of to provide essentially local facilities; see, e.g., An Act to Incorporate the Upper Columbia Navigation and Tramway Co., [1891] B.C. Stat. c. 50, repealed by [1926-27] B.C. Stat. c. 55 (1927); and An Act to Incorporate the Bear River Steamship Co., Ltd. [1905] N.S. Stat. c. 141. For the floating of lumber, see, e.g., N.B. Rev. Stat. c. 219 (1952), and ferries, see, e.g., Ont. Rev. Stat. c. 141 (1960), have attracted legislative attention. But the lacuna as to intraprovincial water carriage generally is underscored by the specification of regulatory authority so as not to embrace it, see, e.g., The Municipal and Public Utility Board Act, Man. Rev. Stat. c. 175, § 2(l) (1954) (“Public utility” subject to Board control is limited to railways and motor buses.). Perhaps this results because there is in fact no significant relevant carriage to be dealt with. Similarly, air taxi service has been ignored by the provinces even though it does not conveniently fit any of the service categories of the Commercial Air Services Regulation; [1949] S.O.R. 4, 5, and [1947] P.C. 972, at § 1.
249. See Can. Rev. Stat. c. 271, §§ 10-12 (1952) (Licensing applicable only to proclaimed places and not to be extended to intercoastal and many other branches of traffic.), and id., § 31 (Tolls control for bulk water carriage of goods is limited to Mackenzie River.).
251. Id. c. 29.
vides an inclusive though sketchy technique of regulation requiring submission to the Board by the air carriers of the terms and conditions of their contracts of carriage, for scrutiny and potential revision. Any restraint in fashioning contract terms favoring the carrier has been, as it is whenever proposal of terms is left to a potential contracting party with the superior bargaining position, a restraint mostly dictated by the pattern of the industry only somewhat tempered by publication and the possibility of disallowance. For international carriage firmer outlines are provided through Canadian adherence to the Warsaw Convention.255

The provision of railway service has been a central concern in Canadian history, especially in the history of Confederation. This is reflected in the British North America Act’s grant to Parliament of authority over “Railways ... connecting the Province with any other ... of the Provinces, or extending beyond the Limits of the Province” and further over “Works ... situate wholly within the Province ... declared by the Parliament of Canada to be for the general advantage of Canada ...”,256 in its imposition of a federal duty to provide for an Intercolonial Railway in the Maritime Provinces,257 in the clause in the Order in Council admitting British Columbia which stipulated for a railroad connection with that province,258 and in the railway clauses of the schedule to the act for confirming the term of Newfoundland’s union.259 As early as 1868 Parliament enacted a Railway Act260 which, as modified over the years, remains the organic law for rail carriers.261 The mandate for its implementation was originally confided to the Railway Committee of the Privy Council, now transmuted into the Board of Transport Commissioners. Like the Air Transport Board, it has among its powers the general supervision of the terms and conditions of contracts of carriage, including tolls and tariffs.262 But, in contrast with the Aeronautics Act, the Railway Act itself prescribes a wide array of particulars to which rate structures and railway practices, e.g., non-discrimination,263 must conform. Moreover, it assigns a less passive role to the Board than that given the Air Transport Board by the Aeronautics Act. Instead of mere monitoring and disallowance, the Board of Transport Commissioners is itself to formulate rules on various important subjects; for instance, freight classification264 and limitation of liability provisions265 may originate with it as well as with the railway. Even where the provisions originate with the railway, the Board’s function is not merely one of giving clearance; a provision

256. BNA §§ 91(29), 92(10).
257. Id. § 145.
259. 12-13 Geo. VI c. 22, sched. §§ 3(a), 32, 33(a) (1948).
262. See id. §§ 326, 355.
263. See id. §§ 319(3), 328(5).
264. See id. § 325.
265. See id. § 353(2).
is not operative "unless . . . first authorized or approved by order or regulation of the Board,"266 a measure of participation calculated to implicate the Board somewhat more in the final product.

Federal law dominates most substantial railway freight shipments having extraprovincial incidents. However, a larger segment of railway freight traffic is local to the province than is the case with air or water carriage and there is a correspondingly increased range of operation for provincial legislation. Accordingly, Railway Acts exist in some of the larger provinces, similar to the Federal Act and to each other in delegating control to some administrative authority, but so dissimilar in the authority designated and in the content of the delegation as to defy orderly brief summary.267 They cannot be left out of account however in presenting a total picture of the law on carriage of goods.

Motor vehicle businesses are a prime domain of provincial law. There is a great deal of commercial freight carriage by highway which is interprovincial and hence open to federal regulation. However, Parliament has elected to leave the matter to the provinces by a statute consolidating extraprovincial with local operations in respect of the licensing and regulatory capacity of the provincial boards.268 The quite general pattern in the provinces has been to use the licenses required as a condition for commercial motor carrier operations as the instrument for Board control.269 Licenses are obtainable and tenable only on condition of compliance with, *inter alia*, regulations emanating from the Lieutenant Governor in Council or from the Board with the assent of the Lieutenant Governor in Council, whose authority to make regulations covers a wide range of matters, commonly including that of "prescribing the forms of or conditions in the bill of lading."270

Meticulous attention must obviously be paid to the kind and place of carriage before one can determine what claims are recognized between shipper, consignee, or carrier, and indeed before one can even know where to seek their definition. Nevertheless, the traditional conceptions of the general law governing their relations have molded the exercises of regulatory powers by the constituted authorities and filled in the interstices, so that some loose indication of prevailing doctrine is possible.

The ancient common law distinction between a common carrier, holding out a transportation service to the public, and a contract carrier, dealing by special agreement, endures.271 One licensed as a common carrier may contract in the latter capacity for carriage beyond the ambit of the normal and licensed

266. See id. § 353(1).
transportation service.\textsuperscript{272} Under the civil law, "carrier" seems to contemplate more particularly the former\textsuperscript{273} although at least for some purposes differential consequences in line with common law results are recognized.\textsuperscript{274}

A common carrier may not refuse to receive appropriate goods in suitable condition for carriage on the standard terms.\textsuperscript{275} There is no such obligation on a contract carrier.\textsuperscript{276} The Civil Code is equivocal, clearly imposing on "carriers" an obligation to receive and convey "all persons applying . . . if the transportation of passengers be a part of their accustomed business" as against one of receiving "all goods offered for transportation" but qualifying the whole by the proviso that "unless, in either case, there be a reasonable and sufficient cause of refusal,"\textsuperscript{277} language arguably apt for setting up the existence of a course of dealing by special contract.\textsuperscript{278}

The significance of the distinction arises in connection with the carrier's liability for losses arising in the handling of the goods more often than it does in refusals to deal. Here it would seem that Quebec law, imposing liability on carriers for loss or damage not shown to have arisen from "a fortuitous event or irresistible force, or . . . a defect in the thing itself"\textsuperscript{279} accords with the common law,\textsuperscript{280} which provides an equivalent liability for the common carrier in every case of loss or damage not attributable to an act of God or of the Queen's enemies,\textsuperscript{281} but holding a contract carrier only to exercise the care required of any bailee for hire.\textsuperscript{282} These are the principles applicable in the absence of express provisions otherwise in the contract of shipment,\textsuperscript{283} but such express provisions are currently so common in practice that they almost devour the general rule.

Carriage of goods generally and especially that by common carriers is, and by statute or regulation often is required to be, subject to a writing emanating from the carrier acknowledging the receipt of particular goods and undertaking to carry and deliver them pursuant to the terms therein. Such a writing, usually, although not invariably, styled a bill of lading, must follow a form prescribed by or comply in its contents with the prescriptions of statute or regulation.


\textsuperscript{273} Cf. QCC art. 1673.

\textsuperscript{274} See 12 M. Faribault, Traite de Droit Civil 374 (1951).


\textsuperscript{277} QCC art. 1673.

\textsuperscript{278} Cf. Roussel v. Aumais, 18 Que. C.S. 474 (1900).

\textsuperscript{279} QCC art. 1675.


\textsuperscript{283} How far these may go is well illustrated in W.R. Johnson & Co. et al. v. Inter-City Forwarders, Ltd. et al., [1946] Ont. 754, [1946] Ont. W.N. 798, [1947] 1 D.L.R. 8 (applying a clause limiting amount of shipper's recovery to a case of theft of goods by carrier's agent).
One established feature of the applicable statutes or regulations is a specification of the limitations of and conditions on liability of the carrier which the bill of lading may contain.\textsuperscript{284} If a term is a permissible one, all that remains is its interpretation to determine whether it applies to the circumstances established as to the loss or damage; but that can be difficult enough, as an examination of the cases which have considered the "owner's risk" clause in the federally approved bill of lading will confirm.\textsuperscript{285} Under the Civil Code, a carrier limitation of liability is in any event binding only upon persons to whom it is made known and not even upon them if the damage is traced to the carrier's fault\textsuperscript{286}—a provision which if taken to be one of public order may not be confined in operation to Quebec bills of lading or Quebec licensed carriers.\textsuperscript{287}

Water carriage has attracted its own elaborate body of statutory rules for carrier liability.\textsuperscript{288}

When the carriage shifts from one under a bill of lading to carriage \textit{dehors} the bill's terms, the exculpatory provisions vanish with the contract, to make the liability rest on the carrier's status, \textit{e.g.}, as common carrier,\textsuperscript{289} just as it does when there is failure to supply a bill or use of a bill with unapproved exculpatory provisions. In like manner, before the bailment becomes,\textsuperscript{290} or after it ceases to be,\textsuperscript{291} one for carriage, the relevant standard is that of bailee for hire with the resultant remittance to the exercise of care as the criterion of liability.

The bill of lading's exculpatory terms are only incidental. Its primary function is to express the obligation to carry and deliver. The contract, although made between shipper and carrier, is for carriage and delivery to the consignee if a straight bill\textsuperscript{292} or to him or a holder under endorsement if an order bill;\textsuperscript{293} the consignee (or an assignee to the extent that the law allows assertion of assigned contract rights) or the endorsee, even though thus not a contracting party, has a direct right to the stipulated delivery or damages for breach of the agreement to deliver.\textsuperscript{294} To the bill's quality of an acknowledgment of receipt and a contract for delivery, there is added, if it is an order bill, that of being a symbol of the goods and an indicium of a right to deal with them by a holder

\textsuperscript{284} See, \textit{e.g.}, [1955] Alta. O.C. 1003, reg. 3.8.3 (a); [1960] R.R.O. reg. 503, §§ 14, 15.


\textsuperscript{286} QCC art. 1676.

\textsuperscript{287} See 7 J. Mignault, \textit{Droit Civil Canadien} 387-390 (1906) for an analysis of the provision as one of public order.


\textsuperscript{289} \textit{Fleet v. Canadian Northern Que. R.R.}, 50 Ont. L.R. 223, 64 D.L.R. 316 (1921).

\textsuperscript{290} \textit{Bell v. Windsor & Annapolis Ry.}, 24 N.S. 521 (1892); \textit{Swale v. CPR}, 29 Ont. L.R. 634, 15 D.L.R. 816 (1913); \textit{Beausejour v. Dominion Express Co.}, 5 Rev. de Jur. 503 (1899).

\textsuperscript{291} See \textit{Milloy v. Grand Trunk Ry.}, 21 Ont. A.R. 404 (1894).

\textsuperscript{292} Cf. \textit{Matter of Eutenier}, 9 W.L.R. 627 (Sask. 1908).


under requisite endorsements.\textsuperscript{295} Hence, where consignment is under an order bill, the carrier can safely surrender the goods only upon production of the bill, and claims in the goods are dependent on the rights consequent on taking and holding an outstanding bill.\textsuperscript{296}

"The carrier has a right to retain the things transported until . . . paid for the carriage or the freight,"\textsuperscript{297} alike under the Civil Code and a common law lien.\textsuperscript{298} The former ranks carriers first among all creditors having a right of pledge or of retention.\textsuperscript{299} The common law lien, while not a general lien in the sense that the carrier may hold goods for an unpaid balance of accounts, looks to the bill of lading as a unit and permits the holding of such portion of the goods as remain undelivered for freight charges arising under the entire bill of lading under which they were carried rather than just their particular fraction of these charges.\textsuperscript{300}

\begin{itemize}
\item \textsuperscript{295} Bedard v. Spencer Grain Co., [1919] 2 W.W.R. 723 (Man.).
\item \textsuperscript{296} See Corby v. Williams, 7 Can. S. Ct. 470 (1881).
\item \textsuperscript{297} QCC art. 1679.
\item \textsuperscript{298} Buffalo & Lake Huron R.R. v. Gordon, 16 U.C.Q.B. 283 (1858). The common law lien is limited strictly to the amount due for carriage and does not extend to expenses incurred in maintaining possession incident to the assertion of the lien; see Winchester v. Bushy, 16 Can. S. Ct. 336 (1889).
\item \textsuperscript{299} See QCC art. 200.
\item \textsuperscript{300} Neill v. Reid, 9 N.B. 246 (1859); De Senneville v. Baillargeon, 37 Que. C.S. 215 (1909).
\end{itemize}